Federal Court  Cour fédérale

Date: 20210209

Docket: T-606-18

Citation: 2021 FC 129

Ottawa, Ontario, February 9, 2021

PRESENT: The Honourable Madam Justice Strickland

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

VANCOUVER PILE DRIVING LTD.

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] The trial of this action is scheduled to commence on February 22, 2021. The Defendant, Her Majesty the Queen in Right of Canada [Canada], brings this pre-trial motion seeking:

1) an Order requiring the Affidavit #1 of Captain Russell R. Johnson, sworn April 6th, 2020 to be field with Court and entered into the Trial Record pursuant rules 258(4), 262, 265(2) and 269;

2) an Order permitting Affidavit #1 of Captain Russell R. Johnson (the "Johnson Report") to be entered into evidence without requiring Captain Johnson to testify in chief or cross examination pursuant to Rule 279;

3) in addition or in the alternative, if Captain Johnson is required to attend for cross-examination:

    a) an Order setting out the terms of Captain Johnson's attendance, including the reason for the attendance, which party will be required to call him as a witness, and, who shall bear the cost of securing his attendance;

        i) if Canada is responsible for securing Captain Johnson's attendance, then

            1. an Order that Canada be granted leave to serve and file the Johnson Report; and require the Plaintiff to provide any objections to the expert report with two days of service; and

            2. an Order that the Plaintiff provide Canada with all documents in their possession and control relating to the opinion contained in the Johnson Report;

4) an Order that the Plaintiff provide Canada with all documents in their possession and control relating to the opinion of Dr. Kimberly Meier ("the Meier Report");

5) an Order that the Plaintiff serve an amended affidavit of documents that provides the particulars of the documents in their possession and control related to the reports and opinions of Dr. Meier and Captain Johnson, in particular those documents which they have asserted litigation privilege over;

6) costs of this motion in any event of the cause; and

7) any other Order that this Honorable Court deems just.

Background

[2] This admiralty action was commenced by the Plaintiff, Vancouver Pile Driving Ltd., on March 27, 2018, as against The Owners and All Others Interested in the Ship "Black Hawk II", Gisbourne Marine Services Ltd., Ross Wayne Sacco and Timothy Rogers [collectively, the Gisbourne Defendants].

[3] The Plaintiff is the owner of a 2005 Kobelco CK200 Crawler Crane [Crane] which was secured on board the Plaintiff's barge, the "W.M. Saunders" [Barge]. On May 31, 2017, the

Barge was under tow by the tug “Black Hawk II” [Tug], which Tug was owned and operated by Gisbourne Marine Services Ltd., when the Crane struck the Golden Ears Bridge [Bridge], resulting in damage to the Crane and Barge [the Allision]. The Plaintiff claimed that the loss or damage to the Barge and Crane was a result of a breach of the towage contract by, or the negligence of, the Gisbourne Defendants. The Plaintiff claimed that, as a result the Allision, it suffered damages and expenses including the cost of repairing the Crane and Barge and related incidental costs and expenses, estimated to be in excess of $1.0 million CDN.

[4] On October 10, 2018, the Gisbourne Defendants issued a Third Party Claim against Canada asserting that Canada owes a duty of care to those relying on Canadian Hydrographic Service [CHS] publications, to ensure the accuracy of those publications, and that the Canada breached that duty causing the Allision. Further, that if the Plaintiff suffered the alleged damages and expenses, then this was caused by the negligence of the Canada, its servants, agents or others for which Canada is responsible at law.

[5] In its Third Party Defence filed on December 17, 2018, amongst other things, Canada alleged that any damages suffered or expenses claimed by the Plaintiff or the Gisbourne Defendants was caused by the Gisbourne Defendants’ negligence. Canada stated that it repeated and relied upon the allegations contained in the Plaintiff’s Statement of Claim against those parties.

[6] By way of an Amended Statement of Claim filed on July 16, 2019 the Plaintiff added Canada as defendant to the action claiming, similarly to the allegations of the Gisbourne

Defendants, that the Crane struck the Bridge as a result of Canada publishing inaccurate or incomplete information with respect to the vertical clearance of the Bridge.

[7] In its Statement of Defence filed on August 15, 2019, Canada made similar pleadings as found in its Third Party Defence.

[8] The action progressed in the normal course, documents were exchanged and discoveries were conducted. With respect to expert witnesses, Canada's Motion Record indicates that on March 29, 2020 counsel for the Plaintiff served Canada and the Gisbourne Defendants with the April 6, 2020 expert opinion report of Captain Russell Johnson, a mariner and former tugboat master, whose opinion speaks to the conduct of the tow [Johnson Report]. On June 30, 2020, counsel for the Gisbourne Defendants served the expert opinion of Dr. Kimberly Meier, an expert in vision and cognition, speaking to how the human eye perceives vertical clearances [Meier Report] on Canada and the Plaintiff.

[9] Pursuant to Rule 258(1), the Plaintiff filed and served a requisition for a pre-trial conference, which was held on October 5, 2020, before the Trial Management Judge, Prothonotary Ring.

[10] Although in the Plaintiff's written response to this motion it disputed that the parties had agreed that the Pre-Trial Conference memoranda were available to the trial judge, when appearing before me the Plaintiff corrected its submission and confirmed that there was

agreement in this regard. The October 6, 2020 Order of the Prothonotary, issued following the Pre-Trial Conference, states:

> 1. Pursuant to Rule 267 of the *Federal Courts Rules* [*Rules*], and on consent of the parties, the parties' pre-trial conference memoranda may be disclosed to the trial judge.

[11] The Plaintiff's Pre-Trial Conference Memorandum listed the Johnson Report among the documents of the Plaintiff to be used at trial. The Gisbourne Defendants' Pre-Trial Conference Memorandum identifies as attached documents the Meier Report and a report of Captain Rose, and referenced those reports in its written submissions. Canada's Pre-Trial Conference Memorandum identified its documents upon which it intended to rely and noted in its written submissions that the Plaintiff had retained an expert witness who would testify that the Gisbourne Defendants' exercise of good judgment was lacking. Canada also submitted that it would object to the admissibility of the Rose Report and the Meier Report and, with respect to those reports and the Johnson Report, that it anticipated making arguments as to the weight to be afforded to the reports. Canada did not reference any expert opinion evidence that it intended to tender at trial.

[12] The Prothonotary's post Pre-Trial Conference Order of October 6, 2020 included that, pursuant to Rule 52.2, the Plaintiff would file and serve a document containing the particulars of and any basis for any objection to an opposing party's proposed expert witness by October, 16, 2020. No other reference was made to expert opinion reports.

[13] Subsequent to the Pre-Trial Conference, the Plaintiff and the Gisbourne Defendants reached a settlement agreement. Canada indicates that it was advised of the settlement on

December 3, 2020. On January 18, 2021, counsel for the Gisbourne Defendants filed a Notice of Discontinuance whereby those defendants wholly discontinued their third party action against the Crown.

[14] Upon motion of the Gisbourne Defendants, as the trial judge I issued a Consent Order, dated January 25, 2021, whereby the action by the Plaintiff as against the Gisbourne Defendants was dismissed, without order as to costs and as if after a trial on the merits, as the Plaintiff and the Gisbourne Defendants settled this matter as between them. The action by the Plaintiff as against Canada continued unaffected by that Order.

[15] A term of the settlement agreement required the Plaintiff to revise its Further Amended Statement of Claim, removing allegations against the Gisbourne Defendants and adding a pleading whereby the Plaintiff waived any right to recover from the Crown any portion of the damages attributable to the fault of any one or more of the Gisborne Defendants. Accordingly, the Plaintiff brought a motion seeking an order granting it leave to amend its Further Amended Statement of Claim to the form attached as Schedule A of the motion record materials, being the Further Further Amended Statement of Claim. By Order dated January 28, 2021, I granted the Plaintiff leave to so amend its Further Amended Statement of Claim and to file the Further Further Amended Statement of Claim. I also ordered that the style of cause of the action was amended to remove The Owners and All Others Interested in the Ship “Black Hawk II”, Gisbourne Marine Services Ltd., Ross Wayne Sacco and Timothy Rogers as defendants to this action and to remove the Crown as the Third Party.

[16] On December 17, 2020, counsel for the Plaintiff wrote to counsel for Canada to advise that the Plaintiff would be tendering and relying upon the Meier Report, which the Gisbourne Defendants had commissioned, at trial. The Plaintiff asked if Canada intended to object to the Plaintiff's tendering of the report that Canada advise of its position in that regard. In its written submission in support of this motion Canada states that it advised the Plaintiff that it intends to cross-examine Dr. Meier and noted its objection to her report as previously set out in Canada's Pre-Trial Conference Memorandum.

[17] Canada indicates that the Plaintiff provided Canada with its Witness List and Will-Say statements on January 3, 2021. Captain Johnson was not included in the list and counsel for the Plaintiff confirmed by email of January 11, 2021 that the Plaintiff would not be tendering the Johnson Report at trial. However, that if Canada intended to call Captain Johnson at trial, then counsel for the Plaintiff asked that he be produced for cross-examination by the Plaintiff.

[18] In its Motion Record Canada has included an email string concluding on January 22, 2021 where counsel debated the compellability of Dr. Meier's and Captain Johnson's files.

[19] Canada filed this motion on February 1, 2021.

Issues

[20] When appearing before me, Canada's position on what is in issue in this motion and the remedies that it seeks varied considerably from its written submissions and its notice of motion. Canada described its submissions as having contracted, it did not pursue many of the lines of

argument raised in its written submissions and concentrated instead on its procedural concerns. Canada also clarified or refined some of the positions taken in its written submissions as well as its underlying procedural concerns. The Plaintiff therefore was able to refine and narrow its response. Both parties were agreeable to the Court crafting an order that is responsive to Canada's contracted, refined or revised concerns.

[21] In the result, my reasons that follow contain an abbreviated analysis of the arguments raised by Canada in its written submissions.

Is the Plaintiff compelled to call Captain Johnson at trial?

[22] Canada's position in its written submissions was, because the Plaintiff indicated at the Pre-Trial Conference that it intended to rely on and tender the Johnson Report at trial, it was reasonable for Canada to rely on those submissions. Further, that the Report is now part of the Trial Record and the Plaintiff must tender it at trial. Canada submitted that parties can be held to representations that they make during a pre-trial conference (referencing *Apotex Inc. v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 28 [*Apotex*] and that issues must be placed squarely on the table in pre-trial memorandum (referencing *Wenzel Downhole Tools Ltd v National Oilwell Canada Ltd*, 2010 FC 669 at para 20 [*Wenzel*]).

[23] Canada did not pursue this line of argument at the hearing of the motion. It is therefore sufficient for me to say that I agree with the Plaintiff's submission that Canada's assertions are not supported by *Apotex* and *Wenzel*. Those cases do not support the proposition that when a party indicates in its pre-trial memorandum that it intends to call certain witnesses at trial, it is

then bound to call those witnesses at trial – even where the witnesses become unnecessary to the party's case due to a subsequent settlement. *Apotex* is concerned with whether a motion to amend pleadings should be granted when a new issue for trial was not addressed in a timely manner. It does not address the compelling of a party to tender an expert report on the basis that it was referenced in pre-trial memorandum. In my view, *Apotex* stands for the proposition that all live issues are to be put on the table in a pre-trial conference and that there is no place for strategic non-disclosure or purposeful non-clarification.

[24] *Apotex* and *Wenzel* are also distinguishable because of the post pre-trial conference developments in this file. It is clear from the reasons of the Court of Appeal in *Apotex* that Apotex had been well aware of the new issue, and of the lack of clarity surrounding it, but had made no effort to remedy the situations for a period of years (see *Apotex* at paras 28 – 32, 34-35). In that case there had not been a significant change of circumstance after the pre-trial conference (see also *Wenzel* at paras 19, 20 and 24). Conversely, in this matter, the Plaintiff and the Gisbourne Defendants reached a settlement after the pre-trial conference. It was as a result of the settlement the Plaintiff determined that it was no longer necessary for it to tender the Johnson Report in support of its case.

[25] I also note that Canada points to no representation made by the Plaintiff at the pre-trial conference that it would tender the Johnson Report in any circumstance.

[26] Nor am I persuaded that Canada was prejudiced by the Plaintiff's decision not to tender the Johnson Report, as it argued in its written submission. In that regard, the Plaintiff indicated in

its submissions that it offered Canada the opportunity to participate in the initial retainer of Captain Johnson, which Canada declined to do. In my view, Canada cannot complain of prejudice resulting from its own strategic decisions not to participate in the initial retainer of Captain Johnson or to tender its own expert report speaking to the standard of care/contributory negligence of the Gisbourne Defendants, and the fact that the Plaintiff's case changed in light of the settlement agreement with the Gisbourne Defendants.

[27] To the extent that Canada suggested in its written submissions that there was an inadvertent omission or a strategic non-disclosure on the part of the Plaintiff, which now serves to preclude the Plaintiff from declining to tender the Johnson Report at trial, it did not pursue this submission at the hearing of the motion. And, in any event, Canada has not demonstrated this based on the record before me (*Abbott Laboratories v Canada (Minister of Health),* 2006 FC 340 at para 14 [*Abbott FC*]).

[28] Notably, in response to the motion, the Plaintiff filed the affidavit of Vernon J. Pahl, counsel for the Plaintiff, attaching as an exhibit an email string of correspondence dated January 28-29, 2021, between Captain Johnson and Canada in which Captain Johnson agrees to be retained by Canada and confirms that he is available between February 22 and March 3, 2021 to attend at trial. Canada confirmed this at the hearing of the motion. Accordingly, Canada has not established that it will be prejudiced by the Plaintiff's decision not to tender the Johnson Report at trial.

[29] In sum, the mere fact that the Plaintiff indicated at the pre-trial conference that it intended to tender the Johnson Report at trial does not compel the Plaintiff to do so. I am also not persuaded that the Plaintiff's decision not to call Captain Johnson as an expert witness nor to tender his report at trial was made for the purpose of prejudicing Canada. Indeed, the resolution of the claim against the Gisbourne Defendants narrows the issues for trial. Canada made a strategic decision to rely on another party's expert evidence rather than retain its own expert, and it bears the risk and consequences of that strategy.

Service of the Johnson Report

[30] In its written submissions, Canada argued that Rule 258(4) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] requires expert affidavits to be attached to the pre-trial memorandums. Canada submitted that the Johnson Report and the Meier Report were not, but should have been, included with the Plaintiff's and the Gisbourne Defendants' Pre-Trial Conference memoranda, and, therefore, should now be before the Court as a part of the Trial Record. Alternatively, the breach of Rule 258(4) should be remedied by requiring the filing of those reports.

[31] At the hearing of this motion, Canada indicated that its main concern in this regard is actually to ensure that if the Johnson Report was not provided with the Plaintiff's Pre-Trial Conference memorandum, that there be no subsequent assertion by the Plaintiff that it had not properly been served with the Johnson Report by Canada. As I understand it, this is based on the service requirements of Rules 279(b), 258(4), and 262(1).

[32] As discussed at the hearing, there is no dispute that the Plaintiff, who retained Captain Johnson, served Canada with the Johnson Report, regardless of whether or not it was also included with the Pre-Trial Conference Memorandum. Both parties acknowledge that they are in receipt of the report. Counsel for the Plaintiff confirms that there would be no prejudice to the Plaintiff if Canada were to serve the Johnson Report late. Further, that the Plaintiff was agreeable, in these circumstances, to waiving any requirement that the Johnson Report now be served on it by Canada.

[33] I note that even if the Meier and Johnson Reports were not filed with the Plaintiff's and the Gisbourne Defendants' Pre-Trial Conference Memoranda – and I make no finding in that regard – the fact is that the Pre-Trial Conference was concluded months ago. Neither the parties nor the Prothonotary appear to have raised a concern that the reports did not accompany the memoranda. Had either been of the view that the reports were required to assist with pre-trial conference but had not been provided, then their absence would or should have been raised at that time. It is now too late for Canada to allege a breach of Rule 258(4) and to request the Court to remedy the breach by the filing of the reports. Requiring the reports to be filed now will have no impact on the concluded Pre-Trial Conference.

[34] Further, in my view, Pre-Trial Conference memoranda do not, in the normal course, form a part of the Trial Record. Rule 269 deals with the content of the Trial Record. It states that the Trial Record shall contain the pleadings, any particulars, all orders and directions respecting the trial and any other filed document that is necessary for the conduct of the trial. And finally, the

mere fact that an expert report accompanies a pre-trial memorandum does not mean that it is part of the evidentiary record. Rule 279 deals with the admissibility at trial of expert evidence.

[35] I see no utility revisiting the sufficiency of the filed Pre-Trial Conference memoranda.

[36] However, if as Canada now submits, this issue is one of sufficiency of service of the Johnson Report, then as both parties acknowledge that they are in possession of the Johnson Report, my order will reflect this and that no further service is required.

Can Canada call Captain Johnson as an expert witness?

[37] As to Canada calling Captain Johnson as an expert witness at trial, in its written submissions Canada submitted that it did not wish to examine Captain Johnson and whether Captain Johnson should be required to attend for cross-examination was really a question of which party should bear the cost and burden of his attendance at trial. Canada submitted that the Court should exercise its discretion, pursuant to Rule 279, and order that the Johnson Report be entered into evidence "without further time and expense to any party". Further, that cross-examination of Captain Johnson by the Plaintiff is unnecessary and "somewhat awkward" – raising concerns as to the extent to which the Plaintiff should be able to use information held in its own solicitor's brief for the purposes of cross-examination. The Plaintiff's response was that any alleged awkwardness in its cross-examining Captain Johnson arises only because Canada seeks to rely on the Plaintiff's report in making its defence, rather than having retained its own expert, and that this is no basis for precluding the Plaintiff from exercising its right to cross-examination.

[38] At the hearing of this motion Canada indicated that it was not taking issue with the Plaintiff's right to cross-examine Captain Johnson. Its concerns were more related to documentary production in advance of cross-examination.

[39] At the hearing Canada also submitted that it was not clear that the Plaintiff did not take issue with Canada tendering the Johnson Report at trial. However, in its written submissions the Plaintiff agreed with Canada that there is no property in a witness, including expert witnesses. As such, the Plaintiff submitted that Captain Johnson is not disqualified from testifying as an expert witness for the Crown simply because he prepared his report at the request of the Plaintiff. So long as he is not asked by Canada to provide any evidence that would necessitate the disclosure of privileged communications with Plaintiff's counsel, the Plaintiff agreed that Canada can call Captain Johnson to testify, if the Court permits (referencing *Rumley v Attorney General*, 2002 BCSC 405 at para 20; *Abbott FC*). However, this does not mean that the Plaintiff is not entitled to cross-examine their former expert. The Plaintiff again confirmed this view at the hearing before me.

[40] The jurisprudence indicates that if a party has retained an expert and communicated privileged information to the expert, that expert may still be asked for an opinion by an opposing party and may called by that party as an expert at trial. There is no property in a witness (*Abbott FC* at para 20). However, in that event, the expert need not disclose, and may not be questioned on privileged information relating, for example, to the defence strategy of counsel who initially retained and instructed the expert or advice given to that counsel as to the cross-examination of other experts.

[41] In my view, the jurisprudence supports that it is open to Canada to call Captain Johnson as an expert witness at trial and, by doing so to seek to have the Johnson Report admitted into evidence at that time. Based on its written submissions, it appears that Canada's main objection to doing so is that Canada does not want to bear the cost of Captain Johnson's attendance. This is insufficient to support a request that this Court order, pursuant to Rule 279, that the report be admitted into evidence without its author attending at trial.

Objections to Johnson Report

[42] At the hearing of this motion, counsel for the Plaintiff undertook to advise counsel for Canada and the Court by end of day on Monday, February 8, 2021 whether it has any objections to the Johnson Report and, if so, what they are. The Plaintiff has since advised the Court that it does not have any objections to the Johnson Report but confirms that it plans to cross-examine Captain Johnson at trial.

Production of Dr. Meier's and Captain Johnson's working files

[43] As to the experts' files, in its written submissions Canada cited jurisprudence that it submits supports the proposition that the expert witness files must be produced. Specifically, when an expert witness is called to testify, or their report is tendered into evidence, the expert will be required to produce documents in their possession that are relevant to the matters of substance of their opinion or credibility (referencing *Lax Kw'alaams Indian Band v Canada (Attoreny General)*, 2007 BCSC 909 [*Lax*]; *Jesionowski v Was-Yas*, [1993] 1 FC 36; *Bailey v Barbour*, 2013 ONCA 4731 at para 27]; *Vancouver Community College v Phillips, Barratt*,

[1987] 20 BCLR (2d) 289 (BCSC) [*Vancouver Community College*]). Further, according to Canada, "an incursion into the solicitor's brief will be justified if a party serves a report and declares their intentions to rely on it" (referencing *Nowe v Bowerman,* 2012 BCSC 1723 at para 11; *Andreason v The Corporation of the City of Thunder Bay*, 2014 ONSC 314 at para 13; *Gulamani v Chandra*, 2009 BCSC 1393). Canada submitted that because the Meier Report and the Johnson Report were served and because the Gisbourne Defendants and the Plaintiff indicated at the Pre-Trial Conference that they intended to rely on those reports at trial, those parties "unequivocally waived privilege over the expert files and the contents of the solicitor briefs relating the Johnson Report and the Meier Report".

[44] However, at the hearing of this motion Canada clarified that it is seeking the working files of Dr. Meier and Captain Johnson. It is not seeking disclosure of the files of counsel for the Plaintiff or counsel for the Gisbourne Defendants.

[45] The Plaintiff submits that while the *Federal Courts Rules* are silent as to the production of an expert's file, at common law privilege over the expert's file is waived only when the expert is produced for cross-examination. At that point, the witness must produce any documents that may relate to the substance of the opinion or their credibility (*Vancouver Community College* at p. 297-298; *Lax* at para 7). An expert's file is producible, but privilege over the solicitors file is not waived.

[46] In my view, the jurisprudence is clear with respect to solicitor-client privilege and litigation privilege. The latter encompasses experts' files.

[47] This is well set out in *Lax*. There the plaintiffs sought and received the working files of three expert witnesses, with the exception of the working files that Canada claimed pertained to advice from the witnesses to Canada regarding the cross-examination of the plaintiff's experts. Canada refused to produce those documents on the grounds that they were protected by litigation privilege that had not been waived because the experts will be testifying. The British Columbia Supreme Court stated:

> [5] Litigation privilege, or solicitor's brief privilege as it used to be called, is a well-recognized exception to the obligation of a party to disclose and produce any and all documents in its possession or control that may relate to an issue in the litigation. Litigation privilege differs from solicitor-client privilege in two important respects. Firstly, litigation privilege is not absolute in scope or permanent in duration. Its purpose is to create a zone of privacy in relation to pending or apprehended litigation, thus it usually terminates when the litigation ends unless closely related litigation is still pending. Solicitor-client privilege, on the other hand, continues indefinitely until it is expressly or impliedly waived by the client.
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> [6] The second important difference between litigation privilege and solicitor-client privilege is that the latter extends only to communications between the solicitor and the client whereas the former includes communications between solicitor and third parties as well, if made for the dominant purpose of litigation. (***Blank v. Canada (Minister of Justice)***, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319).
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> [7] There is a well-recognized exception to litigation privilege that is relevant here. When an expert witness who is not a party is called to testify, or when his or her report is tendered in evidence, he or she may be required to produce all documents in his or her possession which are or may be relevant to matters of substance in his or her evidence or credibility, unless it would be unfair or inconsistent to require such production. This exception to litigation privilege is based upon implied waiver. Once an expert has become a witness she offers her professional opinion to assist the court and must no longer be in the camp of a partisan. She should have nothing to hide and be willing to have her opinion tested by offering up documents relevant to the preparation and formulation of her opinions, as well as to her consistency, reliability, qualifications and other matters touching on her credibility. (***Vancouver Community***

> ***College v. Phillips, Barratt*** (1987), 1987 CanLII 2532 (BC SC), 20 B.C.L.R. (2d) 289 (S.C.)).
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> [8] However, there is an exception to the exception. This exception was first pronounced by Mr. Justice Finch, as he then was, in the ***Vancouver Community College v. Phillips, Barratt*** case referred to above. I quote:
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> > 29 … It would not, however, be fair to require the witness to deliver up papers that are wholly irrelevant, either to the substance of his opinion or to his credibility. For example, papers concerning his personal affairs remain his own and are no one else's business. Similarly, the expert may be doing work for other persons not party to the litigation. He should not be required to disclose their secrets. As well, in the litigation in which the witness is called to testify, he may remain a confidential advisor to the party who retained him in, at least, one respect. He may be asked or may have been asked to give advice on how to cross-examine the other side's witnesses. In putting forward his own opinion, he need not necessarily attack the opinions of experts opposite. Counsel may wish to save that sort of ammunition until after the adverse expert has been called. It would not be fair to require the witness to disclose documents relating only to the cross-examination of such adverse experts because it would give the other side an advantage not available to the party calling evidence on a subject matter first.

[48] The above law was also set out in *Vancouver Community College*, where the British Columbia Supreme Court concluded:

> [34] I will attempt to summarize my view of the law. When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to

> waive the lawyer's brief privilege which previously protected the documents from disclosure.

[49] Thus, in my view, it is clear that once the Meier and Johnson Reports were served on other counsel, privilege over the reports was waived. This is not disputed by either party.

[50] Fairness and consistency require that the facts and evidence upon which the experts formed their opinion must be produced. This would include letters of instruction, the working files of Dr. Meier and Captain Johnson, communications that go to the substance of their opinion or to their credibility, including communications from instruction counsel.

[51] Thus, if the Plaintiff intends to call Dr. Meier as a witness at trial, then Canada is entitled to full disclosure of that expert's working files. However, Dr. Meier was retained by the Gisbourne Defendants – who are no longer parties to this action – not the Plaintiff. Regardless, the Plaintiff has indicated that Dr. Meier's working file(s) will be produced to Canada as soon as they are received by the Plaintiff. Canada has indicated that this is satisfactory to it.

[52] As to Captain Johnson, as I understand it, Canada now submits it is not seeking production of the Plaintiff counsel's files but that it is entitled to production of any documentation or communications as between counsel and Captain Johnson that do not fall within confidential advice given as to strategy, cross-examination of other witnesses or similar and which speaks to Captain Johnson's opinion or credibility. To know if this exists, and if the Plaintiff wishes to maintain a claim of solicitor privilege, Canada submits that the Plaintiff must provide a reasonable description of such documents or an edited copy and make specific claims

of privilege (*Delgamuukw v British Columbia*, [1988] 55 DLR (4th) 73 (BCSC) at paras 21 and 22). Canada also seeks clarity as to whether Captain Johnson or the Plaintiff will produce Captain Johnson's working files.

[53] The Plaintiff maintains it is the expert witness who is required to produce his or her working files (*Vancouver Community College* at p 297-298; *Lax* at para 7) and that it has discharged Captain Johnson from his retainer. However, the Plaintiff is willing to make efforts to assist with the facilitating of the production of the expert's working files. The Plaintiff also submits that pursuant to Rule 223(4) it is open to it to treat documents of the same nature – that is, relating to the retainer of Captain Johnson and the preparation of his report – as a bundle of documents.

[54] Rule 223 deals with affidavits of documents:

> **223 (1)** Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.
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> **(2)** An affidavit of documents shall be in Form 223 and shall contain
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> > **(a)** separate lists and descriptions of all relevant documents that
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> > > **(i)** are in the possession, power or control of the party and for which no privilege is claimed,
> > >
> > > **(ii)** are or were in the possession, power or control of the party and for which privilege is claimed,
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> > > **(iii)** were but are no longer in the possession, power or control of the party and for which no privilege is claimed, and
> > >
> > > **(iv)** the party believes are in the possession, power or control of a person who is not a party to the action;

> **(b)** a statement of the grounds for each claim of privilege in respect of a document;
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> …..
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> **(3)** For the purposes of subsection (2), a document shall be considered to be within a party's power or control if
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> **(a)** the party is entitled to obtain the original document or a copy of it; and
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> **(b)** no adverse party is so entitled.
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> **(4)** A party may treat a bundle of documents as a single document for the purposes of an affidavit of documents if
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> **(a)** the documents are all of the same nature; and
>
> **(b)** the bundle is described in sufficient detail to enable another party to clearly ascertain its contents.

[55] Practically speaking, the retainer and letter of instruction provided by counsel for the Plaintiff to Captain Johnson, and any written communications between them pertaining to his opinion or credibility, will be found in the expert's working files which are no longer subject to privilege. They will be produced as such and, therefore, will no longer fall within any bundle of documents that the Plaintiff may identify in its affidavit of documents as retaining litigation privilege.

[56] However, if there are communications or documents within the expert's working files over which the Plaintiff is asserting ongoing litigation privilege, then these must be sufficiently described so that Canada will understand how many such documents there are, the general nature of the documents, as well as the grounds for each claim of privilege for each or all of them. Without knowing what, if any, such documents exist, the Court cannot determine whether or not

it is appropriate for the Plaintiff to treat them as a bundle (*Apotex Inc. v. Sanofi-Aventis*, 2010 FC 77 at paras 43 – 44).

[57] That said, the trial of this matter is to start in less than two weeks. If any such documents exist and if they are sufficiently identified by the Plaintiff, then this may avoid any need for Canada to pursue further information and/or production and the potential delay of trial.

[58] In summary:

- I am refusing Canada's request that the Johnson Report be filed as part of the Plaintiff's Pre-Trial Conference memorandum – if it was not included – and entered into the Trial Record;
- Any requirement for leave for Canada to late serve the Johnson Report on the Plaintiff arising from a decision by Canada to tender the report at trial is waived. The Plaintiff has acknowledged that it initially retained Captain Johnson and, therefore, is in possession of his report and, that the Plaintiff would not be prejudiced by late service on it by Canada as the party now intending to tender that report;
- I am refusing Canada's request that the Johnson Report be entered into evidence without requiring Captain Johnson to testify in chief or on cross-examination. It is open to Canada to call Captain Johnson as an expert witness and to tender his report into evidence at trial pursuant to Rule 279. If Canada elects to call Captain Johnson as an expert witness, any costs associated with his attendance are Canada's responsibility;
- The Plaintiff does not dispute that Captain Johnson's working files must be produced. And, although Captain Johnson has been discharged as an expert witness by the Plaintiff, counsel has indicated that they are willing to make efforts for the purpose of attempting to facilitate the production of his working files. I will therefore order that counsel for the Plaintiff request Captain Johnson to, without delay, provide it with complete copies of those files. Upon receipt, counsel for the Plaintiff shall immediately provide complete copies to counsel Canada, excepting any communications or documents over which the Plaintiff asserts ongoing litigation privilege;
- The Plaintiff did not retain or instruct Dr. Meier. Regardless, counsel for the Plaintiff has advised that it anticipates Dr. Meier will provide her working files shortly and has agreed to provide complete copies of the files to counsel for Canada upon receipt.

Canada has indicated that it takes no issue with this approach. My order will reflect this;

- Upon the Plaintiff's review of these reasons, its files, Captain Johnson's working files and its existing affidavit of documents the Plaintiff will, if necessary, file an amended affidavit of documents that will generally describe any communications as between counsel for the Plaintiff and Captain Johnson or documents over which it claims retained litigation privilege and the basis for the claim for each document. This is to be done without delay.

ORDER IN T-606-18

THIS COURT ORDERS that

1. If Canada elects to retain Captain Johnson and tender the Johnson Report at trial, then any requirement for leave to late serve, or for service of the Johnson Report on the Plaintiff by Canada, is hereby waived. Should Canada elect to retain Captain Johnson and tender him as an expert witness at trial, it does so at its own expense;

2. The Plaintiff will provide complete copies of Dr. Meier's working files to counsel for Canada upon receipt of those files from Dr. Meier by counsel for the Plaintiff;

3. Counsel for the Plaintiff will immediately request that Captain Johnson provide counsel for the Plaintiff with complete copies of his working files. Upon receipt of Captain Johnson's working files, counsel for the Plaintiff will immediately provide complete copies of those working files to counsel for Canada subject to and excluding any documents or communications over which counsel for the Plaintiff claims ongoing litigation privilege;

4. If counsel for the Plaintiff is asserting ongoing litigation privilege over any documents or communications contained in Captain Johnson's working files, then if necessary, the Plaintiff will, without delay, file an amended affidavit of documents that will generally describe each of any such communications or documents over which it claims retained litigation privilege and the basis for the claim; and

5. The Plaintiff shall have its costs of this motion.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-606-18
STYLE OF CAUSE:	VANCOUVER PILE DRIVING LTD. v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	FEBRUARY 5, 2021
ORDER AND REASONS:	STRICKLAND J.
DATED:	FEBRUARY 9, 2021

APPEARANCES:

Jordan Bank Vernon Pahl Alexandra Wickett	FOR THE PLAINTIFF
Andrea Gatti Shaun Ramdin Eric Girard	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Guild Yule LLP Vancouver, British Columbia	FOR THE PLAINTIFF
Department of Justice Canada Vancouver, British Columbia	FOR THE DEFENDANT