IN THE MATTER OF THE SECURITIES ACT,

R.S.O. 1990, CHAPTER S.5, AS AMENDED

– AND –

IN THE MATTER OF
PHILIP SERVICES CORP., ALLEN FRACASSI,
PHILIP FRACASSI, MARVIN BOUGHTON,
GRAHAM HOEY, COLIN SOULE,
ROBERT WAXMAN AND JOHN WOODCROFT

DECISION AND REASONS

FOR

MOTION TO DISCLOSE BROUGHT BY STAFF

Hearing:	**November 10 and 11, 2004**	
Panel:	**Paul M. Moore, Q.C.**	**Vice Chair of the Commission (Chair of the Panel)**
	Robert W. Davis	**Commissioner**
	Suresh Thakrar	**Commissioner**
Counsel:	**Karen Manarin** **Judy Cotte**	**For the Applicant, Counsel for Staff of the Ontario Securities Commission**
	Bradley M. Davis **Erin Michael O'Toole**	**For the Responder to the motion, Counsel for the Receiver of Philip Services Corp.**

I. The Proceeding

[1] This is a motion brought on consent, and in camera, by staff of the Commission for an order authorizing staff to make disclosure to the other respondents of certain documents for the hearing of the merits in this matter pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5 (the Act). Philip Services Corp. by its receiver claims privilege over the documents and is the responder to the motion. The documents in question are:

> Document 1: (DT901965 to DT901978) Letter from Brice Voran, Shearman & Sterling to John Warren, Borden & Elliot
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> Document 2: (DT901955 to DT901958) Borden & Elliot letter to Colin Soule, Senior Vice-President, General Counsel and Corporate Secretary, Philip Services Corp.
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> Document 3: (DT901960) Letter from Brice Voran, Shearman & Sterling, to John Warren, Borden & Elliot
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> Document 4: (DT901961 to DT901964) Internal Shearman & Sterling memorandum from Nancy Bertrand to Brice Voran and Richard Price re: disclosure requirements
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> Document 5: (DT901959) Letter from Paul Mingay, Borden & Elliot, to Colin Soule, Philip Services Corp.
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> Document 6: (DT300184 to DT300188) Colin Soule's handwritten notes from the audit committee meeting of Philip Services Corp. held on April 23, 1998
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> Document 7: (DT900559 to DT900564) Fax memorandum to Colin Soule, Philip Environmental Inc from Christopher Morgan of Skadden, Arps, Slate, Meagher and Flom LLP re: Letter to SEC relating to Pro Formas
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> Document 8: (DT900553 to DT900555) Fax memorandum to Marvin Boughton of Philip Environmental Inc from Christopher Morgan of Skadden, Arps, Slate, Meagher and Flom LLP re: financial statement for inclusion in forms F-4
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> Document 9: Connie Caisse's handwritten notes of audit committee meeting of Philip Services Corp held on January 19, 1998
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> Document 10: (DT901813 to DT901819) Letter to Colin Soule re: special matter from David R. Byers of Stikeman Elliott LLP

[2] During the course of submissions, documents 1 to 5 were referred to collectively as the "Legal Opinions". Documents 7 and 8 were referred to as the "Skadden Letters". All these documents constitute correspondence between Philip and its legal counsel on various issues including Philip's legal disclosure obligations in the United States or Ontario.

[3] Document 6 was referred to as the "Soule Notes" and document 9 was referred to as the "Caisse Notes". The Caisse Notes are the handwritten notes of Connie Caisse, a director and Vice President of Corporate Accounting and controller of Philip, who attended the January 19, 1998

meeting of Philip's audit committee. The Soule Notes are the handwritten notes of Colin Soule, Senior Vice President, General Counsel, and Corporate Secretary of Philip, who attended the April 23, 1998 meeting of Philip's audit committee.

[4] Document 10 was referred to as the "Stikeman Letter". This document consists of a cover letter dated March 3, 1998 from Philip's Canadian legal counsel at Stikeman Elliott, to Soule. It encloses a memorandum containing a series of potential questions from the press and analysts and suggested answers on various topics that were pertinent to Philip at that time.

[5] It is undisputed that all the documents in question are relevant to a determination of the merits of this matter.

[6] Philip asserts a claim of privilege over all the documents and staff concedes that a *prima facie* solicitor-client privilege attaches to all but the Stikeman Letter.

[7] On August 30, 2000 the notice of hearing under section 127 of the Act and staff's statement of allegations in this matter were issued. Staff quoted extensively from the Legal Opinions in the statement of allegations.

[8] Philip took issue with staff regarding disclosure to the other respondents of the documents in question on the basis of privilege. An order of the Commission was issued on June 27, 2003 mandating the bringing of this motion.

[9] Counsel for Philip requested that the decision and reason on the motion disguise the substance of the documents in question, if we found that privilege continued with respect to them. In view of our findings, we do not need to consider this request.

II. Background to the Proceeding

[10] Philip was a public company trading on the Toronto Stock Exchange. On November 6, 1997, Philip made a public offering of approximately 20 million common shares, 15 million of which were sold in the United States and 5 million of which were sold in Canada and internationally. The offering raised approximately US $364 million. On November 6, 1997, Philip filed with the Commission a prospectus that included its audited financial statements for the years 1995 and 1996, and unaudited financial statements for the first nine months of 1997.

[11] Deloitte and Touche LLP was Philip's auditor from 1990 to December 1999. Deloitte consented to the inclusion of their unqualified audit opinions on the audited financial statements for 1995 and 1996 in the prospectus. Deloitte also provided a letter of comfort with respect to the unaudited interim financial statements of Philip contained in the prospectus.

[12] Throughout the relevant period, Stikeman Elliott was Canadian legal counsel to Philip with respect to this matter.

[13] In January 1998, two months after the public offering, Philip made the first of a series of announcements that negatively altered Philip's financial picture as disclosed in the prospectus filed with the Commission in November 1997. The matters disclosed significantly reduced Philip's earnings as set out in its 1995 and 1996 audited financial statements, and substantially altered its

1997 financial picture. Following these disclosures, the price of Philip shares dropped dramatically.

[14] In May 1998, staff commenced an investigation under section 11 of the Act into the adequacy of the disclosure on the part of Philip in relation to the public offering.

[15] Philip was subsequently de-listed on April 14, 2000.

[16] On April 17, 2000 Philip completed a financial reorganization under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36. As a result of the reorganization, Philip has been essentially rendered a non-operating entity with assets insufficient to satisfy its creditors. In connection with the reorganization, all the directors and officers of Philip resigned. Since then it has not had any officers or directors and acts through its receiver. A newly restructured company emerged from Chapter 11 of the U.S. Bankruptcy Code and the *Companies Creditors Arrangement Act* as a result of the reorganization. That new company is not a respondent in this proceeding.

[17] On July 15, 1998, staff served a summons on Deloitte, compelling it to produce copies of all correspondence with Philip between January 1, 1995 and June 1, 1998; audit working paper files for years ended 1995, 1996, 1997; and any interim draft and/or final reports and/or memos relating to the losses identified by Philip's 1997 financial statements and document briefs.

[18] In response to the summons, Deloitte assembled 324 files. It was agreed that rather than physically produce the files to staff, Deloitte would keep them in a separate secure location to which staff would have access. Staff attended at that location at various times, including on September 1 to 4, 1998 and August 30 to September 30, 1999, to review and copy documents. In addition, Deloitte also sent copies of numerous documents to staff on various occasions, including December 20, 1999.

[19] All of the documents in question, except the Caisse Notes, were received by staff from Deloitte in various tranches of disclosure.

[20] Staff also served a summons to produce documents on Philip on July 15, 1998. The Caisse Notes were received by staff from Philip on two separate occasions: August 28, 1998 and September 30, 1998.

Disclosure to Philip of Summons Served on Deloitte

[21] On November 25, 1998, counsel for Deloitte requested that staff obtain an order under section 17 of the Act to permit Deloitte to disclose to Philip that Deloitte was required to produce documents to staff.

[22] The Commission authorized Deloitte to disclose to Philip the existence of the summons in order to permit Philip to consider whether to assert privilege over certain documents in Deloitte's possession that were subject to the summons.

[23] Accordingly, counsel for Deloitte provided counsel for Philip with a list of documents over which Philip might want to claim privilege (the Deloitte Document List) that Deloitte intended to produce.

[24] Counsel for Philip reviewed all of the documents on the Deloitte Document List and advised Deloitte that Philip intended to claim privilege over the documents, save and except for one document which is irrelevant to this motion.

[25] Counsel for Philip provided staff with particulars of the documents listed on the Deloitte Document List.

Facts related to the Legal Opinions

[26] The Legal Opinions were created by Philip's legal advisors, Borden & Elliot in Ontario and Shearman & Sterling in the United States. Borden & Elliot and Shearman & Sterling prepared the Legal Opinions for the purposes of providing legal advice to Philip concerning Philip's disclosure obligations. The Legal Opinions were delivered to Philip prior to the issuance of the prospectus.

[27] On January 19, 1998 Philip invited members of Deloitte to attend a meeting of Philip's audit committee. At that meeting the issue of the alleged wrongdoings of Waxman, a former officer of Philip, was discussed. The discussion centered around whether the circumstances of Waxman's conduct amounted to a reportable incident that Philip was legally obligated to disclose. In the context of this discussion, Deloitte was subsequently provided with copies of the Legal Opinions.

[28] The Legal Opinions, together with other documents in questions, were produced to staff by Deloitte under a cover letter dated December 17, 1999 from Marshall King of Gibson, Dunn & Crutcher LLP, legal counsel to Deloitte in the United States, in which King stated that "we have determined that the documents produced herewith are <u>not</u> privileged. Thus, you should disregard the "Privileged & Confidential" stamp that appears on some of these documents."

[29] Deloitte did not request Philip's consent to release the Legal Opinions to staff. Deloitte did not disclose to counsel for Philip that it had produced the Legal Opinions or intended to produce them to staff. No officer or director of Philip produced copies of the Legal Opinions to staff.

Facts Related to the Soule Notes

[30] Relying on privilege, Philip produced the Soule Notes in a redacted form to staff on October 16, 2001. An identical redacted version was produced by Soule, himself, to staff on October 31, 2003. Philip only claims privilege with respect to the redacted portion of the notes.

[31] Staff obtained an unredacted copy of the Soule Notes when they attended Deloitte's secure location on two occasions: September 1 to 4, 1998 and August 30 to September 30, 1999.

[32] The Soule Notes were the only document of the documents in question that was listed on the Deloitte Document List. Deloitte did not disclose to Philip that it had the other documents in question in its possession or that it intended to disclose these documents to staff.

Facts Related to the Skadden Letters

[33] The Skadden Letters were produced to staff by Deloitte on April 6, 1999.

Facts Related to the Caisse Notes

[34] The Caisse Notes were produced to staff by Stikeman Elliott as part of the disclosure made by Philip on August 28, 1998 and September 30, 1998. They were the only document in question not provided by Deloitte to staff.

[35] The Caisse Notes memorialize Soule's overview given to Philip's audit committee regarding the Legal Opinions.

Facts Related to the Stikeman Letter

[36] The Stikeman Letter was produced to staff by Deloitte under a cover letter dated December 17, 1999 from Marshall King of Gibson, Dunn & Crutcher LLP, legal counsel to Deloitte in the United States.

III. The Position of the Parties

The Position of Staff

[37] Staff concedes that all of the documents in question, other than the Stikeman Letter, were *prima facie* privileged.

[38] Staff argues that Deloitte acted at all relevant times as auditors to Philip and not as agent for Philip with the purpose of communicating with and assisting Philip's legal counsel in providing legal advice to Philip or in assisting Philip in carrying out legal advice.

[39] Consequently, staff submits, when Philip made available to Deloitte the documents in question, other than the Caisse Notes, Philip waived any privilege over the documents.

[40] Staff argues that when Philip produced the Caisse Notes for staff, it waived any privilege over the Caisse Notes.

[41] Staff submits that when the Caisse Notes were provided to staff, an important element of the Legal Opinions was disclosed to staff and that as a result any privilege over the Legal Opinions was waived.

[42] Staff argues that Philip failed to take reasonable steps to protect and preserve any privilege in the documents in question and as a result the documents became available to others, including staff, and privilege over them was lost.

[43] Furthermore, staff argues, because of Philip's failure to take reasonable steps to protect the confidentiality of the Legal Opinions, knowledge of them had become widespread and, therefore, any privilege over them was lost.

[44] Staff submits that Philip and certain individual respondents have put the Legal Opinions in issue in the proceeding and, consequently, any privilege over them was waived.

[45] Finally, staff submits that the Stikeman Letter was not privileged. It conveyed business and public relations advice, but not legal advice.

The Position of Philip

[46] Philip argues that the Commission must determine whether the individual waiving privilege possessed the requisite authority to waive. Philip cites *Syncrude Canada Ltd. v. Canadian Bechtel Ltd.*, [1992] A.J. No. 1234 (Alta C.A.) for the authority that only the possessor of the privilege, their legal counsel, or an agent acting with the express authority of the possessor of the privilege may validly waive.

[47] Philip argues that none of the individuals deposed in the investigation of Philip has given evidence that they relied on the Legal Opinions to justify a course of conduct prior to the issuance of the prospectus. In fact, Philip stresses, when asked about the substance of the Legal Opinions, they each refused to answer on the grounds of privilege.

[48] Philip argues that privilege in the documents in question was Philip's and not its officers' or directors' and only Philip could waive the privilege. If the Legal Opinions had been put in issue in the proceeding, this had been done by staff, or, without admission, by former officers and directors of Philip, but not by Philip or its receiver.

[49] Philip cites *Lloyds Bank Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.) at page 168 for the authority that "certainly [privilege] will not be waived where it is the person who seeks the information that has raised the question of reliance."

[50] Philip argues that Deloitte acted in relation to the Legal Opinions as agent for Philip to communicate with and assist Philip's legal counsel in advising Philip as to its disclosure obligations. Therefore, the provision to Deloitte of the Legal Opinions and other documents in question, other than the Caisse Notes, did not waive privilege.

[51] Philip submits that it continually claimed privilege over the Legal Opinions and other documents and that such privilege was not lost when Deloitte improperly provided the documents to staff or when staff improperly incorporated portions of the Legal Opinions into the statement of allegations in this matter.

[52] Philip states that it is unfair for staff now to argue, based in part on its use of the Legal Opinions and other privileged documents, that it is too late for a claim of privilege to be recognized because the documents have had widespread disclosure.

[53] Philip cites Chapnik J. in *Tilley v. Hails* (1993), 12 O.R. (3d) 306 (Ont. Gen. Div.) at 310, for the authority that staff should not now be allowed to take unfair advantage of material that they had a hand in disseminating:

> It is an established principle of law that a person who has obtained confidential information is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication: *Slavutych v. Barker*, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224; *Schauenburg Industries Ltd. v. Borowski* (1979), 25 O.R. 737, 101 D.L.R. (3d) 701 (H.C.J.).
>
> Furthermore, where such communications are disclosed either inadvertently or through improper conduct by a party, that party's solicitors are not entitled to make use of the documents in the litigation: *Guiness Peat Properties Ltd. v. Fitzroy Robinson*

> *Partnership*, [1987] 2 All E.R. 716, [1987] 1 W.L.R. 1027 (C.A.); *Bernardo v. Deathe*, [1991] O.J. No. 862 (Gen. Div.). The surreptitious delivery of confidential material cannot be sanctioned: *Ontario (Attorney General) v. Gowling & Henderson* (1984), 47 O.R.(2d) 449, 12 D.L.R. (4th) 623 (H.C.J.).
>
> As noted in the *Royal Bank of Canada* case, *supra*, the ethical and proper course of action where lawyers come into possession of privileged documents which privilege may not have been waived, is to enquire whether the documents were intended to be disclosed and if necessary, to test the issue of privilege in court: see also *Amerace Ltd. v. Complin*, Ont. Gen. Div., unreported, released December 22, 1992.
>
> It is clear that mere loss of physical custody does not terminate the privilege.

[54] Philip notes that all of the evidence relied upon by staff in support of the assertion that there has been an implied waiver of privilege was obtained by staff after Deloitte inappropriately disclosed the Legal Opinions to staff without Philip's consent.

[55] Philip maintains that there was no express waiver of privilege over the Legal Opinions because it took every measure to protect the privilege. Philip notes that in spite of the fact that Deloitte had requested staff obtain a section 17 order to permit Philip the opportunity to claim privilege over the documents in Deloitte's possession, Deloitte did not advise Philip it possessed and intended to disclose to staff the Legal Opinions, the Skadden Letters and the Stikeman Letter.

[56] Further, Philip maintains that staff cannot rely on the evidence it has obtained by compulsion pursuant to a summons and then assert that fairness dictates that they may rely on and disclose the Legal Opinions.

[57] Philip argues that as soon as the receiver for Philip realized that the Caisse Notes had been provided to staff by Philip's counsel, Philip asserted a claim for privilege.

[58] Philip argues that the Caisse Notes were provided to staff pursuant to the summons of July 15, 1998 and as such, disclosure was made by means of compulsion. Referring to the two prerequisites of voluntariness and knowledge for a valid waiver as set out in *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (B.C.S.C.), Philip submits that since the notes were disclosed by means of compulsion, the requisite element of voluntariness is missing. As a result, Philip argues, there has been no waiver of the privilege that attached to the Caisse Notes.

[59] Philip concedes that several witnesses were deposed as to the content of the Caisse Notes and that counsel for Philip in attendance at the disposition permitted questions on the Caisse Notes. However, Philip maintains that such counsel constantly reaffirmed Philip's privilege claim.

[60] Philip denies that loss of privilege over the Caisse Notes would entail a loss of privilege over the Legal Opinions referred to therein. Philip argues that the reference to the Legal Opinions in the Caisse Notes cannot amount to a waiver of privilege with respect to the Legal Opinions because what is documented is only a reference to the Legal Opinions and nothing else. Philip argues that the mere reference to the fact that legal advice has been received does not waive the subject matter

of the advice: *Lac La Ronge Indian Band v. Canada* [1996], 10 W.W.R. 625 (Sask. Q.B.) and *Talisman Energy Inc. v. Petro-Canada Inc.* (2000), 262 A.R. 344.

[61] In the case of the deposition of Connie Caisse, Philip argues that counsel for Philip permitted the Caisse Notes to be entered as an exhibit only because he was acting as Caisse's personal counsel and not on behalf of Philip in that instance. Philip reiterates that Caisse was never authorized to waive Philip's privilege.

[62] Philip maintains that the Skadden Letters constitute correspondence from Philip's American counsel relating to U.S. disclosure obligations along with attached draft documents. Philip asserts that it provided these documents to Deloitte with the express purpose of obtaining Deloitte's input in the context of discussions regarding their accuracy. Philip argues that the provision of these materials to the auditors with this specific intent does not constitute a waiver of privilege.

[63] Philip argues that the Stikeman Letter is privileged because even though it is presented as a series of possible questions and answers in plain English for dealing with the press, it draws upon the legal expertise of the counsel that composed the answers with the express purpose of avoiding further liability for the company. Philip maintains that the document was provided to Deloitte to ensure accuracy and to provide input. As such, Philip maintains that the provision of this document does not constitute waiver of privilege. Philips observes that Deloitte did not include this document on the Deloitte Document List and had no authority from Philip to disclose this document to staff. Philip submits that the Stikeman Letter was written by legal counsel in the continuum of the legal advice being provided by counsel relating to problems that the potential questions and answers dealt with. Therefore, the Stikeman Letter was privileged.

IV. Evidence

[64] The parties filed as exhibits six volumes of documents containing, among other things, the documents in question, minutes of the audit committee meeting of January 19, 1998, depositions of representatives of Deloitte and several of the officers and directors of Philip in 1997 and 1998, as well as an agreed statement of limited facts. No evidence was submitted as to how documents, other than the Legal Opinions, provided by Philip to Deloitte were provided.

[65] Counsel made certain admissions and concessions during the argument of the motion. We considered these and the evidence together in making our findings.

[66] We were provided with the transcripts of the depositions of numerous individuals that are involved in the complex matrix of facts in this matter. On February 24, 2000 Alan Kesler was deposed by the SEC. Kesler was one of the Deloitte representatives who was present at the January 19, 1998 audit committee meeting. He was specifically asked about the circumstances under which he came to learn about and receive the Legal Opinions from Philip:

> Q. Did you have any discussions with anyone else at a later time about Philip disclosing or not these – that situation of Mr. Waxman back in September or earlier?
>
> A. Yes.
>
> Q. When did you have such a discussion?

A. On January the 19th at an audit committee meeting where Marvin Boughton was presenting to the audit committee and representatives of Deloitte & Touche were present. Marvin Boughton was presenting his understanding of the charge that was going to be required in the metals division, the issues that had been discovered in the process of conducting the book to physical and his understanding of what might have given rise to those matters.

In the course of that meeting we, being members of – representatives of – Deloitte & Touche, and I can't recall whether I raised it or Ron McNeill raised it, but we apprised the audit committee and members of management of what we believed their obligations, reporting obligations were relative to the discovery of a significant event, public disclosure of a significant event and our responsibilities when becoming aware of what we believed was a significant event in respect to how they reacted to the discovery of such circumstances. And we advised them that it was our – in our judgment, these matters indicated that they should immediately seek outside legal counsel, that they should consult with their SEC legal counsel as to what those reporting obligations were because we believed that was a legal interpretation as opposed to an accounting obligation, **but that we had specific responsibilities as auditors in regards to it** but that we wanted them to consult immediately with external legal counsel. [emphasis added]

In discussion which ensued from that advice we became aware that they had already sought legal counsel previously and it was made clear that that legal advice had been sought when the company first became aware of issues with Bob Waxman, again in that September time frame. Best of my recollection, that was the first knowledge I had of the existence of any such previous consultation with external legal counsel, and I requested copies of the consultation that had been made and the results of that consultation immediately and continued to press that I believed it was appropriate since there were now many new facts and circumstances which had come to the attention of management that at a minimum, that it was appropriate that they consult again. So following the meeting I was provided with copies of the responses which had been received from external legal counsel, which, I believe were dated September 30.

Q. I'd ask you to look at what has been previously marked as Exhibit No. 40 and ask you if this looks like copies of the correspondence with legal counsel you just discussed.

A. I believe these were the documents that I looked at. I can already see that my previous recollection as to dates was not correct, but I'm seeing I'm looking at documents that are dated October 24, October 23rd.

Q. 1997?

A. 1997 yes. October 21st – but I do believe these were the documents that I looked at at that time.

V. Findings and Analysis

Privilege and the Auditors

[67] Philip cites numerous cases for the proposition that solicitor-client privilege may be extended to communications by a client, or their solicitor, to the client's auditor or accountant, where the auditor or accountant is acting in an expert capacity for the purposes of seeking, receiving or implementing legal advice regarding the client's affairs. Philip notes that Canadian jurisprudence has recognized that the interplay between solicitors, their clients and the client's auditing or accounting advisors, in the context of examining ongoing legal issues, can be protected under the guise of solicitor-client privilege: *Re Sokolov* (1968), 70 D.L.R. (2d) 325 (Man. Q.B.); *Susan Hosery Ltd. v. Minister of National Revenue* [1969], 2 Ex.C.R. 27 at para 11 (Can. Ex. Ct.); *Long Tractor Inc. v. Canada (Deputy Attorney General)* (1998), 155 D.L.R. (4th) 747 at paras. 14 and 17 (Sask. Q.B.); *Belgravia Investments Ltd. v. R.* [2002], 3 C.T.C. 482 (Fed. T.D.) at para 40.; *R. v. Canadian Territorial Helicopters Inc.*, [2004] M.J. No. 241 (Q.B.)

[68] Where a party is claiming privilege and argues agency in the extension of that privilege, which is the claim of Philip in this case, that party bears the onus of proving agency, *General Accident Assurance Co. v. Chrusz* (1997), 34 O.R. (3d) 354 (Ont. Gen. Div.).

[69] We find as a fact that at the time that Deloitte learned of and requested the Legal Opinions, Deloitte was acting in their role as auditor and not in an expert capacity for the purposes of seeking, receiving or implementing legal advice for Philip. In fact, it is clear from the deposition of Kesler, that Kesler, acting in his role as auditor, believed it was in the company's best interests for Philip to continue to solicit legal advice. Kesler does not indicate that Deloitte was asked or offered to play any role whatsoever in furtherance of the solicitation of legal advice. Kesler makes it clear that it was Deloitte who asked for the Legal Opinions, not Philip who gave them with instructions to provide input for further solicitation.

[70] Deloitte was not consulted on the first round of legal advice. Deloitte only learned of the Legal Opinions well after the fact of non-disclosure in the prospectus. We do not accept Philip's position that Deloitte was involved in the "continuum" of the provision of legal advice since Deloitte only learned of the Legal Opinions after the issuance of the prospectus.

[71] Furthermore, we doubt that an auditor, in performing its audit review for the purpose of forming its own opinion on the financial statements of a company, could properly be expected to act as the agent of the company in respect of a matter under its review for the purposes of its audit opinion.

[72] In *Cineplex Odeon Corp. v. Canada (Minister of National Revenue, Taxation – M.N.R.)*, [1994] O.J. No. 628, (Ont. Gen. Div.), the tax division of the accounting firm in question was involved in the provision of information to the company's solicitors for the purpose of assisting the solicitors in rendering legal advice. At paragraphs. 11 to 13, Haley J. explained:

> [11] Peats as external auditor for the applicant corporation is governed by the guidelines set out in the handbook of the Canadian Institute of Chartered Accountants. The auditor is called upon to give an objective opinion of the fairness and accuracy of the financial statements prepared by the management of the corporation. Ms. Levine agreed that the auditor must maintain an independence from the management of the corporation in performing the audit. The auditor's report is prepared for the shareholders of the corporation as opposed to the management.
>
> [12] If such an audit were conducted by another firm of chartered accountants there would be no question that they would be third parties in relation to the corporation and disclosures to those auditors would constitute waiver of privilege subject to certain limited exceptions which I will discuss later. Is the function of the audit by the same accounting firm sufficiently different from that of the tax team in the same firm, acting as agent for the client, that the audit team must be notionally treated as a third party for consideration of waiver of privilege?
>
> [13] In my view the answer is yes. If the tax team provided advice to the client or to its solicitor that advice would not be privileged. It is only in the very limited situation where the tax team provides information to the solicitor for the purpose of the client's receiving legal advice that the privilege can be maintained. This is not the creation of an accountant-client privilege but the acknowledgement of an extension of solicitor-client privilege through the principles of agency. If advice given by the tax team, which cannot be protected by the agency because it is not given for the purpose of obtaining legal advice, turns up in the auditor's file it is clearly not privileged.

[73] In *U.S. v. Arthur Young & Co.* 84-1 USTC 83,670 (U.S.S.C.) at page 83,765, the U.S. Supreme Court stated:

> Nor do we find persuasive the argument that a work-product immunity for accountant's tax accrual workpapers is a fitting analogue to the attorney work-product doctrine established in *Hickman v. Taylor*, 329 U.S. 495 (1947). The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favourable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretation of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

[74] It is evident from the minutes of the meeting that the purpose of Philip's audit committee meeting of January 19, 1998 was to deal with matters relating to the audit. The representatives of Deloitte invited to the meeting were from Deloitte's audit team. The role played by Deloitte, from giving comfort on the financial disclosure in the prospectus, including comfort on the unaudited financial statements, to the clarification of the Waxman situation and Philip's financial disclosure at and following the two audit committee meetings, and in reviewing the documents in question provided to Deloitte was in performance of its ongoing duties and obligations as auditors of Philip.

[75] We find that the representatives of Deloitte who attended the audit committee meetings of January 19, 1998 and April 23, 1998 were present in their capacity as part of the audit team of Deloitte and that Philip provided the documents in question, other than the Caisse Notes, to Deloitte in their capacity as auditors to assist Deloitte in performing their audit of the financial statements of Philip. Accordingly, Deloitte was a third party to Philip and not solely the agent of Philip with the sole purpose of communicating with and assisting Philip's legal representatives.

[76] Therefore, privilege did not attach to information shared or arising at the two audit committee meetings in the presence of Deloitte. The Caisse Notes and the Soule Notes memorialized what happened at the meetings. Such documents were never privileged.

[77] The legal opinions were furnished to Deloitte on the instruction of the chair of the audit committee. They were not furnished subject to any instruction not to use them for any purpose other than to assist the company's legal counsel in providing legal advice to the company. We find that Philip's decision to provide the Legal Opinions to Deloitte was informed and voluntary.

[78] We also find that the disclosure concerning the Legal Opinions at the audit committee meeting of January 19, 1998 at which Deloitte was present, and in the Caisse Notes constituted a waiver of privilege over the Legal Opinions. The disclosure went to the purported substance of the Legal Opinions. The Caisse Notes provide with reference to the Legal Opinions: "they have talked to AF + been told that legal advice had indicated not necessary to disclose." Therefore, in fact, privilege over the Legal Opinions was waived even before they were provided, physically, to Deloitte.

[79] Once the essence, or a significant portion, of a privileged document is disclosed, the privilege that would apply to the whole document is waived. If this were not the case, a party could engage in selective and self-serving disclosure with respect to a particular document. See *Leadbeater v. Ontario*, [2004] O.J. No. 1228 (O.S.C) at paragraphs 56 and 68.

Protecting Privilege

[80] The Legal Opinions were not conveyed to Deloitte with the accompanying caveat of privilege that one would expect from a party that asserts that privilege.

[81] If a party does not wish the provision of a document to a third party to result in a waiver of privilege over the document, it must take certain steps to protect the confidential nature of the document and strictly control its use.

[82] In *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.) three co-accused were charged with murder. Notes were found in the jail cell of one of the co-accused, Bray, that had been prepared by his lawyer. When Bray took the stand, Dunbar, the co-accused who had found the notes in Bray's cell, petitioned to cross-examine Bray on the content of the notes. Counsel for Bray

argued that the notes were privileged and the trial judge agreed. The Court of Appeal ruled otherwise and noted that even though the notes had been removed from the cell surreptitiously by Dunbar, the fact that Bray had not made every effort to protect the privilege resulted in a waiver of the privilege.

[83] In *Syncrude* there was evidence offered on the part of the plaintiff that the documents in question were handed over to a third party mediator, with strict guarantees that privilege would not be lost. This is a prerequisite to the protection of privilege.

[84] Unlike in *Syncrude*, we have no evidence that the documents in question that were provided to Deloitte were provided with an intention that privilege be retained. We do not know how documents, other than the Legal Opinions, that were provided to Deloitte were provided to Deloitte. In the absence of such evidence, we infer that Philip did not regard them as privileged, or if it did, it intended to waive privilege by allowing the documents to come into the possession of Deloitte to inform Deloitte of pertinent information, as was the case with the Legal Opinions, in performing its audit role.

[85] Philip was reorganized in April 2000 and since then has been without the benefit of instructions from corporate officers and directors. However, this did not relieve Philip of the task of properly protecting privilege.

[86] We conclude that Philip did not adequately protect its privilege, to the extent it had not otherwise been lost.

Widespread Knowledge

[87] Even if privilege with respect to the Legal Opinions had not otherwise been lost, Philip failed to take reasonable steps to preserve privilege and, as a consequence of Philip's action and inaction, knowledge of the Legal Opinions and their contents has become widespread. Therefore, any privilege not otherwise lost would have been lost as a consequence of the failure of Philip to take reasonable steps to prevent such knowledge from becoming widespread.

Production to Deloitte or Staff

[88] If privilege attached (and we find it did not with respect to the Caisse Notes and the Soule Notes) and had not been lost through disclosure to Deloitte at the meetings (which we find was the case with respect to the Legal Opinions), it would have been lost with respect to the documents in question, other than the Caisse Notes, when they were provided by Philip to Deloitte.

[89] Privilege, if any, with respect to the Caisse Notes (and other documents in question produced by Philip to staff in unredacted form) would also have been lost when they were produced by Philip to staff.

Compulsion

[90] There was no compulsion in the production of privileged documents. Section 13(2) of the Act allows for a scheme for the protection of the rights of those who are subject to a deposition or to the production of documents. Philip relied on section 13(2) on February 23, 1999 by providing staff with a list of documents that it had itemized and over which it claimed privilege. Staff has never

challenged the claim of privilege over the reports of the independent advisors KPMG and Pricewaterhouse. The Caisse Notes were not listed in this letter and when they were provided to staff there was no listing or claim of privilege. Rather the documents were simply handed over in their entirety with no indication that they were privileged communications. The belated claim for privilege by Philip's receiver could not undo any waiver.

[91] Further, several deponents were questioned on the contents of the Caisse Notes. Questions were asked and voluntarily answered on the contents of the Caisse Notes.

Stikeman Letter

[92] Philip bears the onus of proving privilege over the Stikeman Letter, on a balance of probabilities, as set out in *Solosky v. Canada* (1979), 50 C.C.C. (2d) 495 (S.C.C.).

[93] There are arguments for the position that the Stikeman Letter is not privileged. The memorandum accompanying the cover letter is not couched as a legal response or a legal opinion. Rather it sets out possible questions and answers on factual matters surrounding the discovery of the Waxman issue and is intended to assist Philip's staff in handling possible inquiries by the press or analysts. The document was not marked by Stikeman Elliott or Philip as privileged. The "Privileged and Confidential: Prepared at Request of Counsel" stamp on the face of the document was added by Deloitte, a fact which was admitted by counsel for Philip. The cover letter supplied by counsel contains the following suggestion which would imply that the contents were not intended to be privileged: "It would be a good idea to review the attached with your auditors and the forensic accountants if you decide to use any of the suggestions."

[94] However, the letter was written by Philip's outside legal counsel and it is directed to its in-house legal counsel.

[95] While the memorandum is framed as a series of questions and answers, the possible answers to some questions reveal that counsel was aware of Philip's exposure to liability on issues to which Philip was attempting to respond at that time. There was a question about when the company first discovered the inventory problem. The answer to this question could bear on the timing of regulatory disclosure in the United States and Canada. There is a question about the employment status of Waxman and other individuals in the company. The answer to these questions could impact on the consideration of employment law issues, especially with respect to Waxman. There are questions that use the term "fraud". The suggested answers to these questions suggest a tailored response with regards to potential criminal liability on the part of the company.

[96] Philip indicates it had retained Stikeman Elliott to assist it in dealing with numerous legal issues relating to the discovery of Waxman's conduct. The issues included disclosure obligations, the restatement of financial results, on-going regulatory investigations and potential civil litigation. Accordingly, Stikeman Elliott was engaged with Philip at the time in the "continuum of communication in which the solicitor tenders advice." *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (Fed. C.A.) at p. 769. The Stikeman Letter was provided in that continuum.

[97] With some lingering doubt, we conclude that the Stikeman Letter is *prima facie* privileged.

[98] The Stikeman Letter was found in the possession of Deloitte. There is no evidence surrounding the circumstances under which this document came into the possession of Deloitte. We

conclude that Philip did not intend to preserve privilege (or if it did it took no steps to protect privilege) when it provided the Stikeman Letter to Deloitte and that privilege was waived voluntarily.

Putting the Legal Opinions in issue

[99] Privilege can be lost over a document where the one entitled to the privilege puts the document in issue. It is not enough for the one challenging the privilege to put the document in issue.

[100] With respect to the Legal Opinions, if Deloitte had been acting solely as agent of Philip to communicate with or assist Philip's legal counsel, and if privilege had not otherwise been lost when Philip disclosed the Legal Opinions to Deloitte, it would have been lost when the officers and directors of Philip at the relevant time (i.e. 1997 and 1998) put the Legal Opinions in issue in this proceeding.

[101] The Legal Opinions were put in issue by Philip when key officers and directors of Philip at the relevant time (i.e. 1997 and 1998) referred to and disputed the import of the Legal Opinions and when and by whom they were read and relied upon by Philip. (For example, on February 2, 2000, Hoey deposed: "Colin had indicated that whoever he was seeking legal counsel from, which as I indicated, was Stikeman Elliott and probably Skadden Arps as well from a U.S. perspective, that Skadden and Stikeman concurred with Deloitte's view as to reporting obligations.") These persons were the officers and directors who formed a significant part of the corporate mind of Philip at the time. The depositions putting the Legal Opinions in issue occurred when officers and directors were deposed by the SEC or by staff in connection with investigations into the conduct at issue in the section 127 hearing under the Act.

[102] The evidence revealed by various depositions goes well beyond a mere mention of the Legal Opinions. In fact, the collective state of mind of the directors of Philip with respect to the existence and content of the Legal Opinions will be a central issue for the hearing of the merits of this matter.

[103] Case law recognizes that when a party to a proceeding places its state of mind in issue and connects its state of mind with legal advice, privilege will be deemed to be waived with respect to that advice: *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.); *Rogers v. Bank of Montreal*, [1985] B.C.J. No. 2116 (B.C.C.A.); *Lloyds*; *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div.).

[104] In *Bank Leu Ag v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (O.S.C.) Ground J. at paragraph 5 said:

> [5] Privilege may be waived expressly or impliedly. In the case at bar it is not disputed that there was no express waiver of privilege by GLC. When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a

party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.

Who can waive privilege

[105] The fact that some of the depositions in question were taken after Philip was reorganized and ceased to have officers or directors does not mean that Philip has not put the Legal Opinions in issue. The corporate mind of Philip, and the agents through whom it acted at the relevant time, and who obtained, and stated they relied on, the Legal Opinions, is in issue in this proceeding.

[106] A section 127 proceeding is not a civil action with pleadings. Staff and this panel do not know for certain what defence the respondents will make in the hearing on the merits. In determining whether the Legal Opinions have been put in issue by Philip in this proceeding, it is legitimate for us to look at the depositions of officers and directors at the relevant time that were made before staff and other regulators, such as the SEC, in connection with investigations of the conduct at issue in this matter, notwithstanding that the notice of hearing and statement of allegations were not issued until August 30, 2000.

VI. The Decision

[107] This panel rules that the documents in question are no longer privileged and may be disclosed to the respondents.

DATED at Toronto this 7th day of December, 2004.

”Paul M. Moore”

Paul M. Moore, Q.C.

”Robert W. Davis”

Robert W. Davis

”Suresh Thakrar”

Suresh Thakrar