3.2 Court Decisions, Orders and Rulings

3.2.1 Philip Services Corp. (Receiver of) v. Ontario Securities Commission (Ont. Div. Ct.)*

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SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

BETWEEN:

PHILIP SERVICES CORP. (RECEIVER OF)
Appellant)

AND

ONTARIO SECURITIES COMMISSION
Respondent)

HEARD: March 22, 23, 24, 2005

BEFORE: O'Driscoll, Lane and Linhares de Sousa JJ.

COUNSEL: David R. Byers and Bradley M. Davis, for the Appellant

Karen Manarin and Judy E. Cotte, for the Respondent

REASONS FOR JUDGMENT

LANE J.:

[1] The appellant ("Philip") appeals from the decision of the Ontario Securities Commission ("Commission") dated December 7, 2004, finding that Philip had waived privilege in respect of ten documents (collectively "the Documents") described in five classes: Legal Opinions; Skadden Letters; Stikeman Letter; Soule Notes and Caisse Notes. With respect to the first three classes, the Commission decided that Philip had waived privilege by providing them to its auditor, Deloitte & Touche LLP ("Deloitte"), without cautioning Deloitte that they were privileged or requesting the maintenance of confidentiality. As to the Caisse Notes and the Soule Notes, the Commission decided that they were not privileged but had they been privileged it had been waived when they were given to the Staff of the Commission ("Staff").

[2] Because of the dual role of the Commission as both investigator and regulator, I will adopt the terminology used by the parties and refer to the Commission when it acted as investigator/prosecutor as "Staff" and to the Commission in its decision-making role as "the Commission".

Background

[3] Philip Services Corp. was a multi-national company, listed on the Toronto Stock Exchange and other exchanges. In the late summer and fall of 1997, it was preparing to launch a public offering of 20 million common shares, 15 million of which were to be sold in the United States and 5 million in Canada and internationally. The offering was intended to raise approximately (U.S.) $364 million.

[4] In September, 1997, a senior officer and Board Member of Philip, Robert Waxman, admitted to the senior management of Philip that he had fraudulently diverted at least $2 million, and perhaps as high as $20 million, of company funds for his own benefit (the "Waxman Issue"). As a result of this disclosure, Philip obtained the Legal Opinions in October of 1997, advising as to whether Philip had an obligation to disclose the Waxman Issue in the pending prospectus. Philip did not disclose the Waxman Issue in the prospectus.

[5] On November 6, 1997, Philip filed with the Commission the prospectus, audited financial statements for the years ended 1995 and 1996, and unaudited financial statements for the first nine months of 1997. At the same time, Philip filed a

* Source: Canadian Legal Information Institute.

Registration Statement with the United States Securities and Exchange Commission (the "SEC"). None of these documents referred to the Waxman Issue.

[6] In January 1998, two months after the public offering, Philip made the first of a series of announcements that significantly reduced Philip's earnings as set out in its audited 1995 and 1996 financial statements, and substantially altered its 1997 financial picture. Following these disclosures, the price of the Philip shares dropped dramatically. Philip was subsequently de-listed and sought bankruptcy protection.

[7] In May 1998, Staff commenced an investigation, authorized by the Commission under s. 11 of the Act, into the adequacy of the disclosure made by Philip in support of the public offering. Staff was concerned that Philip was aware of the Waxman Issue and other negative financial information in November 1997 but chose not to disclose it until after the public offering was completed.

[8] A Summons to produce documents was served by Staff on Philip and another on Deloitte and each responded. In response to the summons dated July 15, 1998, Deloitte assembled 324 files. Staff attended at the location where the files were stored 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 documents to Staff on various occasions.

[9] On August 28, 1998, in response to the summons, Philip made disclosure of a number of documents to Staff, including a copy of the Caisse Notes. On September 30, 1998, Philip produced another group of documents, which included a second copy of the Caisse Notes. Connie Caisse was the Director of Corporate Accounting for Philip.

[10] Between September 1 and September 4, 1998 Staff obtained copies of the Soule Notes and the Caisse Notes from Deloitte, pursuant to Staff's review of the documents produced by Deloitte.

[11] The Legal Opinions were provided to Staff in a letter dated December 17, 1999, from Deloitte's U.S. legal counsel, enclosing them. The letter stated that the documents were responsive to the Summons, and went on to state that,

> Some of these documents were only recently uncovered. Others were maintained in a privileged file, but upon our review of that file, we have determined that the documents produced herewith are not privileged. Thus, you should disregard the "Privileged & Confidential" stamp that appears on some of these documents. In addition, you will note that many of these documents are duplicative of documents that have previously been produced to you (and there may also be multiple copies of some document within this production); nevertheless, we believed it was best to err on the side of producing multiple copies.

The Main Proceeding

[12] On August 30, 2000, a Notice of Hearing and Statement of Allegations was issued by the Commission against Philip and seven of its former officers and directors under section 127 of the *Securities Act*, in which Staff alleged failure by the defendants to make full, true and plain disclosure of material facts concerning, inter alia, the Waxman Issue, including the amount of his personal benefit, the fact that Mr. Waxman had been relieved of his duties, and the taking of a promissory note from him. Staff also alleged that the management was aware, prior to the Prospectus filing, that developments, largely in the Metals Division, would lead to a re-structuring charge which had largely been identified and quantified by late summer of 1997, but which was not disclosed in the Prospectus filed November 6, 1997. The Allegations contain what are alleged to be quotations from certain legal opinions received by Philip prior to the filing date. Portions are underlined in an apparent effort to show that the defendants knew that these two matters should have been reported as material events. The Allegations conclude that Philip and certain officers failed to advise the Underwriters and the public of the facts as to the Waxman Issue and were aware at the filing of the prospectus of the charges to be taken by Philip in respect of the Metals Division, which made the financial statements misleading.

[13] Within the Proceeding begun on August 30, a hearing was held to determine the issues as to solicitor-client privilege in certain documents.

The Disputed Documents

[14] The following ten documents are the subject of the appeal:

(a) Letter from Brice Voran, Shearman & Sterling to John Warren, Borden & Elliot;

(b) Borden & Elliot letter to Colin Soule, Senior Vice-President, General Counsel and Corporate Secretary, Philip Services Corp.;

(c) Letter from Brice Voran, Shearman & Sterling, to John Warren, Borden & Elliot;

(d) Internal Shearman & Sterling memorandum from Nancy Bertrand to Brice Voran and Richard Price re: disclosure requirements;

(e) Letter from Paul Mingay, Borden & Elliot, to Colin Soule, Philip Services Corp.;

(f) Colin Soule's handwritten notes from the audit committee meeting of Philip Services Corp. held on April 23, 1998 (the "Soule Notes");

(g) 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;

(h) 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;

(i) Connie Caisse's handwritten notes of audit committee meeting of Philip Services Corp held on January 19, 1998 (the "Caisse Notes"); and

(j) Letter to Colin Soule re: special matter from David R. Byers of Stikeman Elliott LLP (the "Stikeman Letter").

[15] Documents (a) to (e) (collectively, the "Legal Opinions") were prepared for Philip by the law firms of Borden & Elliot and Shearman & Sterling for the purpose of providing legal advice to Philip concerning Philip's disclosure obligations.

[16] Documents (g) and (h) (collectively, the "Skadden Letters") were prepared by the law firm of Skadden, Arps, Slate, Meagher and Flom LLP for the purpose of providing legal advice to Philip concerning Philip's filings with the U.S. Securities and Exchange Commission.

[17] The Soule Notes and the Caisse Notes are the notes made by their respective authors of communications between Philip's in-house counsel, Colin Soule, and Philip's Audit Committee at Committee meetings.

[18] The Stikeman Letter was prepared by the law firm of Stikeman Elliott for the purpose of providing Philip with advice on responding to potential questions from the press and analysts concerning Philip's restatement of its financial statements.

[19] The Commission held that the disputed documents were no longer privileged and were to be disclosed to the respondents other than Philip. Philip appeals.

Standard of Review

[20] Pursuant to s. 9 of the *Securities Act*, a party may appeal a final decision of the OSC to the Divisional Court:

> s. 9(5) Where an appeal is taken under this section, the court may by its order direct the Commission to make such decision or to do such other act as the Commission is authorized and empowered to do under this Act or the regulations and as the court considers proper, having regard to the material and submissions before it and to this Act and the regulations, and the Commission shall make such decision or do such act accordingly.

[21] The statutory right of appeal under the Act is not limited. In fact, the powers of the Court on appeal are quite broad, which might lead one to infer that little deference should be paid to the Commission. However, the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers*), dealt in detail with the appropriate standard of review to be applied when reviewing administrative tribunals generally, and securities commissions in particular.

[22] The Supreme Court explained the range of possible standards to be applied, and the criteria for deciding which standard to use. It concluded that a securities commission is a highly specialized tribunal with policy-making authority derived from statute and broad discretion to determine what conduct is in the public interest. The Court said:

> Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.
>
> In the case at bar, the Commission's primary role is to administer and apply the Securities Act. It also plays a policy development role. Thus, this is an additional basis for deference.
>
> Thus, on precedent, principle and policy, I conclude as a general proposition that the decisions of the Commission, falling within its expertise, warrant judicial deference.

[23] The position of the Supreme Court with respect to the deference that should be shown to securities commissions was confirmed in the recent case of *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*. In that decision, Justice Iacobucci, for the Court, said, at pp. 152-153:

> The OSC is a specialized tribunal with a wide discretion to intervene in the public interest and that the protection of the public interest is a matter falling within the core of the OSC's expertise. Therefore, although there is no privative clause shielding the decisions of the OSC from review by the courts, that body's relative expertise in the regulation of the capital markets, the purpose of the Act as a whole and s. 127(1) in particular, and the nature of the problem before the OSC, all militate in favour of a high degree of curial deference. However, as there is a statutory right of appeal from the decision of the OSC to the courts, when this factor is considered with all the other factors, an intermediate standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness.

[24] Philip submitted that the Commission's application of the law of privilege is to be reviewed on a standard of correctness. Staff agreed, but submitted that findings of fact and factual inferences should be reviewable on a standard of reasonableness. In our view, the position of Staff is correct. Some deference is due to the Commission even on a paper record, as here, having regard to its statutory role as primary finder of fact. But in respect to the major issue before it, the Commission has no advantage, relative to the Court, in its understanding of the common law of privilege, and the court is entitled to substitute its view of the law for the view of the Commission.

Factual Review: The Legal Opinions

[25] We have already seen that the Legal Opinions came to Staff from Deloitte after a review of whether they were privileged by Deloitte's lawyers. Since legal advice is commonly privileged, it is necessary to explore the circumstances of the disclosure of the Legal Opinions by Philip to Deloitte. They came into the hands of Deloitte from Philip as a result of an Audit Committee meeting. Messrs. Ron McNeill and Alan Kesler of Deloitte were involved in the audit of Philip. They attended a meeting of the Philip audit committee on January 19, 1998. Ms. Caisse was also present and made the Caisse Notes. At that meeting, management presented a summary of the Waxman Issue and Deloitte immediately advised Philip to obtain legal advice as to whether Philip was required to publicly disclose the Waxman Issue. In response, Deloitte was told by Mr. Soule that legal advice on that issue had already been obtained and the Legal Opinions had been received in or around September of 1997. Howard Beck, the Chairman of the audit committee, directed that Deloitte and the audit committee should be provided with a copy of the Legal Opinions.

[26] Mr. Kesler was examined by the SEC and he explained how Deloitte was provided with a copy of the Legal Opinions. His evidence is as follows:

> . . . In the course of that meeting, we being members of – representatives of – Deloitte & Touche, and I can't recall whether I raised or Ron McNeill [another partner at Deloitte] raised it, but we apprised the audit committee and members of management that 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.
>
> 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…

[27] From this evidence, it appears that the Legal Opinions were given to Deloitte in their capacity as auditors, and the Commission so found at paragraphs 69 and 70:

> 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.
>
> 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.

[28] The Commission went on to find that Deloitte also acted at all subsequent times in the capacity of auditor, received the documents free of any warning that they were released for a limited purpose only and that Philip's decision, (presumably as conveyed by Audit Committee Chairman Beck) to release the Legal Opinions to Deloitte was informed and voluntary.

[29] Philip submitted that the documents given to Deloitte as a result of the meeting of the Audit Committee were "provided to Deloitte in its expert capacity for the purposes of seeking, receiving or implementing legal advice regarding Philip's affairs." The findings of the Commission are inconsistent with this submission and we must give deference to the Commission's findings of fact if there is evidence to support them. The evidence of Mr. Kesler provides such a foundation and, accordingly, we proceed on the basis that the documents in question were given to Deloitte in its capacity as auditor and not otherwise. That brings us to the heart of this part of the case: What is the effect of giving privileged documents to your auditor? Does the privilege, or any part of it survive?

Law of Privilege

[30] The place of beginning of any discussion of the privilege attached to solicitor and client communication is *Descoteaux,* where the Supreme Court determined that solicitor-client privilege is a substantive rule of law and not a rule of evidence, and set out the way in which courts are to approach conflicts between the privilege and other principles of law: (page 875)

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[31] Philip submitted that it follows from these passages that where the right of an auditor to demand information from the audited company and its officers and directors is exercised in relation to documents which are privileged, the resulting disclosure must be treated as limited to the purpose for which the statute grants the right to obtain disclosure. I will return to this submission after considering certain jurisprudence relied on by the parties.

[32] In its reasons, the Commission referred to two important cases, one in Ontario, *Cineplex* and one, *Arthur Young* in the U.S. Supreme Court, (cited at length in *Cineplex*) on the disclosure of privileged documents to auditors.

[33] In *Cineplex*, the firm of Peat Marwick Thorne ("Peat") acted through its tax department as tax advisors of Cineplex and, through its audit department as the external auditor. Outside solicitors created documents for the purpose of giving legal advice to Cineplex and met with in-house counsel and Peat's tax team to whom they gave the documents for the purpose of Peat assisting in the giving of the legal advice. Subsequently, some of the documents were provided to the audit team by Ms. Levine, a member of the tax team, without instructions to do so from the client and without any intention to waive the privilege. Haley J. held that the general principle was clear: information and advice passing between client and accountant was not privileged. However, these documents were privileged in the hands of Ms. Levine because they were received by her as agent of the client in obtaining legal advice for the client. These circumstances brought the receipt of the documents within the exception to the general rule enunciated by the Exchequer Court of Canada in *Susan Hosiery,* where the accountant is using his skill as an accountant in acting as the agent of the client to obtain legal advice.

[34] Haley J. went on to discuss the different situation of the auditor in passages that are obiter, in that the documents were given to assist the accountant in providing legal advice and not as auditor, but are nevertheless of importance:

> 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.
>
> 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?
>
> 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 [page146] 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.

[35] She then considered the U.S. law:

> The position of the independent certified public accountant acting as auditor was considered by the Supreme Court of the United States in U.S. v. Arthur Young & Co., 84-1 U.S.T.C. 83,670. In that case privilege was claimed by the client in tax accrual work papers prepared by the accounting firm in the course of its audit. In finding that there was no privilege in the work papers the court commented on the role of the auditor at p. 83,765:
>
> Nor do we find persuasive the argument that a work-product immunity for accountants' tax accrual work papers is a fitting analogue to the attorney work- product doctrine established in Hickman v. Taylor, supra. 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 [page147] client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

[36] Haley J. continued:

> It is this difference in function and duty owed that leads me to conclude that the audit team of Peats is in a notional third party position vis-a-vis the rest of the firm. While as a consequence accounting firms may have to take steps to isolate those documents which come to it as agent of the client for the purpose of the client's obtaining legal advice I do not think that will necessarily create chaos in the accounting firm. It may instead underline the anomalous position in which an auditor is placed if he is also part of the firm rendering accounting advice to the corporate client whose financial statements are being audited.

[37] At page 150, concluding her reasons, Haley J. wrote:

> It appears from the practice in the United States outlined in an article "Lawyers' Responses to Audit Inquiries and the Attorney-Client Privilege", Arthur B. Hooker; in (1980), 35 Bus. Law. 1021, that auditors will often request, privileged documents from clients or their attorneys in the course of the audit. To the extent that these disclosures are necessary to permit the independent auditor to fulfil his obligations the client will be required to waive the privilege.

[38] It is important to observe that the decision in *U.S. v. Arthur Young and Co.* was not a case involving privileged documents handed over to the auditor, but rather involved a claim of “work-product privilege” of the kind enjoyed by lawyers for their litigation files, claimed for the auditor’s working papers. The difference in function between the lawyer and the auditor led the U.S. Supreme Court to reject the analogy and deny the privilege. The case is not directly applicable to the case at bar as the two privileges are quite different.

[39] Since the decision in *Cineplex*, Haley J.’s reasons have been considered in several cases. One of interest is the decision of Noel J. in *Canadian Museum* where the Museum had laid off seven employees and the Union published a report

criticizing the Museum's management and handling of funds. In response, the Museum ordered a forensic audit to be prepared by Peat Marwick Thorne, ("PMT"), accountants, in order to support potential legal action against the authors of the Union report. The President of the Museum referred to the PMT report before a Parliamentary Committee as likely to discredit the Union report. At a meeting of the Museum Audit committee at which representatives of the Auditor General were present, it was proposed that a copy of the PMT report be given to the Auditor General, the statutory external auditor of the Museum. This was done to enable the Auditor General to answer any questions about the issues. When the Union brought proceedings to obtain the PMT report, the Museum asserted privilege. The Union contended that the Museum had waived its privilege by voluntarily disclosing the PMT report to the Auditor General.

[40] Noel J. reviewed the passages in *Cineplex* that I have referred to, including the references to the practice in the United States at page 150, and at page 456, he commented:

> The reason behind such a practice is obvious. Because of the higher duty which they owe to the shareholders, external auditors are bound to disclose otherwise privileged information which comes to their attention and which may have a material impact on the financial statements under audit so that the release of such information to the auditors is a de facto abandonment of the privilege by the client.
>
> The Auditor General is by law the auditor of the Museum. [See Note 4 below] As such his responsibilities and functions are essentially the same as those of external auditors. He acts as a "public watchdog" which demands in turn that he maintain total independence at all times. He owes no fidelity to the entities which he is called upon to audit. His only obligation in relation to any given audit is to state for the benefit of the responsible minister and Parliament whether the statements audited present information fairly in accordance with stated accounting principles on a basis consistent with prior years together with any reservations he may have. [See Note 5 below]
>
> Note 4: Museums Act, S.C. 1990, c. 3, s. 30. Note 5: Auditor General Act, s. 6.
>
> Keeping the foregoing in mind, I believe that the Auditor General must be looked upon as a third party vis-à-vis the government entities that he is called upon to audit. In terms of the privilege, it is also apparent that the disclosure of an otherwise privileged document to the Auditor General in the course of an audit is wholly inconsistent with an intent to maintain the privilege and as such amounts to a waiver. The mere fact that the Auditor General cannot be confined by a privilege belonging to the entity which he is called upon to audit, [See Note 6 below] and that he must indeed make use of relevant and material information that comes to his attention in the fulfilment of his statutory mandate clearly establishes that the voluntary release of information to the Auditor General must be understood as a waiver of privilege by all those concerned.

[41] Staff submitted that these cases support the view that the voluntary giving of a privileged document to the auditor by the person possessing the privilege must be understood to be a complete waiver of the privilege. I am not so sure that they go that far. Noel J's comments that auditors are "bound to disclose otherwise privileged information", can equally be read as confined to a waiver for the purposes of the audit, if one limits the duty to disclose to the requirements of the law and auditing standards, as I think it must be. There is no free-standing duty on auditors to make public disclosure of everything they learn that might interest the criminal or tax authorities; their duties arise from their role as auditors as governed by law and professional obligations.

[42] Philip submits:

> However, given Philip's statutory obligation to cooperate with its auditor, and the public policy rationale for encouraging full and frank disclosure by a company to its auditors, it is respectfully submitted that a company should not be required to waive solicitor-client privilege for all purposes over a document where the document is provided to an auditor in its capacity as auditor.

[43] In support of this submission, Philip refers to the *Ontario Business Corporations Act* ("OBCA"), the legislation that governed Philip's affairs throughout the material time. The OBCA expressly recognizes the important nature of the relationship between an auditor and the officers and directors of a company by making mandatory the provision of documents to an auditor (the failure of which is subject to sanction of fine or imprisonment). Section 153(5) to (7) of the OBCA provides, as follows:

> Right of access
>
> (5) Upon the demand of an auditor of a corporation, the present or former directors, officers, employees or agents of the corporation shall furnish such,
>
> (a) information and explanations; and

(b) access to records, documents, books, accounts and vouchers of the corporation or any of its subsidiaries,

as are, in the opinion of the auditor, necessary to enable the auditor to make the examination and report required under this section and that the directors, officers, employees or agents are reasonably able to furnish.

Furnishing information

(6) Upon the demand of the auditor of a corporation, the directors of the corporation shall,

(a) obtain from the present or former directors, officers, employees and agents of any subsidiary of the corporation the information and explanations that the present or former directors, officers, employees and agents are reasonably able to furnish and that are, in the opinion of the auditor, necessary to enable the auditor to make the examination and report required under this section; and

(c) furnish the information and explanations so obtained to the auditor.

Idem

(7) Any oral or written communication under this section between the auditor or former auditor of a corporation and its present or former directors, officers, employees or agents or those of any subsidiary of the corporation, has qualified privilege.

[44] Philip emphasizes that the statute creates a compulsion to disclose to the auditor which is inconsistent with the concept that disclosure to the auditor is voluntary and so forms the basis for an implied waiver of privilege for all purposes. Whether the statute is formally invoked or not, company and auditor alike are aware of it and the company must be deemed to have acted under it, as a form of practical compulsion.

[45] In further support of the existence of a limited waiver, Philip referred to *Interprovincial Pipe Line* where Gibson J. of the Federal Court dealt with the issue of the waiver of privilege in the context of demands for production of documents under the *Income Tax Act*. By coincidence, *Interprovincial* and *Canadian Museum* were decided virtually simultaneously, the former on October 13, 1995 and the latter on October 5, 1995. Neither refers to the other. In *Interprovincial* the documents included (a) notes prepared by external auditors during their audit and (b) documents exchanged between the Edmonton and Toronto offices of the auditors relating to advice given by them to outside counsel for the client in order that those counsel could advise the client.

[46] In *Interprovincial*, the Federal Court held that the provision of a privileged document to an auditor must be considered a limited waiver of privilege, not a waiver of privilege for all purposes. Interprovincial was governed by the *Canada Business Corporations Act* ("CBCA") which contains, in section 170(1), provisions similar to those of section 153 of the OBCA discussed above, which require a company to furnish its auditor with whatever documents are requested. Gibson J. referred to the substantive rule of privilege as set out in *Descoteaux,* supra, and concluded that the statutory obligation to furnish documents to an auditor must be read in a manner that does not interfere with any claim of solicitor-client privilege except to the extent absolutely necessary to achieve the ends sought by the legislation. He held, at page 380:

> 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 CBCA]. It would 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 … 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 [CBCA]. If Parliament had intended there to be a secondary purpose in section 170(1) … beyond the primary purpose of accuracy in financial reporting, it was open to it to enunciate that purpose … Since Parliament did not do so, it would be inappropriate, and indeed contrary to the principles enunciated in *Descoteaux,* to interpret subsection 170(1) more broadly than necessary to achieve the end clearly sought to be served.

[47] It is true, as urged by Staff, that in *Interprovincial,* the giving of the documents was accompanied by statements intended to protect privilege. In my view that does not affect the basis of the decision, that disclosure to the auditors for their purposes is not properly disclosure to the world, because of the great importance of the solicitor-client privilege to the proper functioning of the legal system. The documents were sought by Mr. Kesler because Deloitte was the auditor and were given to him in that capacity. It would be contrary to the basis of the decisions in *Descoteaux,* supra, and *Lavallee,* infra, to extend the scope of that disclosure to the world.

[48] In the English case of *British Coal* the Court of Appeal dealt with a case of litigation privilege in which documents prepared for a civil action, and therefore privileged, were given to the police to assist them in their investigation of possible criminal fraud arising from the same facts. The police laid charges and produced the documents to the accused as part of their disclosure. The accused were acquitted and sought to use the documents in the civil action. The judge required the return of the documents and enjoined the accused/defendants from using them. The defendants appealed alleging that the privilege had been waived by disclosure to the police. The court dismissed the appeal. The act of disclosure of the documents to the police to assist in the criminal case could not objectively be regarded as a waiver of any rights in the civil case. The plaintiff acted in pursuance of a duty to assist in the conduct of the criminal proceedings and it would be contrary to public policy if the plaintiff's act had the effect of automatically removing the "cloak of privilege which would otherwise be available to them in the civil litigation for which the cloak was designed."

[49] While *British Coal* deals with a different form of the privilege, the acceptance of the concept of a limited waiver is of interest in the present case.

[50] In *Lavallee, Rackel & Heintz*, the Supreme Court dealt with whether section 488.1 of the *Criminal Code*, which authorizes a procedure for determining issues of privilege in the context of seizure of documents from a person's solicitor, infringed section 8 of the *Charter.* The court divided on the issue, but both Arbour J. for the majority and LeBel J. for the minority, agreed that solicitor and client privilege must be strictly upheld. Arbour J. reviewed the prior jurisprudence holding that the privilege has "long been regarded as fundamentally important to our justice system" and that the 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." Arbour J. also observed (at paragraph 20) that Lamer J. in *Descoteaux* (supra) had applied the minimal impairment test, limiting the breach of solicitor-client privilege to "what is strictly inevitable". At page 241, Arbour J. wrote:

> Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this court is compelled in my view to adopt stringent norms to ensure its protection. Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary. In short, in the specific context of law office searches for documents that are potentially protected by solicitor-client privilege, the procedure set out in s.488.1 will pass *Charter* scrutiny if it results in a "minimal impairment" of solicitor-client privilege.

[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 section 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.

[52] Accepting the above as the guiding principle, I turn to the case at hand. Auditors, in pursuit of their important public function of ensuring the fairness of the presentation of the accounts of public companies, have the right to obtain whatever documentation they require, which may, as here, involve the production to them of documents as to which the client claims solicitor-client privilege. Auditors are not in the family of the client; they are third parties. Ordinarily the voluntary production of privileged documents to third parties is a waiver of the claim for solicitor-client privilege. Clearly, the auditor must be free to use the documents for the purposes of the audit without limitation. The auditor may ask the client to publish them or a summary of them in a note to the financial statements if that is required for a fair presentation, failing which the auditor, in a serious case, will likely feel obliged to resign, a serious and public event for a company regulated by a securities commission. But the mere possession of the documents does not give the auditor the right to publish them in the financial statement, never mind otherwise. The financial statements are the clients; the auditor's right is to withhold the certificate. To what extent do these functions require that the waiver of solicitor-client privilege by the client be for all purposes at all future times?

[53] The appellant Philip submits at paragraph 65 of its factum:

> 65. There is a strong public policy rationale for protecting privileged documents from further disclosure when such documents are provided to a company's auditors as part of the conduct of the legislatively prescribed audit process. To conclude otherwise would lead to an improper result; public companies would be required to weigh the need to engage in full and frank disclosure with their auditors with the risk that associated legal advice will become a matter of public record. Where public policy dictates, it is open to the court to find that the waiver of privilege should be circumscribed, not a waiver for all purposes.

[54] On the other hand, respondent Staff assert at paragraph 70 of their factum

> 70. The fact that auditors have a public duty beyond that of the companies they audit reveals why this Court should reject Philip's argument (paragraphs 59-66 of its factum) that the law should be changed to recognize the concept of

limited waiver and allow companies, in these circumstances, to share privileged documents with their auditor without waiving privilege. (It should be noted that Philip did not make this argument before the Commission. Therefore, this Court does not have the benefit of the Commission's decision and expertise regarding the role of an auditor.) Contrary to Philip's assertion, it would be against public policy to allow a company to prevent auditors from disclosing or acting upon information or documents provided to them that reveal wrongdoing or fraud in the companies they audit, on the grounds of privilege. Such a policy would allow companies to conceal such wrongdoing from their shareholders, and prevent auditors from complying with their own independent obligations to report such wrongful conduct.

[55] Philip's submissions speak to the company weighing the need for frank disclosure to the auditor as opposed to the chance that their information will become public. That may in practice be the case where the company is less than appropriately forthcoming. In my view, the effect of section 153 of the OBCA is that there is no weighing that is appropriate; the company must in any event disclose what the auditor seeks. That is part of the basis for confining the extent of the waiver. The submissions of Staff assume that the limited waiver of the privilege for the purposes of the audit will prevent the auditors from making disclosures revealing fraud that they otherwise would make. But the purposes of the audit are those established by law or by the standards of the auditing profession, and to the extent that the law or those standards require that auditors report to the shareholders, or to anyone else, on any matter, the waiver will extend to that matter. To come to the Waxman Issue in particular, the auditors would be able to use the disclosed documents as an aid to judging the need for amendments or notes to financial statements, the need for further examination of the company's financial controls, the need for amendments to certificates appended to financial statements filed with regulators, any need for reporting to insurers, any requirement for reporting to licensing authorities, and so forth.

[56] It was submitted that a limited waiver would place auditors in an impossible position: they would have the document but be unable to use it. For the reasons set out above, I disagree. The auditor has the scope to use the document across the full range of auditor responsibilities. Whether the auditor could disclose the contents of the document in the course of explaining why they were resigning the account seems a red herring. With a regulated public company, the resignation of the auditor accompanied by a refusal to certify the accounts is the kind of weapon that renders the disclosure of legal advice redundant.

[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.

[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.

Discussion of the Legal Opinions at the Audit Committee:

[59] The Commission found, at paragraphs 74 to 79, that the Deloitte representatives were present at the Audit Committee meetings of January 19, 1998 and April 23, 1998, as part of the audit team and they received the documents in question, other than the Caisse Notes, to assist Deloitte in their audit function. Further, the Commission found that the disclosure made as to the Legal Opinions at the meeting of January 19, itself constituted a waiver of the privilege even before the documents themselves were handed over. The Caisse Notes, the Commission said, provided evidence that the substance of the Legal Opinions was discussed in the presence of the Deloitte people and so the privilege was waived. These are findings of fact, save as to the conclusion on the waiver point, and deserve deference. There is evidence in the record from which these conclusions can be reached either directly or by logical inference, and I accept the facts as found.

[60] As the meeting was for audit purposes and the Deloitte representatives were present as part of the audit team, it follows that the oral disclosures of the contents of the Legal Opinions were made on the same basis as the delivery of the Legal Opinions themselves: to the auditor for audit purposes. There is no reason the treat the two kinds of disclosure, oral and documentary, differently. In my view, the privilege was waived to the same extent in each case: for the purposes of the audit and not beyond.

Protecting Privilege

[61] The Commission notes that there was no evidence before it that the documents provided to Deloitte, other than the Legal Opinions, were provided with an intention that privilege be retained; indeed there was no evidence as to how Deloitte obtained them. The Commission inferred that Philip did not regard those documents as privileged or, if it did, that Philip intended to waive the privilege by permitting the documents to come into Deloitte's possession to inform Deloitte of pertinent information in performing its audit role. In my view, given that Deloitte was the auditor, the only reasonable inference is that Deloitte received

these documents in that role. It follows that the privilege was waived, but, as with the Legal Opinions, only to the extent necessary to enable the auditor to carry out its function. Philip did protect its privilege on the occasion of giving the documents to Deloitte, to the extent it was necessary to do so, by giving the documents on that occasion only to its auditors, thereby limiting the scope of the waiver.

The Caisse Notes and the Soule Notes

[62] Ms. Caisse was Director of Corporate Accounting and made notes of the proceedings at the Audit Committee meeting of January 19, 1998. Mr. Soule was General Counsel and made notes at the Audit Committee meeting of April 28, 1998. The notes contain evidence of some of the matters discussed at those meetings, including references to the Legal Opinions. Philip refers to these notes as the "memorialization of communications between Philip's house counsel and the Audit committee." It seems to me that these Notes, to the extent that they reveal legal advice, are privileged except that the privilege was waived by the presence of the Deloitte people, but only to the extent necessary for the audit function that the Deloitte people were performing.

[63] However, Philip did not list the Caisse Notes in its letter itemizing its claims for privilege and actually produced them to Staff in two batches of documents in response to the Summons. In addition, Ms. Caisse was cross-examined on them and they were made an exhibit. They were also released to the SEC on consent. Mr. Beck was also cross-examined, the Caisse Notes were made an exhibit and questions were answered as to whether the Board had ever discussed the point of whether the Waxman Issue should be disclosed because of the management integrity aspect referred to in the Shearman and Sterling letter and deferred by that firm to the Board for decision. The Commission found that, on these facts, there was no privilege left and there was ample evidence to support the finding.

[64] The Soule Notes were also produced, but in a redacted form excising the notes about the content of legal advice provided to the Audit Committee by Mr. Soule. There was no evidence as to how these notes, made by Philip's General Counsel at an Audit Committee meeting, came into the possession of Deloitte. When Deloitte included the Soule Notes on a list of Philip documents in Deloitte's possession, Philip instructed Deloitte not to produce them. The Soule Notes record the discussion of legal issues and are prima facie privileged. The privilege was waived when the discussion took place in the presence of Deloitte representatives, but only to the extent necessary for Deloitte's purposes as auditors. Any subsequent delivery of the Soule Notes to Deloitte ought not to affect the scope of the waiver. In view of the importance of confining interference with the solicitor-client privilege to the most minimal intrusion, delivery of these Notes to Deloitte should be presumed to have been in furtherance of the existing relationship, i.e. in performance of its audit role. The Commission found in its reasons at paragraph 84 that one interpretation of the presence of these documents in Deloitte's files was exactly that. In my view, that interpretation must be adopted in these facts to achieve minimal intrusion.

Other Documents

[65] The Skadden Letters and the Stikeman Letter were found by the Commission to be prima facie privileged, but were found in the files of Deloitte without any evidence as to why they got there. However, on their face they relate to the same issue that led Philip to give other related documents to Deloitte, which leads to an inference that they were probably delivered to Deloitte for the same purpose as the others. Again, in view of the importance of the privilege and the pressing public interest in confining interference with it to the most minimal intrusion, the documents should be presumed to have been delivered in furtherance of the audit function of Deloitte.

Delivery to Staff by Deloitte

[66] Philip submits that, if the Legal Opinions, the Stikeman Letter, the Skadden Letters and the Soule Notes remained privileged at the time that Philip provided them to Deloitte, the subsequent production of these documents by Deloitte cannot impact on the strength of those privilege claims. As stated above, this court must determine whether the individual purportedly waiving the legal right to privilege possessed the requisite authority to make such a waiver. The disclosure of privileged documents to Staff by Deloitte does not waive privilege in the documents, as Deloitte lacked the requisite authority to waive privilege over the documents.

[67] In support of this submission, Philip refers to the decision of the Alberta Court of Appeal in *Syncrude* where the court dealt with alleged waiver of privilege. Privileged documents turned up ten years after they had been created for the plaintiff in the possession of one of the defendants. There was no direct evidence of how they got there, but former counsel for that defendant had recorded when arranging the documents for the case, that these had come from a binder of documents given to one Kutner, who had been engaged by the parties jointly to investigate the facts. There were submissions made as to the lack of evidence, but the court cut to the chase:

> What is more, the gap in the evidence is about a point which seems to us largely irrelevant. Why or how or with what intent Mr. Kutner may have let the papers get into the hands of Bechtel really does not matter. Clearly Mr. Kutner had no authority to act as the plaintiff's agent to waive privilege. If anything, the all-party agreement would suggest the

> opposite. Privilege can only be waived by the party (client) owning it or his agent, not by strangers. That is elementary law. And waiver is the issue, for it is now clear that mere loss of physical control over documents does not destroy privilege.

[68] Equally clearly, Deloitte had no authority to act as the agent of Philip to waive the privilege, which still attached to these documents in its possession. Philip gave Deloitte no specific authority to waive privilege. Nor can there be an implied authority, for the audit responsibilities of the auditor do not normally require the surrender of the client's privileged documents to third parties for their purposes and not for the purpose of the audit responsibilities of Deloitte. The mere possession of the documents did not carry the authority to waive the privilege. The fact that the Disputed Documents largely came into the possession of Staff via an unauthorized disclosure by Deloitte undermines their usefulness in the hands of Staff.

Disclosure in the Course of This Litigation: Implied Waiver

[69] I have already observed that the Statement of Allegations in this present Proceeding contains extracts from some of the Legal Opinions. Presumably, Staff put these extracts in the Statement because Staff believed that the documents were no longer privileged. But whatever the reasoning, if the documents were still privileged, this unauthorized publication cannot be permitted to alter that status. That would be entirely contrary to the authority of the Supreme Court discussed above that solicitor-client privilege is of central importance to the administration of justice and is to be protected from impairment.

[70] Privilege can be lost in the course of litigation where the party with the privilege seeks to take an unfair advantage by, in effect, using the existence of legal advice as a shield against the opposite party, but resisting the disclosure of that advice. As usual, one cannot have it both ways. But the party having the privilege is the one who can, in this fashion, lose it. Such a waiver can occur even in the absence of any actual intention to waive. A party may act in such a fashion as to make it unfair for that party to continue to maintain the privilege. But the opposite party may not, by referring to the legal advice given to the party with the privilege, thereby put the privileged advice in issue.

[71] In *Lloyds Bank v Canada Life,* the motion judge reviewed a number of cases on the effect of putting a party's state of mind in issue, and concluded that the privilege is not always waived where the state of mind is in issue. She commented at page 168:

> Certainly, it will not be waived where it is the person who seeks the information that has raised the question of reliance.

[72] She continued by referring to Wigmore:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

[73] As the Bank had pleaded that, in making certain loans to a subsidiary of the defendant, it had relied upon comfort letters received from the defendant on which it sought to make the defendant liable for the default of the subsidiary, the motion judge required the Bank to answer whether it had received legal advice on the security offered by the comfort letters. The Bank had put in issue its reliance and the reasonableness of this reliance was an issue as to which the advice was highly pertinent.

[74] In the present case, there is no document equivalent to a pleading by any of the respondents in which reliance on the Legal Opinions might formally be put in issue, but some persons have been cross-examined. In its reasons the Commission acknowledges the absence of any certainty as to what defence will be mounted by the respondents. It suggests that it therefore is legitimate to consider what has been said by the officers and directors at the time of the prospectus in their depositions before the regulators here and in the U.S. On the same point, Staff submits that "all of the directors and officers, including the respondents, justify their actions by asserting either that they relied on the Legal Opinions, or they relied on what they had been told about the Legal Opinions." Their factum contains several paragraphs outlining the evidence of various former officers and directors as to discussions involving the Legal Opinions prior to the finalizing of the prospectus. Of the several persons examined, only Mr. Soule, Mr. Hoey and Mr. Allan Fracassi are actually parties to the Proceeding. In my view, the non-parties examined cannot, by anything they may say, put the Opinions in issue in the case against any respondent.

[75] Much of the evidence to which Staff refers us and which the Commission reasons cite, was evidence that the officers and directors of Philip in the pre-prospectus period were interested to learn about the Opinions and discussed them with each other, although very few actually read them; perhaps only Mr. Soule on whom the others relied to explain the situation to them. Mr. Beck said he did not even know they had been obtained until after the prospectus was filed. This evidence has nothing to do with possible waiver by implication. That would arise when the respondent(s) take the position in these proceedings that their decision not to disclose the Waxman Issue was justified by the Legal Opinions.

[76] Philip submits that the question of waiver by implication depends upon how the respondents answer the allegations in the Statement that the Waxman Issue should have been disclosed in the prospectus. The issue is "whether Philip has put the content of the Legal Opinions into issue by asserting in this proceeding that it relied on the Legal Opinions to justify a course of action taken by it prior to the issuance of the prospectus." [emphasis in original]

[77] Put another way, the waiver of privilege is implied if and when Philip or an individual respondent submits that it or he was justified in not disclosing the Waxman Issue because it or he had received legal advice that it was not necessary to do so. By relying on the opinion, the client waives the privilege. But if Philip defends the allegations on some other basis, such as that the thefts were not of material amount or the resignation of Robert Waxman was not a material change, without reliance on the Legal Opinions, the opinions may well not be in issue and the privilege might be maintained. That is a matter for the Commission when the defence is put forward and the evidence as to the decision not to disclose is heard.

[78] Staff are not entitled to use the Opinions to attempt to prove the state of mind of a respondent unless that respondent has put the Opinions in issue by relying on them or has put his state of mind in issue in circumstances creating an implied waiver of the privilege. None of the former officers and directors cross-examined answered questions about the content of the Legal Opinions; all claimed privilege, a position inconsistent with waiver.

[79] At paragraph 105 of its reasons, the Commission states that some former officers and directors "stated they relied on" the Legal Opinions, but counsel for Philip submitted that no such statements were made. The only example in the reasons is a statement quoted from the transcript of Mr. Hoey that Mr. Soule had indicated that whoever he was seeking counsel from had concurred with Deloitte's view as to reporting obligations. It seems clear that there was no "Deloitte's view" until January 1998, which makes it clear that this cannot be a report of a conversation prior to the filing of the prospectus. Counsel for Philip asserted that no evidence existed of any reliance on the Legal Opinions by way of defence to the allegations in this proceeding, and we were not taken to any.

[80] In one passage of his transcript, Mr. Fracassi said that he asked Colin Soule to seek advice; that Mr. Soule got advice and "gave me what the conclusion was or what his opinion and advice was to me. I then made a decision with all of that information and we moved on." What Mr. Fracassi did not say was that he acted in accordance with the Legal Opinions or in accordance with Mr. Soule's advice or on neither. Nor was he pressed in the examination to state if he did or did not rely on the Legal Opinions and act accordingly. Yet that is what he must say to defend himself on the basis of reliance on them.

[81] Staff submitted that Philip "cannot assert good faith reliance on the Legal Opinions, and at the same time fail to disclose the Legal Opinions upon which they relied. It would be demonstrably unfair and inconsistent to allow Philip to prevent the Commission and all other parties from exploring the issue and the Legal Opinions." I agree entirely with that statement of the law, but in my opinion the Commission acted prematurely in applying that reasoning when there is no actual claim in the depositions by any respondent that he acted in reliance upon the Legal Opinions.

[82] Staff relied on the decision of Winkler J. in *Toronto Dominion Bank v. Leigh Instruments Ltd.*, where he found that,

> The combined effect **of the pleadings, the opening statement of the plaintiff and the evidence is,** according to the defendants, that the Bank has placed in issue its state of mind regarding the strength and enforceability of comfort letters. The plaintiff, they assert, has pleaded reliance on the conduct of the defendants, when they knew, or ought reasonably to have known, through the advice of their legal department, that comfort letters were not binding. The consequence, they assert, is that the plaintiff has waived by implication any solicitor-client privilege it may have held over the legal advice or knowledge which gave rise to that state of mind. I agree with those submissions. [emphasis added]

[83] The difficulty with applying that case to the present one is that there is as yet in this case no pleading by the party with the privilege, no opening statement by that party and no evidence on behalf of Philip and several respondents. The Commission, in its reasons, acknowledges that the defence to be submitted by the respondents is as yet unknown. In the light of the importance of the solicitor-client privilege, it is surely premature and unfair to declare the privilege lost by inference from the statements of non-parties and the fact that some respondents have admitted discussions at the time of the prospectus about the Opinions having been received and what was said in second-hand conversations about their content. The *Toronto-Dominion Bank* case illustrates what is needed to place the Opinions in issue in the proceeding and the material before us falls short of that.

[84] When the hearing on the merits of these allegations takes place, it may be that there will be persons who will seek to defend themselves on the basis of reliance on the Legal Opinions or on a particular view of the law, as to which knowledge of the content of the Legal Opinions would be relevant. If so, the Commissioners hearing the case will need to rule on the waiver issue. At the present, I cannot see any basis in the evidence for finding that any respondent has, as yet, defended himself on the basis that he relied on the Legal Opinions in making the decision not to disclose. Accordingly there has not yet been any implied waiver of the privilege.

Disclosure in the Course of this Litigation: Unscrambling the Egg

[85] In paragraph 64 of their factum, Staff submit:

> 64. In this case, the Legal Opinions have already been published in Staff's Statement of Allegations and in the civil litigation between Philip and Deloitte. In addition, the content of the Legal Opinions has been put in evidence through the introduction of the Caisse and Soule Notes into evidence. The Commission properly concluded that Philip has waived privilege to such an extent it would be impossible to "undo what has been done." As stated by the Commission,
>
> 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.

[86] The above finding of the Commission that Philip failed to take reasonable steps to preserve its privilege must, in large measure, be based on the erroneous finding that by giving the Legal Opinions to Deloitte, or perhaps by omitting to state on that occasion that the privilege was still applicable, Philip had lost the privilege in all events. Philip cannot be blamed for the unauthorized disclosures made by Deloitte, although Philip did produce the Caisse Notes itself. Nor can Philip be saddled with the responsibility for the action of the Staff in putting the text of two of the Opinions into the Statement of Allegations when they had received the documents from someone with no authority to waive the privilege. In these circumstances, the finding of fact as to reasonable steps is suspect, to say the least, and seems to arise in large measure from an error in law. Accordingly, the court is not bound to accept the Commission's finding of these facts.

[87] Is it, as Staff allege, too late for Philip to claim privilege because it is impossible to undo what has been done? Obviously, those who have read the Opinions are not going to forget what they have read, so Philip's position has been damaged. But there is no reason to permit the damage to escalate by permitting those documents to be used by those who have them as if Philip had actually or impliedly waived the privilege when no waiver has occurred. When Staff obtained the Legal Opinions from Deloitte, Staff should have sought direction on notice to Philip as to how to treat these documents. Use of them by Staff prior to the final disposition of proceedings to determine the issue of privilege, (that is, these proceedings) cannot be used as evidence that the privilege has been lost. In *Tilley v. Hails*, the court said:

> [W]here [privileged] 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. […] The surreptitious delivery of confidential material cannot be sanctioned. […]
>
> 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.
>
> It is clear that mere loss of physical custody does not terminate the privilege.

[88] The submission of Staff that their own publication of the Opinions, in the face of the principles enunciated in *Tilley*, can affect the privileged nature of the documents is contrary to reason and principle. That the Opinions have been put in issue by Deloitte in its litigation with Philip is also not a matter that can create a waiver of the privilege by Philip in this litigation.

Fairness of the Trial: Full Answer and Defence

[89] Counsel for Staff submits that:

> . . . fairness dictates that for the purposes of the hearing into this matter, the parties must be permitted to explore whether the Respondents and representatives of Philip acted in good faith upon the advice of legal counsel. Philip, at paragraph 74 of its factum, quotes Wigmore on the issue of implied waiver, who stated that "regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. " This is consistent with Mr. Justice Ground's decision in *Bank Leu Ag v. Gaming Lottery Corp.* The Commission relied on the following quote from Mr. Justice Ground's decision:
>
> > When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for the 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.

Bank Leu Ag v. Gaming Lottery Corp., (1999), 43 C.P.C. (4th) 73 (Ont. Sup. Crt.) at p. 77

[90] *Bank Leu* was a motion regarding the production of privileged documents. One issue was whether the privilege had been impliedly waived by the client when it had asserted breach of duty on the part of its solicitors in failing to warn it of certain risks in a transaction. Ground J. held that such an assertion was a deemed waiver of the privilege that otherwise protected all documents relating to advice given to the client as to the risks involved in the transaction. The statement that "privilege will be deemed to have been waived when the interests of fairness and consistency so dictate" must be taken in context: the client had asserted a breach of duty by the lawyers and could not complain if their communications with him were thereby rendered no longer privileged. Ground J. was not asserting, as I read the case, any general principle that fairness over-rides the privilege where it is the opposite party and not the client who wishes to put the legal advice into issue.

[91] Staff also submitted that permitting Philip to maintain the privilege would hamper the search for truth for two reasons. The first was the importance of the Opinions in assessing the credibility of the Deloitte witnesses. The second was the impact of non-disclosure on the right of the respondents to make full answer and defence. The short answer to the first is that privilege often hampers the search for truth, as Wigmore acknowledges, but it is nevertheless an important principle in the administration of justice that persons consulting lawyers have total confidence in the privacy of their disclosures, so long as they do not themselves put the advice in issue. As to the second, the respondents will no doubt be better judges of that than Staff or this court.

Conclusions

[92] In summary, I conclude that all of the Disputed Documents were prima facie privileged; that the provision of copies to Deloitte in its capacity as auditor did not waive the privilege for all purposes, but only to the extent necessary to enable Deloitte to carry out its audit functions; that delivery by Deloitte to Staff of those documents received from Philip was unauthorized and incapable of defeating the privilege; that Staff has not established any implied waiver by Philip by reason of the evidence given in this proceeding by the respondents or by other former officers and directors of Philip as no one has asserted as yet that the Legal Opinions were relied on by him in deciding not to disclose the Waxman Issue; that the use of the Opinions by Staff in this proceeding and by Deloitte in other actions cannot be a waiver by Philip of its privilege or otherwise affect that privilege; and that, except for the Caisse Notes, all the Disputed Documents remain privileged and may not be used or relied on by Staff as matters stand at this time. The caveat just expressed is meant to make it clear that developments during the hearing may alter the situation and may require rulings based on fresh developments.

[93] For these reasons, I would allow the appeal, set aside the order of the Commission and, pursuant to section 9(5) of the Act, direct the Commission to decide the motion in accordance with these reasons. It would follow that the references to the content of and quotations from the Legal Opinions in the Allegations should be removed. Costs should follow the event and may be the subject of written submissions.

"Lane J."

"O'Driscoll J."

"Linhares de Sousa J."