NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 38

Date: 20190516
Docket: CA 479331
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, Stephen McNeil and Diana Whalen

Appellants

v.

Alex M. Cameron

Respondent

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: February 12, 2019, in Halifax, Nova Scotia

Subject: **Solicitor-Client Privilege. Implied Waiver. Abuse of Process.**

Summary: The respondent, Alex Cameron, conducted civil litigation for the Nova Scotia Department of Justice for approximately 26 years prior to 2017. While employed with the Department of Justice, he was counsel for the Province on an appeal by the Sipekne'katik Band of a decision of the Minister of Environment approving installation by Alton Natural Gas Storage L.P. of a brine storage pond.

In his brief and subsequent oral arguments on the Alton Gas appeal, Mr. Cameron, inter alia, took the position that the Province did not have a duty to consult with the Band.

The Premier and the Minister of Justice, appellants on this appeal, made public statements which called into question Mr. Cameron's instructions to make the argument there was no duty to consult.

Mr. Cameron retired from the Department of Justice and filed a Notice of Intended Action against the Premier, the Attorney

General and the Province for defamation, abuse of public office, constructive dismissal and violation of his constitutional rights.

After serving the Notice of Intended Action, Mr. Cameron made an Application in the Nova Scotia Supreme Court for determination of whether the instructions which he had received, as set out in the Notice of Intended Action, on the Alton Gas appeal were solicitor-client privileged and, if so, whether that privilege had been waived.

The application was heard before Justice John D. Murphy and by written decision dated May 11, 2018 (reported as 2018 NSSC 185), Justice Murphy found that the communications sought to be disclosed in the Notice of Intended Action were solicitor-client privileged but the Province had waived privilege. The written decision was released with the solicitor-client communications redacted.

The Province appeal and Mr. Cameron filed a Notice of Contention.

Issues:

(1) Did the application judge err in finding that there had been an implied waiver?

(2) Did the application judge err in failing to find an abuse of process by Mr. Cameron?

(3) Did the application judge err in making final determinations of fact?

(4) Could the application judge's decision be upheld on the alternative ground that the communications to Mr. Cameron were not privileged either because they disclosed instructions only; or that because of the unique position of the Attorney General of Nova Scotia she was not entitled to rely on solicitor-client privilege?

(5) What portions of the redacted decision of Justice Murphy should remain redacted?

Result:

Appeal dismissed and Notice of Contention dismissed. The application judge did not err in finding that the communications were solicitor-client privileged nor did he err in finding that privilege had been waived.

He also was correct in finding that there had been no abuse of process.

Finally, his decision should be unredacted as nothing contained in it is subject to solicitor-client privilege.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

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v.

Alex M. Cameron

Respondent

Judges:	Farrar, Saunders and Oland, J.A.
Appeal Heard:	February 12, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed; Notice of Contention dismissed with costs to the respondent per reasons for judgment of Farrar, J.A.; Saunders and Oland, JJ.A. concurring.
Counsel:	William C. McDowell, Rebecca Jones and Sean Lewis, for the appellants S. Bruce Outhouse, Q.C. and Justin Adams, for the respondent

Reasons for Judgment:

Introduction

[1] The respondent, Alex M. Cameron, conducted civil litigation at the Nova Scotia Department of Justice for 26 years prior to 2017. On April 17, 2017, Mr. Cameron retired from employment with the Department of Justice and served a Notice of Intended Action indicating he intended to sue the Province of Nova Scotia; the premier, Stephen McNeil; and the then Attorney General, Diana Whalen, for defamation, abuse of public office, constructive dismissal and violation of his constitutional rights.

[2] In the Notice of Intended Action he maintains the appellants have damaged his reputation and professional integrity by making public statements which imply that he acted without instructions in the course of his employment. For ease of reference I will refer to the appellants collectively as "the Province".

[3] In his Intended Action, Mr. Cameron wants to disclose and rely upon communications with his former employer. On September 19, 2017, Mr. Cameron filed a Notice of Application in Chambers in the Nova Scotia Supreme Court for a ruling on whether the communications sought to be disclosed were solicitor-client privileged and, if so, whether privilege had been waived.

[4] Justice John D. Murphy heard the application on October 25 and 26, 2017. By oral decision dated February 22, 2018 and a written decision released on May 11, 2018 (reported as 2018 NSSC 185), Justice Murphy found that the communications sought to be disclosed in the Notice of Intended Action were solicitor-client privileged but that the Province had waived privilege.

[5] The written decision of May 11, 2018 is heavily redacted to remove any communications that may be solicitor-client privileged. Justice Murphy ordered the decision would remain redacted until October 15, 2018 unless otherwise ordered by this Court.

[6] The Province filed a Chambers motion in this Court asking that the decision remain redacted. By order dated October 23, 2018, I ordered the decision would remain redacted and the determination of what should remain redacted would be decided by the Panel hearing the appeal proper.

[7] The Province appeals Justice Murphy's decision. Mr. Cameron has filed a Notice of Contention.

[8] For the reasons that follow, I would dismiss both the appeal and the Notice of Contention with costs to Mr. Cameron in the amount of $20,000 inclusive of disbursements.

Background

[9] As noted earlier, Mr. Cameron conducted civil litigation at the Department of Justice for 26 years prior to 2017. After 2001 he was generally charged with the conduct of civil litigation involving Aboriginal rights cases.

[10] In early 2016, the Sipekne'katik Band filed an appeal in the Supreme Court of Nova Scotia with respect to a decision of the Minister of Environment which had approved installation by Alton Natural Gas Storage L.P. of a brine storage pond connected to a proposed underground storage facility for natural gas (the Alton Gas appeal).

[11] Mr. Cameron was counsel for the province on the Alton Gas appeal.

[12] The position taken by the Band in the Alton Gas appeal was that the province did not make every reasonable effort to consult and accommodate the Band prior to approving the installation.

[13] On July 29, 2016, Mr. Cameron filed a submission on behalf of the Province responding to the Band's argument. The submission contained a section questioning whether the province had a constitutional duty to consult which provides, in part:

> 78. In short, the "tension" between de facto Crown sovereignty and pre-existing Aboriginal sovereignty gives rise to the honour of the Crown. The "assertion" of Crown sovereignty over sovereign "unconquered peoples", is the source of the obligation to deal honorably. But in the context of the Shubenacadie Band, the historical evidence references a "submission" to the Crown in 1760. The evidence is discussed below at para. 91. As a result of that submission, Crown sovereignty over the Band was not merely de facto, it was legal. The Band's submission in 1760 negates a claim of sovereignty, and therefore negates a constitutional duty of consultation.
>
> [Underlining in original]

[14] This has come to be known in these proceedings as the Sovereignty Argument.

[15] The brief went on to argue that, if there were a duty to consult, the Province had fulfilled that duty.

[16] The Sovereignty Argument became an issue of considerable controversy in the House of Assembly and in the media prior to the hearing of the Alton Gas appeal.

[17] The Alton Gas appeal was heard on November 14 and 15, 2016. On November 14, the presiding judge, Justice Suzanne Hood, asked Mr. Cameron whether he would be arguing that the Province did not have a duty to consult the Band. Mr. Cameron replied as follows:

> THE COURT: Thank you. You can be seated. Just before you move on to the subject of consultation, Mr. Larkin, I just want to confirm with Mr. Cameron that you are making the argument, in spite of all the correspondence and the consultations that the Province has engaged in, that the position of the Province now is that there is no duty to consult.
>
> MR. CAMERON: I wish to address that with some subtlety in my arguments.
>
> THE COURT: Yes.
>
> MR. CAMERON: My point is, in this context, a cautionary one. I've referred you to the – you'll have seen the appendix to the factum with the historical document from 1760, and my suggestion to the Court will be that that has potential implications for the idea of duty to consult in Nova Scotia.
>
> At the same time, I will be forcefully suggesting that you may not need to deal with that because the overriding position of the Province in this case is that it has a policy to consult, it does consult and it consulted very deeply in this case, so any duty was acquitted on the facts of the case.
>
> THE COURT: Okay.
>
> MR. CAMERON: But I will be referring to that document by way of cautioning the Court in relation to making any sort of sweeping statement about --
>
> THE COURT: Whether there is or is not.
>
> MR. CAMERON: --- Constitutional law in Nova Scotia.

[Emphasis added]

[18] Later in his submissions he outlined his argument to the Court:

> The third point I made is with respect to that very same historical document, which you can take judicial notice of. The point is this: The constitutional duty to consult flows from the Honour of the Crown. The Honour of the Crown arises from this clash of sovereignties; British sovereignty, aboriginal sovereignty. The historical document shows a Native submission by this Band, and perhaps others, to British sovereignty. So there's no clash. So that raises the question whether the duty to consult can apply to this Band.
>
> Now, yesterday, my friend, Mr. Larkin, objected, and he said, "Look" – and I agreed with his objection, in this respect - - he said,, "Look, there - - this is one out of a whole host of historical documents," and so on, and that's right. And that is why I am simply raising this point by way of saying be cautious. Be careful respecting - - making definitive sweeping statements respecting the duty to consult. Because Nova Scotia has a history, which has not been litigated, and this case is not the right one for it.
>
> …
>
> So moving on. It's clear that Nova Scotia consults and takes that position very seriously. It has a policy to consult. It's committed to consultation; it has an agreement on consultation. And none of that gives rise to a constitutional duty. The Courts have elaborated constitutional duties, and that's not for governments to do by way of policy and agreement.

[19] The media coverage of the hearing was intense and was very critical of the Sovereignty Argument (Application decision at ¶17).

[20] On Thursday, November 17, 2016, after a Cabinet meeting, the Premier and the Attorney General of Nova Scotia made public statements on that day and on subsequent occasions (the Statements). In his decision, Justice Murphy summarized the Statements as follows:

> [17] … I summarize the Applicant's description as follows, with the Respondents' clarifications added and underlined:
>
> > After a Cabinet meeting on Thursday, November 17, 2016, during a media scrum, the premier said:
> >
> > (i) "*I believe that brief went way beyond where it needed to go. <u>I am looking for an explanation from the Justice Department</u>*."
> >
> > (ii) The brief was "*not what I believe*."
> >
> > (iii) "*I had no idea it was being put forward*."
> >
> > The Minister of Justice stated in a media scrum at about the same time: "*I can reiterate what the premier said. Went beyond the position of gov.*"

> These comments were reported in the local and national media.
>
> The following statements by the Premier [were] reported in the APTN National News on Friday, November 18, 2016:
>
> > *I'm not happy, not just as the minister, but as the premier, that the position was put forward in the court ... Disappointed would be a huge understatement. To say that I was furious would probably be more accurate ... My hope is that the Chiefs and the Mi'kmaq community will understand it is not a reflection of who I am, and who our government is.*
>
> On November 23, 2016 the media reported on an upcoming meeting between the Premier and Nova Scotia Mi'kmaq Chiefs at which the Premier intended to apologize for the brief. The Premier was quoted as saying, "*that brief didn't reflect who I am, doesn't reflect the belief of my government ...*"
>
> On November 24, 2016, the Premier was reported in the Canadian press as having said, "*The words that were attached to a brief that went before the court were not mine and were not my feelings*."
>
> At about the same time, Minister Whelan stated publicly that the brief "*doesn't reflect the government's position*."
>
> Among the statements attributed to the Minister of Justice, about legal briefs in her department was, "*I'll be asking more about what the process is and to be sure that we are more sensitive ...*"
>
> [Underlining and italics in original]

[21] On December 5, 2016, the Province removed Mr. Cameron as solicitor of record in the Alton Gas appeal.

[22] On December 20, 2016, through other counsel, the Province formally withdrew the Sovereignty Argument from the Alton Gas appeal.

[23] On or about April 30, 2017, Mr. Cameron retired and on or about May 2, 2017, he served his Notice of Intended Action.

Issues:

[24] The Notice of Appeal and Notice of Contention raise five issues. A sixth issue arose on the motion to this Court to have Justice Murphy's decision remain redacted. I would summarize the issues, identify where they arise, and address them in the following order:

1. Did the application judge err in finding that the Province impliedly waived privilege (NOA);
2. Did the application judge err in holding that the proposed action is not an abuse of process (NOA);
3. Did the application judge err in making final determinations of fact about the Statements and on issues of fact and law that are properly for a trial judge (NOA);
4. Should the application judge's decision be upheld on the basis that the instructions given to Mr. Cameron were not intended to be confidential and, accordingly, are not privileged (NOC);
5. Is the Attorney General, as the Chief Law Officer of the Crown, precluded in the circumstances of this case from claiming solicitor-client privilege (NOC); and
6. What portions of Justice Murphy's decision should remain redacted (Chambers Application)?

[25] I will address the standard of review when considering each of the issues.

Analysis

Issue #1 Did the application judge err in finding that the Province impliedly waived privilege?

Standard of Review

[26] As is so often the case, as the Province does here, parties cite the grounds of appeal and simply indicate that they are to be reviewed on a correctness standard without any analysis of why correctness is the appropriate standard of review.

[27] With respect, this ground of appeal engages different standards of review. The legal test to find implied waiver is an extricable question of law and is reviewable on a correctness standard. If the application judge articulated the correct legal test, his application of the test to the evidence is also a question of law and is also to be reviewed on a correctness standard. If he identified and applied the test properly, his findings on whether there was an implied waiver are to be reviewed on a palpable and overriding error standard (See *McPherson v.* Campbell, 2019 NSCA 23, ¶18 and cases cited therein).

Analysis

[28] In arguing the application judge erred in holding that privilege had been impliedly waived the Province says he:

(a) failed to adopt and apply a restrictive approach to waiver in the context of solicitor-client privilege;

(b) erred in holding that implied waiver could apply outside the litigation context; and

(c) erred in adopting an *ad hoc*, general "fairness test" for implied waiver where no such test exists.

[29] With respect, as I will explain, the application judge committed no such errors.

Restricted Approach to Waiver

[30] The leading decision on waiver in this country is that of McLachlin J. (as she then was) in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (S.C.). Professor Adam M. Dodek summarizes the decision in his text, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc., 2014), as follows:

> **§7.107** … McLachlin J. laid out the test for both explicit and implied waiver. Waiver occurs where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. Waiver may also occur in the absence of intention to waive, "where fairness and consistency so require". This second set of principles applies to implied waiver. As the terms indicate, "fairness and consistency" are open-ended concepts and there are various scenarios where implied waiver may arise …
>
> [Emphasis added]

[31] In its factum the Province argues that any waiver of solicitor-client privilege is limited to the following cases:

(a) where the holder of the privilege puts the relevant legal advice, or his/her state of mind, in issue in a current proceeding by or against a third party;

> (b) where the holder of the privilege puts the relevant legal advice, or his/her state of mind, in issue by initiating proceedings against his/her former lawyer, or by pleadings or testimony that makes allegations of misconduct or negligence against the former lawyer; or
>
> (c) where the privilege holder has knowledge of the existence of the privilege and there is a voluntary evincing of an intention to waive the privilege. In such a situation, where voluntary partial disclosure has occurred, "fairness and consistency" may require the disclosure of the complete communications. In this context, the privilege holder has voluntarily waived a certain aspect of a privileged communication for his or her advantage in litigation, and in so doing is being unfair and inconsistent.

[Appellant's factum, ¶91]

[32] There is no suggestion in *S. & K. Processors* that implied waiver is somehow "restricted" to the three types of cases described by the Province in its factum, or that "fairness and consistency" is limited to the type of cases described by it. As Professor Dodek notes, the language of fairness and consistency is open-ended to encompass the various scenarios where implied waiver may arise.

[33] The Province relies heavily on *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 in suggesting that implied waiver is limited to the "three established circumstances". With respect, that case does not support the Province's assertions.

[34] *Soprema* involved a claim for negligent misrepresentation. Soprema alleged its auditor, Wolrige, made false representations respecting the accuracy of financial statements which Soprema relied upon in exercising a share purchase option. In order to make out the cause of action of negligent misrepresentation against Wolrige, Soprema had to show it relied reasonably on the alleged misrepresentations.

[35] Since Soprema had received legal advice before exercising the option Wolrige sought disclosure of documents which Soprema claimed were subject to solicitor-client privilege.

[36] Wolrige claimed it could not test the reasonableness of Soprema's reliance on its representations without access to the advice Sopremea received from its legal advisors before deciding to proceed with the option.

[37] The court had to consider whether Soprema had impliedly waived solicitor-client privilege by alleging reasonable reliance on Wolrige's representations. The

hearing judge held that there had been an implied waiver because the claim of reasonable reliance put Soprema's state of mind in issue in such a way as to make the privileged communications highly relevant.

[38] The British Columbia Court of Appeal overturned the hearing judge.

[39] In arguing that courts must take a restrictive approach when considering implied waiver, the Province relies upon the following excerpt from the British Columbia Court of Appeal's decision:

> [50] … In *R. v. McClure*, 2001 SCC 14 at para. 35, the Court said that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis" (emphasis added) …
>
> [Emphasis in original]

[40] However, on closer examination of the decision, it can be seen the British Columbia Court of Appeal actually followed the same approach taken by Justice Murphy in this case and did not suggest implied waiver is subject to some kind of "restricted approach". It expressly approved the lines of authority relied upon and applied by Justice Murphy. In considering when implied waiver may arise the British Columbia Court of Appeal said:

> [28] … This can happen in myriad ways, as illustrated in *Halsbury's, supra*. Parties may expressly raise reliance on legal advice they received as a justification or an excuse: see e.g., *R. v. Campbell*, [1999] 1 S.C.R. 565. They may assert misconduct or incompetence of their legal advisers (see e.g., *R. v. Dunbar*, [1982] O.J. No. 581 at paras. 68-72, 68 C.C.C. (2d) 13 (C.A.)), dispute instructions (see e.g., *Newman v. Nemes*, [1978] O.J. No. 3101, 8 C.P.C. 229 (Ont. H.C.J.)), or seek to justify mistakes in affidavits as made by counsel (see e.g., *Souter v. 375561 B.C. Ltd.*, [1995] B.C.J. No. 2265, 130 D.L.R. (4th) 81 (C.A.)). …
>
> [Emphasis added]

[41] In ¶38-54 of his decision, Justice Murphy outlined the law of solicitor-client privilege in much the same way as the British Columbia Court of Appeal. He cited *R. v. McClure*, 2011 SCC 14 as did the British Columbia Court of Appeal. Justice Murphy's discussion of the law, where the instructions of a solicitor are called into question, were as follows:

[45] Adam Dodek in *Solicitor-Client Privilege*, (Markham: Lexis Nexis Canada Inc., 2014) discusses "Categorical Implied Waiver by Conduct", as follows:

> Certain actions by a privilege holder will almost always be deemed to constitute an implied waiver of the privilege. They may be considered categorical in the sense that if they are found to fit within a recognized category, the privilege will be deemed to have been waived. For example, when a party directly or indirectly impugns the legal advice received from a lawyer, the privilege will be deemed to have been waived. (p. 241)
>
> ... Where a client imputes [sic] the conduct of his counsel through allegations of negligence, there is a forfeiture or an implied waiver of the right to confidentiality. The courts have stated that fairness in these cases dictates that counsel must not be frustrated by claims of privilege in defending these claims... (p. 242)
>
> ... The privilege will also be waived when a party blames their former solicitor for a course of conduct... (p. 242)

In *R. v. Dunbar* (1982) 138 DLR (3d) 221, the Ontario Court of Appeal adopted the following passage from *Wigmore on Evidence* (2nd ed), at para. 66:

> As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third persons, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. Perhaps the whole doctrine that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation. The only question about such a principle is whether in all cases the privilege ought not be the same qualification, that it should yield when the evidence sought is necessary to the attainment of justice.

[46] In *R v. Hobbs*, 2009 NSCA 90 at paras. 12 and 20, this Province's Court of Appeal, following *Dunbar* and the British Columbia Court of Appeal decision in *R. v. Li*, (1993) 36 BCCA 181, acknowledged that information protected by solicitor‑client privilege may be disclosed by a lawyer when necessary to defend allegations of malpractice or misconduct, or an attack upon character or integrity. *R. v. Hobbs* also noted that waiver can arise from conduct as well as words, citing with approval at para. 17 the Ontario Court of Appeal's endorsement in *Harich v. Stamp, et al.*, 1979 OR 92(d) 395 of the following passage from *McCormick on Evidence* (2nd ed) (1972) at p. 194:

> Waiver includes, as *Wigmore* points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as

> partial disclosure, which would make it unfair for the client to insist on the privilege thereafter.
>
> [47] There is Canadian authority to support the Applicant's position that a clients' disputing the instructions given to counsel may amount to a waiver of solicitor-client privilege respecting those communications. (*Nixon v. Timms, supra*, *Bentley v. Stone*, 1998 OJ No. 4823; *Biehl v. Strang*, 2011 BCSC 213; *Souter v. 375561 B.C Ltd*, [1995] BCJ No 2265 (BCCA)).

[Emphasis added]

[42] This is a correct articulation of the law on implied privilege (See also *R. v. Campbell*, *infra*, ¶46-48 and ¶67-73).

[43] Having correctly set out the law, the application judge turned his mind to the facts of this case and found the clear implication from the Statements made by the Premier and the Attorney General was that Mr. Cameron acted without or contrary to instructions:

> [50] I agree with Mr. Cameron that the Statements clearly imply that Mr. Cameron acted without instructions, or contrary to instructions, and that they bear no other reasonable interpretation. I also agree with Mr. Cameron that unless he is permitted to disclose the instructions he received, he will be prevented from asserting the causes of action he seeks to pursue. Any claim he may have against the Respondents for defamation, abuse of public office, constructive dismissal or violation of his constitutional rights is based upon the Respondents' implication that he acted without or contrary to instructions. Unless those instructions are revealed, there is no factual foundation for the claims he seeks to advance.

[44] As the Court recognized in *R. v. Li* (1993), 36 B.C.A.C. 181 (cited by the application judge at ¶46 of his decision), in circumstances where a lawyer's conduct is called in question, the law allows the lawyer to defend himself against attack upon his or her character and integrity by permitting disclosure of confidential communications from the client that are necessary to answer the allegations against him.

[45] The authorities clearly recognize, and the application judge correctly identified, that one example of implied waiver is where a client impugns the conduct of his lawyer, and disclosure of privileged information by the lawyer is necessary to defend the allegations of malpractice or misconduct.

[46] It would be manifestly unfair to allow the Province to hide behind solicitor-client privilege while at the same time impugning the conduct of its solicitor. I

pause here to comment that it was not necessary below, nor is it necessary here, to determine whether Mr. Cameron had instructions to advance the Sovereignty Argument. That is a matter to be determined at the trial proper.

Ongoing Litigation is not a Requirement for Implied Waiver

[47] The application judge canvassed the law of implied waiver and found that the Province's Statements impliedly waived privilege (¶38-54). In doing so, he rejected the Province's argument that implied waiver cannot arise without existing litigation (¶54). The application judge supported his decision by referencing two freedom of information cases: *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General)*, 2007 NLTD 172 and *Peach v. Nova Scotia (Transportation and Infrastructure Renewal)*, 2010 NSSC 91, which did not involve ongoing litigation and which concluded that solicitor-client privilege had been waived (¶53).

[48] The Province argues that the application judge was wrong in holding that the doctrine of implied waiver can be applied outside the context of existing litigation. They purport to distinguish *Imperial Tobacco*, *supra*, and *Peach*, *supra*, as cases involving "voluntary waiver" rather than implied waiver

[49] With respect, this distinction does not advance the Province's argument because the considerations are the same for both express and implied waiver. As Professor Dodek explains in *Solicitor-Client Privilege*:

> **§7.1** … Waiver involves situations where a lawyer or client has taken some subsequent action which calls into question the continuing intention to keep their communications confidential or is inconsistent with that intention. Waiver is the flip side of the "made in confidence" requirement for the privilege to attach in the first place. As discussed in Chapters 2 and 5, confidentiality is the *sine qua non* of privilege [citing *Blank v. Canada (Minister of Justice)*, 2006 S.C.J. No. 39, at para. 32]. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege.

[50] Simply put, waiver involves ending the confidentiality that would otherwise cloak solicitor-client privilege. Ending that confidentiality can happen expressly or impliedly. In the following passages, Professor Dodek explains express waiver, implied waiver, and the difficulty inherent in distinguishing the two:

> **§7.5** Courts use the terms "expressly", "voluntarily" and "explicitly" interchangeably to refer to the situation where the client openly decides to waive

> the privilege over part or all of their confidential communications with their solicitor…
>
> **§7.6** For there to be express waiver, it must be shown that the privilege-holder: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it. This test was set out by McLachlin J (as she then was) in … *S. & K. Processors* … and remains the leading authority on the issue of both express and implied waiver…
>
> […]
>
> **§7.104** … "implied waiver" refers to the situation where a party does not explicitly waive the privilege but takes some action that is inconsistent with maintaining the privilege….
>
> […]
>
> **§7.105** The line between explicit and implied waiver is frequently blurry. What the courts refer to as "waiver by conduct" is sometimes considered explicit waiver and at other times as "implied waiver". The label attached to the waiver is far less important than the analysis and the consequences: the loss of privilege and the revelation of confidential lawyer-client communications.
>
> **§7.106** … Thus, the common characteristic of all types of waiver is some voluntary action on behalf of the privilege holder that is inconsistent with continuing to protect the privilege.
>
> **§7.107** In *S. & K. Processors*… McLachlin J. laid out the test for both explicit and implied waiver…Waiver may also occur in the absence of intention to waive, "where fairness and consistency so require." This second set of principles applies to implied waiver….
>
> [Emphasis added]

[51] Waiver involves conduct inconsistent with confidentiality. Such conduct can be express, or it can be implied. The focus of the analysis is on the conduct of the person who holds the privilege and whether they waive it by doing something which is inconsistent with continuing to protect it.

[52] The Province's position, in essence, is that a client can publicly disparage his lawyer with impunity, as long as it is done impliedly and not in the context of an existing court proceeding. Its position is not supported by the authorities and the application judge was correct in rejecting it.

"Societal Values", "Fairness" and Implied Waiver

[53] The Province argues that the application judge interpreted *Smith v. Jones*, [1999], 1 S.C.R. 455 as "inviting an *ad hoc* “societal values” test for implied waiver". This argument is based on the following from the application judge’s decision:

> [39] … In *Smith v. Jones, supra*, while recognizing that solicitor-client privilege should be maintained to the extent feasible, the Supreme Court stated that it is not absolute and in certain circumstances other societal values must prevail (paras. 35, 51).

[54] The two paragraphs referred to by the application judge from *Smith v. Jones* are as follows:

> CORY J.: …
>
> [35] The solicitor-client privilege permits a client to talk freely to his or her lawyer secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed. It has long been recognized that this principle is of fundamental importance to the administration of justice and to the extent it is feasible, it should be maintained. Yet when public safety is involved and death or serious bodily harm is imminent, the privilege should be set aside. This appeal must determine what circumstances and factors should be considered and weighed in determining whether solicitor-client privilege should be set aside in the interest of protecting the safety of the public.
>
> […]
>
> [51] Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. <u>It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail</u>.
>
> [Emphasis added]

[55] The application judge actually used the very words of Cory, J. in *Smith v. Jones* to make the point that solicitor-client privilege is not absolute and will yield to other societal values.

[56] The application judge did not develop an *ad hoc* societal values test for implied waiver. Immediately following this passage in his decision, the application judge went on to set out the test for implied waiver in *S. & K. Processors* and the law where a client calls into question the instructions given to

their lawyer as I have set out in detail above. The application judge correctly identified and applied the law as it relates to implied waiver.

[57] The Province says that fairness is not to be used as an *ad hoc* balancing exercise, suggesting that is what the application judge did here. In support of its position, it says that considerations of fairness only arise where some aspect of privilege has already been waived citing as authority *S. & K. Processors*, as follows:

> [10] … In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. …
>
> [Emphasis added]

[58] Considerations of "fairness and consistency" are central to the doctrine of implied waiver in all of its manifestations, not just where some aspect of privilege has already been waived. They apply in the case of an unintended implied waiver based on partial disclosure by the privilege holder and they apply equally in the case of an unintended implied waiver based on the privilege holder impugning the advice or conduct of his or her lawyer.

[59] This is clear from a reading of the entire paragraph of McLachlin J.'s decision in *S. & K. Processors*, and not just that portion cited by the Province. The whole of ¶10 is as follows:

> [10] Notwithstanding the fact that the *Evidence Act*, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in *Wigmore on Evidence* (McNaughton Rev., 1961), vol. 8, pp. 635-36, relied on by Meredith J. in *Hunter v. Rogers supra*, double elements are predicated in every waiver--implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. In *Hunter v. Rogers, supra*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[Emphasis added]

[60] The passage from *Wigmore on Evidence*, McNaughton Rev., 1961, relied on by Meredith J. in *Rogers v. Hunter* (1981), 34 B.C.L.R. (S.C.) (which McLachlin J. referenced) provides as follows:

> 7. …
>
> What constitutes a waiver by implication?
>
> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, ie., not only the element of implied intention, but also the element of fairness and consistency. 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.

[Emphasis added]

[61] The words from *Wigmore on Evidence*, underlined above, confirm that a privileged person's intention does not control the operation of implied waiver. Rather, it is considerations of fairness, referencing the "objective consideration" of the privileged person's conduct, which govern.

[62] I do not accept, as the Province suggests, that fairness considerations arise only where some aspect of privilege has already been voluntarily waived. Justice McLachlin did not state any such limitation. Indeed, that argument would make a privileged person's intention, rather than their conduct, the controlling consideration and would effectively eliminate the doctrine of implied waiver.

[63] The application judge found that it was unfair for the Province to suggest publicly that Mr. Cameron acted without instructions or contrary to instructions, while at the same time asserting privilege to prevent him from revealing his understanding of the instructions (¶62). By doing so, the application judge did not embark on an "*ad hoc* and generalized fairness approach to implied waiver". Rather, he applied and followed a well-established line of cases which have recognized that it would be inconsistent and unfair for the holder of the privilege to publicly dispute instructions on the one hand, and yet maintain that those

instructions are privileged on the other, thereby preventing the lawyer from disclosing those instructions to vindicate his or her professional reputation.

[64] Finally, under this ground of appeal, the Province argues that in accepting Mr. Cameron's argument that fairness requires that solicitor-client privilege be set aside, the application judge "assumed precisely what is in dispute - that Mr. Cameron was defamed - and found that fairness required a finding of implied waiver." The application judge actually found as follows:

> [65] … The statements strongly imply that the position put forward by Mr. Cameron was not that of the government. The Respondents' conduct in making the Statements is inconsistent with the maintenance of the confidentiality which privilege is intended to protect. Mr. Cameron cannot respond without disclosing the Communications. In the circumstances of this case, it would be unfair to maintain privilege and thereby bar Mr. Cameron from claiming he was disadvantaged.

[65] The application judge did not assume that Mr. Cameron was defamed in reaching his conclusion that privilege in relation to Mr. Cameron's instructions had been impliedly waived. Rather, at the risk of being repetitious, he found that the Province put in issue the instructions Mr. Cameron received. Having made it an issue, it would have been unfair in the circumstances of this case to maintain privilege thereby preventing Mr. Cameron from leading evidence to show he received instructions to make the Sovereignty Argument.

[66] The conclusion by the application judge that there was an implied waiver of privilege with respect to Mr. Cameron's instructions did not turn on any finding or assumption made by him that Mr. Cameron followed his instructions and was defamed. The application judge expressly disavowed the need to make any such finding or assumption, stating he would not "attempt to resolve the conflicting evidence to determine what instructions Mr. Cameron received concerning the Sovereignty Argument" (¶9).

[67] The finding of the application judge that there was an implied waiver of privilege turned on the unfairness of preventing Mr. Cameron from making his claims against the Province. Like the Court below, this Court does not have to make any findings on those claims in order to determine whether, in these circumstances, there has been an implied waiver of privilege.

Conclusion

[68] I see no error in the application judge's thorough review of the law and its application to the facts of this case. I would dismiss this ground of appeal.

Issue #2 Did the application judge err in holding that the proposed action is not an abuse of process?

Standard of Review

[69] Whether abuse of process is a stand alone concept that must be considered without regard to the principles of waiver is a question of law and will be reviewed on the correctness standard. Whether the facts on the record before the application judge warrant a finding of abuse of process is a question of mixed law and fact and will be reviewed on a palpable and overriding standard.

Analysis

[70] In its factum, the Province frames its argument as follows:

> 123. … His Lordship considered abuse of process only in the applied waiver analysis, and not as a stand-alone principle of law, and then erred in finding that the release of the Province's solicitor-client communications would constitute only a "minimal intrusion".

[71] The Province cites no authority which suggests that the abuse of process analysis should be applied independent of the waiver analysis. Its argument amounts to an assertion that a lawyer's confidentiality obligations are absolute and must be observed without regard to the doctrine of waiver.

[72] I agree with Mr. Cameron, this argument is without merit. It would prevent a lawyer from ever defending themselves from a client's allegations of wrongdoing.

[73] The Province emphasizes that a lawyer is ordinarily duty bound to his client to keep their dealings confidential. In its factum it says:

> 126. Mr. Cameron seeks to bring an action in violation of his duty of confidentiality to his client, and in a manner which would undoubtedly bring the administration of justice into disrepute. …

[74] This would mean that any proceeding involving the necessity to reveal solicitor-client privilege information in support of that proceeding is abusive.

[75] With respect, the rules regarding confidentiality are not that absolute.

[76] The Nova Scotia Barristers' Society *Code of Professional Conduct* expressly contemplates that confidentiality obligations give way where a lawyer is alleged to have engaged in professional misconduct:

> 3.3-4 If it is alleged that a lawyer or the lawyer's associates or employees:
>
> (a) have committed a criminal offence involving a client's affairs;
>
> (b) are civilly liable with respect to a matter involving a client's affairs;
>
> (c) have committed acts of professional negligence; or
>
> (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,
>
> the lawyer may disclose confidential information in order to defend against the allegation, but must not disclose more information than is required.

[77] As it did before the application judge, the Province relies on *Manning v. Epp*, [2006] O.J. No. 2904 (S.C.) as a "virtual mirror image" of this case. It made the same argument before the application judge and he rejected it distinguishing *Manning v. Epp* as follows:

> [60] I agree with the Applicant that *Manning v. Epp* is distinguishable. The facts and allegations in that case were extreme. <u>The finding that some information disclosed was privileged, inadmissible, in violation of the lawyer's duty of confidence, and an abuse of process was reached in the context of an attempted collateral attack on the municipality's right to discharge counsel, and a lawyer's claims which the court found were not made out on the facts pleaded</u>. In *Manning and Epp,* the claim rested almost entirely on information the plaintiff obtained from his former client during the course of a retainer; in this case, the claim is based principally on public statements the Respondents made to media about Mr. Cameron's work. In *Manning v. Epp* the former counsel's claim was deemed to be an abuse of process when it disclosed privileged information and information that was irrelevant and scandalous; in this case Mr. Cameron is not abusing process; rather, he is seeking the Court's ruling on an issue of privilege before proceeding with an action.
>
> [Emphasis added]

[78] *Manning v. Epp* is far removed from this case and the application judge was correct to distinguish it.

[79] The application judge astutely noted that Mr. Cameron is not abusing the process; rather, he was properly seeking the court's ruling on an issue of privilege before proceeding with an action, an entirely appropriate course of action.

[80] Under this ground of appeal, the Province also argues that the application judge erred by applying a minimal intrusion test to the issue of solicitor-client privilege in the following passage of his decision:

> [55] …In my view, disclosure of the Communications, which primarily convey instructions, and do not reveal financial information, commercial activity or legal advice, would be a minimal intrusion into *prima facie* privileged client information, and would not violate confidence concerning the business and affairs of the Respondent.

[81] With respect, this does not reflect a minimal intrusion test, and the application judge did not apply any such test in reaching his decision on waiver. The passage must be understood in the context of the Province's position before the application judge. It argued that Mr. Cameron's Intended Action constituted an abuse of process because he owed a fiduciary and professional obligation to hold in strict confidence all information concerning the business and affairs of a client.

[82] Beginning at ¶55 of his decision, the application judge dealt with this aspect of the Province's argument and rejected it. His comments at ¶55, to the effect that disclosure of the Communications would not reveal the Province's business or affairs, were not the basis for his finding that there was no abuse of process or his earlier finding that there had been a waiver of privilege. It was simply a response to the Province's argument that Mr. Cameron owed it a fiduciary and professional obligation.

Conclusion

[83] I would dismiss this ground of appeal.

Issue #3 Did the application judge err in making final determinations of fact about the Statements and on issues of fact and law that are properly for a trial judge?

Standard of Review

[84] If the application judge were precluded from making findings of fact, his doing so would be an error of law. However, I am of the view that he was not restricted from making findings of fact for the purposes of his legal determinations.

Analysis

[85] The Province takes issue with the application judge's decision where he says:

> [50] I agree with Mr. Cameron that the Statements clearly imply that Mr. Cameron acted without instructions, or contrary to instructions, and that they bear no other reasonable interpretation. …

[86] The Province says that the implication and interpretation of the Statements is a contested issue between the parties and to make such a determination on a limited record is premature.

[87] First of all, the factual determination which the judge made was solely for the purpose of determining whether there was an implied waiver of privilege. It was fully argued by both parties and there was no restriction on the evidence which they could submit on this issue.

[88] Further, and perhaps most importantly, any determinations that the application judge made on the application to determine the issue of privilege are not binding on the judge hearing the trial in this matter. I have addressed this in some detail previously (¶64-67).

Conclusion

[89] This ground of appeal is entirely without merit and I would dismiss it.

Issue #4 Should the application judge's decision be upheld on the basis that the instructions given to Mr. Cameron were not intended to be confidential and, accordingly, are not privileged?

Standard of Review

[90] Mr. Cameron raises this issue by way of Notice of Contention. The application judge said the following about this issue in his decision:

> [30] ...In this case, it is therefore not necessary to decide if communications conveying only instructions to a solicitor are privileged.

[91] Mr. Cameron cites this portion of the application judge's decision for authority that the issue was not decided and, therefore, is not subject to deference and no standard of review applies to this issue.

[92] With respect, I disagree. As will become apparent, this is a mischaracterization of what the application judge found. In determining that it was not necessary to decide the issue in this case, the application judge was making a decision on a question of mixed law and fact based on the evidence before him. As a result, it is reviewable on a palpable and overriding error standard.

Analysis

[93] The position taken by Mr. Cameron before the application judge was that the instructions to counsel concerning matters to be communicated to an opposing party or the court are not intended to be confidential and are, therefore, not privileged.

[94] After setting out Mr. Cameron's position the application judge held:

> [30] I have made a detailed review of the Communications and the affidavit evidence concerning the meetings and correspondence between Mr. Cameron and his clients. As Mr. Cameron suggests, the instructions he received relate primarily to whether he should present something – the Sovereignty Argument – to the court. The Communications do not reveal information clearly confidential, such as facts which might prejudice the client if disclosed, competitive financial information, an opinion concerning the strength of an argument, or the likely outcome of the Appeal. The primary focus of the Communications was not to seek or provide legal advice. <u>However, in the context of instructions about what to present to the court, the exchanges between Mr. Cameron and his clients included discussion about why he made a recommendation</u> (Affidavit, especially paras. 12 and 13, Exhibits 2, 13-20 inclusive) <u>concerning the Sovereignty Argument, and about how it should be addressed if raised by the judge. Legal analysis and litigation strategy, while not the main focus, were components of the Communications. In this case, it is therefore not necessary to decide if communications conveying only instructions to a solicitor are privileged</u>.
>
> [Emphasis added]

[95] In this part of his decision, the application judge was saying that he found it unnecessary to decide the issue argued by Mr. Cameron because it did not arise on the facts before him.

[96] In particular, he found that the communications between Mr. Cameron and the Province regarding the Sovereignty Argument were intermingled with legal analysis and legal strategy and, while not the focus of the communications, were part of them. Put another way, the instructions Mr. Cameron received about advancing the Sovereignty Argument could not be separated from the legal analysis and legal strategy of the Alton Gas appeal. Therefore, the issue of whether communications conveying only instructions to make the Sovereignty Argument were privileged did not arise on the facts.

Conclusion

[97] I would dismiss this ground of the Notice of Contention.

Issue #5 Is the Attorney General, as the Chief Law Officer of the Crown, precluded in the circumstances of this case from claiming solicitor-client privilege?

Standard of Review

[98] The application judge's finding that solicitor-client privilege protects the government as it does any other client is a question of law which is reviewable on a correctness standard.

Analysis

[99] Mr. Cameron relies on the role of the Attorney General as set out in the *Public Service Act*, R.S.N.S. 1989, c. 376, and, in particular, s. 29(1) which provides:

> **Functions, powers and duties**
>
> **29(1)** The functions, powers and duties of the Attorney General and Minister of Justice shall be the following:
>
> (a) the Attorney General is the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;

> (b) the Minister of Justice shall see that the administration of public affairs is in accordance with the law, and has the superintendence of all matters connected with the administration of justice in the Province not within the jurisdiction of the Dominion of Canada;
>
> (c) the Attorney General shall advise the heads of the several departments upon all matters of law concerning such departments or arising in the administration thereof;
>
> (d) the Attorney General has the settlement and approval of all instruments issued under the Great Seal;
>
> (e) the Attorney General has the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the Government;
>
> (f) the Attorney General has the functions and powers that belong to the office of the Attorney General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers that previous to the coming into force of the British North America Act, 1867 belonged to the office of Attorney General in the Province and that under the provisions of that Act are within the scope of the powers of the Government of the Province, including responsibility for affairs and matters relating to courts and prosecutions;
>
> (g) the Attorney General and Minister of Justice has such other powers and shall discharge such other duties as are conferred and imposed upon the Attorney General or Minister of Justice by any Act of the Legislature of the Province, or by order in council made under the authority of the Act.

[100] Mr. Cameron's argument, at its simplest, is that the Attorney General has a unique role as the guardian of the public interest and, as a result, solicitor-client privilege operates differently. He relies on *R. v. Campbell*, [1999] 1 S.C.R. 565, where Justice Binnie said:

> 52 … solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration, …

[101] Mr. Cameron made the same argument before Justice Murphy. After reviewing the argument Justice Murphy concluded:

> [33] In my view, any higher public interest threshold that Government must satisfy does not reduce its entitlement to solicitor-client privilege in this case. The applicant emphasized Justice Binnie's observation in *R. v. Campbell*, [1999] 1 SCR 565 at para. 52 that solicitor-client privilege "may operate differently in some respects because of the public interest aspect of government administration." However, that the statement was made in the context of rejecting a broad assertion that no privilege exists in respect of communications between

> the police and crown counsel in the course of a criminal investigation, and after Justice Binnie noted at para. 49 that "the fact that [the lawyer] works for an 'in-house' government legal service does not affect the creation or character of the privilege."
>
> [34] In *Stevens v. Canada (Prime Minister)* 161 D.L.R. (4th) 85 (FCA), para. 22, Linden J.A. noted:
>
> > I can find no support for the proposition that a government is granted less protection by the law of solicitor client privilege than would any other client. A government, being a public body, may have greater incentive to waive the privilege, but the privilege is still its to waive.

[102] I agree with the conclusion of the application judge. What other higher public interest the Attorney General may have does not reduce her entitlement to solicitor-client privilege. That was made clear in *Stevens v. Canada (Prime Minister)*, 161 D.L.R. (4th) 85 (F.C.A.) as cited by the application judge. It also finds support in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, where the Supreme Court of Canada said that solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to government agencies:

> [19] Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 49. In *Campbell*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.
>
> …
>
> [21] Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

[Emphasis added]

[103] To suggest that the Attorney General is precluded from claiming solicitor-client privilege because of her higher public interest is simply not supported on the authorities.

Conclusion

[104] I would dismiss this ground of the Notice of Contention.

Issue #6 What portions of Justice Murphy's decision should remain redacted?

[105] As I am of the view that the application judge did not err in determining that the Province had waived solicitor-client privilege in this matter, the communications set out in Justice Murphy's decision are no longer subject to solicitor-client privilege and there is no reason to redact any portion of his decision. Justice Murphy's decision will remain redacted until noon on May 31, 2019 and will be released at that time barring an Order of the Supreme Court of Canada or this Court.

Disposition

[106] I would dismiss the appeal and the Notice of Contention with costs to the respondent in the amount of $20,000 inclusive of disbursements which is the sum both parties proposed as reasonable at the hearing.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.