IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Soprema Inc. v. Wolrige Mahon LLP,*
2016 BCSC 813

Date: 20160509
Docket: S135769
Registry: Vancouver

Between:

Soprema Inc., Conax Properties Ltd., and Crigel S.A.

Plaintiffs

And

Wolrige Mahon LLP

Defendant

And

Mallette S.E.N.C.R.L.

Third Party

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiffs and Third Party, Respondents:	Barry Fraser Seva Batkin
Counsel for the Defendant, Applicant:	Howard Mickelson, Q.C. Lorne Kotler
Place and Date of Hearing:	Vancouver, B.C. March 29 - April 1, 2016
Place and Date of Judgment:	Vancouver, B.C. May 9, 2016

Table of Contents

1.0 INTRODUCTION

[1] Before me are two interlocutory applications brought by the defendant in this claim against it for damages for alleged auditor's negligence. The first is for leave to file a third party notice pursuant to subrule 3-5(4)(a) of the *Supreme Court Civil Rules*. The second is for the production of documents over which the plaintiff Soprema Inc. and the third party Mallette S.E.N.C.R.L. have claimed privilege, pursuant to subrules 7-1(13), (17) and (20). It raises the question of the limits of the law concerning implied waiver of privilege.

[2] Although the applications are quite distinct, I will deal with them in one set of Reasons because of the importance to each of the somewhat complicated context they share. They are opposed by the plaintiffs and by the third party. When speaking of these parties collectively, I shall refer to them as the "respondents".

2.0 BACKGROUND

[3] The narrative I am about to relate is based upon the pleadings and the parties' submissions. I make no findings of fact.

[4] The plaintiffs are related corporations who share a common chief executive officer, Mr. Pierre-Étienne Bindschedler. At the material time, they were the owners of 50% of a group of companies called the Convoy Group. Chief among these companies was Conax Holdings Ltd ("Conax Holdings"), which owned the principal operating (revenue-producing) subsidiaries of the group.

[5] The other 50% of the Convoy Group was owned by Mr. Ali Nanji and his holding company (collectively, the "Nanji Group") until early October 2012, when the plaintiff Soprema bought them out after exercising an option to do so. Until then, Mr. Nanji was president of the Convoy Group, and oversaw its management and operations.

[6] The defendant accounting firm ("Wolrige") was Conax Holdings' external auditor from August 2006 through September 2012.

[7] The plaintiffs' claims are essentially twofold, and arise out of fraudulent conduct in which, they allege, Mr. Nanji engaged from August 2006 through January 2012. This conduct, the plaintiffs say, consisted of concealing supplier rebates, overstating allowances for doubtful accounts and inventory reserves, filing false income tax returns, and other dishonest conduct, all of which, essentially, had the effect of significantly understating the income of Conax Holdings, and hence of the Convoy Group.

[8] The plaintiffs claim, first, that Wolrige was negligent in carrying out its duties as external auditor from 2006 through March 2012, as a result of which Wolrige failed to detect the alleged fraud, and failed to warn the plaintiffs of it.

[9] The second aspect of the plaintiffs' claim relates to Wolrige's activities after the fraud came to light in the period from October 2011 through early January 2012, primarily in auditing the financial statements for the year ending February 28, 2011, and the subsequent year, which, due to a change in the year-end, closed on December 31, 2011. The plaintiffs allege that these statements significantly misrepresented the income earned by the Convoy Group--this time overstating it, rather than understating it as Mr. Nanji had allegedly done. The result, the plaintiffs claim, is that Soprema substantially overpaid when it purchased the Nanji Group's shares. Soprema made the decision to exercise that option on July 10, 2012, and completed the purchase the following October.

[10] On this aspect of the claim, the plaintiffs allege that in addition to carrying out its audit negligently, Wolrige made specific representations to Soprema, and to its advisor, Mallette, a Québec accounting firm, on which representations Soprema relied when it decided to exercise its option to buy out the Nanji Group. These amounted, the plaintiffs say, to negligent misrepresentations.

[11] Wolrige denies that it was negligent. On the audited financial statements generally, Wolrige relies upon the principles enunciated in *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165 and *Foss v Harbottle* (1843), 2 Hare 460, 67 ER 189 (HL). On this basis, Wolrige maintains that it owed no duty of care to the

plaintiffs, and that there was no reasonable reliance. Wolrige further denies making the alleged misrepresentations, and in the alternative takes the position that neither the plaintiffs nor Mallette relied in fact on any representations they may have made, or that any reliance was reasonable. The question of reliance is central to Wolrige's position on the alleged waiver of privilege issue.

[12] Wolrige further maintains that Mr. Bindschedler was at all material times aware of what Mr. Nanji was doing before the alleged fraud came to light in January 2012, and that in any event, Soprema, through Mr. Bindschedler and his general manager, Mr. Richard Voyer, retained Mallette to advise them in relation to the alleged fraud. Any reliance, says Wolrige, was on Mallette, not on Wolrige.

[13] This, too, is relevant to the assertion of privilege, because its scope extends beyond communications between Soprema and its legal advisors to encompass communications with Mallette as well.

[14] Over the years in question, Wolrige entered into engagement letters with Conax Holdings, and relies on these engagement letters in its proposed third party claim. These engagement letters included terms by which the management of Conax Holdings agreed that it was responsible for such matters as establishing internal control systems, preparing consolidated financial statements in accordance with generally accepted accounting principles, maintaining adequate accounting records and internal controls, and providing a representation letter to be relied on by Wolrige. For the years ending February 28, 2009, through February 29, 2012 (which year-end, as we have seen, was subsequently changed to December 31, 2011), the engagement letters specifically included an indemnity clause by which Conax Holdings agreed to indemnify Wolrige from and against losses of the sort described in the clause (discussed below).

[15] After Mr. Bindschedler and Mr. Voyer engaged Mallette, they asked Wolrige to give Mallette access to its "working papers prepared in connection with the audit of the February 28, 2010 & 2011 consolidated financial statements of Conax Holdings Ltd." Wolrige agreed to do so upon Mallette, Mr. Bindschedler and

Mr. Voyer executing an "access letter" in which Mr. Bindschedler and Mr. Voyer agreed that the information would be kept confidential, and undertook to indemnify and hold harmless Wolrige from any claim by Mallette or any other third party arising as a result of Wolrige permitting access to the working papers in connection with the transaction. Wolrige relies on this access letter, dated January 15, 2012, in its proposed third party claim.

3.0 THE PROPOSED THIRD PARTY CLAIM

[16] The proposed third party notice is addressed to various companies in the Convoy Group: Conax Holdings, Convoy Supply Ltd, Conax Properties Ltd, and Simplex Holdings Ltd. Convoy Supply is the successor corporation of Conax Holdings. These claims arise out of the engagement letters.

[17] The proposed third party notice is also addressed to Mr. Bindschedler and Mr. Voyer, and raises claims arising out of the access letter.

[18] I will consider first the legal framework. I will then consider how the proposed claims fit within the framework, and whether leave should be granted.

3.1 The Legal Framework

3.1.1 The nature of third party proceedings

[19] The nature of third party proceedings was discussed with clarity by McLachlin J.A., as she then was, in *McNaughton v Baker* (1988), 25 BCLR (2d) 17 at 20-21 (CA). As Justice McLachlin stated at p 21:

> Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure.

[20] Third party claims are governed by Rule 3-5 of the *Supreme Court Civil Rules*. As suggested by the excerpt quoted above from *McNaughton*, the principal requirement is a connection between the relief sought in the third party notice and what is at issue in the main action:

> **3-5** (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
>
> (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,
>
> (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
>
> (c) a question or issue between the party and the person
>
> (i) is substantially the same as a question or issue that relates to or is connected with
>
> (A) relief claimed in the action, or
>
> (B) the subject matter of the action, and
>
> (ii) should properly be determined in the action.

[21] Wolrige's proposed third party claims, then, must fall within these enumerated grounds.

[22] In addressing this question, the respondents raise a number of shortcomings in the manner in which the third party notice is drafted. They note in particular that although the phrase "contribution and indemnity" is repeated many times in the pleading, nowhere does Wolrige plead the *Negligence Act*, RSBC 1996, c 333, which, they say, must be pleaded to support a claim for contribution and indemnity.

[23] Properly analyzed, however, the proposed claims are not of the sort typically raised in the third party notices, for contribution where fault on the part of the proposed third party contributed to the plaintiff's loss, as contemplated in section 4 of the *Negligence Act*. Rather, it alleges that the proposed third parties are directly liable to Wolrige. The *Negligence Act* is irrelevant to such a claim--see the discussion in *McNaughton* at 20-21, and in *Stanco Projects Ltd v HMTQ and Aplin & Martin Consultants Ltd*, 2006 BCCA 503 at paras 3 and 4.

[24] While the drafting may leave something to be desired, such shortcomings as there are may readily be corrected by amendment, and I think it important to address the substance, rather than the form, of the pleading. This is why the law requires me to look at pleadings not just as they stand, but as they might reasonably be amended: *Kripps v Touche Ross & Co* (1992), 69 BCLR (2d) 62 at 68 (CA).

3.1.2 The significance of the requirement for leave

[25] Normally, the question that arises for consideration by a court is whether a third party notice should be struck out as failing to come within these enumerated grounds, or for other reasons, including that the claims disclose no reasonable cause of action, or are otherwise bound to fail. To quote again from *McNaughton*, at p 25:

> As a general proposition, a third party should not be required to adduce evidence in support of a pleading before trial…. It is sufficient that his pleading discloses a reasonable cause of action or defence. The courts take a liberal approach to pleadings. Before the courts will strike out a pleading or refuse an amendment on the ground that it discloses no reasonable cause of action or defence the case must be perfectly clear.

[26] In this case, the question is not whether a third party claim should be struck out, but whether Wolrige should be granted leave to pursue the proposed third party claim. This arises because Wolrige did not file its proposed third party notice within 42 days after being served with the notice of civil claim as it is now required by Rule 3-5(4). Only before that period expires can a third party notice be issued without leave.

[27] The requirement for leave raises additional considerations, as discussed in cases such as *Clayton Systems 2001 Ltd. v Quizno's Canada Corporation*, 2003 BCSC 1573, *The Owners, Strata Plan LMS 1751 v Scott Management Ltd*, 2010 BCCA 192, *Tyson Creek Hydro Corporation v Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741, aff'd 2014 BCCA 17, and *Hadland v Reems*, 2015 BCSC 115.

[28] These include questions such as prejudice to the parties, the expiration of any limitation period, the merits of the proposed claim, any delay in the proceedings and

the timeliness of the application. In *Scott Management* at para 90, the court noted that the fundamental question is whether greater injustice and inconvenience would arise from allowing the claim to continue as a third party proceeding, or from leaving it to be pursued as a separate future action. In *Tyson Creek*, Goepel J., then of this Court, observed at para 51 that in determining whether to grant leave, "the court must consider several factors including, most importantly, possible prejudice to the plaintiff".

[29] As I understand the law, the reference to consideration of the merits in this context relates not to a weighing of the evidence, but rather to whether, in the context of the litigation as it has developed to the date of the application, the proposed pleading discloses a reasonable cause of action that is properly related to the subject matter of the plaintiff's claim. Nevertheless, because the question is one of leave to include a third party claim, as opposed to proceeding with it separately, the situation is slightly different from where a claim is sought to be struck. The degree of merit may, I apprehend, be a factor in considering the fundamental question of balancing injustice and inconvenience, as discussed in *Scott Management*.

[30] Counsel for the plaintiffs submits that where these issues arise in the context of litigation that is considerably further advanced than is normally the case, after extensive document production, the completion of many days of examination for discovery, and many interlocutory applications, a closer examination of the merits is warranted.

[31] I do not see it quite the same way. The fundamental test remains the same: whether it is perfectly clear that the pleading discloses no reasonable cause of action. Where evidence developed during the course of the litigation makes it perfectly clear that a claim is bound to fail, or gives rise to a substantial impact on the balance of injustice and inconvenience, I accept that it would be appropriate and proportionate to take that into account; the matter then falls outside of the "general

proposition" referred to in *McNaughton* at p 25. But the state of the litigation cannot justify a weighing of the evidence to determine what is otherwise an arguable claim.

[32] The principal area of inquiry in determining this balance remains whether the result of the defendant's delay in bringing its proposed third party claim unfairly prejudices the other parties, as discussed in *Tyson Creek*.

3.2 The Claims

3.2.1 The proposed corporate third parties

[33] As against Conax Holdings/Convoy Supply, Wolrige asserts both a claim for indemnity, and a claim for damages. The claim for damages is twofold: damages for breach of contract in the form of the obligations undertaken by Conax Holdings in the engagement letters over the years in question, and damages for the tort of deceit. The damages claimed are formulated as a full indemnity of Wolrige's liability, if any, to the plaintiffs, but I take that to be the proposed measure of the damages, rather than the basis for recovery.

[34] In relation to the tort of deceit, it is important to remember that although the plaintiffs allege that Mr. Nanji deceived them, so that one might think of Conax Holdings' alleged deceit as being contributory to the loss claimed by the plaintiffs, the allegation in the third party notice is based not on any deceit of the plaintiffs, but on Conax Holdings' deceit of Wolrige in the context of their professional business relationship.

[35] The claim for indemnity is brought pursuant to the indemnity clause contained in the 2009-2012 letters of engagement, so that the *Negligence Act* is irrelevant. Section 4(2)(b) contemplates a different kind of indemnity, based upon joint and several liability. That is not what is alleged here. Rather, Wolrige alleges a direct contractual right to indemnity.

[36] There is nothing about the nature of these allegations that make them conceptually inappropriate for inclusion as third party claims in this action pursuant to Rule 3-5(1) in accordance with the principles discussed in *McNaughton*. They

arise out of a relationship between Wolrige and the proposed third parties that is central to the claim of the plaintiffs against Wolrige.

[37] The proposed third party claims against Conax Properties Ltd and Simplex Holdings Ltd., on the other hand, are problematic. The pleading does not disclose any basis upon which the appropriateness of these claims can be assessed. Counsel indicated that, in essence, these were contingent claims as Wolrige could not be sure whether certain issues would be pursued. As it stands, no claim is advanced against Wolrige with respect to the financial statements of these two companies, and nothing is alleged in the third party notice that would tie in Wolrige's relationship with them to what is claimed by the plaintiffs.

[38] It follows that there is at present no foundation for maintaining a third party claim against these proposed third parties. This lack is not a matter that can be cured by amendment, and on this basis, leave is denied in relation to the proposed third parties Conax Properties Ltd and Simplex Holdings Ltd.

[39] The respondents then assert that the proposed claims against Conax Holdings/Convoy Supply raise no reasonable cause of action. They point out that audit engagement letters for the years ending February 28, 2006 through February 28, 2009, did not contain any indemnity provisions. They note further that Wolrige's representative on discovery admitted that there was no engagement letter for the restated financial statements. Finally, they say that, on the evidence, there was no engagement letter for the statement ending December 31, 2011. On this basis, the respondents argue that any claim based upon breach of these purported agreements cannot succeed.

[40] In my view, this remains to be determined. There was an audit letter for the year that was scheduled to end on February 28, 2012. There was no new letter when that year end was changed to December 31, 2011, but Wolrige asserts, and is entitled to attempt to prove, that the same terms applied to the revised engagement by express or implied agreement. The same logic applies to the restated financial statements.

[41] Turning to the indemnity clauses, the respondents advance the same argument in relation to both those contained in the engagement letters with Conax Holdings, and the clause in the access agreement signed by Mr. Bindschedler and Mr. Voyer. That argument is that, in law, these claims are bound to fail because a party is not entitled to be indemnified against liability arising from its own negligence without express words or necessary implication: *Stanco Projects Ltd*; *Gertsen v Municipality of Metropolitan Toronto* (1974), 2 OR (2d) 560 (HCJ).

[42] Wolrige does not contest the legal principle, but maintains that this is a matter of contextual interpretation that will depend upon the evidence, so it cannot be said at this stage that its claims based on the indemnity clauses are bound to fail.

[43] As we shall see, the two forms of indemnity clause are quite different. I turn to the clause in the engagement letters from Conax Holdings, which reads:

> **Indemnification.** The Client hereby agrees to indemnify, defend by counsel retained and instructed by us, and hold harmless Wolrige Mahon from and against any and all losses, costs including solicitors' fees, damages, expenses, claims, demands or liabilities arising out of or in consequence of:
>
> (a) the breach by the Client, or its directors, officers, agents, or employees, of any of the covenants made by the Client herein…, and
>
> (b) the services performed by Wolrige Mahon pursuant to this Agreement, unless, and to the extent that, such losses, costs, damages and expenses are found by a court of competent jurisdiction to have been due to the negligence of Wolrige Mahon. In the event that the matter is settled out-of-court, we will mutually agree on the extent of the indemnification to be provided by the Client.

[44] The respondents submit that the proposed claim based on this clause is bound to fail because not only are there no express words that would entitle Wolrige to be indemnified against liability arising from its own negligence, but the clause specifically provides that Wolrige is *not* entitled to be so indemnified.

[45] I disagree. Arguably, the clause provides two separate bases for indemnity. The first is against claims arising out of the client's breach, which is what is alleged here. It is arguable that an indemnity under this clause even for losses arising from Wolrige's own negligence may be a matter of necessary implication. The second is

against claims arising out of services performed by Wolrige Mahon pursuant to the agreement. How the two interrelate is a matter for interpretation that will depend upon the surrounding circumstances. Only the second category is subject to an express exclusion based on Wolrige's negligence, but even then the exclusion arises only after a finding of negligence has been made by a court of competent jurisdiction. That has yet to occur.

[46] In these circumstances, I conclude that it cannot be said at this point that the pleading raises no reasonable claim.

[47] The final consideration is whether the delay in attempting to commence third party proceedings, requiring Wolrige to seek leave, unfairly prejudices the respondents.

[48] That these proposed third party proceedings were not commenced within 42 days of the notice of civil claim being filed is not something I find to be a matter for concern in the context of this very complex litigation, particularly given the significant amendments. Nor is the delay since that time.

[49] Wolrige gave notice of its intention to pursue a third party claim against the Convoy Group in December 2013, and shortly after the amendments to the notice of civil claim in April 2015, the parties entered into a Tolling Agreement pending the hearing of this application.

[50] Meanwhile, much time in this litigation, which has been under my management, has been occupied in lengthy interlocutory procedures, extensive examinations for discovery, and the production of copious documents on each side, often only after considerable prodding.

[51] Among the interlocutory procedures was an application concerning the proposed bifurcation of the trial, to which the parties eventually agreed. In addition, this action is to be tried together with an action brought by the plaintiffs against Mr. Nanji and others arising out of the alleged fraud. The respondents submit that the fundamental goal of avoiding a multiplicity of proceedings is not in play here

because the trial has already been bifurcated. It is not clear to me, however, that trifurcating the trial would improve matters, or reduce inconvenience.

[52] The first trial, which presently is expected to cover all issues other than the professional negligence of Wolrige (and so covering issues of duty of care and reliance, and the involvement of Mr. Nanji) is over a year away.

[53] In these circumstances, I can find no basis for concluding that unfair prejudice would result in permitting Wolrige to pursue its claims against Conax Holdings and Convoy Supply in third party proceedings, notwithstanding the delay involved. All of the parties involved will be participating in the trial, and will be dealing with the issues that give rise to the proposed third party claims.

[54] Accordingly, leave is granted to issue a third party notice against the proposed third parties Conax Holdings and Convoy Supply.

3.2.2 The proposed individual third parties

[55] I turn to the proposed claims against Mr. Bindschedler and Mr. Voyer.

[56] This is framed as a claim for breach of their obligations under the access letter. Wolrige says that it agreed to produce its working papers to Mallette, and to discuss its work with Mallette, only on condition that Mallette, Mr. Bindschedler and Mr. Voyer enter into an access agreement. That agreement included a requirement that Mr. Bindschedler and Mr. Voyer indemnify Wolrige against and hold it harmless from any claim by any third party arising as a result of permitting this access. Wolrige maintains that this requirement is triggered here by the plaintiffs' allegation that Wolrige made representations to Mallette upon which Soprema relied. But for the access agreement, Wolrige asserts, it would never have provided any information to Mallette that could possibly constitute a representation, thus triggering the indemnity clause.

[57] With respect to the application of the access letter, Wolrige pleads that:

> Commencing in or about March 2012, by agreement, express or implied, partly written and partly oral, as a result of a request by Mallette for further

> access to Working Papers, the parties expanded the application of the access agreement to Wolrige Information relating to fiscal years February 2007 to December 2011.

[58] Wolrige goes on to allege, in the alternative, that Mr. Bindschedler and Mr. Voyer are estopped from their conduct, and by the conduct of their agent Mallette, from denying this extended application of the access letter agreement. Wolrige further alleges breach by Mr. Bindschedler and Mr. Voyer of their duty to maintain confidentiality, leading directly to Soprema's claim based upon negligent misrepresentation.

[59] The respondents point out that the proposed third party notice neglects to mention that as a result of these breaches, Wolrige thereby suffered a loss, but this is a matter easily remedied by amendment. When viewed in the context of a series of allegations headed "Claims against Bindschedler and Voyer for breach of the Access Agreement", followed by the claims and losses described in the relief sought against those two proposed third parties in Part 2 of the proposed third party notice, the respondents are left in little doubt as to what is being claimed.

[60] For the reasons discussed above in relation to the claim arising out of the indemnity clauses in the engagement letters with Conax Holdings, I accept that the portion of this claim that relies upon the indemnity clause in the access letter appears to fall within the grounds enumerated in Rule 3-5(1). It is a claim for relief that relates to the alleged representations that are part of the subject matter of the action.

[61] The respondents maintain, however, that any claim based upon this indemnity clause is bound to fail in the circumstances here asserted. The relevant portion of the agreement, on the letterhead of Wolrige Mahon, provides:

> In connection with the review being undertaken by Mr. Bindschedler and Mr. Voyer of the property, management, business and affairs of the Convoy/Conax Group of Companies, they and Conax Holdings Ltd have requested that Mallette, who has been engaged by Mr. Bindschedler and Mr. Voyer, be granted access to the working papers prepared in connection with the audit of the February 28, 2010 & 2011 consolidated financial statements of Conax Holdings Ltd. We have received authorization from

> Mr. Bindschedler, Mr. Voyer and the other management of Conax Holdings Ltd to allow Mallette such access to working papers prepared in the course of our audit, except for the matters relating to audit planning and documentation process.
>
> …
>
> The audit, and the working papers prepared in connection with it, and responses to Mallette's questions, should not be used as a substitute to other inquiries and procedures that should be undertaken for the purpose of forming an opinion regarding Conax Holdings Ltd's financial condition, or for any other purpose in connection with the transaction described above.
>
> …
>
> Mr. Bindschedler and Mr. Voyer also agree to indemnify and hold harmless our firm and personnel from any claim by Mallette or any other third party that arises as a result of our permitting access to the working papers in connection with this transaction.

[62] In my view, the respondents' position has merit. This part of Wolrige's proposed third party claim does not advance a reasonable claim in the context of this litigation.

[63] First, on its face, the access letter does not extend sufficiently far to support all of the allegations based upon it. Wolrige alleges, without the support of any material facts, that the application of the access letter agreement was expanded to cover additional information beyond what is specified in the letter. I would not find the claim unreasonable on this ground alone because Wolrige is not obliged to support its allegations with evidence at this stage (before trial). Nevertheless, the baldness of the allegation, unsupported by material facts, raises a question.

[64] Second, there is the problem of the nature of the indemnity claimed. Essentially, Soprema's claim is that Wolrige negligently represented to Mallette and to Soprema that the audit in question was accurate and reliable, and that Wolrige intended and expected that this would be communicated to, and relied upon by, Soprema. It seems to me an unreasonable stretch to suggest that such a claim arises from Wolrige's permitting access to its working papers as described in the agreement.

[65] Third, the indemnity clause neither expressly extends to claims arising from Wolrige's own negligence, nor would it appear to do so by necessary implication given the limitation of the clause to claims resulting from the permitting of access, as opposed, for instance, to the provision of advice.

[66] Consequently, in order to succeed, this indemnity claim requires an interpretation of the agreement that: extends it to cover information beyond that specified in it; expands its application beyond liability related to the provision of information (working papers); and imports by necessary implication an extension of the indemnity that the agreement simply does not support. I conclude that in these circumstances, it is sufficiently clear that the proposed claim against Mr. Bindschedler and Mr. Voyer fails to raise a reasonable cause of action.

[67] Even if I am wrong in that, I cannot see that the conduct of this litigation will be advanced by including in it this aspect of the claim. I discuss this further below.

[68] The claim against Mr. Bindschedler and Mr. Voyer for breach of the duty of confidentiality imposed by the latter is also problematic. That claim arises out of the following clause in the access letter:

> Further, Mr. Bindschedler and Mr. Voyer agree that, except as required by law, the information acquired as a result of this review of the working papers will be kept confidential and will be used by them and those acting on their behalf only in connection with Mr. Bindschedler's and Mr. Voyer's duties and responsibilities as directors of the Convoy/Conax Group of Companies.

[69] Wolrige alleges, in essence, that Mr. Bindschedler and Mr. Voyer breached the obligation of confidentiality imposed by the access letter by taking information they obtained as directors of the Convoy Group pursuant to the access agreement, and disclosing it to Soprema. Given that they were Soprema's nominees on the Convoy Group board, and had retained Mallette to advise them separately for this very reason, it is difficult to understand this claim. The actual pleading does not assist:

> In breach of the Access Agreement, Bindschedler and Voyer did not maintain confidentiality over Wolrige Information but rather facilitated the use of such Wolrige Information by strangers to the Access Agreements, namely the

> plaintiffs, for a purpose patently outside of the permitted purpose of the Directors' Review.

[70] But apart from that difficulty, I cannot see that this claim properly relates to anything alleged by the plaintiffs against Wolrige. It relates neither to the representations described in the amended notice of civil claim as the "2012 Audit Representations", nor to those described as the "Soprema Representations" allegedly made on July 5, 2012, neither of which arose from information acquired pursuant to the access agreement. As to what the notice of civil claim describes as the "Mallette Representations", these are by definition representations that Wolrige made with the intention and expectation that they would be communicated to Soprema and relied upon by Soprema. As such, no expectation of confidentiality could arise.

[71] This raises questions not only of whether the claim falls within the enumerated grounds for a third party claim, but also whether it raises a reasonable cause of action, and whether greater injustice and inconvenience would arise from allowing the claim to continue as a third party proceeding, or from leaving it to be pursued as a separate future action.

[72] These claims were first raised in July 2015, considerably more than 42 days after filing of the amended notice of civil claim that raised the representations that these allegations are intended to address. Much discovery had already taken place, and the allegations focus on an aspect that is at best tenuously connected to the plaintiffs' claim against Wolrige. In my view, these proposed third party claims constitute nothing more than a sideshow that is best left to separate proceedings if they are to proceed at all.

[73] I conclude that the combined effect of these problems is that leave must be denied for these proposed claims.

[74] Accordingly, leave is denied in relation to the proposed third party claims against Mr. Bindschedler and Mr. Voyer.

3.3 Conclusion on the Proposed Third Party Claims

[75] Leave to commence third party proceedings against Conax Holdings and Convoy Supply is granted.

[76] Leave to commence third party proceedings against Conax Properties, Simplex Holdings, Mr. Bindschedler and Mr. Voyer is denied.

[77] The parties are to schedule a case management conference for this case and for the *Nanji* action, in order to deal with the trial of the third party claims in the context of the current trial schedule.

4.0 WAIVER OF PRIVILEGE

4.1 The Scope of the Application

[78] On this application, Wolrige seeks an order requiring the plaintiffs to disclose approximately 250 documents that the plaintiffs maintain are subject to solicitor-client privilege.

[79] Wolrige has focused its application on documents generated between May 28, 2012 and July 13, 2012. This period starts just before the date of the alleged representations that the plaintiffs allege Wolrige made to Mallette and Soprema concerning the reliability of its audit of Conax Holdings' February 28, 2011 and December 31, 2011 financial statements. It ends just after the date on which Soprema exercised its option to purchase the Nanji Group's shares in the Convoy Group. It includes a particularly crucial period around July 5, 2012, the date on which Mr. Bindschedler has given evidence that he spoke by telephone to Mr. Smiley of Wolrige, and received advice upon which he relied in deciding days later to exercise the option.

[80] The point, says Wolrige, is that these documents all relate to Soprema's state of mind at the crucial time when it alleges that it relied upon representations from Wolrige. Wolrige maintains that Soprema did not rely on anything it had to say, and if it did, it did so unreasonably. Wolrige cannot fairly test the extent or reasonableness of Soprema's reliance, it says, unless it has access to documents concerning the

advice received by Soprema from all the advisers it retained in carrying out its due diligence before deciding to exercise the option.

[81] Some documents, by way of example, relate to legal advice Soprema received at the relevant time in relation to a potential claim against Wolrige. Depending upon the nature of that advice, Wolrige contends, it may indicate that Soprema had no business relying on Wolrige.

[82] Some of the other documents relate to communications between Soprema and Mallette, but privilege is maintained on the basis that they were generated for the purpose of being placed before Soprema's legal advisors. Ironically, when Mallette was separately represented (it is now represented by counsel for the plaintiffs) it disclosed some of these documents, but now takes the position that the disclosure was made in error. How, Wolrige asks, can it fairly explore the extent to which Soprema relied upon Mallette and other advisors, as opposed to Wolrige, when the net of privilege is cast so widely?

[83] In these circumstances, Wolrige submits, first, that Soprema's assertion of privilege is too broad, and second, to the extent that it has established privilege over the documents in question, Soprema must be taken to have implicitly waived that privilege by placing its state of mind squarely in issue.

[84] The parties agree that the onus falls upon Soprema and Mallette to establish that the communications in question meet the requirements of solicitor-client privilege. Once they have done so, the onus falls upon Wolrige to establish that the communications should nevertheless be disclosed.

4.2 The Claim of Privilege

[85] In response to this application, Soprema (supported by Mallette) withdrew claims of privilege made with respect to 15 of the documents, deleted a further 53 documents from its list as being duplicates of other privileged documents, and filed the affidavit of Mr. Hugo Belisle in support of its claim for privilege over the remaining documents. All fall within the relevant time frame.

[86] Mr. Belisle is a member of the Québec bar and is the corporate services manager and general counsel for Soprema. He joined Soprema in September 2010 as corporate counsel, providing legal advice and services to the Company, as well as to Mr. Bindschedler and Mr. Voyer. He became general counsel on November 12, 2012.

[87] In his thorough and very helpful affidavit, Mr. Belisle identified the various parties whose names appear in the documents in three groups. The first is Soprema personnel, including Ms. Alma Garnett, who provided advice to Soprema with respect to its potential acquisition of the Nanji Group's 50% interest in the Convoy Group, and later became CEO of the Convoy Group, replacing Mr. Nanji.

[88] The second is external legal counsel, including Clark Wilson LLP in Vancouver, O'Melveny & Myers LLP in California, and Réjean Roy in Québec City.

[89] The third group is Mallette personnel. According to Mr. Belisle, Mallette was a confidential advisor subject to an express contractual duty of confidentiality, and in that capacity was authorized by Soprema to request and receive legal advice from Mr. Belisle and from external counsel on issues affecting Soprema, and to participate in confidential communications concerning such legal advice. In this way, Soprema argues, Mallette would be either a "conduit" for the passing of advice between solicitor and client, or an "interpreter" for the benefit of counsel. Such claims to solicitor-client privilege over third party communications are discussed very helpfully by Doherty J.A. in *General Accident Assurance Co v Chrusz* (1999), 180 DLR (4th) 241 at 276-279 (Ont CA).

[90] Mr. Belisle goes on to describe the documents in question. The first subset comprises "communications with outside counsel". Some of these do not list any outside counsel as author or recipient but are either authored by Mr. Belisle or were received by him, while approximately nine others showed no involvement of either Mr. Belisle or outside counsel.

[91] Mr. Belisle deposes that these were (1) communications made for the purpose of requesting or receiving confidential legal advice for Soprema, or providing information to be used by external counsel in providing confidential legal advice to Soprema, or (2) communications between Soprema and/or Mallette personnel forwarding and/or discussing confidential legal advice received or to be sought from the external counsel. He then set out a number of legal issues, one or more of which, he deposed, were addressed by these communications.

[92] The second subset comprises “in-house counsel documents”. These mostly consist of communications involving Mr. Belisle, but some do not show him as either offering or receiving them. Mr. Belisle deposes that these were (1) communications between personnel at Soprema and/or Mallette and Mr. Belisle for the purpose of requesting or receiving confidential legal advice for Soprema, or for providing information to be used by Mr. Belisle in providing confidential legal advice to Soprema, (2) confidential communications between Soprema and/or Mallette forwarding and/or discussing confidential legal advice received from Mr. Belisle, or (3) confidential communications with others for the purpose of obtaining confidential appraisal information for the purpose of legal advice being provided by Mr. Belisle to Soprema. Once again, Mr. Belisle sets out the “legal issues affecting Soprema” with respect to which he provided such confidential legal advice. These include “potential claims against… Wolrige, and others”.

[93] The third subset consists of 30 documents grouped under the heading “internal privileged documents” which were neither authored nor received by legal counsel. According to Mr. Belisle, these consist of confidential communications (1) between personnel within Soprema and/or Mallette made for the purpose of identifying or discussing information to be provided to legal counsel so that it could be incorporated into legal advice to be provided to Soprema, and discussing legal advice that had been provided to Soprema; and (2) between Soprema and/or Mallette personnel and a real estate appraiser instructing and obtaining confidential information from him for the purpose of confidential legal advice being provided to Soprema.

[94] An outline of the legal issues addressed in these documents is again provided, and include the financial affairs of the Convoy Group; valuation of the Convoy Group's properties; the reserves improperly kept by the Convoy Group; overcharging of Soprema by the Convoy Group; and the valuation of the shares of the Convoy Group.

[95] Wolrige submits that I should review at least this last group of 30 documents, which are essentially staff communications that did not involve legal counsel as author or recipient, in order to assess the validity of Soprema's claim of privilege. Such a review is permitted by Rule 7-1(20), but should generally be undertaken only where the affidavit evidence leaves the court in doubt: *Keefer Laundry Ltd v Pellerin Milnor Corp*, 2006 BCSC 1180 at para 73-75.

[96] In asserting privilege, Soprema relies upon the third party communications and "continuum of communications" principles discussed the *General Accident* case and in cases such as *Camp Development Corporation v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras 40-44. In *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 892-893, Lamer J. explained it this way:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or what the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[97] The party seeking to establish the privilege must always walk a fine line between disclosing too little information about the communications, and disclosing so much that the benefit of the privilege is effectively lost.

[98] In this case, the affidavit of Mr. Belisle goes about as far as is possible. It satisfies me that the "external counsel documents" and the "in-house counsel documents" are privileged as having been made with a view to obtaining legal

advice, developing information to assist in obtaining legal advice, or to discuss legal advice, all within the context of a corporate client that has retained confidential advisors. I except from this finding the nine documents described as “external counsel documents” which do not involve any external or internal counsel: SO1015259.000001, SO1015270.000001, SO1015276.000001, SO1015293.000001, SO1015656.000001, SO1015717.000001, SO1015722.000001, SO1015766.000001, and SO1015784.000001.

[99] Like those nine documents, the third subset, “internal privileged documents”, is less clear. To the extent these communications constitute internal discussions of legal advice provided by Mr. Belisle or external counsel, then I accept that privilege has been established. But to the extent they identify or discuss information that is ultimately provided to legal counsel for incorporation into legal advice, it is not clear that those involved in the communications are simply conduits between solicitor and client, as they must be, acting solely for the purpose of developing information to facilitate the advice. For instance, information or advice provided by Mallette to Soprema as part of its retainer does not become privileged by reason of Soprema ultimately forwarding it to counsel for advice--unless, of course, Soprema requested the information specifically for that purpose. As noted in *General Accident* at 277-278, “communications to or by a third party are not protected by client-solicitor privilege merely because they assist the solicitor in formulating legal advice for client”.

[100] Accordingly, I conclude that Soprema has established privilege for all of the documents in question other than the nine specified documents and the documents in the last subset, called “internal privileged documents”, insofar as these documents (including the nine) do not consist of internal discussions of legal advice received. Soprema is to produce any such documents to me for review within 28 days of these reasons.

4.3 Has Privilege Been Implicitly Waived?

[101] In *Do Process LP v Infokey Software Inc*, 2015 BCCA 52, Newbury J.A., for the majority, stated:

> [1] It is a well-established principle of law that "when a party makes its state of mind material to its claim or its defence in such a way that to enforce [solicitor-client] privilege would be to confer an unfair litigation advantage on the party claiming it", the privilege will be considered waived: see *Doman Forest Products Ltd v GMAC Commercial Credit Corp-Canada*, 2004 BCCA 512 at para 12.

The key words are "in such a way".

[102] In *Doman*, the court said this:

> [28] Further, on the question of postponement of the election, it is not enough to constitute a waiver that Doman's pleading puts it state of mind in issue and that its state of mind might have been influenced by legal advice, as the chambers judge concluded. There must be the further element that the state of mind involves Doman's understanding of its legal position in a way that is material to the lawsuit. In other words, it must appear from the pleading that legal advice would be relevant to the particular state of mind putting issue.

[103] In the present case, Wolrige submits that enforcing Soprema's assertion of privilege confers on Soprema an unfair litigation advantage given its allegation of reliance on a set of alleged representations that Soprema says Wolrige negligently made. As a matter of fairness and consistency, argues Wolrige, waiver should be implied even in the absence of an intention to waive. Where, contextually, Soprema was undertaking "due diligence" in the process of deciding whether to exercise its option, and has thrown a cloak of privilege over the communications it had at the crucial time with its advisors, both legal and otherwise (on the basis that the non-legal advisors were contributing information for the purpose of obtaining legal advice), Wolrige is greatly prejudiced by its inability to probe the advice Soprema received from those other advisors. All of that advice goes to Soprema's state of mind when it says it reasonably relied on Wolrige.

[104] Soprema counters that Wolrige seeks to expand this encroachment on privilege well beyond the limits to which the courts have sought to confine it. It is not

enough, contends Soprema, that its state of mind is in issue on the pleadings. Waiver arises only if the state of mind put in issue in the pleadings relates to Soprema's understanding of its legal position (see the passage quoted from *Doman*), so that fairness and consistency require a waiver of privilege concerning the legal advice relating to that legal position. Thus in *Do Process*, a claim upon an agreement, the defendants pleaded that the agreement was signed "under duress, without legal advice and without any or adequate consideration" so that it was unenforceable. This pleading put the defendants' understanding of their legal position squarely in issue.

[105] That is not so in this case, asserts Soprema. What is missing is anything in the pleadings that makes Soprema's understanding of its legal position relevant.

[106] The difficulty presented by this case is that, contextually, it is much wider in scope than most of the cases that discuss these principles. It is not a question like *Do Process* or *Doman* of a discrete piece of advice that may or may not relate to the issues raised. The pleadings raise Soprema's state of mind in the form of reliance on professional advice in the context of a complex decision that had a great deal of input. Correspondingly, the assertion of privilege does not relate to discrete solicitor-client communications, but to a wide range of communications with different advisors that have at least some relevance, or they would not have been listed.

[107] Underlying all of the cases is the key question of whether the legal assertions of the party asserting the privilege make it unfair for that party to retain the benefit of the privilege: see *Do Process* at para 23. Only in such circumstances will waiver be implied. But must those assertions relate specifically to the party's understanding of its legal position?

[108] In *Rogers v Bank of Montreal* (1985), 62 BCLR 387 (CA), the bank put its defaulting customer into receivership. The customer then sued the bank and the receiver for damages for wrongful appointment of the receiver, and the receiver claimed indemnity from the bank in third party proceedings. In its defence to the receiver's claim, the bank pleaded that it relied on the receiver's advice as to the

timing of the demand for payment and the lawfulness of the appointment. When the receiver demanded discovery of documents relating to legal advice the bank had received from its lawyers concerning the demand and the appointment, the bank asserted privilege. The court noted that by claiming reliance on the advice of the receiver, it became necessary to enquire into the corporate state of mind of the bank when it was induced and decided to act. The privilege was accordingly waived.

[109] Wolrige argues that this logic applies here. By claiming reliance on the advice of Wolrige, Soprema has made it necessary to inquire into its corporate state of mind at the time it says it was induced and decided to act. Soprema responds that this case supports its position, because the bank in *Rogers* had put in issue its knowledge of the law that was at the heart of the dispute.

[110] In *Allarcom Limited v Canwest Broadcasting Corporation* (1987), 19 BCLR (2d) 167 (SC), the plaintiff brought an action for specific performance of an agreement. The defendants pleaded, amongst other things, that they had relied to their detriment on certain conduct of the plaintiff, that the plaintiff knew of such reliance, and therefore was estopped from alleging that it was entitled to rely on certain provisions of the agreement. Gibbs J stated at 170:

> The plaintiff contends that, having put their state of mind in issue by pleading that they relied upon the plaintiff's conduct to their detriment, the defendants cannot now raise the barrier of solicitor-client privilege to prevent the plaintiff from showing that the defendants had advice and opinions which effectively negate the allegation of reliance upon the plaintiff's conduct. On the authority of the Court of Appeal in *Rogers v Bank of Montreal*…the plaintiff is on solid ground.

[111] Once again, it would appear at least arguable that the "state of mind" in issue in *Allarcom* related to the parties' legal position under the agreement. In this case, Soprema submits, its allegation that it relied on Wolrige's representations that it carried out an audit and was satisfied as to the accuracy of the audit has nothing to do with any legal advice or Soprema's understanding of its legal position.

[112] There is no doubt that, as we have seen, the cases that raise this issue tend to concern advice received about a party's legal position, made relevant by the

pleadings. Is it only in those circumstances that a party makes its state of mind material "in such a way" that to enforce the privilege would be to confer an unfair litigation advantage? Or is that just the way the issue arose?

[113] To assist in resolving this conundrum, I find two recent cases from Ontario helpful. The first is *Creative Career Systems Inc v Ontario*, 2012 ONSC 649, upon which Soprema relies, while the second is *Roynat Capital Inc v Repeatseat Ltd*, 2015 ONSC 1108, which is emphasized by Wolrige.

[114] *Creative Career Systems* involved a claim by a private career college against the provincial government for negligence, misfeasance in public office, and unlawful interference in contractual relations, essentially for refusing to register several campuses of the plaintiff. The allegations included one that the government had acted in bad faith. After individual defendants testified on discovery that they had obtained legal advice before acting on the plaintiff's applications, the plaintiff sought discovery of that advice, alleging implied waiver. In considering waiver, the court stated:

> [25] A party will be deemed to have waived privilege on grounds of fairness and consistency when he or she makes their communication with a lawyer an issue in the proceeding: *Bank Leu AG v. Gaming Lottery Corp.* (1999), 43 C.P.C. (4th) 73 (Ont. S.C.J.) at p. 77, affd. (2000), 132 O.A.C. 127 (Div. Ct.); *Leadbeater v. Ontario*, *supra* at para. 32; *Guelph (City) v. Super Blue Box Recycling Corp.* 2004 CanLII 34954 (ON SC), [2004] O.J. No. 4468 (S.C.J.) at paras. 77-100.
>
> [26] Thus, if a party places its state of mind in issue with respect to its claim or defence and has received legal advice to help form the state of mind, privilege will be deemed to be waived with respect to such legal advice: *Bank of Leu AG v. Gaming Lottery Corp*. [1999] O.J. No. 3949 (S.C.J.) at paras. 5-11; *Toronto Dominion Bank v. Leigh Instruments Ltd.* (1997), 1997 CanLII 12113 (ON SC), 32 O.R. (3d) 575 (Gen. Div.); *Woodglen & Co. v. Owens* (1995), 1995 CanLII 7070 (ON SC), 24 O.R. (3rd) 261 (Gen. Div.); *Lloyd's Bank of Canada v. Canada Life Assurance Co*. (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.).
>
> [27] There is, however, a subtle and profound point here about when a party must answer questions about the occurrence of legal advice in the factual narrative of a case. The subtle and profound point is that there is no waiver of the privilege associated with lawyer and client communications from the mere fact that during the events giving rise to the claim or defence, the party received legal advice, even if the party relied on the legal advice during

> the events giving rise to the claim or defence. For a party to have to disclose the legal advice more is required.
>
> [28] In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2004 BCCA 512 (CanLII), a case about whether privilege associated with legal advice had been waived, Justice Smith points out at para. 28 that it is not enough to constitute waiver that a pleading puts a party's state of mind in issue and that its state of mind might have been influenced by legal advice, there must be the further element that the state of mind involves the party understanding its legal position in a way that is material to the lawsuit. In other words, the presence or absence of legal advice itself must be material to the claims or defence to the lawsuit. The materiality of the legal advice to the claims or defences in the law suit makes questions about it relevant.
>
> [29] But the materiality of the legal advice, while necessary to make questions about it relevant, is still not sufficient to justify the compelled disclosure of the legal advice. To justify a party being required to answer questions about the content of privileged communications, the party must utilize the presence or absence of legal advice as a material element of his or her claim or defence. The waiver of the privilege occurs when the party uses the receipt of legal advice as a material fact in his or her claim or defence. While the waiver is a deemed waiver, it requires the intentional act that the party makes legal advice an aspect of his or her case. In *Simcoff v. Simcoff*, 2009 MBCA 80 (CanLII), Justice Steel made the point neatly at para. 27, where he stated:
>
> > 27. However, a mere reference to the receipt of legal advice does not constitute waiver. Waiver must involve something more. It requires not simply disclosing that legal advice was obtained, but pleading reliance on that advice for the resolution of an issue.
>
> [30] Thus, a deemed waiver and an obligation to disclose a privileged communication requires two elements; namely: (1) the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence; which is to say that the presence or absence of legal advice is material to the lawsuit; and (2) the party who received the legal advice must make the receipt of it an issue in the claim or defence.
>
> [Emphasis original.]

[115] It is material to note, contextually, that this case involved questions raised on discovery where the existence of legal advice was first disclosed.

[116] This judgment was considered by the Divisional Court in the *Roynat* decision, a case involving waiver of privilege in the context of a claim of negligent misrepresentation, like this case. There, however, the alleged misrepresentation was by a lawyer who was an associate at the firm, Blakes, acting for the defendants.

[117] The court began by setting out the parameters of privilege, which apply with equal force here:

> [1] Solicitor client privilege is a cornerstone of our Justice system. It is a substantial civil and legal right that has been elevated to a class privilege and a principle of fundamental justice [citations omitted]. However, solicitor client privilege is not absolute and is subject to exceptions when it is deemed to have been waived.

[118] It then reviewed the decision under appeal:

> [5] Reversing the decision to have Master Brott, Greer J. ordered the plaintiffs to answer the refused questions concerning the legal advice they received concerning the alleged misrepresentation. She concluded that the plaintiffs placed their state of mind in issue by claiming that they relied upon a representation made by Blakes. The plaintiffs were deemed to have waived solicitor client privilege for the legal advice that they received, as the principles of fairness and consistency require that the questions be answered to allow Blakes and the associate to adequately defend against the plaintiffs' reliance claim.
>
> [6] Corbett J. granted leave to appeal, questioning the legal analysis of the motions judge and raising concerns about inconsistent legal precedents.

[119] The court went on to consider a number of cases, including *Rogers* and *Allarcom*, as well as *Creative Career Systems*, and appeared to limit the application of *Creative Career Systems*:

> [54] The rule that a pleading of reliance may invite waiver has been considered and applied not only in British Colombia [*sic*] and Ontario, but also in Saskatchewan and Alberta. In *International Minerals & Chemical Corp. v. Commonwealth Ins. Co.* (1992), 1992 CanLII 8153 (SK QB), 104 Sask. R. 216, [1992] S.J. No. 451 (Sask. Q.B.), the Saskatchewan Court of Queen's Bench adopted the rulings in *Rogers* and *Allarcom* and held that when the pleading places in issue reliance, "[t]he sanctity of solicitor client privilege must yield to full disclosure in this situation." Similarly, in *Sovereign General Insurance Co. v. Tanar Industries Ltd.*, 2002 ABQB 101 (CanLII), [2002] A.J. No. 107, the Alberta Court of Queen's Bench reviewed and adopted the principles outlined in *Leigh Instruments* and other cases. The Court confirmed that potential instructions provided to counsel in the context of a claim of reliance were highly relevant and should be disclosed to the opposing party.
>
> **Conclusions as to the law**
>
> [55] The cases relied upon by the defendants demonstrate a lengthy, clear, and consistent line of authority upon which the motions judge appropriately relied.
>
> [56] In both *Creative Career Systems* and *Super Blue Box*, the Court confirms that in the context of a claim involving potential bad faith, or a

challenge to good faith, a person cannot rely on legal advice to bolster his or her claim of good faith, or to refute a claim of bad faith, without disclosing the contents of the advice received. This makes perfect sense. However, where a party does not rely on the receipt of legal advice to support his or her claim to have acted in good faith, there is no implied waiver of solicitor client privilege. The adverse party is not entitled to disclosure of the content of the legal advice received if the party has not put that advice in issue.

[57] In the circumstances of both *Creative Career Systems* and *Super Blue Box*, the parties placed no reliance on the legal advice received to support their claim of good faith. Therefore, implied waiver did not apply and the opposing party was not entitled to disclosure of the legal advice given. Further, in *Creative Career Systems*, Perell J. concluded that the legal advice sought was not relevant to the matters in issue.

[58] I am of the view that the principles at para. 30 of *Creative Career Systems* can be adapted to appropriately apply to this negligent misrepresentation claim and the question of reliance. Applying the two step test, this negligent misrepresentation claim advanced by the plaintiffs makes (1) the presence of legal advice relevant to the plaintiffs' allegation of reliance; and (2) the party who received the legal advice [in this case the plaintiffs] made the receipt of the legal advice an issue in this claim as the plaintiff must prove that relying on the defendants' alleged representations was reasonable. If Cassels provided the plaintiffs with legal advice on this issue to the contrary to the position alleged in this claim, the plaintiffs' reliance would not be reasonable.

[59] The line of cases relied upon by the defendants confirms that there are limited circumstances where waiver of solicitor client privilege may apply: if a party places its state of mind in issue, alleges reliance on representations made by the adverse party, and obtained legal advice with respect to that representation. I do not read *Creative Career Systems* as inconsistent with this analysis. Alternatively, I agree with the defendants' argument that *Creative Career Systems* was dealing with a different issue, and therefore the two step test outlined in para. 30 of that decision needs to be interpreted to be consistent with established law.

[120] In upholding the waiver found by the chambers judge, the court concluded:

[84] The principles of fairness and consistency temper and guide when waiver of privilege is deemed to occur. Whether fairness and consistency require implied waiver of privilege is case specific and factually dependent. The court provides an important gatekeeper function to avoid inappropriate requests for disclosure, balancing fairness with the importance of solicitor client privilege. Deemed waiver and disclosure will be limited to circumstances where the relevance of the evidence in question is high, and the principles of fairness and consistency require disclosure to allow a party to adequately defend.

[85] Turning to the facts of this case, the evidence confirms the solicitors for both parties were actively involved with each other for the purpose of closing the transaction. The examination of Traves confirms multiple

> discussions between the plaintiffs and Cassels during this hectic period, "10 to 20 times per day." The plaintiffs purport to rely on one email from the Associate on the day of closing that is, in the context of the transaction, capable of different interpretations. Blakes had made it clear in writing on two occasions that it would not be certifying or confirming the raising of the Equity Funds. Traves chose to contact the Associate directly on the date of closing concerning the Equity Funds, apparently after speaking to his counsel.
>
> [86] It can be readily inferred from these unusual factual circumstances that the alleged representation by Blakes in the email from the Associate on the date of closing would have been considered by the plaintiffs lawyers, Cassels and would have been the subject of discussion between Cassels and their clients. These factual circumstances demonstrate some nexus between Cassel's advice and the plaintiffs' alleged state of mind of detrimental reliance on Blakes' statement.

[121] After considering these authorities, I am unable to agree with Soprema's position that waiver cannot be implied unless it has, by its pleadings, put its understanding of its legal position squarely in issue. What matters, as I understand the authorities, is whether Soprema has put its state of mind in issue in a manner that makes the privileged communications in question highly relevant to that state of mind, in that there is a clear nexus between the two. It is that nexus, that relevance, that implies the waiver, where required by fairness and consistency. As the court noted in *Roynat*, this question is case specific and factually dependent.

[122] On the specific facts of this case, I am satisfied that an implied waiver does arise, and is required by fairness and consistency. This is because by alleging reliance on the representations of Wolrige, which of necessity must be reasonable reliance, Soprema has put its state of mind in issue "in such a way" as to make the privileged communications it received concerning its decision highly relevant. The question is not its understanding about its legal position *per se*, but rather upon what basis it decided to act when it was allegedly induced to act. The types of privileged communications outlined by Mr. Belisle, including advice from Mallette and others concerning the decision, are of significant importance to this issue. To leave Wolrige to defend the allegations of reliance without access to these communications would confer an unfair litigation advantage on Soprema.

4.4 What is the extent of the waiver?

[123] It does not follow from this conclusion that there is an implied waiver of all privileged communications over the time in question. As the court stated in *Roynat*,

> [83] Deemed waiver of privilege to allow a party to defend is not a waiver of all privileged communications, but only those communications relevant to the issue of reliance.

[124] Wolrige submits that it has addressed the issue of potentially inappropriate requests for disclosure, "balancing fairness with the importance of solicitor client privilege", by limiting its request temporally. It maintains that no further circumscription of its request should be imposed, because one cannot tell from the document descriptions which of them may contain relevant and helpful information. But the question is not what helpful information they may contain, but to what extent they are relevant to the issue of Soprema's reliance. A number of the subjects covered by the communications in question, as outlined by Mr. Belisle, would clearly have no relevance to what Soprema relied upon, and the reasonableness of its reliance, in deciding to exercise its option.

[125] It follows that a more surgical approach is both required in law and justified on the evidence. That is the essence of the "gatekeeper function" referred to in *Roynat*. The extent of the waiver that fairness and consistency require in this case is confined, as I see it, to those privileged communications generated between May 28 and July 13, 2012, that concern or discuss:

- the receipt, extent and content of the information received by Soprema or its advisors that is alleged to constitute what are defined in the amended notice of civil claim as the "2012 Audit Representations", the "Soprema Representations" and the "Mallette Representations" (collectively, the "defined representations");

- the understanding of Soprema or its advisors of the nature and reliability of the information received from Wolrige concerning the defined representations;

- the basis upon which Soprema exercised its decision to exercise its option;

- what reliance Soprema should, could or did place upon the defined representations;

- whether Wolrige had acted negligently in relation to the information that was the subject of the defined representations, or in a manner that raised concerns about the accuracy and reliability of such information; and

- the factors taken into account, or which should be taken into account, by Soprema in deciding whether to exercise its option.

[126] Any such documents should be produced within 35 days.

5.0 CONCLUSION

[127] Wolrige has leave to file a third party notice against the proposed third parties Conax Holdings and Convoy Supply. Wolrige should amend its proposed third party notice to comply with these reasons.

[128] Wolrige's application for leave to file a third party notice against the proposed third parties Conax Properties, Simplex Holdings, Mr. Bindschedler and Mr. Voyer is dismissed.

[129] The parties are to schedule a case management conference for this case and for the *Nanji* action, in order to deal with the scheduling of the trial of the third party claims in the context of the current trial schedule.

[130] Wolrige's application for the production of documents over which the plaintiff Soprema and the third party Mallette claim privilege is allowed in part. The respondents are to produce for my inspection the documents described in paras 98 through 100 of these Reasons within 28 days. The respondents are deemed to have

waived privilege over the communications described in para 125 of these Reasons, and are to produce any such documents to Wolrige within 35 days.

[131] Wolrige is entitled to its costs in the cause.

GRAUER, J.