

June 28 2013

In the Matter of an Application Under Rule 11(c) of the *Rules of Procedure* of the
Elliot Lake Commission of Inquiry

BETWEEN

The Elliot Lake Commission of Inquiry

Applicant

and

Paul Mand

Respondent

and

The Elliot Lake Commission of Inquiry

Applicant

and

Eastwood Mall Inc., Robert Nazarian, Irene Nazarian and Levon Nazarian

Respondents

Goudge J.A.:

[1] The Elliot Lake Commission of Inquiry was established on July 19, 2012 under the *Public Inquiries Act 2009*, S.O. 2009, c. 33, Sched. 6.

[2] Rule 11 of its *Rules of Procedure* addresses the procedure for asserting and determining claims of privilege for documents sought by Commission Counsel. It reads:

Where a participant or summons recipient objects to the production of any document, or part thereof, on the grounds of privilege, pursuant to subsection 8(3) of the Act, the following procedures will apply:

a. The participant or summons recipient shall deliver to Commission Counsel a list setting out pertinent details of the document(s), or part thereof, over which claims for privilege are being asserted. This shall include the date, author, recipient and a brief description of the document(s), and may include additional material, such as an affidavit, to support its claims;

b. Commission Counsel shall review the list and decide if they will recommend to the Commissioner that he accept the claim for privilege;

c. If Commission Counsel are not prepared to recommend to the Commissioner that he accept the claim for privilege, the list and any further material file by the participant or summons recipient shall be submitted forthwith, together with Commission Counsel's written submissions, to the Commissioner or, at the Commissioner's option, to the Honourable Stephen T. Goudge, Justice of the Ontario Court of Appeal, for

determination. If the Commissioner or Justice Goudge is unable to make a determination based on the record before them, they may request a copy of the disputed document(s) for inspection; and

d. If the claim for privilege is dismissed, the document(s) shall be produced to Commission Counsel forthwith.

[3] Pursuant to that Rule, two applications have been made to me by Commission Counsel. The first concerns documents in the possession of the respondent Paul Mand, the managing partner of Mand Rai LLP Lawyers, formerly the lawyers for the Algo Centre Mall and for Eastwood Mall Inc., owners of the Algo Centre Mall at the time of the collapse. The second application concerns documents in the possession of the respondents Eastwood Mall Inc., its President Robert Nazarian, his wife, Irene Nazarian and his son, Levon Nazarian, who worked for Eastwood Mall Inc.

[4] For each application, I have received and reviewed Application Records and a Factum and Reply Factum of Commission Counsel, and a responding Application Record from the respondents.

[5] The legal principles I propose to apply in making my determination of these applications are straightforward and uncontested:

- a. The party asserting the privilege must establish an evidentiary base for it.

- b. Solicitor-client privilege applies to a communication between solicitor and client which entails the seeking or giving of legal advice and is intended to be confidential by the parties.
- c. This privilege extends to a third party where the third party serves as a channel of communication between the client and the solicitor and the communication otherwise meets the criteria for the existence of the privilege.
- d. Litigation privilege applies to a communication created for the dominant purpose of litigation, actual or reasonably contemplated, whether the communication is between lawyer and client or lawyer and third party.
- e. Settlement privilege applies to a communication made to bring about settlement of actual or reasonably contemplated litigation and that is made with the intention that it not be disclosed if settlement negotiations fail.

[6] With these principles in mind, I turn to the particulars of the two applications.

The Mand Application

[7] This application concerns 26 documents for which solicitor-client privilege is claimed, 31 documents for which litigation privilege is claimed, and 4

documents not produced because the respondent says they are in the public record.

[8] For the 26 documents for which solicitor-client privilege is asserted, the respondent says simply that they are communications made in confidence “regarding the matter of my client” “for the purposes of providing legal advice”. In my view, for the reasons that follow, I would not sustain the claim for privilege, except as set out below.

[9] A number of documents in this group appear to have been prepared by a third party. There is no showing that the third party was serving as a conduit for or interpreter of information for the purpose of legal advice, and hence no basis to extend the privilege to them. In Schedule A of Commission Counsel’s Factum this applies to documents 1, 2, 5, 6, 8, 9, 10, 11, 17, 18, 24, 25, 26, 27, 28, 31, 36, 37 and 38.

[10] For documents 7, 12 and 13, the creator would appear not to be either the lawyer or the client but an unknown person for an unknown purpose. That is not enough.

[11] Document 15 is a final contract with a third party and therefore not confidential to the solicitor and client.

[12] Document 39 consists of a letter from another lawyer representing the same client and an accompanying document prepared by a third party. The letter

from the other lawyer is privileged, but the remainder of document 39 is not privileged. Document 40 is a communication to another lawyer (representing another party to litigation) and thus not confidential.

[13] Of this group, document 14 could be said to qualify for the privilege. While its author is unknown, it appears to have been given by the client to the lawyer for the purposes of receiving legal advice about that very document. In addition, put beside document 15 it may be that the legal advice given about it could be inferred. Taking into account both considerations, I would therefore determine that the privilege should extend to it.

[14] In summary, the only materials protected by solicitor-client privilege are document 14 and the portion of document 39 that is a letter from the client's other lawyer.

[15] For the 31 documents for which litigation privilege is asserted, the respondent says that they are communications made in drafting a statement of defence and cross-claim in the action of 1204112 Ontario Inc., et al. In my view, it has not been established that any of these documents attract this privilege. All but one (document 4 of Schedule "C" to Commission Counsel's Factum) are communications with the lawyer for the opposite party in the litigation, which does not qualify. The one exception does not qualify either because there is nothing to show that it was created for a litigation purpose.

[16] Finally, in this application there are 4 documents that the respondent declines to produce because he says they are available in the public record. This is not a basis to claim privilege for them and I would so find.

The Nazarian Application

[17] This application involves 289 documents. For 144 of these, the respondents claim solicitor-client privilege. For the other 145 documents, the respondents claim litigation and/or settlement privilege.

[18] The group of documents that raise the issue of solicitor-client privilege can conveniently be dealt with in subgroups. I will identify the documents in each subgroup using the number attached to them by Commission Counsel in the far left column of Schedule C3 of the Reply Factum.

[19] The first subgroup consists of communications involving one of the respondents, the lawyer and a third party accountant. Some of these communications are between only two of these and some appear also to be copied to the third. These communications are listed in Appendix A to these reasons.

[20] There is no doubt that in the right circumstances solicitor-client privilege can extend to a third party accountant. However, the only justification offered here for the extension of the privilege is found in a schedule to the affidavit of the respondents' present solicitors in the responding Application Record. For each

document the very brief reason given for solicitor-client privilege is only that the third party is the client's accountant and the information is being given to and by the accountant as agent for the purpose of obtaining legal advice.

[21] For present purposes, I am prepared to accept these assertions as factual. Nonetheless, I cannot conclude that this cryptic explanation warrants a finding that these communications are subject to solicitor-client privilege. There is no assertion by the respondents that the third party accountant was serving as a channel of communication between the respondents and their lawyer. Nor is there any assertion that these were communications where the third party was employing an expertise in assembling information provided by the client in order to explain that information to the lawyer. Nor is it enough that the accountant was described as an agent of the client. In this connection, see *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) *per* Doherty J.A. at 356. I cannot conclude that a description such as this, that leaves so much to the imagination, allows the conclusion that the third party was authorized by the respondents to obtain legal advice for them or relay such advice to them. I cannot say that the third party's function was essential to the maintenance of or operation of the solicitor-client relationship.

[22] The second subgroup consists of communications involving one of the respondents, the lawyer and a third party such as a demolition firm, and an

assistant land surveyor or real estate agent. These communications are listed in Appendix B.

[23] Once again, the only justification for the privilege claimed is the bald assertion that the information in the communication was given to and by the third party as agent for the client for the purpose of obtaining legal advice. As with the first subgroup, I would dismiss the claim for privilege and for the same reasons, but with an additional rationale. Unlike the accountant subgroup, there is nothing inherent in the skill set of these third parties that would seem to equip them to possibly gather information provided by the client and explain it to the lawyer. Rather, their expertise would seem to rest with gathering information from sources extraneous to the client and passing it on as was the case with the third party in *Chrusz, supra*. This does not trigger the privilege.

[24] The third subgroup for which solicitor-client privilege is claimed consists of communications to or from one of the respondents, from or to another respondent or a third party, forwarding what is described simply as a communication between client and counsel. These are listed in Appendix C.

[25] I would dismiss this claim for privilege because there is no showing that the communication forwarded was for the purpose of legal advice, a fundamental pre-condition for the privilege.

[26] The fourth subgroup consists of communications to or from a respondent, from or to a third party, where the rationale for the privilege claimed is that counsel was copied for the purpose of providing legal advice. These are listed in Appendix D.

[27] I would deny this claim because of the involvement of the third party. Although the third party has an email address of “algocentremall.com” there is nothing to show that the third party acted as an agent of a respondent rather than a stranger to the proceedings. The solicitor-client privilege cannot be extended to communications involving such a third party.

[28] The fifth subgroup is made up of communications between a respondent and counsel that the respondent forwards to his alternate email account. These are listed in Appendix E.

[29] The only reason offered for the privilege here is that the forwarded communication is between the respondent and counsel. Unfortunately that is not enough to sustain the claim. There is no assertion, even a bald one, that the forwarded communication was for the purpose of legal advice.

[30] The sixth subgroup consists of communications between two of the respondents forwarding communication between counsel and the respondent that was sent for the purpose of legal advice. These are listed in Appendix F.

[31] I would accord privilege to these communications. The respondents appear all to be clients of counsel in the same matter. In my view, communications with each other relaying communications with counsel and one of them which are privileged to that client must also be privileged to the other client. As the Rules of Professional Conduct of the Law Society of Upper Canada make clear, nothing can be confidential as between clients where counsel has a joint retainer.

[32] The final subgroup consists of communications between another counsel and a respondent where this counsel was said to be acting for the respondent and the communications otherwise met the requirements for the privilege. I am prepared to accept that these communications involved legal advice to the respondent and were intended to be confidential. I would therefore allow the claim. These documents are listed in Appendix G.

[33] The respondents' claim for litigation and/or settlement privilege concerns 145 documents. The respondents say that all were created in contemplation of an action the respondents commenced against Zurich Insurance Company Ltd. on June 17, 2013. These documents are listed in Appendix G.

[34] There are two difficulties with the litigation privilege claim. First, the respondents assert only that the communication said to be covered by the privilege were in contemplation of litigation. That does not go far enough. The

communications must be created for the dominant purpose of litigation. Second, the communications must be created at a time when the Zurich litigation was a reasonable prospect. In my view, there is no information from the respondents to indicate when or why the Zurich litigation became a reasonable prospect. The bald assertion made by the respondents does not suffice, particularly given that some of the communications significantly predate the litigation and indeed the mall collapse itself to which the litigation may relate. I would therefore dismiss the claim for litigation privilege.

[35] The claim for settlement privilege also suffers from two fatal flaws. First, there is nothing shown that would meet the requirement that the communications were made with the intention that they would not be disclosed in the event that settlement negotiations failed. Second, for the same reasons I indicated in the context of the claim for litigation privilege, I do not think that the respondents have shown enough in these circumstances to demonstrate that these communications originated at a time when the Zurich litigation was in reasonable contemplation. I conclude therefore that settlement privilege does not apply to these communications.

[36] In summary, my determination is that none of these 145 documents are subject to litigation and/or settlement privilege.

A handwritten signature in blue ink, appearing to read "C. J. ...", is located in the bottom right corner of the page.

Appendix A

39	520
90	522
91	524
92	528
104	544
109	545
110	583
111	584
114	599
115	600
116	601
117	602
121	603
370	621
371	624
374	705
377	713
378	776
379	777
380	1142
402	1143
403	1177
409	1178
572	1243
573	1395
2409	1396
413	1411
414	2035
415	2037
466	2038
467	2219
468	2228
469	2317
471	2321
472	2326
473	2436
486	2438
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Appendix B

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Appendix C

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Appendix D

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Appendix E

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Appendix F

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2139

Appendix G

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Appendix H

46	504	680	1866
47	507	681	2082
48	508	682	2116
85	509	683	2140
177	510	684	2153
310	511	685	2154
311	512	686	2155
362	513	687	2168
364	514	688	2169
365	515	689	2201
369	519	690	2202
408	526	691	2203
555	527	701	2217
556	531	711	2244
565	532	712	2245
566	535	737	2249
567	539	738	2256
570	541	751	2261
574	546	752	2266
575	547	753	2272
576	548	754	2277
2399	577	758	2283
421	578	766	2290
430	579	767	2291
453	581	768	2293
454	582	775	2294
455	589	791	2295
464	593	796	2296
479	595	797	2297
483	596	799	2304
484	597	813	2308
485	612	844	2333
488	613	1182	2349
496	638	1183	2368
497	650	1184	
499	651	1864	
501	679	1865	