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IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

**Reference : 2009NBQB131**

F/C/88/08

**Date : 20090514**

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT  
OF THE PROVINCE OF NEW BRUNSWICK

PLAINTIFF

AND

ROTHMANS INC., ROTHMANS, BENSON & HEDGES INC.,  
CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC.,  
PHILIP MORRIS U.S.A. INC., PHILIP MORRIS  
INTERNATIONAL, INC., JTI- MACDONALD CORP., R.J.  
REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS  
TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO  
CANADA LIMITED, BRITISH AMERICAN TOBACCO P.L.C.,  
B.A.T. INDUSTRIES P.L.C., BRITISH AMERICAN TOBACCO  
(INVESTMENTS) LIMITED, and CANADIAN TOBACCO  
MANUFACTURERS' COUNCIL

DEFENDANTS

BEFORE : The Honourable Mr. Justice Thomas E. Cyr

DATE OF HEARING : May 5<sup>th</sup>, 2009

DATE OF DECISION : May 14, 2009

APPEARANCES:

Counsel for the Plaintiff: Philippe J. Eddie,  
Robin Ryan-Bell

Counsel for the Defendant Thomas G. O'Neil, Q.C.

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Imperial Tobacco Canada     Deborah A. Glendinning  
Limited

CYR, J. :

## **I. INTRODUCTION**

[1] Imperial Tobacco Canada Limited (Imperial Tobacco) has filed five motions. The moving party is requesting:

- a) production of the redacted portions of the Contingent Fee Agreement;
- b) that the references to foreign law contained at paragraphs 46 and 47 of Exhibit “B” of the affidavit of Lorne M. Sossin dated April 16, 2009 be struck;
- c) production for inspection of the permit applications submitted to the Law Society of New Brunswick and referred to in the affidavit of Marc L. Richard;
- d) leave to cross-examine C. Clyde Spinney, Q.C.; Marc L. Richard, and Lorne M. Sossin pursuant to Rule 39.03 of the *Rules of Court*; and
- e) variance of the procedural timetable set by myself on January 22, 2009.

## **II. FACTS**

[2] This matter arises out of an action brought by the Province of New Brunswick (Province) pursuant to the *Tobacco Damages and Healthcare Costs Recovery Act*, S.N.B. 2006, c.T-7.5, of the recovery of tobacco related healthcare costs against the tobacco industry.

[3] The defendant, Imperial Tobacco has filed a motion whereby it claims, *inter alia*, that the Attorney General of New Brunswick contracted the conduct of this action to a consortium of U.S., Ontario, and New Brunswick lawyers (Crown Counsel Consortium). According to Imperial Tobacco, the Province has agreed to pay the lawyers a very large contingent fee in the event it is successful in this litigation. In this motion, (the C.F.A. validity

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motion), Imperial Tobacco is challenging the constitutionality, legality, and ethical integrity of the contingent fee agreement (C.F.A.).

[4] The following defendants, Philip Morris International, Inc., Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group, Inc., and Philip Morris U.S.A. Inc. have joined Imperial Tobacco by filing similar motions. A procedural timetable has been set for the C.F.A. motions. The hearing is scheduled to take place on June 16-18, 2009. (See *New Brunswick v. Rothmans Inc.*, [2009] N.B.J. No. 8 (QL).

[5] In the C.F.A. validity motions, the moving defendants argue that the C.F.A. should be declared void and the Crown Counsel Consortium be removed because:

- a) the Crown Counsel Consortium has a disqualifying conflict of interest between their public duties as counsel for the Attorney General and their substantial private financial interests under the C.F.A.;
- b) the Attorney General had no constitutional authority to enter into the C.F.A. and to commit such vast sums of public money to anyone without proper legislative approval, and in this regards the C.F.A. breaches section 53 of the *Constitution Act, 1867*, s. 30 of the *Financial Administration Act*, and the accepted public law principles of fiscal management; and
- c) the C.F.A. breaches the *Law Society Act, 1996* by retaining foreign lawyers to engage in the unauthorized practice of law and by failing to comply with the *Law Society's Contingent Fee Rules*.

### III. ISSUES

[6] The issues raised on the five motions filed by Imperial Tobacco are as follows :

- a) Should the court order the production of the edited portions of the C.F.A.?
- b) Should the court strike paragraphs 46 and 47 of Exhibit "D" of the affidavit of Lorne M. Sossin dated April 16, 2009?

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- c) Should the court order production of the permit applications that were submitted to the Law Society of New Brunswick in regards to Charles William Patrick Jr., Andrew Hoyt Rowell III, Gregory Alan Lofstead, and Jerry Hudson Evans, referred to in the affidavit of Marc L. Richard, dated the 7<sup>th</sup> day of April 2009?
- d) Should the court grant leave to cross-examine C. Clyde Spinney, Q.C., Marc L. Richard, and Lorne M. Sossin, on their respective affidavits, pursuant to Rule 39.03 of the *Rules of Court*?
- e) Should the court vary the procedural timetable previously set?

#### IV. ANALYSIS

##### (1) Motion to produce the redacted portions of the Contingent Fee Agreement

[7] In preparation for the hearing of the C.F.A. validity motions scheduled for June 16-18, 2009, the Province has filed the affidavit of Mr. C. Clyde Spinney, Q.C. (Spinney Affidavit) containing a copy of the redacted version of the C.F.A.. Imperial Tobacco now brings a motion for the production of the edited portions of the C.F.A.

[8] The Province raises a solicitor/client privilege pertaining to the undisclosed portions of the C.F.A. Rule 31.04(4) of the *Rules of Court* provides as follows:

##### **31.04 Inspection of Documents**

**(4) A court may, at any time, order production for inspection of documents generally or of any particular documents in the possession or control of a party for which no privilege is claimed. Where privilege is claimed for a document, the court may inspect the document to determine the validity of such claim.**

*(My underlining)*

[9] I have received in evidence the unredacted version of the C.F.A. contained in a sealed envelope (Exhibit “1”). The Province maintains that its edited portions remain privileged, that they are entirely unrelated and severable from the issues before the court, and that no unfairness would result to the defendants if they remain undisclosed.

[10] The Province argues that the C.F.A. has already been determined to be privileged in proceedings which took place pursuant to the provisions of *The Right to Information Act*, S.N.B. 1978, c.R-10.3. See *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)*, [2008] N.B.J. No. 148 (QL).

[11] The Province maintains that the prior determination regarding privilege is therefore *res judicata* as between Imperial Tobacco and the Province. However, Imperial Tobacco was not a party to the proceedings in *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)*, *supra*.

[12] Furthermore, Mr. Justice Grant expressly noted that the court may be prepared to reconsider this issue in the context of a constitutional challenge to the C.F.A. since it may involve the expenditure of public monies for which legislation is constitutionally required by the *Constitution Act 1867*. See *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)*, *supra*, at para. 26.

[13] Moreover, the decision in *Stamper and Di Domenicantomio v. Canadian National Railway Company* (1995), 63 N.B.R. (2d) 342, (C.A.) is authority for the principle that the matter is not *res judicata*.

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[14] The Province has now waived privilege of a portion of the C.F.A. and has produced it in support of its position regarding the C.F.A. validity motions. It is adamant that it has not waived solicitor/client privilege over the undisclosed portions. Moreover, the Province maintains that the edited portions of the agreement are also irrelevant and entirely unrelated and severable from the issues before the court regarding the C.F.A. validity motions.

[15] Three prerequisites for privilege to attach have been laid down by the Supreme Court of Canada in *Solesky v. The Queen*, [1980] 1 S.C.R. 821. The test was laid down by Dickson, J. (as he then was) at page 837 as follows:

- (i) a communication between solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.

[16] For the same reasons, I find, as did Mr. Justice Grant in *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)*, *supra*, that the C.F.A is clearly a communication between solicitors, acting in their professional capacity, and their client the Province of New Brunswick. Consequently, the first criterion set out in *Solesky* is met.

[17] The second criterion is more problematic and a complete answer can only be found by examining the unredacted version of the C.F.A., Exhibit "1", in order to ascertain whether the undisclosed portions of the agreement are protected by solicitor/client privilege. I have carefully examined the unredacted title and main paragraph of clause 12, title and clause 14, clause 15, and title and clause 20 of the unredacted version of the C.F.A. In doing so, I have read each heading and clause and considered them individually and have also considered them as

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they may relate to one another. I find that the titles and clauses are clearly communications which entail the seeking or giving of legal advice. Consequently, the second criterion set out in *Solesky* is met.

[18] The third prerequisite is that the communication must be intended to be confidential by the parties. In the Spinney Affidavit, while producing the redacted version of the C.F.A., Mr. Spinney expressly confirms that the Province is not waiving the privilege attached to solicitor/client communications. (See paragraphs 5 and 6 at pages 222-223 of the record.)

[19] Imperial Tobacco submits that the voluntary disclosure of almost the entire C.F.A., taken together with the prior public disclosure of its terms, clearly shows an intention to waive privilege over the entire agreement.

[20] The record confirms that the Province, until recently, had chosen not to produce any part of the C.F.A.. They now have decided to produce a redacted version of it in answer to the C.F.A. validity motions to be heard in mid-June of this year. In light of the moving parties' position in the C.F.A. validity motions and in order to answer to the motions, the Province may have been forced to modify its strategy.

[21] In my view, the record confirms that even when the Province initially requested proposals for legal services, its intention always was that the solicitor/client privilege would be maintained and that the undisclosed information would remain confidential. Furthermore, the Province's approach of disclosing certain information regarding the C.F.A. does not, in my view, evince an intention to disclose the edited portions of the agreement, as they were intended to remain confidential.

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[22] Consequently, based on the evidence before me, I conclude that there was a clear intention on the part of the Province that the undisclosed portions of the retainer were to remain confidential.

[23] Imperial Tobacco argues that even if parts of the C.F.A. are protected by solicitor/client privilege, the Attorney General's conduct in issuing the press release, in participating in subsequent media interviews, and in ultimately taking the voluntary step of disclosing almost the entire agreement, all confirm a clear intention to waive that privilege. It relies on the test set out in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (S.C.) where the court stated at page 764 of the decision:

**Waiver of privilege is ordinarily established 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.**

[24] There is no evidence that the Province did not know of the privilege. Consequently, I am satisfied that it did.

[25] The Province, until recently, had decided not to produce any part of the C.F.A. It has always confirmed its intention to maintain solicitor/client privilege pertaining to the undisclosed portions of the agreement. The fact that, in order to defend the C.F.A. validity motions, it has decided to divulge a large part of the agreement does not evince an intention to waive solicitor/client privilege over the whole agreement. Therefore, I conclude that there was no intention to waive the privilege.

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[26] However, a waiver may also occur in the absence of an intention to waive, where fairness and consistency are required. Thus, waiver of privilege as to part of the communication may be held to be waiver as to the entire communication. See *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, *supra*, at p. 764.

[27] I must now consider the question of whether or not fairness and consistency demand that full disclosure of the agreement be made in this case. In doing so, I must examine all of the circumstances to determine whether or not partial disclosure of the C.F.A. could be misleading and/or otherwise unfair to Imperial Tobacco.

[28] After reviewing the entire agreement, I am satisfied that:

- partial disclosure of the C.F.A. is not misleading;
- the information not disclosed is not related to the C.F.A. validity motions and is therefore severable from the remainder of the document;
- the partial disclosure does not give the Province any advantage in the litigation as it relates to the C.F.A. validity motions;
- there is no unfairness towards Imperial Tobacco; and
- there is no advantage to the Province by withholding these portions of the C.F.A..

For these reasons, I conclude that full disclosure is not required for the sake of fairness and consistency.

[29] In summary, I find that the undisclosed parts of the of C.F.A. are subject to the law of solicitor/client privilege, that the privilege has not been waived by the Province such that fairness and consistency would require full disclosure of the agreement.

[30] In a supplemental affidavit dated the 4<sup>th</sup> day of May 2009, Mr. C. Clyde Spinney, Q.C. explains that through inadvertence paragraphs 12(a) and 12(b) of the redacted C.F.A. were

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disclosed in his first affidavit. He submits that these paragraphs should not have been divulged and that the Province is not prepared to waive solicitor/client privilege in regards to them. For the same reasons mentioned above and in keeping with my decision with respect to the undisclosed portions of the C.F.A., and in particular the wording contained in the redacted title and main paragraph of clause 12, I conclude that paragraphs 12(a) and 12(b) inadvertently revealed should be expunged from the redacted versions of the agreement contained in the Spinney Affidavit.

(2) **Motion to strike the references to foreign law contained at paragraphs 46 and 47 of Exhibit “B” of the affidavit of Lorne M. Sossin dated April 16, 2009**

[31] Imperial Tobacco moves to strike paragraphs 46 and 47 of Exhibit “B” of Lorne M. Sossin’s affidavit dated April 16, 2009, (Sossin Affidavit), on the basis that they contain inadmissible opinion evidence on foreign law.

[32] On January 15, 2009, the Province brought a motion seeking to strike portions of a report attached to the affidavit of Professor H. Patrick Glenn, (Glenn Affidavit) on the basis that it adduced both domestic and foreign law. I refused to strike any part of the Glenn Affidavit due to the fact that any reference to domestic and/or foreign law by the expert in order to develop his opinion respecting factual issues would not render his evidence inadmissible. Further, I concluded that reference to domestic and/or foreign law, other than for the purpose of elucidating his opinion on the facts, was not necessary in the case of domestic law and irrelevant in the case of laws of another jurisdiction. See *New Brunswick v. Rothmans Inc.*, [2009] N.B.J. No. 60 (QL) at paras. 47-50.

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[33] According to the Province, paragraphs 46 and 47 of the Sossin Affidavit do nothing more than respond to the points concerning U.S. law made in paragraphs 13-14-17 and 34 of the Glenn Affidavit. Further, that reference to U.S. law in both affidavits is to be considered in a Canadian context as it applies to a factual determination: i.e., the ethical, professional standards, and public policy issues at stake when an Attorney General retains outside counsel pursuant to a contingent fee agreement and nothing else. The Province concedes that the U.S. cases are of limited assistance and that reference to U.S. law in the Sossin Affidavit is to provide a context for his view as to Canadian rules and his conclusions.

[34] Moreover, it argues that the Sossin Affidavit specifically responds to the Glenn Affidavit and that Imperial Tobacco vigorously opposed the striking of all portions of the Glenn Affidavit including in its response to the Province's argument that the Glenn Affidavit gave evidence on U.S. law.

[35] For the same reasons in support of my ruling regarding the Glenn Affidavit, I am of the view that the Sossin Affidavit should remain intact. It would be unfair to the Province to strike paragraphs 46 and 47 of the Sossin Affidavit while leaving intact the Glenn Affidavit and its references to U.S. law. Furthermore, the court is not bound by such expert evidence and is entitled to give it whatever weight it deems appropriate. See *New Brunswick v. Rothmans Inc.*, *supra*, at para. 50.

(3) **Motion to seek leave to cross-examine C. Clyde Spinney, Q.C., Marc L. Richard, and Lorne M. Sossin pursuant to Rule 39.03 of the Rules of Court**

[36] As previously mentioned, the Spinney Affidavit contains a redacted version of the C.F.A. which reveals a large part of the agreement between the Province and its lawyers. In

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addition, he asserts that the Province has retained the services of Mr. William A. Anderson, Q.C. on a fee for services basis. Further, he informs the court that he and Mr. Anderson have ongoing significant involvement in all matters relating to this litigation and that the lawyers representing the Province report directly to and take all instructions for all matters, pertaining to this litigation, from Mr. Anderson and himself.

[37] As previously mentioned, the Sossin Affidavit was filed by the Province in response to the similar affidavit filed on behalf of Imperial Tobacco and serves to provide expert opinion on the ethical, professional standards, and public policy issues at stake when an Attorney General retains outside counsel pursuant to a contingent fee agreement.

[38] In addition to the Spinney Affidavit and the Sossin Affidavit, the Province delivered the affidavit of Mr. Marc L. Richard, dated April 7, 2009, (Richard Affidavit), whereby he confirms that he is Executive Director of the Law Society of New Brunswick. Further, he states that the U.S. lawyers, who are part of the Crown Counsel Consortium, have been granted permits to act as foreign legal consultants in New Brunswick.

[39] The Province has provided a copy of the permits confirming that the U.S. lawyers have met all requirements under the *Law Society Act 1996* and the *Foreign Legal Consultants Rules* under the same Act. Mr. Richard confirms that they have been granted permission to act as foreign legal consultants in New Brunswick.

[40] Imperial Tobacco seeks leave to cross-examine the affiants on the affidavits mentioned above submitted by the Province in response to the C.F.A. validity motions. It is relying on Rule 39.03 which reads as follows:

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### 39.03 Cross-Examination on Affidavit

**On the application of any party, the court may order the attendance for cross-examination of any person making an affidavit for use upon a motion or application.**

[41] The court's power under Rule 39.03 to allow cross-examination on an affidavit is discretionary and is to be used sparingly. See *Butternut Hill Farms v. Royal Bank* (2008), 328 N.B.R. (2d) 305, (Q.B.) at para. 15.

[42] Various criteria have been cited by the courts to determine whether cross-examination is appropriate, such as ambiguities or inconsistencies within the affidavit in question. It is not sufficient that a party disagrees with the facts contained in an affidavit. See *Saint John (City) Employee Pension Plan v. Ferguson*, [2009] N.B.J. No. 99 (QL) at para. 5 and *Butternut Hill Farms v. Royal Bank*, *supra* at para. 15.

[43] In a decision of this court in *Saint John (City) Employee Pension Plan v. Ferguson*, *supra*, Mr. Justice Glennie, in refusing to permit cross-examination of the affiants, stated at paragraphs 3-4-5 and 6:

**3 The relief sought by the plaintiff is discretionary in nature and case law in this province establishes that cross-examination on an affidavit made for use on a motion is not routinely granted. Cross-examination is the exception rather than the norm, and the onus rests on the party seeking to cross-examine to establish that the situation is so exceptional as to justify cross-examination.**

**4 I deny the motion of the plaintiff to cross-examine Mr. Ferguson and Mr. Marks and in doing so I rely upon the decision of this Court in *Butternut Hill Farms Inc. v. Royal Bank*, 2008 CarswellNB 117, where Justice Rideout considered a similar request and stated as follows at paragraph 15:**

**The discretionary powers contained in Rule 39.03 are to be used sparingly and only after the party requesting cross-**

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**examination has shown special circumstances or sufficient reason calling for cross-examination.**

5 Various criteria have been cited by the courts in determining whether cross-examination is appropriate. **Special circumstances must be established such as ambiguities or inconsistencies within the affidavit in question. It is not sufficient that a party disagrees with the facts contained in an affidavit.** See *Uniwell Corp. v. Uniwell North American Inc.*, 1994 CarswellNat 329 and *McDonald's Corp. v. Coffee Hut Stores Ltd.*, 1993 CarswellNat 1942.

6 **The party seeking cross-examination must present evidence which seriously disputes the contents of the affidavit in question or demonstrates that the matter is simply too complex to proceed by way of affidavit evidence.** See *New Brunswick (Security Frauds Prevention Act, Administrator) v. Reid*, 2001 CarswellNB 87; *Woodstock (Town) v. Christie*, 1999 CarswellNB 29; and *Fortis Properties Corp. v. United Steelworkers of America, Local 1-1306*, 2005 CarswellNB 777.

(My underlining)

[44] No affidavit was filed in support of Imperial Tobacco's motion to cross-examine the deponents on its affidavits.

[45] The party seeking to cross-examine has the onus of establishing the existence of special circumstances or providing sufficient reasons why it is required. See *Butternut Hill Farms v. Royal Bank*, *supra*, at paras. 15 and 17.

[46] In my opinion, the party seeking cross-examination must establish that there are special circumstances which warrant such cross-examination. Imperial Tobacco has failed to do so for the following reasons:

- there are no ambiguities or inconsistencies within the affidavits in question;
- Imperial Tobacco has not established any special circumstances to warrant a cross-examination of the deponents on their respective affidavits; and
- Imperial Tobacco has failed to otherwise provide sufficient reasons to warrant the cross-examination of the affiants in the circumstances.

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[47] Consequently, the motion for leave to cross-examine is accordingly denied.

(4) **Motion to produce complete copies of Foreign Legal Consultant Permits and any other documents submitted to and received by the Law Society on behalf and concerning the permit applications in the possession and/or control of the Province**

[48] The Richard Affidavit states that the attorneys from the United States representing the Province have been granted Foreign Legal Consultant Permits to act as foreign legal consultants in New Brunswick. Imperial Tobacco seeks production of the permit applications, including related documents, as well as the permits issued by the Law Society of New Brunswick.

[49] The request for the applications material was denied by the Province. However, copies of the permits to act as foreign legal consultants in New Brunswick, issued by the Law Society of New Brunswick, were produced and are attached to the affidavit of Sylvie Roy, dated the 1<sup>st</sup> day of May 2009.

[50] Imperial Tobacco relies on Rules 31.04(1)(a) and 31.04(4) of the *Rules of Court*.

[51] The Province refuses to provide the complete permit applications alleging that Imperial Tobacco's request for these documents is nothing more than "a fishing expedition" whereby it seeks to obtain private and confidential material which is unnecessary for the hearing of its motions.

[52] Further, it argues argue that Imperial Tobacco has not established that the complete applications have any relevance to the matters at issue.

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[53] In support of its opposition to produce the permit applications, the Province raises Rules 31.11(1) and 31.11(3) of the *Rules of Court* pertaining to documents in the possession of a person not a party to the proceedings. With respect, these rules have no application in the present motion for Imperial Tobacco's motion is based on Rule 31.04 of the *Rules of Court*

[54] Rule 31.04 of the *Rules of Court* provides as follows:

### **31.04 Inspection of Documents**

**(1) A party is entitled, at any time, to request inspection of any document in the possession or control of any other party which**

**(a) is referred to in the originating process, a pleading or an affidavit filed by such other party, or**

**(b) is listed in the other party's Affidavit of Documents and is not privileged.**

**(2) A party who wishes to inspect a document shall serve on the other party a Request to Inspect Documents (Form 31C).**

**(3) A party upon whom a Request to Inspect Documents is served shall forthwith serve on the party making such request, a notice stating a time between 9:30 a.m. and 4:30 p.m. and a date within 5 days from the service of the Request to Inspect Documents on which the documents may be inspected at the office of his solicitor or some other convenient place, and shall make the documents available for inspection at that time and place.**

**(4) A court may, at any time, order production for inspection of documents generally or of any particular documents in the possession or control of a party for which no privilege is claimed. Where privilege is claimed for a document, the court may inspect the document to determine the validity of such claim.**

**(5) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy at his own expense unless the person having possession or control of the document agrees to make a copy for the party inspecting the document, in which case he shall be reimbursed for the cost of so doing.**

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**(6) Where a document may become relevant only after the determination of one or more of the issues in the action and the production of such document for inspection prior to that determination would result in a serious prejudice to a party, he may apply to the court for leave to withhold the production until after such determination.**

*(My underlining)*

[55] The Province has filed the Richard Affidavit in support of its position regarding the C.F.A. validity motions. As Executive Director of the Law Society of New Brunswick, he states at paragraph 3 of his affidavit:

**3. I hereby certify that Charles William Patrick Jr., Andrew Hoyt Rowell III, Gregory Alan Lofstead and Jerry Hudson Evans of the law firm Richardson, Patrick, Westbrook & Brickman of South Carolina, USA have complied and met all the requirements of the *Foreign Legal Consultants Rules* made under subsection 17(2)(x)(ii) of the *Law Society Act, 1996* and in particular have:**

- a) delivered completed permit applications in the form approved by Council of the Society, and**
- b) paid the permit fees fixed by Council of the Society.**

[56] Mr. Richard clearly mentions in his affidavit that the U.S. lawyers have delivered to the Law Society of New Brunswick complete permit applications in the form approved by Council of the Law Society. Rule 31.04(1)(a) of the *Rules of Court* expressly provides that a party is entitled, at any time, to request inspection of any document in the possession or control of any other party which is referred to in an affidavit filed by such party.

[57] The right to inspect documents referred to in an affidavit filed by a party is subject to a claim of privilege. Where privilege is claimed for a document, the court may inspect it to determine the validity of such claim. (See Rule 31.04(4)).

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[58] Rule 31.04(6) expressly provides that where a document may become relevant only after the determination of one or more of the issues in the action and that the production of such document for inspection prior to that determination results in a serious prejudice to a party, the party may apply to the court for leave to withhold the production until after such determination.

[59] The Province does not advance a claim of privilege in regards to the documents sought by Imperial Tobacco in its motion.

[60] I must now determine whether the documents requested are relevant and, if so, whether they should be withheld for its production would result in a serious prejudice to the Province.

[61] Chief Justice Drapeau has set out the test to be utilized in cases where Rule 31.04(6) is considered and applied in the case of *Kay v. Kay*, [1999] N.B.J. No. 289 (QL) where the first step is set out as follows at paragraph 28:

**28 First, he or she must satisfy the court that the document in question is not relevant in respect of the issue to be determined first and may only become relevant after the determination of this issue. It is settled law that the relevance of any document is a question of law; it is not a discretionary matter.**

*(My underlining)*

(...)

[62] One of the arguments raised in the C.F.A. validity motions is that the agreement breaches the *Law Society Act 1996* by retaining foreign lawyers to engage in the unauthorized practice of law and by failing to comply with the *Law Society Contingent Fee Rules*. In reply,

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the Province has chosen to file the Richard Affidavit and to produce the Foreign Legal Consultant Permits issued by the Law Society of New Brunswick. Mr. Richard declares at paragraphs 5(b), (c), and (d) of his affidavit that the foreign lawyers retained:

- b) **are members of the Law Society of New Brunswick pursuant to section 2 and subsection 33(5) of the *Law Society Act 1996*;**
- c) **have been granted Foreign Legal Consultant Permits to act as foreign legal consultants in New Brunswick pursuant to the *Law Society Act, 1996*; and**
- d) **are authorized to practice the law of their country or internal jurisdiction in New Brunswick as Foreign Legal Consultants.**

[63] The delivered completed permit applications, provided by the foreign legal consultants mentioned in paragraph 3 of the Richard Affidavit, are, in my view, relevant and fall into the general wording of Rule 31.04(1)(a) as being documents specifically mentioned in an affidavit filed on behalf of a party to the proceedings. Moreover, the legal status of the foreign lawyers and the allegation of their unauthorized practice of law in the Province of New Brunswick have been raised as live issues in the C.F.A. validity motions.

[64] The Kay decision sets out the prerequisite which must be satisfied to meet the requirements of the Rule where a party is seeking leave to withhold production of a document. The following passages found at paragraphs 29, 30, and 31 of the decision deserve particular attention.

**29 Second, the party seeking leave to withhold the production of a document must satisfy the court that he or she would suffer “serious” prejudice as a result of its immediate production for inspection. The drafters of Rule 31.04(6) refrained from defining the level of seriousness of the prejudice required. In doing so, they were no doubt motivated by a concern for flexibility in the application of the Rule.**

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In my view, it would be unwise to undermine this sound approach by ascribing an overly rigid meaning to the expression “serious prejudice”. Nonetheless, some general observations are called for.

30 I begin by observing that Rule 31.04(6) is the only rule among the rules expressly concerned with prejudice to a party that requires a demonstration of “serious prejudice”. See for example Rules 29.10 and 30.11. The adjective “serious” makes it plain that evidence of prejudice simpliciter will not pass muster. (...) “Serious” prejudice in the context of Rule 31.04(6) connotes detriment, harm or injury that is grave, important or onerous; mere inconvenience to a party does not meet the test. See Blott, Fejer, Felkai, Rovet v. McCafferty (1989), 69 O.R. (2d) 235 (Ont. S.C.), per Master Sandler.

31 Finally, it bears mention that the party seeking leave to withhold production of a document must satisfy the court that he or she “would”, not “may”, suffer serious prejudice as a result of its immediate production. The word “would” implies such a degree of certainty as to the occurrence of the requisite prejudice that mere conclusory statements or speculation by a party as to its potential will rarely, if ever, suffice.

(My underlining)

[65] The onus rests on the party seeking leave to withhold production of a document to meet the requirements of the Rule. See *Kay v. Kay*, *supra*, para. 27.

[66] The Province’s position regarding Imperial Tobacco’s motion is that the request for the complete permit applications is nothing more than “a fishing expedition” that seeks to obtain private and confidential material which is unnecessary for the proper hearing of the C.F.A. validity motions. Nothing more is advanced by the Province but this conclusory statement. In submitting its argument in this way, the Province, in my view, has failed to satisfy the court that it would suffer “serious” prejudice as a result of the production for inspection of the foreign legal consultant application documentation it has in its possession or control. The Province, therefore, has not satisfied the test set out in *Kay v. Kay*, *supra*.

[15]

[67] Consequently, I order that pursuant to Rule 31.04(1)(a), the completed permit applications provided to the Law Society of New Brunswick by Charles William Patrick Jr., Andrew Hoyt Rowell III, Gregory Alan Lofstead, and Jerry Hudson Evans of the law firm Richardson, Patrick, Westbrook & Brickman of South Carolina, U.S.A. and related documentation in the possession or control of the Province, be produced for inspection. The Province shall make the documents available for inspection, with the needed changes in the details, as provided for in Rule 31.04(3) of the *Rules of Court*.

(5) **Motion to vary the procedural timetable**

[68] Imperial Tobacco has filed a motion to vary the procedural timetable for the hearing of the C.F.A. validity motions. Among the arguments raised in support of its motion, it argues that the Province's expert, Mr. Sossin, has been afforded the opportunity to review and opine on the redacted version of the C.F.A and that its expert witness, Professor Glenn, must be given the same opportunity.

[69] Due to the fact that Professor Glenn had teaching commitments out of the country until May 10, 2009, it contends that he will be unable to prepare his further report until early June.

[70] The record shows that Imperial Tobacco has had possession of the redacted version of the C.F.A. since mid-April 2009. In my opinion, Professor Glenn should be in a position to file a supplemental affidavit in which he is given the opportunity to opine on the redacted copy of the C.F.A. prior to May 29, 2009.

[15]

[71] In light of my rulings on the other four motions, there appears to be no other reason why the procedural timetable for the hearing of the C.F.A. motions should be changed other than to provide time for Imperial Tobacco's expert witness to opine on the redacted version of the C.F.A. For these reasons, the hearing of the C.F.A. validity motions will remain as scheduled for June 16, 17, and 18, 2009. However, I will modify the timetable regarding the filing of written submissions in order to accommodate the concerns of Imperial Tobacco as follows:

- a) on or before May 29, 2009: defendants will file their written submissions;
- b) on or before June 7 2009: the plaintiff will file its written submissions;
- c) on or before June 10, 2009: the defendants will file their replies, if any.

## V. SUMMARY

[72] I have ruled that the undisclosed parts of the C.F.A. are subject to the law of solicitor/client privilege, that the privilege has not been waived by the Province such that fairness and inconsistency would require full disclosure of the agreement, and that paragraphs 12(a) and 12(b) inadvertently disclosed must be expunged from the redacted version contained in the Spinney Affidavit.

[73] Imperial Tobacco's motion to strike paragraphs 46 and 47 of Exhibit "B" of the Sossin Affidavit on the basis that they contain inadmissible opinion evidence on foreign law, is denied.

[74] Imperial Tobacco's motion to seek leave or to cross-examine C. Clyde Spinney, Q.C., Marc L. Richard, and Lorne M. Sossin, pursuant to Rule 39.03 of the *Rules of Court*, is denied.

[75] I have ordered that, pursuant to Rule 31.04(1)(a), the completed permit applications provided to the Law Society of New Brunswick by Charles William Patrick Jr., Andrew Hoyt Rowell III, Gregory Alan Lofstead, and Jerry Hudson Evans of the law firm Richardson, Patrick, Westbrook & Brickman of South Caroline, U.S.A. and related documentation, in the possession or control of the Province, be produced for inspection, with the needed changes in the details, as provided for in Rule 31.04(3) of the *Rules of Court*.

[76] Regarding the motion to vary the procedural timetable pertaining to the C.F.A. validity motions, I have ruled that Imperial Tobacco's expert witness will be given until May 29, 2009 to review and opine on the redacted version of the C.F.A. The procedural timetable as it relates to the filing of submissions is modified as follows:

- a) on or before May 29, 2009: defendants will file their written submissions;
- b) on or before June 8 2009: the plaintiff will file its written submissions;
- c) on or before June 10, 2009: the defendants will file their replies, if any.

The dates for the hearing of the C.F.A. validity motions remain set for June 16, 17, and 18, 2009.

**DATED at Edmundston, New Brunswick this 14<sup>th</sup> day of May 2009.**

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**THE HONOURABLE MR. JUSTICE THOMAS E. CYR**  
**Judge of the Court of Queen's Bench of New Brunswick**