

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *De Angelis v. Siemy*,
2025 BCSC 1031

Date: 20250605
Docket: S171068
Registry: Vancouver

Between:

Barbara De Angelis

Plaintiff

And

Annie Siemy and J & A Properties Ltd.

Defendants

And

**456804 BC Ltd. Nick Kochan, Olga Kochan,
B.B.J. Holdings Ltd., Bill Kockhan and
John Does #1 through 20**

Third Parties

Before: Associate Judge Robertson, Sitting as Registrar

Reasons for Judgment

Counsel for the Plaintiff:

C.P. Dennis, KC
R. Power

Counsel for the Defendants:

R.S. Anderson, KC
C. Chai

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
February 24, 2025 &
March 12 and 25, 2025

Written Sur-Reply Submissions:

April 1, 2025

Place and Date of Judgment:

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June 5, 2025

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[1] This application involves the scope of disclosure of counsel’s files as required to be made by a party whose accounts are being taxed on a special costs basis. The application is being made further to directions made at a pre-hearing conference conducted January 13, 2025, during which the registrar directed that the parties secure a half day hearing to determine the issue prior to the assessment.

[2] The specific order sought by the plaintiff is that the defendants:

- a) provide the plaintiff with access to defendants' counsel's file except as set out in (b), such access to include copies of communications between counsel and the defendants or third parties, finalized and draft pleadings,
- b) particularize in a schedule of documents any documents which the defendants object to producing due to irrelevance.

[3] Both parties argue that the determination of this application depends upon, firstly, whether or not the Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 (“*Gichuru*”) stands for a blanket proposition that the files of a party’s counsel must be disclosed if they chose to have their accounts assessed following a special costs award and, secondly, whether solicitor-client privilege is otherwise waived.

Background

[4] The underlying action involved a claim by the plaintiff that the defendant, Annie Siermy (“Ms. Siermy”), the plaintiff’s aunt, had agreed to leave the bulk of a sizeable estate, including corporate interests, to her as compensation for years of unpaid services rendered from the 1950’s to 2002 (the “Legacy Agreement”) which she alleged was originally confirmed by way of a 2002 will in which the plaintiff was named as the primary beneficiary. The plaintiff also alleged that the Legacy Agreement was further confirmed in three letters purportedly written by Ms. Siermy meant to be delivered to Ms. Siermy’s husband in the event that she pre-deceased him to explain Ms. Siermy’s reasons for her estate planning decisions (the “Letters from the Grave”).

[5] In 2011, Ms. Siermy executed new estate planning documents changing her primary beneficiary from the plaintiff to a different niece. At that time, the plaintiff and Ms. Siermy had a falling out.

[6] At a high level, the plaintiff's claim was that the 2011 will and estate planning documents were not effective as Ms. Siermy was contractually bound to leave the plaintiff her estate by virtue of the Legacy Agreement. The plaintiff sought specific performance of the Legacy Agreement, or the imposition of a constructive trust. In the alternative, the plaintiff claimed that Ms. Siermy was unjustly enriched by the services the plaintiff provided in reliance on the existence of the Legacy Agreement.

[7] The unusual feature of this action was that Ms. Siermy, the testator, had not yet passed away and as such was able to provide testimony at trial. She denied the existence of the Legacy Agreement, and denied that she wrote the Letters from the Grave.

[8] Following a 19-day summary trial conducted on a hybrid basis with cross examination of the plaintiff and Ms. Siermy on their affidavits and expert evidence as to handwriting analyses on the Letters from the Grave, reasons for judgment were issued by Justice Ross on January 11, 2022, indexed at 2022 BCSC 31.

[9] Justice Ross dismissed the plaintiff's claims in their entirety finding that there was never any Legacy Agreement as alleged, and that the plaintiff had either forged two of the Letters from the Grave, or obtained Ms. Siermy's signatures on them surreptitiously, those being the two that specifically referenced the alleged Legacy Agreement.

[10] The plaintiff appealed that decision, with the appeal being dismissed with reasons indexed at 2022 BCCA 401. Although the Court of Appeal found that the signatures on the Letters from the Grace could not have been obtained surreptitiously, they found that it was open to the summary trial judge to make the finding he did as to them being forged.

[11] The plaintiff sought leave to appeal to the Supreme Court of Canada, with leave being denied: 2023 CanLII 67205 (SCC).

[12] Following the conclusion of the appeals, the parties reappeared before Justice Ross for a determination as to costs, with the defendants seeking special costs assessed on a lump sum basis at \$2,416,575.65. In reasons indexed at 2024 BCSC 485, Justice Ross set the scale of costs in favour of the defendants on a special costs basis, discounted by 30%, with such costs to be assessed by the registrar.

[13] The defendants argue that in declining to make the order on a lump sum basis, Justice Ross implicitly found that the affidavits that have been filed by the plaintiff are insufficient, from an evidentiary standpoint, for an assessment, such that the plaintiff's opposition now to any further disclosure is a "redo" of the arguments made before Justice Ross.

[14] On this point, Justice Ross made no specific finding as to the evidence required to be tendered on the assessment, finding only that this was not an appropriate case to deviate from the standard process by which the matter is referred to a registrar, citing *Gichuru*:

[154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[15] As things currently stand in respect of the underlying litigation, the parties believe that the plaintiff is now seeking a reconsideration of the appeal decision;

however, the status of that was not entirely known as counsel acting for the plaintiff in these proceedings is not counsel on any such appeal matters.

[16] The parties have not yet scheduled the assessment of their allowable special costs, which they estimate to be approximately \$1.7M (after applying the 30% discount), seeking to have the disclosure issues resolved in advance of doing so.

[17] The parties attended a pre-hearing conference on January 13, 2025 during which the required level of disclosure of the defendants' counsel's file was discussed, with the parties being directed to set down this half day hearing pursuant to R. 18-1(5), under which an associate judge, registrar, or special referee may direct production of documents and give general directions in respect of the conduct of an assessment hearing. The matter was not concluded on the date originally set aside for the application, with further dates being secured thereafter.

The Defendants' Evidence

[18] The defendant's position is that the evidence tendered to date, that being an initial affidavit of justification and an affidavit in response to some of the issues raised by the plaintiff (collectively, the "Affidavits of Justification"), is sufficient disclosure.

[19] To quote Justice Ross, the Affidavits of Justification "boil down to a partner at the firm indicating that the time recording was accurate and reasonable."

[20] The issue has been made more problematic by the defendants' solicitors' billing practices, in that they provided legal services to the defendants in respect of other matters, but did not open or bill such other matters to separate file numbers. Obviously legal costs incurred in respect of matters outside of this action are not recoverable from the plaintiff and need to both be separated out, and quantified.

[21] Specifically, the partner deposes that they were retained by the defendants in July 2016, and since then have provided legal services to the defendants in relation to five matters, including the subject action, in addition to other estate matters and the appeals of this action. The time spent in respect of the five matters, including this

action, were all recorded under the same file number. The estate matters and appeals were, however, recorded on a separate file number and are not relevant to this assessment.

[22] In his first affidavit, the partner deposes that based on his review of the “index of the pleadings” in this action and his “personal knowledge of the conduct” of this action he:

- a) Prepared a spreadsheet, exhibited to the affidavit, which “accurately sets out, among other things, the dates pleadings and affidavits were filed, applications were filed, orders were made, lists of documents were delivered, examinations for discoveries took place, and the summary trial of this [action] took place” (the “Litigation Chronology”), and
- b) Caused the “narrative information and related hours” from the firms’ accounting software to be migrated into excel format, which he then “reviewed each time entry”, subject to his “involvement in varying degrees”, pursuant to a set of principles deposed to in his affidavit, with some examples of how those were applied (the “Time Entry Summary”), which included:
 - i. An initial assessment to determine whether the time period in question demonstrated the work related to a specific matter and, if so, to assign it accordingly;
 - ii. Secondly, if there remained any ambiguity after considering the above, he would go to the “underlying file materials” to see if they provided further context; and
 - iii. Finally, where a time entry related to a singular event which likely touched on multiple matters, he would use the “indicia above” to apportion the time entry accordingly.

[23] Further, if the work overlapped or was useful for the other matters, with the example provided being an interview of the client as to the family history and interpersonal dealings, he would consider what percentage of the time entry related

to each matter and if there had only been *this* action and no others, whether the time entry still would have been necessary at some point.

[24] Finally, with respect to the other time entries, which I believe references the time entries of other time recorders, he would consider if they obviously related to this action and, if not, he would use his best judgment as to how long the tasks described would typically take and allocate accordingly. Whenever he called upon his own judgment to make an allocation he erred on the side of “conservatism”, meaning that he would give the benefit of any doubt in favour of reducing amounts rather than increasing them.

[25] The following is an excerpt of the Time Entry Summary, which is 306 pages long, to illustrate the results of that analysis and nature of the evidence:

Invoice	Date	Description	Lawyer	Time (Hrs)	Action	Other Matter
971448	27-Aug-20	Review documents for our Mr. Mike Wagner; prepare document memorandum; email to our Mr. Mike Wagner; prepare memorandum on Tenancy Issues for our Mr. Robert Anderson; lengthy email to our Mr. Mike Wagner in respect of correspondence from Mr. Knutson dated August 27, 2020;	VL	5	5	0
971448	30-Aug-20	Draft a lengthy email with several enclosures to clients regarding issues at Queen Anne. Email to our Mr. Robert Anderson. Discussions with and email from our Mr. Robert Anderson regarding discovery and summary trial timetable in September and October.	MJW	1.1	0.4	0.7
971448	30-Aug-20	Drafting memorandum summarizing Barbara's alleged personal services to Annie and Joe; Associated review of pleadings, affidavits, and other background documents	KWS	6.1	6.1	0
971448	31-Aug-20	Email to Mr. Knutson re schedule for Barbara's Action; draft submissions re summary trial; review email from Mike Wagner to clients re status and attaching Notice, copy of Mr. Knutson's letter to Mr. Inman and email correspondence; internal emails; email from our Mr. Wagner attaching email from David Plunkett to Bayside; email attaching Invoice from Mr. Clemens; email from our Mike Wagner attaching draft form of Order; email from our Peter Haley attaching documents; review draft listing agreement;	RSA	5.4	2	3.4

[26] Only the Time Entry Summary has been produced, without any of the actual invoices themselves being included.

[27] It is not clear on the face of that summary what the actual dollar value was that was billed to this action for each of those time entries, leaving the defendants (and, ultimately, the assessor) to cross reference those entries with the summary of

billable rates as exhibited separately, and perform the mathematical exercise to determine the actual amount billed for each entry.

[28] The affidavit also includes the BC Legal Management Association Charge Out Rate Survey for the years 2016 to 2021 as to average billing rates in Metro Vancouver.

[29] As to many of the disbursements the allocation is not as clear, with the evidence being that it is either “impossible or at a minimum would be extremely difficult and time consuming to identify whether they relate to [this action]” or one of the other matters billed to the same file number. As such, they have claimed 50% of those disbursements which are not obviously identified to be for this matter (there are disbursements, such as the retainer of the handwriting expert, which are easily identified to relate only to this action).

[30] The remainder of the affidavit provides evidence as to “features of the action which made it unusually complicated”.

[31] The second affidavit making up the Affidavits of Justification was sworn by the same deponent, and was tendered in response to specific issues that had been raised, including the issues that have been caused by the practice of only using one file number for multiple matters, the suggestion that more thorough information would be obtained from the actual invoices sent to the defendants, and some criticism as to the actual work that was undertaken or necessity thereof.

[32] In that second affidavit, various particulars are given as to the work done. For example, at para. 14(b) includes the following evidence:

.... I recall that we spent some time looking into was what [sic] a competent manager would have done, in Barbara’s shoes – in terms of what she would have been paid (and to that end, we adduced an affidavit to this effect, from Sandra Cawley, a professional appraiser), but also what a competent manager would have done over the years in terms of running the buildings and the business. ...

Parties’ Positions

[33] The plaintiff makes two primary arguments in seeking disclosure of the entirety of the defendants’ solicitor’s files:

- a) First, that it is necessary in order for there to be a fair assessment as to the reasonableness of the costs being claimed having regard to principles of natural justice, and that the defendants have waived privilege over their solicitors' files with that waiver being both implicit by virtue of seeking the assessment, and
- b) Secondly, by tendering the two affidavits from counsel which refer to and rely on information from a file review undertaken to "unscramble the egg" in order to conduct the allocation, which the plaintiff requires access to in order to determine if that allocation is reasonable.

[34] Thus, the plaintiff argues for production of the entirety of the file subject only to claims of irrelevance which are to be particularized.

[35] In the alternative, if the entire file is not ordered to be produced on the grounds that privilege may still attach to some or all of the file, then the plaintiff argues that the order should be made requiring the defendants to establish privilege over each such document with particulars of that claim, rather than basing it on a bare assertion of privilege over the entirety of the file.

[36] While the logistics of such a position, or specific procedural terms that would then be sought to be ordered, were not fully set out, presumably that would require the defendants' counsel to provide a complete list of all file materials with a particularized notation as to the basis on which they are being withheld from production, whether it be on the grounds of relevance (as contemplated in the order sought in the notice of application), or privilege as part of this alternative relief.

[37] In response, the defendants argue that it is entirely their own choice as to how much (or how little) they disclose for the purposes of having their accounts assessed with the defendants bearing the risk that should they fail to disclose sufficient evidence to establish the reasonableness of the accounts, that they will not be allowed their costs as sought, the risk being theirs. They argue that *Gichuru* does not stand for the proposition that such disclosure is required in all instances. In

addition, the defendants note that discovery rules, such as the requirement for a list of documents, do not apply for registrar hearings, although they do acknowledge that by virtue of R. 23-6(5) a registrar conducting a pre-hearing conference may give directions for the conduct of the hearing, including directions regarding production of documents and any other matter that may assist in the just and efficient determination of the issues.

[38] Finally, the defendants argue that the plaintiff's position poses a "real threat" in that, notwithstanding the reprehensible conduct of the other party which was deserving of rebuke sufficient to result in an order for special costs, a successful party may choose to abandon their claim given the effort of what would likely be a "Herculean task of producing their counsel's entire file".

Legal Framework and Parties' Positions

[39] Pursuant to R. 14-1(3), in assessing special costs the registrar must consider all circumstances, including the following:

- a) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
- b) the skill, specialized knowledge and responsibility required of the lawyer;
- c) the amount involved in the proceeding;
- d) the time reasonably spent in conducting the proceeding;
- e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
- f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
- g) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; and
- h) Rule 1-3 and any case plan order.

[40] That a client was billed a particular fee does not necessarily make it reasonable as it is only time “reasonably spent” on a matter that is to be considered: *Gichuru* at para. 105.

[41] Given that the registrar will be guided by the above principles when assessing the costs claimed, they also provide the framework for determining the level of disclosure required on an assessment.

[42] As to the extent of disclosure that is necessary in that respect, both parties rely upon *Gichuru*, but disagree as to what it stands for in terms of the required level of disclosure in order to conduct a special costs assessment.

Pre-*Gichuru*

[43] With respect to disclosure specifically, the decisions leading up to *Gichuru* are of some note.

[44] One of the earlier decisions that addressed disclosure in this context was *Denovan v. Lee* [1991] B.C.J. No. 3460 (QL), 62 B.C.L.R. (2d) 213 where, in deciding an application for an order compelling the solicitors to make full disclosure of their file in order for their client’s special costs could be assessed, Master Donaldson commented that in order for a party to avail themselves of increased or special costs, they must make sufficient information and material available to enable the assessing officer to properly determine what would be a reasonable fee for the services rendered. It followed that the documents relevant to that determination had to be made available to the other party prior to the hearing so that they could prepare:

8. ... It should be noted that documents which are not relevant to that issue need not be disclosed. It would seem however that disclosure of much of the file including the “work product”, opinions provided by counsel to the plaintiff, and instructions from the plaintiff to counsel would be items which must be disclosed to enable the assessment officer to make a property determination of the reasonableness of the fee.

[45] As such, the court concluded that there would have to be an ultimate choice made by the party seeking its costs, namely whether “to avail itself of the financial

benefit of having costs assessed as increased or special costs balanced against its concern for retaining solicitor-client privilege over the contents of its file.” Thus, the court ordered that the plaintiff must “if it wishes to proceed with the assessment, provide the defendant access to its file” with irrelevant portions being kept back upon proper objection, and any dispute as to that objection, to be dealt with by the assessor.

[46] Initially, the decisions following *Denovan* found that full and complete disclosure of a solicitor’s file was necessary in order for an assessment to be undertaken. For example, in *Turner v. Rhodes*, 1998 CanLII 5723, Justice Hood stated as follows:

[5] The fees claimed, and the services to which they pertain, must of course be verified. The plaintiff is entitled to test them, and the Registrar requires sufficient knowledge of them to enable her to consider whether they are proper or reasonably necessary pursuant to section 57(3). Presumably, in the case at Bar, it is necessary for the privileged documents or information to be made available to the plaintiff and to the Registrar for their purposes.

[47] Similarly, in *In the Matter of Commonwealth Trust Company*, 2005 BCSC 534, the registrar determined that “full and complete disclosure” of counsel’s file is required (at paras. 19 and 22), concluding as follows (a similar argument being made here by the plaintiff):

[23] In my view, CIS will not be able to determine (and provide as has been requested by the Liquidator) the specifics of its objections to the solicitors’ time and work without a full disclosure of the nature and content of that work. CIS should not be put to the requirement of making that determination without full access to the materials on which it can base such determination.

[48] In contrast, in *Grewal v. Sandhu*, 2011 BCSC 726, Justice Smith found that *Denovan* did not “stand for a blanket proposition that in every case a client must choose between solicitor-client privilege and the ability to take the benefit of a remedy to which the court has already said he is entitled” (at para. 7).

[49] In doing so, Justice Smith referenced *Chaplin v. Sun Life Assurance Company of Canada et al*, 2006 BCSC 449, in which the “all or nothing” approach was modified:

[23] The effect of this decision, I believe, is that the party taxing its costs is entitled to maintain all legitimate claims of privilege without forfeiting the right to tax the costs on the scale ordered by the court. If the claim of privilege precludes the other party and the taxing officer from reviewing a relevant document, the applicant will fail to establish an entitlement to that item unless it can be proved by other means. Other items of the bill may, however, be proved by the selective waiver of privilege referred to above.

[24] In my respectful opinion, the British Columbia decisions are not completely inconsistent with the English and Australian cases. *Obiter dicta* of both Master Donaldson, in *Denovan*, and Hood J. in *Turner*, do appear to contemplate that if the party taxing its costs elects to stand on its claim of privilege, the entire bill must be taxed as ordinary costs. It is clear, however, that the alternative suggested by the Commonwealth cases was not explored before them.

[25] In my view, the duty of the court is to balance, as best it can, the right of one party to uphold the principle of solicitor/client privilege against the other party's right to natural justice and the disclosure of relevant evidence. I conclude that the balance can best be achieved by allowing the defendant to maintain its claims of privilege for all the documents it has enumerated. It may do so without prejudicing its general right to have the costs assessed on an increased costs basis, as specified by the learned trial judge. However, it takes the risk that a particular aspect of the costs will be disallowed by the taxing officer because the evidence is simply not there to support the claim.

[50] The court in *Chaplin* also considered the argument that the defendant was seeking the documents for an ulterior purpose, finding that even if that were the case it would “make no difference” as the documents would be producible irrespective of other uses to which they could be put, although noting that limitations on their use could be imposed (at para. 28).

[51] In *Willison Navigation Inc. v. BCR Finav No. 3 et al*, 2007 BCSC 190, the court confirmed that in order to determine if the legal fee is objectively reasonable, a party must know the particulars of what the solicitor did, which requires an examination of the lawyers work and “disclosure of their file” (at para. 52), adopting the comments made in *Canadian National Railway Company et al. v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559:

[28] ...I cannot conceive that a proper examination of CN's reasonably incurred legal costs could be made without disclosure of CN's file and examination of CN's lawyers in respect of the file and matters arising therefrom. The simple presentation of the clients' bill to the trial judge (as occurred in *Edwards v. Bell*) combined with counsel's submissions would not adequately allow ABC to challenge the reasonableness of CN's legal

costs. Nor would it allow for the objective determination of the reasonableness of CN's legal costs.

[52] In summary, prior to *Gichuru*, the court approached disclosure as being within the control or choice of the party seeking to enforce their order for special costs, namely that they could maintain their assertion of privilege to refuse to produce those portions of their file subject to such privilege, however they did so at their own risk of not being able to establish that the amounts claimed were reasonable.

Gichuru

[53] *Gichuru* involved an appeal of a trial judge's summary assessment of a special costs order, which was made after the plaintiff's unsuccessful wrongful dismissal claim, in which the plaintiff had "recklessly" pursued allegations impugning the defendant's character and conduct. The appeal was not allowed, but for one element – the court set aside the summary assessment of special costs and referred it to a registrar.

[54] Thus, strictly speaking, *Gichuru* was not a decision regarding the required level of disclosure for a special costs assessment. Rather, the Court of Appeal phrased the issue before it as being "whether a judge can assess special costs absent evidence of the actual fees incurred, and whether a judge can use the rough and ready method to assess special costs" (at para. 82).

[55] The Court of Appeal did in fact leave open the discretion of the court to summarily assess special costs (at para. 106), having regard to R. 14-1(15) whereby the court may "fix the amount of costs", but noted that rules of natural justice would suggest, in most cases, that a summary proceeding is not appropriate absent consent, given that the typical case would require the party against whom costs are being awarded to test the reasonableness of the fees (at para. 103), commenting further that:

[104] ... it is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom.

[56] The exercise of discretion to summarily assess a special costs award was noted to be one which should be “exercised sparingly” (at para. 106), with the exception being when the trial judge is intimately familiar with the litigation, or the costs of the registrar’s hearing cannot be justified (at para. 107). This is because the rules of natural justice require the paying party to be afforded an opportunity to challenge the reasonableness of the fees they must pay.

[57] In making this finding, the Court of Appeal acknowledged that an assessment of special costs may, therefore, be logistically inconvenient:

[110] It is true that a more detailed review may be tedious and expensive. That does not mean such a review is unfair to the successful litigant, particularly given that significant amounts may be in issue. While R. 1-3(1) sets out that the object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding. The amount involved may be an important consideration in determining whether a summary procedure is appropriate.

[58] The Court of Appeal considered several cases where a “rough and ready” calculation was used to fix costs, such as was done in *Bradshaw v. Stenner*, 2013 BCCA 61, at para. 16, *Morriss v. Prism Properties Inc.*, 2011 BCSC 615 at paras. 31 and 32, *Johal v. Viridi*, 2012 BCSC 450, at para. 54 and *King v. TD Canada Trust*, 2013 BCSC 2283, at para. 43. Notably, in those cases, not only was there no disclosure of the solicitor’s file, but no bill of special costs was submitted at all with the costs being assessed on the basis of a flat daily (or half daily) rate.

[59] In *Bradshaw* specifically, the assessment was conducted on a summary basis because the trial judgment was under appeal such that the court was concerned with the potential loss of solicitor-client privilege given the ongoing litigation with the matter not yet being concluded.

[60] The difficulty with conducting an assessment in such a manner without evidence was described in *Gichuru* as follows:

[113] Absent a bill or other evidence of the legal fees incurred there is no way of knowing the amount of those costs. While the disclosure of the

legal account may result in a waiver of privilege, that is the price that a party may have to pay if it seeks to recover special costs.

[114] It is difficult to conceive how a proper examination of a party's reasonably incurred legal fees can be made without disclosure of the party's file: see *A.B.C.* at para. 28 and *Williston* at para. 53. A simple presentation of the client's bill to the trial judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs. In *A.B.C.*, Kirkpatrick J. considered that the prejudicial effect of disclosure could be minimized or eliminated by deferring the assessment until both parties had exhausted or waived their rights of appeal.

[61] The Court of Appeal concluded as follows:

[119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Those cases, such as *Bradshaw*, that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.

[120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.

[62] The plaintiff relies on these statements, along with those of the court in *Denovan*, arguing that in every case where special costs are being assessed, a client must choose between solicitor-client privilege and the ability to take the benefit of the special costs remedy. Thus, they argue, if the defendants here choose to take the benefit of a special costs order, they cannot use solicitor-client privilege as a basis to withhold production of its entire file matters.

Post *Gichuru*

[63] Shortly after *Gichuru*, the Court of Appeal assessed a party's increased costs in *Bronson v. Hewitt*, 2014 BCCA 514. Given that, in this case, increased costs are assessed under R. 60 of the *Court of Appeal Rules*, BC Reg 297/2001 at one half of the amount that would otherwise be allowed as special costs, the same considerations as to disclosure apply.

[64] In *Bronson*, the registrar had declined to order production of the records of counsel for the party presenting their accounts for assessment, before referring the assessment back to the division that had decided the appeal. The registrar's decision was as follows (reproduced at para. 26):

In my view, the duty of the court is to balance, as best it can, the right of one party to uphold the principle of solicitor/client privilege against the other party's right to natural justice and the disclosure of relevant evidence. I conclude that the balance can best be achieved by allowing the defendant to maintain its claims of privilege for all the documents it has enumerated. It may do so without prejudicing its general right to have the costs assessed on an increased costs basis, as specified by the learned trial judge. However, it takes the risk that a particular aspect of the costs will be disallowed by the taxing officer because the evidence is simply not there to support the claim.

[65] In conducting the assessment, the Court of Appeal commented on the registrar's decision, given the payor's argument that the materials filed in support of the assessment itself were deficient, as follows:

[24] Mr. Bronson contends that the material filed by Mr. Hewitt is deficient because he refused to produce details of his lawyers' work product. In our view, the contention goes to the ability of this Court to determine the extent to which work undertaken by both the Hunter and MacLeod firms was reasonably necessary.

...

[27] The Registrar also was referred to *Haydu v. Nagy*, 2012 BCSC 1870 at para. 35. She declined to order production on the basis that the parties claiming costs would, by opposing production on the basis of privilege, bear the risk of not being able to prove their claims.

[28] These comments merely reflect the fact that the burden of proof is on Mr. Hewitt. If, on the evidence before it, this Court is unable to determine whether the fees charged were reasonably necessary they will not be included in the sum fixed as special costs.

[66] The court concluded that production of the underlying work product, specifically research memoranda, was not necessary for the assessment itself:

[34] In our view, it is not necessary for this Court or for Mr. Turriff to have the memoranda prepared by Ms. Knapp and Mr. Taylor in order to understand whether the work they undertook was reasonably necessary. If the issues they considered were relevant to the appeal, the real question is whether the time spent, or more specifically the amount charged for the work, was reasonable. The evidence does provide information on what issues were being considered, although more details and specificity would be helpful. An

affidavit providing this information would have been of assistance, but likely that would have been open to attack as secondary information provided after the fact.

[67] Notably, *Bronson* makes no reference to *Gichuru*.

[68] This court has, however, now considered the issue having regard to the Court of Appeal's comments in *Gichuru*.

[69] In *Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.*, 2022 BCSC 272 the court undertook an analysis of *Gichuru* in the context of the required level of disclosure for an assessment of special costs, specifically with respect to the “choice” of the party to avoid waiver of privilege by waiting until all avenues of appeal are concluded before seeking an assessment, noting that:

- a) such an approach would only address the issue as to litigation privilege, not solicitor-client privilege (at para. 18); and
- b) since *Gichuru* the Supreme Court of Canada has further elucidated the “quasi-constitution protection afforded to solicitor-client communications and importance of that privilege to the integrity of our legal system”, that being a “principle of fundamental justice, not merely an evidentiary rule” (at para. 19),

concluding as follows:

[22] In my view, the suggestion that a party must routinely waive solicitor-client privilege in order to quantify the amounts that a court has already determined the party is contractually entitled to, or abandon its contractual claim for indemnity entirely, overstates the waiver that is required to address natural justice as expressed in *Gichuru*, and other decisions of this Court and our Court of Appeal.

[23] This Court frequently must balance the demands of protecting solicitor-client communications and the relevance of that information to an issue at trial (and hence the interests of natural justice). In these circumstances, as a general rule, this Court protects the privileged information. Even in cases where the privileged information is at the heart of the dispute, for example judicial reviews of administrative decisions made in relation to the disclosure of privileged information, this Court regularly seals that information and will sometimes even preclude counsel from reviewing it despite the obvious obstacles that raises: see for example *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132, aff'd 2020 BCCA 238; *British Columbia*

(Attorney General) v. Canadian Constitution Foundation, 2020 BCCA 48; Insurance Corporation of British Columbia v. Automotive Retailers Association, 2013 BCSC 2062.

[24] It is incumbent upon the assessor of costs, whether that be the registrar in most cases, or a trial judge in rare cases, to weigh both the importance of maintaining solicitor-client communication to the integrity of our justice system against the importance of natural justice in considering applications for disclosure. As stated by the Court of Appeal at para. 110 in *Gichuru*, the proceeding must be conducted in a way that is proportionate to the amounts involved and the importance of the issue in dispute.

[25] In my view, requiring a party to waive privilege over its solicitor-client communications in order to quantify its contractual entitlement, as is contemplated by Camacc in this case, should not be routinely expected. Nor do I consider such a waiver to be a proportionate response to the concerns and issues raised by Camacc as its basis for seeking a review of the contingency fee before the registrar.

[70] Balancing the competing interests of protecting a party's right to solicitor-client privilege against an entitlement to the benefit of the rules of natural justice and fairness, the court directed the registrar to:

- a) closely consider and weigh any demands for the waiver of solicitor-client privilege as a principle of fundamental justice, against the relevance and usefulness of that information;
- b) review closely any demands for waiver of solicitor-client privileged information against the need for such disclosure, addressing the natural justice requirements in each case, and to then tailor the required disclosure to where it is both necessary and proportionate to disclose it; and
- c) ensure that the costs and procedures of the assessment are proportionate to the amounts at issue.

[71] More recently, the court considered an appeal of a master's dismissal of an application for documents production in advance of a special costs hearing in *Pyper v. Schuetze*, 2023 BCSC 2321. In dismissing the application in the first instance, the master, as she was at that time, found that the documents being sought did not exist, had already been disclosed, and were irrelevant or beyond the scope of what

is “necessary to either prove or disprove the reasonableness of the contingency fee agreement”. The appeal was also dismissed with the court questioning how such disclosure was necessary given that the assessment of costs was under a contingency agreement such that the issue in dispute was the reasonableness of that agreement. An appeal of that decision to the Court of Appeal was also dismissed, as was an application to vary the order arising from that dismissal.

[72] The defendants argue that these cases illustrate that there are limits to the disclosure that may be required before an assessment of special costs. However, it should be noted that both *Sequoia* and *Pyper* involved an assessment of special costs where fees were charged under a contingency agreement.

[73] The court in *Sequoia* also recognized that there may be limits imposed on the procedural aspects of a challenge to an assessment of special costs given proportionality concerns based on the issues between the parties, whether the challenge is a delay tactic, a fishing expedition or an abuse of process (at para. 13).

[74] That consideration is relevant here as the defendants argue that the “plaintiff has a demonstrated history of leaving no pebble unturned - to conduct a ‘microscopic’ examination”, or to employ a delay tactic or fishing expedition contrary to any principles of proportionality, pointing specifically to the recent attempt to re-open the Court of Appeal’s decision as an example.

Waiver of Privilege

[75] Regardless of the above, a party presenting their bills for assessment may also be found to have waived privilege. The plaintiff argues that to be the case here, although it is not entirely clear which privilege is being asserted by the defendants as a basis to refuse production of its files.

[76] As to the former, a party claiming that a document is subject to litigation privilege bears the onus of establishing such privilege: *Hamalainen v. Sippola*, 1991 CanLII 440 (BCCA).

[77] As to the latter, given the quasi-constitutional right to solicitor-client privilege, the onus of establishing a waiver of it is on the party seeking to displace it: *Le Soliel Hotel & Suites Ltd. v. Le Soliel Management Inc.*, 2007 BCSC 1420, at para. 22.

[78] The parties did not disagree as to the importance of privilege, or the forms it can take, those being solicitor-client privilege, litigation privilege, and solicitor's brief privilege as identified in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, and summarized in *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 ("*Huang*") at paras. 77 to 81.

[79] There was no fundamental dispute during this application that contents within the defendants' counsel's files were subject to both solicitor-client and litigation privilege. The issue on this application was whether either privilege had been waived.

[80] Waiver can occur either expressly or implicitly. In *S.K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) ("*S.K. Processors*"), McLachlin J., as she then was, stated as follows:

[6] 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. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter* 1981 CanLII 710 (BC SC)...

[81] The issue as to waiver in this context generally involves the implicit waiver, namely whether by submitting the accounts for assessment or by virtue of the evidence led in support of the accounts on such an assessment, an implicit waiver occurs.

[82] Based on its argument that *Gichuru* stands for a blanket disclosure of solicitor file materials, the plaintiff seems to be suggesting that there is always an implicit waiver of all privilege when a party puts forward their special costs accounts for assessment. However, even if that is not the case, the plaintiff argues that by virtue

of the content of the Affidavits of Justification, the defendants have otherwise waived privilege.

[83] In addressing implied waiver in *Huang*, this court considered various decisions where waiver was implied including *S.K. Processors* and found as follows:

[143] The common thread in the cases where implied waiver is found is that the privilege holder has attempted to use and, at the same time, to shelter behind privileged documents. In such cases, fairness and consistency require production because the privilege holder uses the privilege as a sword to justify or explain a position or action while also using the privilege as a shield to prevent the other party from testing the justification or explanation.

[84] As an example of the concern raised in *Huang* that parties may attempt to use privilege as a sword rather than a shield, the plaintiff also referred the court to *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2018 ONSC 5897, a case in which counsel's documents were being sought to be produced on the basis that they were relevant to an extant stay application, and had been referenced by the party seeking the stay in their supporting affidavits, who in turn argued that the underlying documents were irrelevant or subject to settlement privilege claiming that such privilege had not been waived.

[85] The court found that given the contents of the affidavit, privilege had been waived:

[18] The plaintiff proposes to tender the Kestenberg Affidavit and its references to the ongoing drafts of the Ogden Affidavit not only for the timeline, but also to support its position that there was no settlement before June 6 as the parties were not *ad idem*. Surely, unlike the situation in *Sable Offshore Energy v. Ameron International Corp.* 2013 SCC 37, the documents in question are now relevant to the position advanced by the plaintiff before the court, namely whether it and Secure became *ad idem* on June 6 or whether settlement was reached – and the relationship between the plaintiff and Secure changed from adversarial to cooperative - on an earlier date. KSP is entitled to test the veracity of that position as to when the landscape of the litigation changed between the plaintiff and Secure. I find that it would be unfair for the plaintiff to tender its version of the negotiations and ask the court to accept its interpretation of when a settlement was reached and then shield itself from disclosing the relevant documentation on the basis of privilege. That privilege has been waived.

[19] In *City of Kawartha Lakes, supra*, the plaintiff brought a motion to approve a settlement it had reached with certain of the defendants. In support of that motion it tendered an affidavit to demonstrate that the settlement was

reasonable. The plaintiff refused to produce the settlement agreement itself, claiming privilege. As the court noted at paragraph 71, “Because the Affidavit describes all meetings, negotiations, offers, and discussions leading to the alleged partial agreement, the Affidavit alone is sufficient to permit these questions [on the terms of the settlement] to be answered. Once information is contained in an affidavit, realizing that affidavit’s purpose, that information becomes relevant and producible.” Here the purpose of the Kestenberg Affidavit is to demonstrate that the settlement was disclosed as soon as possible after it was reached. Noting that purpose, I find the documents sought will shed light on the negotiations between the plaintiff and Secure and the date their relationship changed from adversity to cooperation and are therefore relevant and producible on the pending motion

[emphasis added]

[86] Counsel for the defendants relies upon the more recent decision of *Red Branch Investments Limited v. Long*, 2021 BCSC 283, (“*Red Branch*”) aff’d 2022 BCCA 293, at paras. 17 to 27, where the court summarized the test for implied waiver of solicitor-client privilege as follows:

[24] It is firmly entrenched in our law that solicitor-client privilege, which protects the fundamental civil and legal rights of a citizen to communicate in confidence with their lawyers, will not be lightly abrogated and must be as close to absolute as possible to ensure public confidence and retain relevance: *0782484 B.C. Ltd.* at paras. 36–37. These rights will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis: *Soprema* at para. 50; *0782484 B.C. Ltd.* at para. 38. Such communications should only be disclosed where “absolutely necessary”, applying “as restrictive a test as may be formulated short of an absolute prohibition in every case”: *Soprema*, at para. 50. Caution must be exercised not to treat implied waiver as ultimately a discretionary call about trial fairness: *Soprema* at para. 51. Our Court of Appeal in *Soprema* went on to observe that:

[53] Where legal advice may have influenced a party’s “state of mind” on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party’s state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant. But it does not follow from this that that litigation advantage is “unfair”. I do not think one can properly describe a litigation advantage “unfair” when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the

privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.

[25] Justice Voith made clear in *E0782484 B.C. Ltd.* at para. 39 that the foregoing comments in *Soprema* did not obviate the need to consider both fairness and consistency when addressing an implied waiver of privilege. In *Soprema* at para. 30, our Court of Appeal noted that, for example, fairness and consistency will required a finding of implied waiver where:

- a) a party waives privilege over part of a communication; and
- b) a party relies on legal advice it received as an element of its claim or defence. Having raised legal advice, for example to justify or explain its conduct, a party cannot in fairness then be permitted to assert privilege to prevent an opposing party from exploring the validity of the claim.

[26] A claim of waiver of privilege cannot be grounded in the absence of either pleadings, evidence or argument asserting reliance on legal advice: *H.M.B.* at para. 47.

[27] In *Michelson v. Borden Ladner Gervais LLP*, 2017 BCSC 1584, this Court stated:

- [18] *Soprema* establishes three requirements for implied waiver:
- (a) the state of mind of the party asserting the privilege is an element of a claim or defence;
 - (b) the party asserting the privilege is known to have received legal advice relating to that issue; and
 - (c) the party asserting the privilege is relying on the legal advice to justify its conduct.

Conclusion

[87] I do not take the Court of Appeal’s comments in *Gichuru* to stand as a blanket proposition that in order to pursue the remedy of special costs, a party presenting their bills must forgo all entitlement they would otherwise have to withhold their files on the grounds of solicitor-client privilege.

[88] However, the starting point is that all litigants are entitled to rely on solicitor-client privilege, it being afforded quasi-constitutional protection that should not be interfered with unless absolutely necessary: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (“*University of Calgary*”) at para. 43.

[89] A party presenting their accounts to be assessed to support a special costs award may find that disclosure of counsel's file materials which are otherwise subject to privilege will be necessary given that:

- a) They have the onus to establish that the accounts are reasonable and counsel's bare assertion, in sworn evidence or otherwise, that they are is generally not sufficient evidence; and
- b) the rules of natural justice require that the payor be able to test the reasonableness of those accounts, which may require production of their counsel's file materials; or
- c) they have implicitly waived privilege through the materials that they have filed to justify their accounts.

[90] It remains the discretion of the presider, typically the registrar, to determine the scope that will be necessary for the case before it, having regard to issues such as proportionality as set out in R. 1-3(2), as incorporated specifically in R. 14-1(3)(viii), and the balancing of the protection afforded by a claim of solicitor-client privilege and the fundamental rules of natural justice.

[91] For example, where an assessment of special costs is being done in respect of one application, or an order made early in the proceedings such as where a notice of civil claim is struck as an abuse and default judgment granted accordingly, or where the fees are being claimed under a contingency fee (as was the case in *Sequoia* and *Pyper*), it may be that the statements of account, the correspondence between the parties, and the court documents are sufficient evidence on which those accounts could be assessed as to reasonableness without any further disclosure being necessary.

[92] In all cases the directions of the court in *Pyper* are apt, the registrar should consider and weigh the entitlement to solicitor-client privilege against the relevance and usefulness in ensuring the principles of natural justice are upheld, and then tailor disclosure to what is both necessary and proportionate having regard to the

costs being assessed and the costs and effort of the procedural steps being proposed.

[93] Applying that analysis, there are various factors in this case that justify a broader level of disclosure than what has been produced to date, namely:

- a) the scale of costs being assessed, that being close to \$2.5M (notwithstanding the 30% reduction, the court will be assessing whether the full amount billed is reasonable, prior to applying the discount);
- b) the length of time over which these services were provided (December 22, 2016 to July 14, 2021);
- c) the number of pleadings, applications, affidavits, orders and lists of documents that were filed and/or prepared (Exhibit “A” to the affidavit of justification provides a list of 192 such steps); and
- d) the billing practices of the defendants’ counsel whereby they billed for multiple matters under one file number such that the determination as to what was actually billed for this particular matter is subject to counsel’s own allocation based on counsel’s own review of their file materials.

[94] To put that another way, given considerations of proportionality, the balancing of the right to solicitor-client privilege against the principles of natural justice in being able to properly challenge the accounts (including as to the allocation based on assertions of counsel made following their own review of file materials), supports a tailored process for further disclosure.

[95] The defendants argue that it is not proportionate to provide disclosure on the proposed terms, namely by separately listing the documents in its file and, to the extent any such document is not produced, that it be identified as to whether or not it is being withheld on the grounds of privilege or relevance.

[96] I do not agree given the above factors.

[97] In addition, even if I were wrong in the above analysis, I would still find that the defendants have waived solicitor-client privilege over their file materials given the contents of the Affidavits of Justification, as summarized above.

[98] The defendants argue that at no time have the defendants placed their state of mind in issue, or injected into the litigation legal advice given to them, such that the plaintiff is unable to meet the requirements for implied waiver as summarized in *Red Branch*, based on the three-part test from *Soprema*, as cited therein. I do not agree.

[99] The three-part analysis in *Soprema*, was specific to circumstances where a waiver of solicitor-client privilege occurred as a result of the party asserting that its conduct (that being the conduct that forms the basis of the litigation itself) was done based on that legal advice.

[100] Similarly, as noted in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263, a case referred to by the defendants, the Court of Appeal confirmed that a trial judge's reliance on unfairness was insufficient to ground an assertion of waiver in such circumstances, citing *Soprema* as follows:

[47] In the absence of either pleadings, evidence or argument asserting reliance on legal advice, the chambers judge's invocation of fairness and consistency are insufficient to ground waiver. This is explained by this Court in *Soprema*:

[51] Accordingly, one must be cautious about a test for implied waiver that does not rest on a bright line capable of identifying "clearly defined circumstances", which depends on balancing interests, and which appears to treat implied waiver as ultimately a discretionary call about trial fairness. In my opinion, the test relied on by the judge does not adequately give effect to the near absolute protection of solicitor-client privilege mandated by the Supreme Court. ...

...

[53] Where legal advice may have influenced a party's "state of mind" on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party's state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant.

But it does not follow from this that that litigation advantage is “unfair”. I do not think one can properly describe a litigation advantage “unfair” when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.

[Emphasis added.]

[101] Notably, the court did not say that concepts such as fairness, and consistency are not relevant to a determination of waiver in any circumstance, but that the court must give effect to the “near absolute protection of solicitor-client privilege mandated by the Supreme Court”. Specifically, in *University of Calgary*, at para. 43, the Supreme Court put it this way:

[43] This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary (*Chambre des notaires*, at para. 28, citing *Lavallee*, at paras. 36-37, *McClure*, at para. 35, *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185, at para. 27, and *Goodis*, at para. 15). Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in “certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis” (*McClure*, at para. 35). These limited categories, which will only be satisfied in rare circumstances, include the accused’s right to make full answer and defence (*McClure*; *Brown*) and where public safety is at stake (*Smith*).

[102] In the case at hand, defendants’ counsel has filed affidavits to support that the work undertaken by it, and amounts claimed for doing that work, are reasonable. Those affidavits do go further, however, than merely presenting evidence of what amount a reasonably prudent lawyer of the same level of expertise as themselves would charge for this matter, referencing only the pleadings and correspondence over which there is no privilege. An affidavit of justification that limited the evidence to those points may not necessarily constitute a waiver of privilege.

[103] Most notably, here, the defendants have tendered evidence that they separated out time entries unrelated to this matter, first based on the deponent’s knowledge gained from working on the file, and then if there was any ambiguity,

based on a review of their file materials. As a result, the defendants have put the full contents of their file into issue. By doing so, and by still asserting privilege, the defendants are attempting to use privilege as both a sword and a shield, much like the parties in *Tallman*.

[104] While counsel for the defendants argue that such a finding is the type of “unfairness” analysis the Court of Appeal said was not determinative in *H.M.B. Holdings*, it is of some significance that in the context of a passing of accounts any “unfairness” here would likely amount to a breach of the rules of natural justice, the corresponding entitlement which is a bedrock of our legal system and must be balanced as against the right to that privilege.

[105] Where I do agree with the defendants, however, is that it may not always be appropriate, or proportionate, to order a broad opening of the file cabinet, as they say, and require disclosure of all file materials on special costs assessment, even if a waiver has occurred.

[106] Rather, given the comments of the Supreme Court in *University of Calgary*, in my view, even where there has been an implied waiver a tailored process for disclosure ought to be put in place, which is proportionate to the issues, complexity and amount involved, so as to strike a balance between the right to solicitor-client privilege on the one hand, and rules of natural justice on the other which require that the paying party have sufficient information to enable them to test the evidence to answer the claim against them.

[107] Here, the matter is complex, involved numerous time keepers and covered a long period of time, with the assessment expected to take several weeks to be heard, and the amount being assessed being just under \$2.5M (before the required discount is applied). Proportionality supports some disclosure.

Orders

[108] Accordingly, I make the following orders:

a) Within 60 days of this order, the defendants are to provide the plaintiff with:

i. All invoices rendered to their client under the file number involving this action, including those billings that may relate to other matters.

I agree with the plaintiff that the full accounts, not just the mined narratives of the time entries exported to excel, are to be disclosed. In addition, as noted, privilege has been waived in respect of the other matters by virtue of the Affidavits of Justification and explanation provided as to how each item was separated out. It would be contrary to the rules of natural justice for the plaintiff to be denied its ability to test the unilateral allocation made by the defendants' counsel.

ii. A list of their counsel's file contents, disclosing which documents over which they are asserting litigation privilege, solicitor-client privilege, and relevance, and the basis for each such claim (the "List of Withheld Documents").

For the purpose of this list, the defendants may list items by class or appropriate grouping, provided that the assertion of privilege is uniform for that class and a determination can reasonably be made of the privilege claim. As an example, if privilege is being asserted over research memoranda, then it would be sufficient to list those memoranda in a manner similar to: "X number of research memoranda with supporting case law and internal correspondence regarding same, as to the following topics/issues [identified]", with the appropriate notation as to the grounds for the privilege being claimed.

b) Any documents within defendants' counsel's file materials that are not identified on the List of Withheld Documents are to be made available for inspection by the plaintiff, on at least 5 business days' notice. Upon inspection of those files, the plaintiff may request copies of any such

documents, provided that they pay the reasonable photocopying charges at \$0.30 per page.

- c) Upon receipt of the List of Withheld Documents, the plaintiff is to advise which, if any, of such documents it objects to being withheld, with the parties being at liberty to seek further directions as to production of such documents, whether that be on a document by document, or class by class basis.
- d) Any documents on the List of Withheld Documents that are subject to litigation privilege, will be producible upon all the conclusion of all potential avenues of appeal in this matter.
- e) Costs of this application will be determined with the assessment.

[109] With respect to documents which may be subject to litigation privilege, a decision may be made to hold the assessment in abeyance pending the resolution or determination of the plaintiffs' recent request for reconsideration by the Court of Appeal.

[110] As such, I am not imposing any timelines on those portions of this order other than that in sub-paragraph (a) above. If there is not reasonable compliance, within reasonable time limits, it can be addressed at a further pre-hearing conference.

[111] I thank counsel for their thorough submissions on these issues.

“Associate Judge Robertson”
Sitting as Registrar