CITATION:	*The Queen v Rolfe (No. 2)* [2021] NTSC 45
PARTIES:	THE QUEEN v ROLFE, Zachary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21942050
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JUDGMENT OF:	Mildren AJ

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EVIDENCE — Privileges — Legal professional privilege — Material produced pursuant to subpoena — Legal professional relationship between members of police force and legal practitioners employed by DPP — Waiver — Disclosure of document to other party — Third parties — Common interest privilege — Intention.

Coroners Act 1993 (NT) ss 6, 15, 34
Criminal Code Act 1983 (NT) Part VI, ss 156, 208E
Criminal Code Act 1995 (Cth) Sch 1, Ch 2
Evidence (National Uniform Legislation) Act 2011 (NT) ss 118, 119
Police Administration Act 1978 (NT) s 148B

Director of Public Prosecutions (Cth) v Kinghorn (2020) 102 NSWLR 72, applied.

Andreou v Neilson-Scott [2020] NTLC 04; *ASIC v Rich* [2004] NSWSC 1089; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Bell v Deputy Coroner of South Australia* [2020] SASC 59; *Buttes Gas & Oil Co. v Hammer (No 3)* [1981] QB 223; *Esso Australia Resources Ltd v Commissioner of Taxation* (1997) 201 CLR 49; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511; *Goldberg v Ng* (1995) 185 CLR 83; *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708; 184 ALR 593; *Grofam v ANZ* [1993] FCA 501; 117 ALR 669; *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125; *Mann v Carnell* (1999) 201 CLR 1; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275; *R v Bunting & Ors* (2002) 84 SASR 378; *R v Dainer, Ex parte Pullen* (1988) ACTR 25; *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* [2006] VSCA 201; (2006) VR 1; *Telstra Corporation v Australis Media Holdings (No 1)* (1997) 41 NSWLR 277; *Wallace v DPP* [2003] AATA 119; *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54, referred to.

REPRESENTATION:

Counsel:

Crown:	S Callan SC
Accused:	D Edwardson QC and A Allen QC
Commissioner of Police:	M Chalmers

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Tindall Gask Bentley
Commissioner of Police:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Rolfe (No. 2) [2021] NTSC 45
No. 21942050

BETWEEN:

THE QUEEN

AND:

ZACHARY ROLFE

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 18 June 2021)

Introduction

[1] The Accused, Zachary Rolfe, is charged on indictment with one count of murder in relation to the shooting of the Deceased, Charles Arnold ('Kumanjayi') Walker, at Yuendumu on 9 November 2019.

[2] The Accused was at all material times a serving police officer in the Northern Territory Police Force. Without going into the details of all of the circumstances leading to the death of the Deceased, it is sufficient at this stage to note that the Deceased had been released from prison under the terms of a suspended sentence which required him to comply with certain conditions relating to his residence and the wearing of an electronic monitoring device. Subsequently, the Deceased removed the electronic

monitoring device and as a result, could not be located. Subsequent police efforts to locate the Deceased were unsuccessful. On 5 November 2019, a warrant was issued for the Deceased's arrest. The Accused and another police officer, Constable Eberl ('Eberl'), were among a number of police that made extensive enquiries within Yuendumu in order to locate and arrest the Deceased. Ultimately, on 9 November 2019, the Accused and Eberl located the Deceased in a room inside a house known as House 511, Yuendumu.

[3] The Crown case is that during the course of attempting to arrest the Deceased, a struggle ensued and the Deceased stabbed the Accused once to his left shoulder with a small pair of medical scissors. The Accused stepped back, drew his firearm and as Eberl and the Deceased continued to struggle, the Accused shot the Deceased once in the middle right region of his back. Eberl took the Deceased to the ground, landing on top of a mattress on the floor on the opposite side of the room, said to be a bedroom. As the Deceased lay on his right side with his right arm holding the scissors beneath him, Eberl was partially on top of him. Eberl had pinned the Deceased's left leg and had his right arm around the Deceased's neck in order to control him. The Accused moved forward towards Eberl and the Deceased, placed his left hand on Eberl's back, and fired a second shot, 2.6 seconds after the first shot. This was followed by a third shot fired 0.53 seconds after the second shot. Both of these shots were fired at point blank range less than 5cm from the Deceased's left chest area, with one of the

shots proving fatal. The shooting was captured by body worn video cameras worn by Eberl and the Accused.

[4] On 9 November 2019, Detective Senior Sergeant Kirk Pennuto ('Pennuto') was on higher duties as Acting Superintendent of the Crime Division of the Northern Territory Police Force. As a result of Pennuto's position, he was notified of the Deceased's death. On or about the same day, the investigation by the police into what had occurred was designated as a major crime investigation and was named 'Operation Charwell'. On 10 November 2019, Pennuto was appointed the Senior Investigating Officer of the investigation, a position he maintained until he was transferred as Superintendent to Katherine. During the course of the investigation, Pennuto kept diary notes which begin on 9 November 2019 and end on 11 November 2020.

[5] The Accused was arrested on 13 November 2019. On or about 19 November 2019, the Accused was charged with murder and an Information was filed in the Local Court of the Northern Territory on 19 November 2019 or in the days following. The Office of the Director of Public Prosecutions Northern Territory ('DPP') took immediate carriage of the prosecution at the same time.

[6] The Crown case, in short, is that shots two and three were unjustifiable as they were unreasonable, unnecessary and disproportionate to the circumstances because the Accused had a range of less than lethal tactical

alternatives open to him. The Crown case is that shots two and three were not in the exercise of any power or function under the *Police Administration Act 1978* (NT). Further, the Crown case is that at the time of firing the shots, the Accused intended to cause serious harm to the Deceased.

[7] The Defence case at trial is expected to be that at all relevant times the Accused acted lawfully when he discharged his firearm in self-defence and in defence of Eberl. It will further be contended that the Accused acted in good faith in accordance with s 148B(1) of the *Police Administration Act*. An important issue will also be whether the Accused is not guilty by reason of s 208E of the *Criminal Code Act 1983* (NT) ('the Code'), which provides:

> A person is not criminally responsible for an offence against this Part if:
>
> (a) the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and
>
> (b) the conduct of the person is reasonable in the circumstances for performing that duty.

[8] The offence of murder, s 156, is contained in Part VI of the Code, as is s 208E.

[9] Section 208E was inserted into the Code in 2006, together with a range of other measures including the insertion into the Code of Part IIA, which substantially incorporated the criminal responsibility provisions of Schedule 1 Chapter 2 of the *Criminal Code Act 1995* (Cth), which in turn dealt with, *inter alia*, provisions regarding self-defence and applying them to particular

offences including murder and manslaughter. Section 208E has not been the subject of a judicial decision by this Court, although it has been discussed by her Honour Judge Armitage in the matter of *Andreou v Neilson-Scott*[1], delivered on 28 February 2020. It is therefore not surprising that the police might wish to seek legal advice as to what evidence might be relevant to that defence if it is raised by the Accused at his trial.

[10] At the same time that the investigation was proceeding in relation to the criminal matter, other officers within the Northern Territory Police Force became involved in the preparation of a draft report to the Northern Territory Coroner ('the Coroner'), anticipating that there would be a coronial enquiry into the Deceased's death. Unlike other jurisdictions, the Coroner does not have the power to commit a person for trial following a coronial inquiry. The Coroner, but not a Deputy Coroner, may investigate a reportable death into a suspected unlawful killing.[2] A Coroner has no power to include in his or her findings a statement that a person is or may be guilty of an offence.[3] I was told by Counsel, without objection, that in accordance with the usual practice, there has been no inquest into the Deceased's death to date, pending the finalisation of these proceedings. There has been, of course, a committal hearing which took place before his Honour Judge Birch in the Alice Springs Local Court between 1 and 3 September 2020. On 26 October 2020, his Honour found that there was a case to answer and

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1 [2020] NTLC 04.

2 *Coroners Act 1993* (NT) ss 6(4)(b), 15(1A).

3 Ibid, s 34(3).

committed the Accused to stand trial in this Court. A trial date has been fixed for five weeks commencing in Darwin on 19 July 2021.

[11] At some time in April 2021, information was provided to Counsel for the Accused that there existed documents in the hands of the Northern Territory Commissioner of Police ('the Commissioner') which had not been disclosed, but which Counsel for the Accused considered ought to have been disclosed in accordance with the obligation resting on the prosecution to disclose all relevant information including information which may assist the Accused in his defence.[4] Apparently those documents were not immediately forthcoming, I infer that this was because the DPP was unaware of them, and so the Accused caused to be issued two subpoenas to the Commissioner.

The Subpoenas

[12] The first subpoena is dated 21 April 2021 and seeks production of various documents compiled or contributed to by Superintendent Scott Pollock ('Pollock'), Assistant Commissioner Nick Anticich (Anticich'), Commander David Proctor ('Proctor') and Senior Sergeant Andrew Barram ('Barram'). On 30 April 2021, a second subpoena was issued seeking the production of notes made by Pennuto relating to the investigation and charge of murder against the Accused. Since that time, the Commissioner has produced into Court all documents identified by him as being captured by the subpoenas,

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4 See for example *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708; 184 ALR 593; *Mallard v The Queen* [2005] HCA 68 at [17]; (2005) 224 CLR 125 at 133.

including redacted versions of all of the documents. No objection was taken to copies of the redacted versions being made available to the parties. The only objection now raised is a claim for legal professional privilege over the redacted portions of the material.

The claim for legal professional privilege

[13] Counsel for the Commissioner referred the Court to the decision of the High Court in *Esso Australia Resources Ltd v Commissioner of Taxation*[5] as authority for the proposition that the provisions of ss 118 and 119 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA') do not apply to documents sought on subpoena but rather that the relevant test was whether the documents were the subject of legal professional privilege at common law. The reason for this is that the ENULA provisions in ss 118 and 119 relate only to the adducing of evidence, and as the Uniform Evidence Acts do not apply throughout all of the Australian jurisdictions, it cannot be applied by analogy or by what McLelland CJ in Eq referred to in *Telstra Corporation v Australis Media Holdings (No 1)*[6] as a paradigm which should be 'rationally reflected in derivatives'. I was not referred to any decision to the contrary.

[14] All Counsel accepted that it is settled law that members of a police force may stand in a confidential legal professional relationship with legal

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5 (1997) 201 CLR 49.

6 (1997) 41 NSWLR 277 at 279.

practitioners employed by the DPP.[7] The same must apply if the DPP engages independent Counsel to prosecute an accused person. What must be established by the party seeking to uphold the privilege is that the material, whatever form it is in, was made or recorded for the dominant purpose of confidential use in litigation, or for the obtaining of confidential legal advice if at the time the communication was made or the document produced came into existence legal proceedings were in reasonable contemplation[8].

[15] I have been provided with an un-redacted version of the diary notes of Superintendent Pennuto. Subject to any argument of waiver, I consider that the portions of the material which are highlighted and are subject to a claim for privilege are privileged except for the following which in my opinion are not related to the dominant purpose of confidential use in litigation or for the obtaining of confidential legal advice if at the time the communication was made or the document produced came into existence, legal proceedings were in reasonable contemplation::

(a) 7 January 2020 1436 hours (Bundle 2, pp 86-87) said to be in Category C.

(b) 3 April 2020 1045 hours (Bundle 1, p 39) said to be in Category C

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7 See *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Waterford v The Commonwealth of Australia* (1987) 163 CLR 54; *ASIC v Rich* [2004] NSWSC 1089 at [43]; *R v Bunting & Ors* (2002) 84 SASR 378 at [45]; *Wallace v DPP* [2003] AATA 119; *R v Dainer, Ex parte Pullen* (1988) ACTR 25; *Grofam v ANZ* [1993] FCA 501; 117 ALR 669.

8 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *R v Bunting & Ors* (2002) 84 SASR 378 at [28].

(c) 9 April 2020 1040 hours (Bundle 1, p 43) said to be in Category C.

(d) 9 September 2020 0610 hours (Bundle 1, p 94) said to be in Category A.

(e) 30 October 2020 0820 hours (Bundle 1, pp 111-112).

[16] I have also been provided with multiple un-redacted versions of the draft report to the Deputy Coroner (although addressed to the Coronial Investigation Unit) prepared by Pollock on which there is handwritten editing by Proctor (whom I will refer to as the authors). Some parts of the drafts are the subject of a claim for legal professional privilege on the basis that the drafts of the report refer to legal advice given to the authors and received from legal practitioners employed in relation to the prosecution of the Accused. There were seven drafts altogether. A final report to the Deputy Coroner has not yet been provided. The passages that are redacted and are subject to the claim for privilege are bounded or bracketed in red pen. In addition, an Aide Memoire was provided to me setting out the page references of the passages subject to the claim for privilege in each version of the report with a cross-reference to the diary notes of Pennuto. The Aide Memoire also refers to inconsistent redacting and indicates that where this has occurred, the claim for privilege is not pressed.

[17] Subject to the question of waiver, I consider that the claims for privilege are well founded except that I note that there is no claim for privilege for the item on page 65 of Document 2 and on page 75 of Document 6 (Document

numbers are as per those used in the Aide Memoire). I think these are mistakes in the Aide Memoire and I will uphold the claim for privilege in respect of both of those matters. I note also that the Aide Memoire records that there is a claim for privilege in relation to Document 4 at page 75. No such page exists, Document 4 is only 64 pages long.

[18] As for the documents produced pursuant to the subpoena dated 21 April 2021 (that is the sum of the material but for the seven drafts of the report referred to above), one document which is potentially privileged is the 'JCM No 4' Document, found at page 16 of the paginated bundle. I consider that the first highlighted block is not privileged, but the second highlighted block on page 2 of the JMC No. 4 Document is privileged, subject to any question of waiver. The other passages at pages 6 and 32 are not privileged, but the passage marked at page 7 is privileged.

[19] Counsel for the Accused submitted that I should consider whether the claims are wider than necessary for the purposes of the claim. I have considered this. The second point made by Counsel for the Accused was that advice given in the context of a criminal investigation has been transferred or translated into the drafts of the report to the Deputy Coroner, and that this may mean that the advice has been the subject of waiver, on the basis, as I understand it, that privileged advice loses its privilege if it is disseminated to third parties. The basis of the suggestion that the authors are third parties is that they were not concerned with the criminal investigation. Reference

was also made to the fact that the Coroner does not make any claim for privilege in relation to the drafts of the report**.**

Waiver

[20] Counsel also submitted that the DPP and the police did not disclose that Pollock had considered two expert reports and set out in detail why he considered that those expert opinions were misconceived, ill-informed and wrong, and that Pollock's opinion was not disclosed to the Defence. Further, it was put that Anticich, who was instrumental in the charges being brought against the Accused, stopped the progression of the report to the Deputy Coroner because it was inconsistent with the prosecution case. It was put that this was relevant to whether there was a genuinely legitimate claim for legal professional privilege in this case, and if so, whether the privilege has been waived.

[21] As to waiver, I was referred by Counsel for the Commissioner to the decision of Martin J as he was then in *R v Bunting & Ors*[9] and in particular, to paragraph [74] of his Honour's reasons where he said:

> … at the point where the duty of disclosure requires disclosure of relevant information, if disclosure of the relevant information requires disclosure of a privileged communication, the conduct of the Director in instituting or maintaining a prosecution becomes inconsistent with the maintenance of the confidentiality of the communication by reason of legal professional privilege. In those circumstances, in my view it would be unfair for the director to maintain the privilege in respect of the communication. Waiver of

9 (2002) 84 SASR 378.

> privilege is, therefore, imputed. In that sense the duty of disclosure "prevails" over legal professional privilege.

[22] However, as Counsel for the Commissioner also pointed out, this passage has not been followed by the New South Wales Court of Criminal Appeal in *Director of Public Prosecutions (Cth) v Kinghorn*[10]. In that case, the Court (Bathurst CJ, Fullarton and Beech-Jones JJ) said at p 116, [172]:

> In our view, the approach in *Bunting* does not represent a correct statement of principle. The test apposite to whether a prosecutor is to be imputed with a waiver of privilege is not informed by the prosecutorial duty of disclosure and an imputed waiver does not arise, per se, from the continuation of a prosecution without disclosure of privileged material that is caught by the duty. With respect, the primary judge erred in finding to the contrary.

[23] To be fair to Counsel for the Accused, he did not seek to rely on what fell from Martin J in *Bunting* but it is difficult to see what relevance the matters to which he referred have to the claim for waiver, unless there was some evidence of fraud or bad faith, but there is nothing like that evident in this case. As the Court in *Kinghorn* observed (at p 110, [152]):

> At common law, the courts will impute an intention to a party to waive privilege where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a consequence will follow "even though that consequence was not intended by the party losing the privilege". The approach of the common law to waiver applies with equal force to the relevant provisions of the *Evidence Act,* namely, s 122(2) (citations omitted).

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10 (2020) 102 NSWLR 72.

[24] The Court in *Kinghorn*[11] went on to refer to examples of where the waiver will be imputed, namely where a party makes an assertion or brings a case which is either about the contents of a privileged communication, or which necessarily lays open the confidential communication to scrutiny, and by such conduct an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication. Hence, a client who gives evidence about instructions given to his lawyers waives privilege over that communication. The Court continued[12]:

> ….in considering imputed waiver the critical matter is to address the particular "conduct" of the privilege holder, which at this point can be treated as the CDDP[13], and whether that conduct is inconsistent with the maintenance of the privilege…All of the cases which deal with imputed waiver do so by analysing some specific aspect of the conduct of the privilege holder in the context of the litigation to determine whether there is an inconsistency of the relevant kind…Even though, as a prosecutor, the CDDP was subject to a prosecutorial duty of disclosure as an aspect of seeking to ensure the fairness of the trial, that circumstance was only a species of "some overriding principle of fairness operating at large"; it was not a matter of itself which was shown to have informed any inconsistency. (citations omitted).

[25] The first matter put before me is that the confidential communications between Pennuto and others and the DPP and other lawyers engaged by the prosecution had been passed on to the authors of the drafts of the report to the Deputy Coroner, and because there is no common interest between those

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11 At p 111, [154].
12 At pp 111-112, [155].
13 The Commonwealth DPP.

members of the Northern Territory Police Force advising the Deputy Coroner and those involved in the prosecution of the Accused, once information has been passed on to the former by the latter, the privilege is lost. The second argument relates to a disclosure by Anticich in a letter to Deputy Coroner dated 30 November 2020 enclosing two memoranda, one dated 16 November 2020 from Detective Superintendent Kennon ('Kennon') to Anticich containing certain references for which privilege is claimed; and a second dated 20 October 2020 from Pollock to the 'Commissioned Officer in Charge, Operation Charwell Coronial' which does not refer to any privileged information.

[26] A leading authority is respect to loss of privilege by third party disclosure is *Mann v Carnell.*[14] The first thing to be noted is that the law relating to loss of privilege is not that which is contained in ENULA, but depends upon the common law, for the same reasons decided in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.[15] The view of the plurality in *Mann* was that, following *Goldberg v Ng*[16], a voluntary disclosure of privileged communications to a third party does not necessarily waive privilege. The reasoning of the plurality depended upon whether there was any inconsistency between the conduct of the client and the maintenance of the

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14 (1999) 201 CLR 1.

15 Ibid at pp 12 [26]-[27], 17 [41], 45 [145]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 83 FCR 511.

16 (1995) 185 CLR 83.

confidentiality which effects a waiver of the privilege. The plurality said (at p 13, [29]):

> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver "is imputed by operation of law." This means that the law recognises the inconsistency and determines the consequences, even though such consequences may not reflect the subjective intention of the party who lost the privilege…What brings about the waiver is inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

[27] The facts in both *Goldberg* and in *Mann* are that the client revealed confidential information on the express condition that the party to whom the information was revealed would treat the information as confidential. As Counsel submitted, this was not the case here. However, that does not necessarily determine the issues in this case.

[28] Reference was made to what is loosely called 'common interest privilege'. In *Bell v Deputy Coroner of South Australia*[17] Blue J said (at [327]):

> So-called "common interest privilege" is not a privilege in its own right. Rather, if two or more persons have a common interest in the subject matter of material the subject of legal professional privilege, there will be no waiver or loss of the privilege by reason of communication of the material by one of those persons to another of those persons.

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17 [2020] SASC 59.

[29] His Honour cited a number of authorities to support this proposition.[18] Examination of those cases shows that there must be a relevant common interest which can arise in a number of ways. One test which has been suggested is whether both parties could have engaged the same solicitors, but there are cases which deny that this is necessary. In nearly all of the cases where the privilege was held to be maintained, the relevant facts showed that the privileged documents had been forwarded to the third party on a confidential basis. In each case where the privilege had been maintained it was shown that the party receiving the privileged information had an interest in receiving it which was either the same, or substantially the same, as the other party. Counsel for the Commissioner did not seek to maintain that this was a common interest case, but rather that the police involved in the preparation of a report to the Deputy Coroner were not third parties for the purpose of waiver at all, but perhaps that is another way of describing what Lord Denning MR referred to in *Buttes Gas & Oil Co*[19] as treating the parties as if they were 'partners in a single firm or departments in a single company'. Although I accept that those police officers involved in the preparation of the drafts of the report to the Deputy Coroner were separate from those officers involved in the criminal investigation, there was a considerable amount of common interest between the two sets of officers.

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18 *Buttes Gas & Oil Co. v Hammer (No 3)* [1981] QB 223 at 243 per Lord Denning MR and at 267-268 per Brightman LJ; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 at 279-280 per Giles J; *Spotless Group Ltd v Premier Building and Consulting Group Pty Ltd* [2006] VSCA 201; (2006) VR 1 at [34] per Chernov JA (with whom Warren CJ and Neave JA relevantly agreed).

19 At p 243 E.

On the other hand, as Counsel for the Accused has pointed out, the Deputy Coroner cannot make findings as to criminal liability, nor commit a person for trial. Nevertheless, at the heart of the matter, the main point of commonality related to the issues concerning the circumstances of the Deceased's death, which included the circumstances under which the weapon was discharged by the Accused, and as has been submitted by Counsel for the Commissioner, the differences of opinion between police officers and the opinion of the expert witnesses, particularly that of Barram. Having read the whole of the material, I agree with Counsel for the Commissioner that there was no intention by the police investigating the circumstances of the alleged offence to waive any claim for privilege, although this does not determine the matter. It seems to me that there is no relevant unfairness in maintaining the privilege. In all the circumstances I find that privilege has not been waived by police officers involved in the investigation of the alleged offence passing on privileged information to police officers involved in preparing a draft report to the Deputy Coroner, bearing in mind that the police have not yet sent a report to the Coroner or Deputy Coroner.

[30] The final question is whether there was an implied or actual waiver of privileged information by Anticich as a result of the letter he wrote dated 30 November 2020 in which he enclosed the two memoranda previously referred to. Only one of those memoranda refers to privileged communications between the DPP and other lawyers engaged by the DPP,

and the police investigating the circumstances of the alleged crime. I refer in particular to the passage on page 2 of the Memorandum from Kennon which refers to ‘the prosecution agreed with’ certain matters and ‘advised’ certain matters. In context, I think this refers not to the police prosecuting team but to the lawyers referred to on page 1 of the memorandum. As Counsel for the Commissioner rightly conceded, this was a disclosure to the Deputy Coroner who was clearly a third party. In this case, the Deputy Coroner has waived any claim for privilege. It was submitted that I should infer from the circumstances that the correspondence evidences an expectation that confidentiality would be maintained with respect to legal professional privilege, at least to the extent that the DPP advice was not contemplated to be an issue at the coronial inquest. It is true that the references to the DPP advice was not the focus of the coronial investigation, but this is a two edged sword. If the DPP advice was of no importance, why mention it at all? It was put that the purpose of the letter from Anticich was not inconsistent with maintaining the privilege and was intended to assure the Deputy Coroner that there was transparency regarding the difference of opinion between Pollock and Kennon over the Barram statement, that that issue had been resolved and that the coronial investigation would continue to take direction from the Coroner. I am unable to accept that there was any implied understanding of confidentiality between the Assistant Commissioner and the Deputy Coroner. The letter of 30 November 2020 is not marked ‘confidential’. It was not a matter of common concern that the differences of

opinion needed to be resolved. Furthermore, the Coroner has waived any confidentiality. There is no statutory provision requiring a Coroner to receive information prior to the inquest on a confidential basis that cannot be waived. In those circumstances, I consider that the references in the attachments to the letter to privileged information have been waived.

[31] Finally, I think this case demonstrates how important it is that the DPP is provided by the police with all of the documents which are relevant, or may be relevant, to the prosecution of a person accused with having committed an offence, and this includes documents which may or are to be the subject of a claim for legal professional privilege, or for that matter, documents which are otherwise protected from disclosure. It is only then that the DPP can decide whether or not the duty of disclosure is such that the privilege should be waived. In this case, as I understand it, the documents in question were not provided to the DPP, which necessitated the issue of the subpoenas in this case. Failure to provide these documents may result in the DPP not becoming aware of them until after the trial, which may in turn have caused the trial to miscarry. Worse, if the documents are never revealed, it may be that an innocent person has been wrongly convicted. It is to be hoped that this situation will not occur in the future.
