Date: 19981214 Docket: CA 149383

NOVA SCOTIA COURT OF APPEAL
Cite as: Global Petroleum Corp. v. CBI Industries Inc., 1998 NSCA 220

Glube, C.J.N.S.; Chipman and Freeman, JJ.A.

BETWEEN:	)	
	)	
GLOBAL PETROLEUM CORP., a body corporate, TUPPER CORP., a body corporate as General Partner of Tupper Associates Limited Partnership, SCOTIA SYNFUELS LIMITED, a body corporate and POINT TUPPER VENTURES LIMITED, a body corporate	)	Michael S. Ryan, Q.C. and Robert W. Carmichael for the Appellants
Appellants	)	
- and -	)	
CBI INDUSTRIES INC., STATIA TERMINALS INC., STATIA POINT TUPPER CORPORATON and STATIA TERMINALS POINT TUPPER, INCORPORATED, all bodies corporate	)	Jonathan C.K. Stobie for the Respondents
Respondents	)	
	)	Appeal Heard: December 1, 1998
	)	Judgment Delivered: December 14, 1998

THE COURT: The appeal is dismissed with costs as per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Freeman, J.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision of Hamilton, J. in Chambers ordering the reattendance of witnesses to answer questions put to them by the respondents' counsel on discovery, and not answered.

The appellants are plaintiffs and the respondents defendants in one or both of two actions in the Supreme Court. The first, the so-called "Terminal Action", involves claims and counterclaims arising out of arrangements for the storage and blending of gasoline at a terminal at Point Tupper. The second, the so-called "Fraud Action", involves allegations of fraud against the respondents in relation to dealings respecting the terminal.

Four witnesses were examined at the relevant discoveries which were applicable to both actions: Edward Faneuil, in-house legal counsel of the appellant, Global; Thomas A. McManmon, Jr., Global's chief financial officer; Alfred Slifka, Global's President and one of its two owners; and Eric Maki, an engineering consultant for the appellant Scotia Synfuels.

The questions at issue put by the respondents' counsel to the witnesses concerned the information they had respecting the allegations of fraud and conspiracy to commit fraud in breach of fiduciary duty. The refusal to answer the questions was based on claims of privilege under the litigation privilege and the lawyers work product and brief rules.

Hamilton, J., at the outset of her decision, recited the general principles applicable to the issue of privilege which she took into account in rendering her rulings. She said:

I am satisfied that no privilege attaches to facts or to acts, as

opposed to advice. I am satisfied a party must answer all questions about facts in their knowledge, information and belief, whether or not that information came to them by or through their lawyer and whether or not such information was obtained in the context of receiving legal advice, again in the sense referred to at page 131 in the text by **Manes and Silver**. Also, as stated on the same page of that text, I am satisfied a party is not required to disclose the privileged communication itself. I find the Canadian position differs from the British position on this.

I am also satisfied a party does not need to identify, during discovery, the evidence he will rely on to prove his case at trial in the sense of disclosing his trial strategy. The effect of the foregoing is that I am ordering the respondents to provide the facts they are aware of that relate to the allegations in their statements of claim from whatever source they obtained them, including from their lawyers, but without the requirement that they disclose the source of those facts. I am also ordering the respondents to provide the basis on which they are claiming both special and general damages, but I am not ordering the production of experts' reports or documents that have been prepared for their lawyer in connection with substantiating their

damages claim.

Hamilton, J. then addressed the issue of the questions directed to Mr. Maki. He did not file an affidavit substantiating his claim to privilege. She held that he had not discharged the onus of establishing privilege and required him to answer all of the questions objected to.

As to the other witnesses, each of whom filed an affidavit, Hamilton, J. reviewed the individual questions objected to and ruled, with respect to each, whether or not they should be answered. In so doing, she drew a clear distinction between facts on the one hand and evidence on the other; between privileged communications on the one hand, and the facts contained therein on the other.

The witnesses were required to reattend to answer the questions, and with the exception of Mr. Faneuil, they were ordered to be discovered in Halifax.

The appellants raised 20 issues in the notice of appeal, but having reviewed the factums and heard the arguments of counsel, they can be restated.

(1) Whether Hamilton, J. erred by requiring the witnesses to provide evidence rather than facts.

(2) Whether Hamilton, J. erred by invading the solicitor/client privilege.

(3) Whether Hamilton, J. erred in requiring Maki and McManmon to attend rediscoveries in Halifax.

GENERAL:

In addressing each of these issues, I must keep in mind the general principles governing an appeal from a discretionary order in Chambers.

(1) This Court will not interfere unless wrong principles were applied or a manifest injustice has resulted. In so doing, we consider the consequences of the order under review, whether the Chambers judge gave insufficient weight to relevant matters, whether all relevant circumstances were brought to the attention of the Chambers judge, and whether the judge misapprehended the facts. See **Exco Corporation v. Nova Scotia Savings & Loan et al** (1983), 59 N.S.R. (2d) 331; **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at 145.

(2) This Court should narrowly confine the scope of appellate intervention on appeals respecting interlocutory decisions, particularly those involving procedural rulings. See **Campbell v. Lienaux** (1998), N.S.J. 142.

(3) The rules respecting procedure and discovery in civil matters should be liberally interpreted to give effect to full disclosure prior to trial. The object is to avoid surprise, save expense, and encourage settlement. See **Coughlan v. Westminer Canada Holdings Limited** (1989), 91 N.S.R. (2d) 214 at 221; **Soke Farm Equipment Ltd. v. New Holland of Canada Limited** (1990), 2 W.W.R. 762 at 768 (Sask. C.A.).

The **Civil Procedure Rules** providing for discovery have existed in their present form for over a quarter of a century. During that time, the practice of the Bar in their use has developed, and court rulings have provided clarification and refinement. Ordinarily, experienced counsel should have no difficulty in making the rules work and in conducting discoveries without unnecessary waste of time and expense. Only rarely should resort to the courts be had. When this happens, the Chambers judge is required to step in and provide a working solution to problems that have proven too difficult for

counsel to resolve on their own. Only rarely should it be necessary to appeal to this Court from such rulings. Even more rarely should it be expected that this Court will intervene in the discretionary resolution by the Chambers judge of such issues.

In the present case, the Chambers judge was confronted with over 45 objections to questions, and was required to weigh the arguments on both sides with respect to each and determine whether the question should be answered, either in part or in whole. I have reviewed the questions and her rulings and having heard and read the submissions of counsel, will address the correctness of her decision overall, by discussion of each of the three issues I have set out.

Hamilton, J. identified the questions at issue by referring to the paragraphs of the affidavit filed by Mr. Farrar in support of the application, and I will identify them in the same manner. It was agreed on argument of this appeal that we should order that the questions referred to in paragraphs 58, 98 and 107 are to be deleted from the order requiring answers.

EVIDENCE VERSUS FACTS:

It is apparent from the decision of Hamilton, J. as well as the affidavits of Messrs. Faneuil, McManmon and Slifka, that the appellants' argument in Chambers was primarily addressed to the issue of solicitor/client privilege. Hamilton, J. was satisfied that such privilege extends to advice given by a lawyer as to how a client's affairs should be structured. For example, the communications which Mr. Faneuil had with his client about entering into the stock purchase and shareholders' agreement of August 20, 1992, did not have to be disclosed. Such discussions and the subject of other questions which Hamilton, J. ordered need not be answered were part of the continuum of Mr. Faneuil's advice to his

client in this regard. As I have pointed out, Hamilton, J. drew a distinction between facts or acts on the one hand and communications and advice on the other, in determining the extent of the privilege as it applied to any particular question. The privileged communication itself need not be disclosed nor need a party disclose the evidence on which he will rely to prove his case at trial in the sense of disclosing trial strategy. However, facts of which the appellants were aware that relate to the allegations in their statement of claim - whatever the source, including lawyers - must be disclosed. The source need not be.

Before us, the appellants pointed to a number of questions required to be answered which were framed as follows or to the like effect:

> Q. What evidence do you have in your possession respecting . . .

In each and every case in which Hamilton, J. ordered that the question be answered, she determined that what in substance was requested was a fact. Her order requires that the witnesses disclose facts, not the evidence to be relied on in establishing such facts. That is very clear from her decision. As a matter of interest, in reviewing the transcript, counsel for the appellants never objected to any of the questions respecting the way in which they were framed, or on the ground that they sought evidence as opposed to facts. The objections were confined to the issue of privilege.

I dismiss the appellants' contention that Hamilton, J. has ordered the witnesses to disclose their evidence.

SOLICITOR/CLIENT PRIVILEGE:

It is beyond dispute that privilege cannot be used to protect facts from

disclosure if those facts are relied on by a party in support of its case. It is immaterial that the fact was discovered through the solicitor or as the result of the solicitor's direction. If it is relied on it must be disclosed. See **Metlege v. Halifax Insurance Company** (1998), N.S.J. No. 309 per Pugsley, J.A. at paragraph 31. See also **Soke Farm Equipment Limited v. New Holland of Canada Limited, supra**, at p. 765; **Wigmore on Evidence**, Third Edition, (1940), Volume 1, page 3; Manes and Silver, **Solicitor-Client Privilege in Canadian Law** (1993), p. 133, note 24; **CMHC v. Foundation Co. of Canada et al.** (1984), 63 N.S.R. (2d) 402 at 405 (N.S.S.C.T.D.).

The appellants assert specifically that Mr. Faneuil, Global's in-house counsel, should not have been required to disclose facts which he may have learned in his capacity as such. Such information, it is asserted, had its source in direct and confidential communications with the client. That was the sole source of Mr. Faneuil's knowledge. Hamilton, J. held that the majority of the questions put to Mr. Faneuil need not be answered because the answers required that he divulge privileged communications between himself and his client.

In my opinion, the appellants' argument loses sight of the distinction between confidential communications on the one hand and a relevant fact which must be disclosed on the other. In **Manes and Silver, supra**, at p. 32, the author states:

> In **Susan Hosiery Ltd. v. Minister of National Revenue** (1969), Jackett P. stated that:
>
> > Whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or the statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts

> contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, it would have been subject to discovery ([1969] C.T.C. 353 at 361).

Here, the example was given of the financial facts of a business, which would not be privileged merely because they had been set out for the solicitor in contemplation of litigation. However, the solicitor's prepared financial statement would be privileged. In further support of the distinction between privileged communications and factual communications, it was also stated that:

> What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion ... in the one case, and the materials created for the lawyer's brief in the other case. The facts or documents which happen to be reflected in such communications or materials are not privileged from discovery if the party would otherwise be bound to give discovery of them ([1969] C.T.C. 353 at 361.)

The appellants rely upon the following passage from the decision of Lamer, J. (as he then was) in **Descoteaux v. Mierzwinski** (1982), 70 C.C.C. (2d) 385 at p. 413:

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

The issue in that case was the validity of a search warrant to obtain allegedly false statements that an applicant for legal aid made with respect to his means. An exception to the general principle of confidentiality of communications existed where the communication was criminal or made with a view to obtaining legal advice to facilitate the commission of a crime. The Supreme Court of Canada did, in general, affirm the principle of confidentiality of solicitor/client communications, but did not hold that the facts communicated, if otherwise relevant, might not be subject to disclosure. In submitting that this case is authority for such a proposition, the appellants are taking a sentence out of context. The underlined sentence in the context of the court's decision clearly relates to the communication itself and the terms in which the facts are communicated, not the facts which may be relevant. If the appellants' assertion were correct, no relevant fact would be discoverable because a party could merely assert that it had been divulged to its solicitor. See also **Manes and Silver, supra**, pp. 30-34, 129-132; **Metlege, supra**, paras 31-38.

Mr. Faneuil gave advice to Global in connection with some of the transactions that are in issue in this litigation. He was actively involved in these events. He was ordered to answer questions that sought facts he acquired in such involvement as opposed to advice to the client. The mere fact that the witness testifying was Mr. Faneuil rather than his client is not relevant in determining whether the facts (as opposed to the privileged communications) should be disclosed. This point was grasped by the court in **Dusik v. Newton et al.** (1983), 38 C.P.C. 87 (B.C.C.A.) at p. 92. What is privileged is the communication. The facts that are not privileged may be elicited from either the solicitor or the client. Mr. Faneuil's position as a witness is no different than any of the other

witnesses. If the client is obliged to disclose the fact, so is he.

In dealing with the questions put to Mr. Faneuil, Hamilton, J. distinguished between what were relevant facts which had come to his attention, and the contents of his professional communications and any part of "the lawyer's continuum of advice, the specifics of which do not need to be disclosed". Having reviewed the questions, the objections taken and the disposition of each issue by Hamilton, J., I am satisfied that she did not err either in principle or in its application.

Specifically, the appellants contended that Hamilton, J. erred in ordering the production of the cost sharing agreement between the appellants Global and Scotia Synfuels. In the course of Alfred Slifka's discovery, he was asked about this agreement. He did not recall how it read or when it was entered into. Respondent's counsel called for a copy of the agreement. Counsel for the appellant took the position that it was privileged, apparently on the ground that it contained some confidential information respecting the relationship between the plaintiffs and their counsel. They did not take the position that this was a confidential communication as opposed to a relevant fact. Hamilton, J. simply ruled that the agreement was a fact and not privileged but negotiations leading up to its creation were. Had there been any communication reproduced in the agreement which was a confidential communication, it would have been open to the appellants to have provided this to the Chambers judge in a sealed envelope. This was not done. There is nothing on the face of the record to suggest that this agreement contained confidential communications and I am not satisfied that Hamilton, J. erred in ordering its production.

Another specific point related to how damages were calculated. Hamilton, J. did not require production of any confidential communications in this respect. She did

require disclosure of facts relied on in supporting the claim. I quote with approval her comment with respect thereto:

> Our **Civil Procedure Rules** encourage full production prior to trial, both in terms of documents and discovery, so as to avoid surprise at trial. To allow a party to claim $100,000,000.00 in general damages and permit them not to provide the basis of their claim until the notice of trial is filed, as argued by the respondents, is not conducive to making the parties aware of the case they have to meet as early as possible to encourage settlement and to encourage a realistic assessment of their relative positions.

With respect to the testimony of Maki, the appellants take a position that Hamilton, J. erred in holding that he had failed to discharge the burden of showing that the questions put to him were improper by reason of the fact that he had not filed an affidavit. In the context of Mr. Maki's claim for privilege, I agree with her statement that to demonstrate it, an affidavit should have been filed setting out the privilege claimed and referring to the content of the communication generally to demonstrate the privilege. The appellant submits that we should look at the questions and the other affidavits in order to determine the merits of Mr. Maki's position. Mr. Maki's position is obviously, as in the case of the other witnesses, that he may decline to answer the questions on the basis of solicitor/client privilege. Having reviewed the discovery and considered the objections taken as a whole, I am satisfied that Mr. Maki's position is no better than any of the other witnesses, including Mr. Faneuil. What was asked of Mr. Maki was what information he had that the cost estimates for the terminal project which had been furnished by the respondents were dishonest and fraudulent. Since the estimates were alleged in the pleadings to be so, the respondents were entitled to find out on what basis the witness said they were. Hamilton, J. was correct in coming to the conclusion that, overall, he had failed

to discharge the burden.

Generally, as to the facts as opposed to evidence or the solicitor's advice as to how those facts will be established, the appellants refer to and rely on **Can-Air Services v. British Aviation Insurance Company et al.** (1988), 30 C.P.C. (2d) 1 (Alta. C.A.). That case is interesting in that the court comments upon the propriety of a certain form of question. The court's view is contrary to that of Haines, J. in **Rubinoff v. Newton** (1967), 1 O.R. 402 at 403. It is not necessary to choose here between the two competing views. The appellant did not take objection to any of the questions at the discovery on this ground. Moreover, they have not shown that the questions ordered by Hamilton, J. in the context of her decision will elicit privileged information as opposed to the facts which must be disclosed.

The burden was on the appellants in the application. Keeping that in mind, I am unable to say that Hamilton, J. erred in striking the balance that she did between disclosure on the one hand and privilege on the other.

REATTENDANCE OF MAKI AND MCMANMON:

The appellants submit that the reattendance of these witnesses in Halifax works an injustice. In both cases it is said that there was basically only one question refused and that any other questions to be addressed to Mr. Maki were questions not

already asked. The location of a discovery examination - in the event that counsel cannot come to an agreement - must be determined by the Chambers judge. If ever a determination requires the exercise of discretion, this does. Having regard first to the fact that it is always open to counsel to come to an agreement to facilitate getting the information at minimal expense, and having regard to the magnitude of this litigation and the amounts involved, I am far from satisfied that trips to Halifax from Boston and Toronto would work an injustice.

In the result, I would dismiss the appeal, but vary the order of Hamilton, J. by providing that the answers to questions referred to in paragraphs 58, 98 and 107 of Mr. Farrar's affidavit are not required. I would award the respondents costs against the appellants in the amount of $2,000.00, plus disbursements to be taxed.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.