**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***R. v. Hobbs***, 2009 NSCA 90

**Date:** 20090909
**Docket:** CAC 302995
**Registry:** Halifax

**Between:**

Kevin Patrick Hobbs

Appellants

v.

Her Majesty the Queen represented by
the Attorney General

Respondent

**Judges:** Roscoe, Bateman and Saunders, JJ.A.

**Motion concerning Solicitor-Client Privilege Heard:**

September 8, 2009, in Halifax, Nova Scotia

**Written Decision: September 9, 2009**

**Held:** Motion by Brian F. Bailey for a declaration that the appellant has waived solicitor-client privilege with respect to representation at trial granted.

**Counsel:** Appellant in person
Ann Marie Simmons, for the respondent
Michael J. Wood, Q.C., for Brian F. Bailey

**Decision**:

[1] At the conclusion of yesterday's hearing we announced our unanimous decision that Mr. Bailey's motion ought to be allowed, with reasons to follow. These are our reasons.

[2] The appellant, who is self-represented on appeal, was charged with two offences, the first being that on April 8, 2005, he unlawfully had in his possession $32,000 which he knew had been derived directly or indirectly from the commission in Canada of an indictable offence contrary to s. 353(1) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, the second, that he transported or otherwise dealt with this currency with intent to conceal or convert it while knowing or believing that it had been derived directly or indirectly from the commission in Canada of a designated offence contrary to s. 462.31(1)(a) of the **Criminal Code**.

[3] After a nine-day trial before Nova Scotia Supreme Court Justice Felix A. Cacchione, Mr. Hobbs was found guilty of both offences. On October 10, 2008, he was sentenced to nine months' imprisonment on each charge to be served concurrently, followed by a period of probation for two years. An order of forfeiture was made with respect to the currency. A DNA order was granted.

[4] Mr. Hobbs appeals both his convictions and his sentence.

[5] The appellant successfully applied for judicial interim release pending appeal which was granted by an order of this Court in Chambers dated November 14, 2008.

[6] In the typed pages attached to his notice of appeal filed October 14, 2008, the appellant did not criticize in any way the conduct of his trial counsel, Mr. Brian Bailey. However, in the factum filed March 16, 2009, Mr. Hobbs complained:

> 2. ... At trial Mr. Hobbs' counsel did not raise any arguments relating to s. 8 of the *Charter*. As a result, Mr. Hobbs has been greatly prejudiced by this failure. Mr. Hobbs had a reasonable expectation of privacy with respect to the contents of his luggage, save and except for searches for items that could be used to jeopardize the security of the aircraft. The monies found in his luggage were not such items.

> 3. The money was found (sic) an initial illegal search and seizure, the subject of that search was narcotics and not money. Mr. Hobbs' s.8 *Charter* right was violated and a pardoning of the illegal search and the admission of evidence found thereafter would bring the administration of justice into disrepute.

[7] This new allegation prompted the Registrar - under the Court's direction - to send Mr. Hobbs a letter dated April 29 reminding him of the procedure to be followed when a claim of ineffective assistance of counsel is advanced, requiring him to notify Mr. Bailey, and to file his own affidavit to support his allegation.

[8] The Registrar's directions led to Mr. Bailey's retention of Michael Wood, Q.C. to represent his interests, and the adjournment of Mr. Hobbs' originally scheduled appeal. The appellant's appeal and motion to introduce fresh evidence are now scheduled to be heard by a panel of this Court on November 30, 2009.

[9] In support of this ground of appeal and his "Ineffective Counsel S. 8 Argument" the appellant filed his own affidavit sworn May 12, 2009, which reads in part:

> I advised my Lawyer, Brian Bailey, to make a Charter Argument under Section 8 of the Canadian Criminal Code (Illegal Search and Seizure). This Charter 8 argument was not represented to the Court as per my request. Therefore; I believe I was inadequately represented by ineffective counsel and this belief will comprise part of my argument for appeal and for my fresh evidence application.

[10] The purpose of yesterday's hearing was to deal with Mr. Bailey's motion for a declaration that the appellant has waived solicitor-client privilege for the purposes of this appeal, which would thereby permit Mr. Bailey to file his own affidavit evidence in response to the appellant's intended motion for leave to introduce fresh evidence. Appearing to make representations at the hearing were Mr. Michael Wood, Q.C., solicitor for Mr. Bailey; Ms. Ann Marie Simmons for the respondent and the appellant personally.

[11] Having carefully considered the record and the submissions we are unanimously of the view that by filing his affidavit sworn May 12, 2009, the appellant has expressly waived his solicitor-client privilege, and that Mr. Bailey

should therefore be permitted to respond to the allegations about his competence as they relate to his retainer.

[12] A lawyer has an ethical duty to hold in strict confidence any information provided by a client, and may not disclose that information except where the client permits, or in certain limited circumstances, for example where disclosure is necessary to prevent a crime, defend allegations of malpractice or misconduct, or to collect a fee. When the lawyer is required to make such disclosure, it should encompass no more than is necessary to answer the allegations.

[13] These ethical requirements are found in Chapter 5 ("Confidentiality") of the *Nova Scotia Barrister's Society Legal Ethics Handbook*. The rule with respect to confidentiality is as follows, and is qualified by certain principles:

> A lawyer has a duty to hold in strict confidence all information concerning the business and affairs of a client where the information is acquired by the lawyer as a result of the professional relationship with the client except where disclosure is
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law; or permitted or required by this Handbook.
>
> When disclosure permitted:
>
> 5.10 Confidential information may be divulged with the express authority of the client concerned and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Unless the client directs the lawyer to the contrary, the lawyer may disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and clerks. A lawyer, therefore, has a duty to impress upon associates, students and employees of the lawyer's office the importance of non-disclosure, both during their employment and afterwards, and to take reasonable care to prevent them from disclosing or using any information that the lawyer is bound to keep in confidence.
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> 5.11 Disclosure may also be justified in order to establish or collect a fee or to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, but only to the extent necessary for such purposes.

[14] A client who puts in issue the advice received from his or her solicitor risks being found to have waived the privilege with respect to those communications.

[15] The decision of the Ontario Court of Appeal in **Harish v. Stamp** (1979), 27 O.R. (2d) 395 (C.A.) is instructive. In that case, a plaintiff had been badly injured in a motor vehicle accident in which the defendant driver was charged with dangerous driving. The defendant had plead guilty to the dangerous driving charge and was criminally convicted. Subsequently, at the civil trial for personal injury damages, the defendant was examined about his guilty plea, and then indicated that he had only entered a guilty plea because of the erroneous advice given to him by his lawyer. The plaintiff sought to cross-examine the defendant on that issue and wanted to call the former defence counsel as a witness. The trial court rejected that approach on the basis that the defendant claimed solicitor-client privilege.

[16] On appeal, the Court of Appeal found that by having raised the issue of the advice given by his lawyer, the defendant had waived solicitor-client privilege. Justice Lacourciere said the following at para. 6:

> I also agree with the appellant that the refusal by the learned trial Judge to allow the plaintiff to call in reply the lawyer who had acted as counsel for the defendant in the criminal proceedings, deprived the plaintiff of another opportunity to fully challenge the defendant's credibility. The defendant driver gave evidence about his lawyer's failure to discuss the defence or his lack of comprehension of it. In the circumstances of the plea the defendant had, in my view, effectively waived the solicitor-client privilege which could not be relied upon as a ground to object to this testimony. When the client alleges a breach of his solicitor's duty to him, he waives the privilege as to all communications relevant to that issue: see *Wigmore on Evidence*, p. 638, para. 2328 (McNaughton Revision), vol. VIII. Unfortunately, the record does not disclose what was the gist of the lawyer's evidence tendered in reply. There was no formal tender of evidence in this respect. I can only assume that the plaintiff's counsel would not have called the legal aid lawyer merely to corroborate the defendant's version of the circumstances. It seems entirely probable that the facts adduced by the prosecution and admitted by the accused at the criminal trial would be entirely inconsistent with the theory of mechanical failure advanced by the defence at the civil trial.

[17] This was echoed by Justice Morden at para. 21:

> In my respectful view, having regard to the evidence which had already been given, the learned trial Judge erred in holding that there has been no waiver of the solicitor-client privilege. Reference may usefully be made to McCormick on Evidence, 2nd ed. (1972), p. 194:
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> > Waiver includes, as Wigmore points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as a partial disclosure, which would make it unfair for the client to insist on the privilege thereafter.

[18] And at para. 23:

> ... In these circumstances I think that it was open to the plaintiff not only to cross-examine the defendant with respect to the circumstances of the guilty plea, including the role of the lawyer therein, but also, if necessary, to call the lawyer to give evidence respecting it. His inability to pursue either of these courses left the plaintiff vulnerable on an issue with respect to which the jury may have been given only a partial or, indeed, a totally misleading account.

[19] A similar situation arose in **R. v. Read** (1993), 36 B.C.A.C. 64 (B.C.C.A.), where the Crown sought directions in respect of a criminal appeal. The accused had criticized the conduct of his defence counsel and repeated the accusations in his factum and in his affidavit filed with the court. The British Columbia Court of Appeal citing **Harich v. Stamp** as well as several other decisions found that privilege had been waived.

[20] In **R. v. Li** (1993), 36 B.C.A.C. 181, the British Columbia Court of Appeal considered a similar situation in which a lawyer had acted for multiple accused persons, and was then alleged to have been in a conflict of interest. The court acknowledged the sanctity of solicitor-client confidentiality but noted that there are necessary limits (at paras. 50-51):

> 50 The law, however, permits Mr. Brooks to defend himself against attacks upon his character and integrity. This right extends to disclosing confidential communications from his client if it is necessary to answer the allegations made against him. This is not an unlimited right. In this respect, see *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont C.A.), where Martin J.A. said, at p. 39:
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> > Dean Wigmore states that when the client alleges a breach of duty by the attorney the privilege is waived as to all communications relevant to that issue: *8 Wigmore on Evidence,*

> *(McNaughton Rev.),* p. 638. In *McCormick on Evidence,* 2nd ed., the author states at p. 191:
>
> > As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third persons, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. [Emphasis in original.]

51 Martin J.A. concluded at p. 41:

> I see no valid reason why Bray's [the accused] imputations against his former lawyers on cross-examination should not constitute a *waiver of the privilege so far as it is necessary to enable them to defend themselves against the imputations.* [Emphasis in original]

[21] It seems clear to us that Mr. Hobbs has done more than simply criticize Mr. Bailey's conduct. He has gone so far as to introduce into evidence the substance of otherwise privileged communications concerning the conduct of his defence as the basis upon which he seeks a finding of ineffective counsel and an overturning of his conviction on appeal. In doing so we find that he has waived the protection of his solicitor-client privilege.

[22] Having found that Mr. Hobbs has waived solicitor-client privilege with respect to Mr. Bailey's legal representation, we wish to emphasize that not all communications between them must necessarily be disclosed. The waiver of privilege does not entitle the Crown to know the substance of all communications between Mr. Hobbs and Mr. Bailey. We leave it to Mr. Bailey and his counsel Mr. Wood to determine the nature and extent of disclosure bearing in mind Mr. Bailey's ethical obligations to Mr. Hobbs as a former client.

[23] Accordingly, we will grant an order directing that because Mr. Hobbs has waived solicitor-client privilege with respect to Mr. Bailey's representation of him at trial, Mr. Bailey shall be permitted to file an affidavit in response to the appellant's fresh evidence motion and appeal.

[24] We will proceed with our schedule of directions as contained in the Registrar's letter to the parties dated June 11, 2009. Accordingly, Mr. Bailey ought to file and serve his affidavit in response to Mr. Hobbs' May 12, 2009 affidavit, on or before September 15, 2009.

[25] The parties will adhere to the timetable stipulated by the Registrar in her letter dated June 11, 2009.

Saunders, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.