

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

Hart, Jones and Matthews, JJ.A.

B E T W E E N:

NOVA CONSTRUCTION COMPANY LIMITED

Appellant

- and -

NOVA SCOTIA POWER CORPORATION and
SURVEYER, NENNIGER & CHENEVERT INC.

Respondents

) Mark E. MacDonald
) for the appellant
)
) John H. Dickey, Q.C. and
) Robert G. Belliveau
) for the respondent,
) Surveyer, Nenniger &
) Chenevert Inc.
)
)
) Thomas P. Donovan
) for the respondent,
) Nova Scotia Power
) Corporation
)
)
) Appeal Heard:
) December 4, 1986
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)
) Judgment Delivered
) January 5, 1987
)
)

THE COURT: Appeal dismissed with costs as per reasons for
judgment of Hart, J.A.; Jones and Matthews, JJ.A.,
concurring

HART, J.A.:

This is an application for leave to appeal and, if granted, an appeal from the decision of Kelly, J. in chambers dated June 26, 1986 whereby the trial judge held that an expert engineering report of T.C. Kenney was subject to privilege and that the privilege had not been waived by the respondent, the Nova Scotia Power Corporation. The report had been prepared to aid the Power Corporation in proposed litigation against the appellant and other respondent, Surveyer, Nenniger & Chenevert, alleging that they were responsible for leaks in a dam constructed as part of the Wreck Cove hydro electric power development in Cape Breton.

The only issue before the Appeal Court is whether the privilege of the Power Corporation to keep the report confidential had been waived.

The basis of the argument for waiver was that the Power Corporation had permitted the report to be seen and used by a group of four consultants charged by the Power Corporation with finding the cause of the leaks, one of whom was the author of the privileged report. The report of that consultant group for which privilege was not claimed made several references to Mr. Kenney's findings. The Power Corporation had also made the Kenney report available to another expert employed by them, Jack K. Sexton, and his

report was not claimed to be privileged. Furthermore, Appendix "A" of the Kenney report was delivered to the appellant's solicitors through inadvertence during the discovery proceedings in the action.

The appellant claims that the wide-spread use of the Kenney report indicates an intention on the part of the Power Corporation to waive its privilege. This is denied by the Power Corporation which says that the only permitted use was that of their own consultants employed to advise them in connection with the problem, except for the inadvertent release of the Appendix by their solicitor which contained only factual information and was not an integral part of the opinions expressed in Mr. Kenney's report.

The trial judge found that the Kenney report was privileged and that the privilege had not been waived by its distribution to the consultants employed by the Power Corporation or by the inadvertent release of Appendix "A" to the other side. He stated:

"Does the provision of a privileged documents to a third party, who in turn provides a report for which no privilege is claimed, constitute a waiver of the privilege attaching to the first report?"

In certain circumstances such an action might constitute a waiver but I do not consider such an implied waiver of privilege takes place where the privileged report does not constitute a significant or substantial basis for the second report. With the possible exception of Appendix A of the Kenney report, that report did not form a basis of the Sexton report nor is a knowledge of the Kenney report necessary for comprehensive understanding of the Sexton report and its conclusions. The Kenney report was one of several reports provided to Mr. Sexton along with a number of plans and sketches relating to the dam in question.

I do not find the provision of the Kenney report to Mr. Sexton nor the minor references to it by him in his report of such a significance as to constitute a waiver of the privilege attaching to the Kenney report."

The trial judge next dealt with the inadvertent release of Appendix "A" to the Kenney report as follows:

"By consent of counsel I have had the advantage of reviewing the Kenney report and I find Appendix A easily severable from the body of the report. Although the report relies on Appendix A to some extent as a source of facts to support the author's opinions, Appendix A is in no way reliant on the report to constitute in itself a complete document reciting certain facts about the dam site, tests and leakage. In addition, the plaintiff NSPC did not initiate or advance Appendix A as evidence on its own behalf. I should also note that the two other appendices of the Kenney report are distinct and severable from the body of the report.

I therefore find that the privilege attaching to the body of the Kenney report has not been waived by the plaintiff by its release of Appendix A."

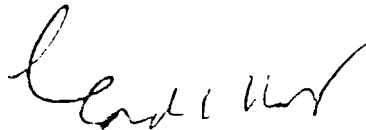
Finally, the trial judge dealt with the release of the Kenney report to the Board of Review:

"(3) The Board of Review report is a report of four consultants hired by NSPC and dated August 1, 1980. One of the consultants was T.C. Kenney, the author of the Kenney report referred to above. Shortly after its completion this report was forwarded to SNC by NSPC and no privilege is being claimed by the plaintiff NSPC for this report. However, Nova and SNC claim that NSPC have waived any privilege attaching to the Kenney report as it provided that report to this consultative group and the Kenney report is listed in the Board of Review report as one of the eleven documents furnished to it by NSPC to assist in the Board's deliberations. The Board had been constituted by NSPC to answer three questions relating to the leakage at certain of the dams at the Wreck Cove site: (1) what is the problem? (2) what is the appropriate solution? and (3) what or who is responsible?

Throughout the report there is no specific reference to the Kenney report or indeed to any of the source material. There is no evidence that the Kenney report played any significant or indeed any part in the opinions expressed by the Board in its report. I cannot accept that the mere fact that a privileged document was available to a person or group who prepare a report for which no privilege is claimed, that the privilege of the first report is thereby waived."


In my opinion, the trial judge was correct in his conclusions. A document protected by privilege cannot be required to be produced before the court unless the privilege is expressly or impliedly waived. Those who seek the document must establish an intention to waive the privilege on the part of the client entitled thereto. No such intention is evidenced here on the part of the Power Corporation which has continually denied a waiver. It was not prepared for the use of the appellants and they are not entitled to have it produced at this stage of the proceedings.

I would therefore dismiss the appeal with costs in the cause.



J.A.

Concurred in:

Jones, J.A. 

Matthews, J.A. 