NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 58

Date: 20190704
Docket: CA 479331
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia,
Stephen McNeil and Diana Whalen

Appellants

v.

Alex M. Cameron

Respondent

Judge:	Beveridge, J.A.
Motion Heard:	June 13, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Rebecca Jones and Sean Lewis, for the appellants Bruce Outhouse, Q.C. and Justin Adams, for the respondent

Decision:

INTRODUCTION

[1] Courts operate in the open. The public have a right to access court documents and be present in court to hear the evidence, arguments and judicial reasons. This is known as the open court principle. This common law principle is now constitutionally embedded as an element of freedom of expression, including freedom of the press and other media in s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

[2] On the other hand, discussions between lawyers and clients to obtain and give legal advice are private. They are confidential. They are protected by solicitor-client privilege. Subject to certain exceptions, a lawyer or client cannot be compelled to disclose privileged information, and it is inadmissible in court proceedings.

[3] A lawyer, at the risk of professional misconduct, must not, without the client's permission, disclose information protected by solicitor-client privilege. A client has no such restrictions. They are free to expressly waive privilege or they can be taken to have done so by virtue of their conduct or statements.

[4] It is the intersection of these two principles that are the focus of the motion I am asked to decide. The appellants apply under s. 65.1 of the *Supreme Court Act* to stay the effect of this Court's Order and continue sealing orders to preclude public access to information that, as of today, is not protected by solicitor-client privilege.

[5] To obtain that relief, I must be satisfied: the appellants have an arguable issue to obtain leave to appeal to the Supreme Court of Canada; that if the stay is not granted, they will suffer irreparable harm; and, the balance of convenience favours a stay. I will discuss the niceties of these criteria later.

[6] For now, it suffices to say that I doubt there is a genuine arguable issue for leave to appeal. But, even if I were satisfied there was, the appellants have not convinced me that they would suffer irreparable harm should the stay not be granted, nor does the balance of convenience favour a stay.

[7] To understand my conclusion, I will first set out sufficient background information to provide context, then turn to the principles that guide how this discretionary power is to be exercised and how I applied them.

BACKGROUND

[8] Alex Cameron is a lawyer. He was employed by the Nova Scotia Department of Justice for 26 years. Mr. Cameron wants to sue the appellants for defamation, abuse of public office, constructive dismissal and violation of his constitutional rights. He claims that public statements made by Premier Stephen McNeil and Diana Whalen, the former Minister of Justice, imply that he acted without or contrary to instructions during a statutory appeal.

[9] Mr. Cameron says he acted on instructions. To avoid being accused of breach of any ethical or legal duty by disclosure of what might be privileged information, he sought a ruling whether the allegations he makes and the evidence he has in support were protected by solicitor-client privilege. The appellants agreed with this approach.

[10] Mr. Cameron attached his Notice of Intended Action as an exhibit to his affidavit of September 15, 2017. The application requested an order that: certain paragraphs in the Notice of Intended Action were not protected by solicitor-client privilege; and, privilege had been waived or did not apply to other paragraphs and to the evidence set out in Mr. Cameron's affidavit of September 15, 2017.

[11] The Honourable Justice John D. Murphy heard the application on October 25 and 26, 2017. He delivered oral reasons on February 22, 2018 which were released in written form to the parties on May 11, 2018 (2018 NSSC 185). The applicants urged Justice Murphy to redact all of his reasons.

[12] On August 7, 2018, Justice Murphy issued an Order and released his partially redacted reasons to the public. The Order granted Mr. Cameron the relief he requested. In summary form: enumerated paragraphs in the intended Notice of Action were not covered by solicitor-client privilege and could be disclosed by the applicant at any time; solicitor-client privilege had been waived by the respondents with respect to other enumerated paragraphs in the intended Notice of Action, and they could be pled by Mr. Cameron without redaction or modification; and, solicitor-client privilege had been waived by the respondents with respect to the evidence in Mr. Cameron's September 17, 2017 affidavit and attached exhibits, and he was at liberty to adduce that evidence during the subsequent proceedings.

[13] Justice Murphy stayed the effect of his Order for 15 days to provide the appellants an opportunity to apply for a confidentiality order pending their anticipated appeal. Further, absent an order of the Nova Scotia Court of Appeal, the unredacted version of his reasons for judgment would be released to the public on October 15, 2018.

[14] The appellants appealed to the Nova Scotia Court of Appeal. The respondent filed a Notice of Contention. Interim confidentiality orders were issued.

[15] The Honourable Justice David P. S. Farrar issued a confidentiality Order on October 23, 2018. I need not recount all of its terms. It is sufficient to say that the order directed the appeal be heard *in camera*, the lower Court file would continue to be sealed, as would the Court of Appeal file. Whether the redacted portions of Justice Murphy's reasons should be released to the public was referred to a panel.

[16] On May 16, 2019, this Court released its unanimous reasons for judgment to dismiss the appeal and the Notice of Contention (2019 NSCA 38). I need not explore in detail the grounds of appeal advanced by the appellants and why they were rejected by this Court. I will comment on them later when I discuss whether the appellants have raised an arguable issue for leave to appeal to the Supreme Court of Canada.

[17] In summary form, the appellants complained the application judge had erred in: determining the appellants had impliedly waived privilege; that the proposed action was not an abuse of process; and by making final determinations about issues of fact or fact and law that are properly for trial.

[18] Farrar J.A., writing for the Court, rejected any suggestion that the application judge had not correctly articulated and applied the law on implied waiver of solicitor-client privilege. The motions judge and the Court of Appeal relied on leading authorities such as: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.); *R. v. McClure*, 2001 SCC 14; *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471; *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.); *R. v. Hobbs*, 2009 NSCA 90; *R. v. Campbell*, [1999] 1 S.C.R. 565.

[19] Justice Farrar concluded:

> [45] The authorities clearly recognize, and the application judge correctly identified, that one example of implied waiver is where a client impugns the conduct of his lawyer, and disclosure of privileged information by the lawyer is necessary to defend the allegations of malpractice or misconduct.
>
> [46] It would be manifestly unfair to allow the Province to hide behind solicitor-client privilege while at the same time impugning the conduct of its solicitor. I pause here to comment that it was not necessary below, nor is it necessary here, to determine whether Mr. Cameron had instructions to advance the Sovereignty Argument. That is a matter to be determined at the trial proper.
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> …
>
> [51] Waiver involves conduct inconsistent with confidentiality. Such conduct can be express, or it can be implied. The focus of the analysis is on the conduct of the person who holds the privilege and whether they waive it by doing something which is inconsistent with continuing to protect it.
>
> [52] The Province's position, in essence, is that a client can publicly disparage his lawyer with impunity, as long as it is done impliedly and not in the context of an existing court proceeding. Its position is not supported by the authorities and the application judge was correct in rejecting it.

[20] The appellant's argument about abuse of process was rejected as being without merit. Justice Farrar observed that the appellants cited no authority for the proposition that an abuse of process analysis should be applied independent of a waiver analysis (para. 71). He concluded:

> [72] I agree with Mr. Cameron, this argument is without merit. It would prevent a lawyer from ever defending themselves from a client's allegations of wrongdoing.
>
> [73] The Province emphasizes that a lawyer is ordinarily duty bound to his client to keep their dealings confidential. In its factum it says:
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> > 126. Mr. Cameron seeks to bring an action in violation of his duty of confidentiality to his client, and in a manner which would undoubtedly bring the administration of justice into disrepute. ...
>
> [74] This would mean that any proceeding involving the necessity to reveal solicitor-client privilege information in support of that proceeding is abusive.

[21] I will comment later about the appellants' continued attempt to rely on *Manning v. Epp*, [2006] O.J. No. 2904 (ONSC), aff'd, 2007 ONCA 390, as authority to preclude Mr. Cameron's intended action.

[22] Lastly, Justice Farrar found the appellants' argument that the motions judge erred by making final determinations of fact was "entirely without merit". The appellants had agreed to the procedure. There was no restriction on the evidence

the parties could and did submit; and the issue was fully argued. Most importantly, the determinations were interlocutory in nature and are not binding on the trial judge. The appellants' application for leave to appeal to the Supreme Court of Canada makes no mention of this putative error.

[23] Before Justice Murphy, the appellants had argued that all of his reasons should be sealed. The failure to do so, they argued, would cause the appellants irreparable harm. The respondent argued that the judge had not disclosed any information or communications that could be interpreted as disclosing anything arguably covered by solicitor-client privilege, waived or not.

[24] Initially, the motions judge appeared to agree with the respondent when he commented:

> I will tell you that my conclusion is that the—my conclusion, as a matter of principle on the Authorities, is that the reasons should not be sealed in whole or in part. In my view, they don't reveal any information subject to solicitor-client privilege or any facts which are tantamount to solicitor-client privilege …

[25] However, the judge went on to acknowledge that it may turn out that he erred. The appellants had announced their plan to seek from the Court of Appeal a further all-encompassing confidentiality sealing order to include his reasons and release of his unredacted reasons would frustrate that motion. The motions judge announced he would temporarily redact certain paragraphs until October 15, 2018.

[26] As I mentioned above, Justice Farrar granted interim confidentiality orders, culminating in his Order of October 23, 2018 that sealed court files pending the outcome of the appeal and referred the question of release of the redacted portions to a panel.

[27] Because the Court decided that none of the communications referred to in Justice Murphy's decision of May 11, 2018 were subject to solicitor-client privilege, there was no reason to redact any portion of his decision (2019 NSCA 38 at para. 105).

[28] The appellants announced their intent to seek leave to appeal to the Supreme Court of Canada and filed a Motion on May 23, 2019 to seek a stay of the Court of Appeal's May 16, 2019 Order pending the outcome of their planned proceedings before the Supreme Court. The motion was scheduled to be heard on June 13, 2019.

[29] Section 65.1(2) of the *Supreme Court Act* gives to this Court or a judge thereof the power to grant a stay of proceedings. The respondent consented to an interim stay until two weeks after the motion is dismissed or further order of the Count should the motion be granted. I issued an Interim Order dated May 31, 2019 granting the relief requested until the hearing of June 13, 2019.

[30] At the conclusion of the hearing on June 13, 2019, I issued a Further Interim Order staying the Order of this Court dated May 16, 2019 and extending the October 23, 2018 sealing order and publication ban issued by Farrar J.A. until two weeks after my decision should the motion be dismissed or upon further order of the Court should the motion be granted.

PRINCIPLES THAT GUIDE THE DISCRETIONARY POWER

[31] The parties do not disagree about the existence or content of my discretion to grant a stay of proceedings pursuant to the *Supreme Court Act*, R.S.C. 1985, c. S-26. Section 65.1 of the *Act* creates concurrent jurisdiction for the Supreme Court of Canada, a provincial appeal court or a judge of either to order that proceedings be stayed on appropriate terms. It provides as follows:

> **Stay of execution — application for leave to appeal**
>
> 65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
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> **Additional power for court appealed from**
>
> (2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
>
> **Modification**
>
> (3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

[32] The general rule is that the applicant for a stay must first seek relief from the provincial court of appeal or a judge thereof (see *Richter & Partners Inc. v. Ernst and Young*, [1997] 2 S.C.R. 5; *Re Pacifica Paper Inc.*, [2001] S.C.C.A. No. 400).

[33] When the appellants first brought their motion, they had not yet filed an application for leave to appeal. However, they intended to do so prior to June 13,

2019. Hence, they tailored their submissions to the s. 65.1(1) test rather than the more stringent requirements of s. 65.1(2). The appellants filed their application for leave to appeal on June 11, 2019. Later, I will set out its details.

[34] The parties accept that the potential for relief is not limited to a stay of execution in the traditional sense, but can extend to making an order that preserves matters between the parties pending appeal (see: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 75 at paras. 10-13).

[35] The appellants submit that the test for granting a stay of an order or judgment appealed from under s. 65.1 is the general test for stays more broadly. The applicant must demonstrate on a balance of probabilities:

(a) There is an arguable issue (or serious question) to be adjudicated;

(b) If the stay is not granted and the appeal is successful, the applicant will have suffered irreparable harm;

(c) The balance of convenience favours a stay.

[36] However, the appellants cannot appeal as of right to the Supreme Court of Canada. Leave is required. It is widely accepted that this creates an important nuance to the first part of the test: the appellants must not only show that its appeal raises arguable issues, but their leave application demonstrates serious or arguable issues for leave to be granted by the Supreme Court of Canada (see: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, *supra*; *Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.* (1995), 144 N.S.R. (2d) 326 (C.A.); *Minister of Community Services v. B.F.*, 2003 NSCA 125; *T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 71; *Higgins v. Nova Scotia (Attorney General)*, 2013 NSCA 118; *Leis v. Leis*, 2011 MBCA 109; *Merck & Co. v. Nu-Pharm Inc.* (2000), 5 C.P.R. (4th) 417 (F.C.A.); *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620; *Toronto Star Newspapers Ltd. (appeal by Donovan) v. Sherman Estate*, 2019 ONCA 465).

[37] With these principles in hand, I turn to how they apply.

ANALYSIS

Serious or arguable issues for leave to appeal to the Supreme Court of Canada

[38] The appellants do not dispute that the Supreme Court of Canada only grants leave in cases of national or public importance. Their Application for Leave to Appeal says:

> 1. The proposed appeal raises issues of public and national importance relating to the law of solicitor-client privilege, and in particular:
>
> (a) the scope of implied waiver of solicitor-client privilege; and
>
> (b) the potential abuse of process associated with a lawyer's use of privileged and confidential information in a legal proceeding against a former client.

[39] The appellants acknowledge that the leading authority in Canada on implied waiver is *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd., supra*. The appellants do not identify any confusion or conflict about the application of the principles set out by McLachlin J., as she then was, in *S. & K. Processors*. They simply say that this case will provide an opportunity for the Supreme Court to provide important guidance on the scope of implied waiver.

[40] As to an arguable issue, their brief articulates their position:

> 44. The Appellants raise an arguable issue. The Application Judge (upheld by this Honourable Court) grounded a finding of implied waiver of the Appellants' solicitor-client privilege on the basis of a "minimal intrusion" analysis that the Appellants say is at variance with Supreme Court jurisprudence. The Appellants will submit that the Application Judge's determination that the waiver he found amounted to a "minimal intrusion into *prima facie* privileged client information, and would not violate confidence concerning the business and affairs of the Respondent," is the kind of case-by-case balancing of solicitor-client privilege that the Supreme Court warned against in *McClure.*

[41] It is usually not difficult for an appellant to satisfy the requirement that there is an arguable or serious issue to be adjudicated. Here, the applicants must at least identify realistic grounds which appear of sufficient substance to be capable of convincing the Supreme Court of Canada to grant leave. I very much doubt that threshold has been met.

[42] The applicants' suggestion that the Application Judge (upheld by this Court) grounded a finding of implied waiver on the basis of minimal intrusion is spurious. It cannot be seriously argued that the application judge found implied waiver on the basis of minimal intrusion or in any way engaged in a case-by-case balancing.

[43] The applicants reference paras. 30 and 55 of the application judge's reasons to demonstrate his grounding of implied waiver was flawed because of his "minimal intrusion" analysis. Paragraph 30 of Justice Murphy's reasons is about the respondent's argument that the communications at issue only contained instructions—which Mr. Cameron argued were not covered by solicitor-client privilege as they are meant to be conveyed to the opposing party. In other words, there was no need to engage in an implied waiver analysis because no privilege attached to the communication of instructions.

[44] Justice Murphy disagreed. He concluded that even though the communications did not reveal information that was clearly confidential, they did contain legal analysis and litigation strategy and hence were *prima facie* privileged.

[45] This was his analysis:

> **B. Does Solicitor-Client privilege apply to the Communication -- Was legal advice sought or received?**
>
> [28] The Respondents say the Communications provided legal instructions to Mr. Cameron and therefore attract solicitor-client privilege; he does not dispute that the Communications conveyed instructions, but maintains they were not privileged because the Respondents have not established that the Communications were directly related to the seeking, formulating or giving of legal advice.

[46] After setting out the divergent authorities as to whether instructions to a lawyer are privileged, he reasoned:

> [30] I have made a detailed review of the Communications and the affidavit evidence concerning the meetings and correspondence between Mr. Cameron and his clients. [**redaction**] The Communications do not reveal information clearly confidential, such as facts which might prejudice the client if disclosed, competitive financial information, an opinion concerning the strength of an argument, or the likely outcome of the Appeal. The primary focus of the Communications was not to seek or provide legal advice. However, in the context of instructions [**redaction**] the exchanges between Mr. Cameron and his clients included discussion about why he made a recommendation (Affidavit, especially paras. 12 and 13, Exhibits 2, 13-20 inclusive) [**redaction**] Legal analysis and litigation strategy, while not the main focus, were components of the Communications. In this case, it is therefore not necessary to decide if communications conveying only instructions to a solicitor are privileged.
>
> [31] While mostly conveying instructions [**redaction**] and not primarily directed toward seeking or giving legal advice, the Communications contained sufficient

> litigation strategy and advice components to evidence intent to be confidential, and therefore attract a presumption of solicitor-client privilege. Mr. Cameron bears the onus to displace that presumption. He maintains it should not apply in this case because of the unique position of the Attorney General as his client, and because upholding the privilege would shield unconscionable conduct and diminish the rule of law.

[47] Reliance on paragraph 55 of Justice Murphy's decision is equally hollow. After the judge had decided that the applicants had impliedly waived privilege, he turned to their argument that Mr. Cameron's ongoing duty of loyalty to his former clients obliged him to hold in strict confidence information about the business and affairs of the Province. To do otherwise, they argued, would amount to an abuse of process:

> **C. Fiduciary Obligations to Former Clients, Confidentiality, and Abuse of Process**
>
> [55] The Respondents submit that Mr. Cameron's ongoing duty of loyalty and confidence to his former clients obliges him "to hold in strict confidence all information concerning the business and affairs of the Respondent that was acquired in his professional capacity as a solicitor of record on the Alton Gas appeal." In my view, disclosure of the Communications, which primarily convey instructions, and do not reveal financial information, commercial activity or legal advice, would be a minimal intrusion into *prima facie* privileged client information, and would not violate confidence concerning the business and affairs of the Respondent.

[48] In fact, it is difficult to discern that the appellants even directly argued to this Court that Justice Murphy made the error they now claim is an issue of national or public importance meriting leave to appeal to the Supreme Court of Canada.

[49] After setting out their arguments that the application judge had erred in his conclusion the appellants had impliedly waived privilege, the appellants' factum turned to its submission that the respondent's use of the privileged material would be an abuse of process:

> THE RESPONDENT'S USE OF THE PRIVILEGED MATERIAL IS AN ABUSE OF PROCESS
>
> 122. A lawyer's duty of loyalty to his or her client is an essential feature of the Canadian legal system. This Court has affirmed that within the duty of loyalty is the duty to hold the client's information in confidence well after representation is complete (the duty of confidentiality). Where a lawyer's duty to his or her client will be violated, an action may constitute an abuse of process.

> 123. Respectfully, the Application Judge erred in failing to adequately consider the law of abuse of process. **His Lordship considered abuse of process only in the implied waiver analysis, and not as a stand-alone principle of law, and then erred in finding that the release of the Province's solicitor-client communications would constitute only a "minimal intrusion".**
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> [Emphasis added]

[50] The application judge's comments in paragraph 55 of his decision, relied upon by the applicants, was firmly placed in context by Farrar J.A.:

> [80] Under this ground of appeal, the Province also argues that the application judge erred by applying a minimal intrusion test to the issue of solicitor-client privilege in the following passage of his decision:
>
> > [55] ...In my view, disclosure of the Communications, which primarily convey instructions, and do not reveal financial information, commercial activity or legal advice, would be a minimal intrusion into *prima facie* privileged client information, and would not violate confidence concerning the business and affairs of the Respondent.
>
> [81] **With respect, this does not reflect a minimal intrusion test, and the application judge did not apply any such test in reaching his decision on waiver. The passage must be understood in the context of the Province's position before the application judge. It argued that Mr. Cameron's Intended Action constituted an abuse of process because he owed a fiduciary and professional obligation to hold in strict confidence all information concerning the business and affairs of a client.**
>
> [82] Beginning at ¶55 of his decision, the application judge dealt with this aspect of the Province's argument and rejected it. His comments at ¶55, to the effect that disclosure of the Communications would not reveal the Province's business or affairs, were not the basis for his finding that there was no abuse of process or his earlier finding that there had been a waiver of privilege. It was simply a response to the Province's argument that Mr. Cameron owed it a fiduciary and professional obligation.
>
> [Emphasis added]

[51] The applicant appellants also suggest that they have an arguable case of national or public importance because there is a conflict in provincial appellate authorities that need to be resolved by the Supreme Court of Canada. They say this in their application for leave to appeal:

> **Conflicting Appellate Authorities**

> 7. The proposed appeal will result in a clarification of conflicting appellate court interpretations of the above issues:
>
> a) the Decision is inconsistent with the implied waiver of solicitor-client privilege in the decision of the British Columbia Court of Appeal in *Soprema Inc v Wolrige Mahon LLP*; and,
>
> b) the Decision is inconsistent with the analysis of abuse of process in the decision of the Ontario Court of Appeal in *Manning v. Epp*.
>
> 8. It is an issue of public and national importance that these competing authorities are addressed and that the doctrines of implied waiver and abuse of process be clarified and articulated by this Court.

[52] Nowhere in the applicants' leave materials, its brief on this application, or in oral argument is there any attempt to demonstrate how *Soprema Inc.* or *Manning v. Epp*, on any realistic reading of those decisions, are in conflict with the Nova Scotia Court of Appeal's decision in this case.

[53] *Soprema Inc. v. Wolrige Mahon LLP*, *supra*, was a case about whether Soprema waived solicitor-client privilege by putting its state of mind in issue by its allegation that it had reasonably relied on Wolrige's representations about financial statements. The reasons of the British Columbia Court of Appeal, authored by Harris J.A., contain no contrary statement about the principles of implied waiver. Indeed, as observed by Farrar J.A., Justice Murphy quoted and relied on the same lines of authority referred to by the British Columbia Court of Appeal in *Soprema*:

> [40] However, on closer examination of the decision, it can be seen the British Columbia Court of Appeal actually followed the same approach taken by Justice Murphy in this case and did not suggest implied waiver is subject to some kind of "restricted approach". It expressly approved the lines of authority relied upon and applied by Justice Murphy. In considering when implied waiver may arise the British Columbia Court of Appeal said:
>
> > [28] ... This can happen in myriad ways, as illustrated in *Halsbury's*, *supra*. Parties may expressly raise reliance on legal advice they received as a justification or an excuse: see e.g., *R. v. Campbell*, [1999] 1 S.C.R. 565. They may assert misconduct or incompetence of their legal advisers (see e.g., *R. v. Dunbar*, [1982] O.J. No. 581 at paras. 68-72, 68 C.C.C. (2d) 13 (C.A.)), dispute instructions (see e.g., *Newman v. Nemes*, [1978] O.J. No. 3101, 8 C.P.C. 229 (Ont. H.C.J.)), or seek to justify mistakes in affidavits as made by counsel (see e.g., *Souter v. 375561 B.C. Ltd.*, [1995] B.C.J. No. 2265, 130 D.L.R. (4th) 81 (C.A.)). ...
>
> [Emphasis added]

> [41] In ¶38-54 of his decision, Justice Murphy outlined the law of solicitor-client privilege in much the same way as the British Columbia Court of Appeal. He cited *R. v. McClure*, 2001 SCC 14 as did the British Columbia Court of Appeal.
> …

[54] I also see no realistic basis to claim a conflict between *Manning v. Epp*, *supra*, and the approach of the Nova Scotia Court of Appeal. In *Manning v. Epp*, the lawyer was outside counsel for the City of Waterloo. The City terminated Mr. Manning's retainer. Manning sued various officials. The motions judge found that the numerous causes of action, in the manner pleaded, failed to disclose any reasonable cause of action.

[55] The Ontario Court of Appeal agreed that the Statement of Claim was devoid of material facts necessary to support the causes of action alleged; and the claims advanced were simply not available as a matter of law on the facts asserted in the pleading (para. 5).

[56] The motions judge had also said:

> [6] … In this case, a solicitor, aggrieved by the termination of his retainer and in the face of ongoing litigation by his former client, has placed on the public record to its detriment, a pleading that discloses no reasonable causes of action, pleads privileged communications, discloses confidential information, is devoid of material facts, yet alleges serious improprieties. This is unprofessional and an abuse of the process of this court. I therefore exercise my discretion to expunge the claim in its entirety.

[57] In the Court of Appeal, Mr. Manning argued there was not a sufficient basis to determine if the pleadings did disclose privileged or confidential information—not that the judge could not strike pleadings that improperly disclosed privileged information:

> 12 The appellants acknowledge before this court that it was open to the motion judge to strike those paragraphs of their pleading that she regarded as containing privileged or confidential information unless privilege had been lost by client waiver or privilege did not arise due to an applicable legal exception. Even assuming - without deciding - that waiver or an exception to privilege would authorize a solicitor to unilaterally place in the public domain information that is arguably privileged or confidential, as occurred in this case, the appellants' pleading does not expressly or impliedly allege either waiver or an established legal exception to the privilege claim.

[58] Farrar J.A. rejected any suggestion that the conduct of Mr. Cameron constituted an abuse of process:

> [78] *Manning v. Epp* is far removed from this case and the application judge was correct to distinguish it.
>
> [79] The application judge astutely noted that Mr. Cameron is not abusing the process; rather, he was properly seeking the court's ruling on an issue of privilege before proceeding with an action, an entirely appropriate course of action.

[59] I recognize that decisions about leave to appeal are exclusively within the purview of the Supreme Court of Canada. Although I doubt the appellants have actually identified any issues of national or public importance for leave to appeal, I will assume that they have demonstrated an arguable issue for leave. I will turn to the requirement that they demonstrate irreparable harm.

Irreparable harm

[60] The appellant applicants must demonstrate on a balance of probabilities that they would suffer irreparable harm should the stay not be granted pending appeal. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, Sopinka and Cory JJ. explained that irreparable harm is "… harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (p. 341).

[61] The only affidavit tendered by the applicants was that of counsel, Mr. Sean Lewis. It attached various portions of the record before the Nova Scotia Supreme Court and Court of Appeal. The applicants tendered no affidavit evidence that even attempted to establish irreparable harm.

[62] Instead, they assert that any disclosure of their *prima facie* privileged communications would lead to irreversible harm to their constitutionally-protected right of confidentiality, which could not be undone or compensated for by a damages award. They also claim:

> 55. It is in the nature of solicitor-client communications, as with confidential information generally, that their publication instantly eviscerates the underlying right, which is premised on privacy and confidence. **Disclosing the Appellant's protected Communications will rob them of their right of appeal and may make any appeal hearing moot. It is the very paradigm of harm that cannot be quantified in monetary terms after the legal issues have been finally adjudicated.**

[Emphasis added]

[63] With respect, I am unable to accept that refusing to further stay Justice Murphy's Order of August 7, 2018 would cause irreparable harm to the applicants.

[64] It cannot be gainsaid that solicitor-client privilege is fundamental to the proper functioning of our legal system. It has evolved from its roots as a rule of evidence to not just one of substance but also a principle of fundamental justice (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 at paras. 9-10; *Minister of National Revenue v. Thompson*, 2016 SCC 21 at para. 17). Except for limited exceptions, all information protected by solicitor-client privilege is out of reach of the state. It cannot be forcibly discovered or disclosed and is inadmissible in court. Arbour J., in *Lavalee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, for the Court, explained:

> 24 It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.

[65] In this case, the state is not attempting to obtain solicitor-client information, nor does Mr. Cameron seek a court order to compel disclosure. Mr. Cameron has the information. Absent waiver, he would be obliged to protect it. If he did not, he would be subject to discipline by the Nova Scotia Barristers' Society. Further, any information protected by solicitor-client privilege is inadmissible in court.

[66] Mr. Cameron brought proceedings to determine if the applicants had waived privilege by virtue of their published comments. Justice Murphy found, based on the evidence the parties adduced, that the applicants had waived privilege. The application judge said:

> [50] I agree with Mr. Cameron that the Statements clearly imply that Mr. Cameron acted without instructions, or contrary to instructions, and that they bear no other reasonable interpretation. I also agree with Mr. Cameron that unless he is permitted to disclose the instructions he received, he will be prevented from asserting the causes of action he seeks to pursue. Any claim he may have against the Respondents for defamation, abuse of public office, constructive dismissal or violation of his constitutional rights is based upon the Respondents' implication

> that he acted without or contrary to instructions. Unless those instructions are revealed, there is no factual foundation for the claims he seeks to advance.

[67] The analysis and conclusions of the application judge have been upheld by this Court. If the Supreme Court of Canada were to grant leave to appeal and then eventually find that this Court erred, what would be the consequences?

[68] The law is clear. The disclosure of privileged information in or by the courts does not destroy or waive privilege. In *Bell v. Smith*, [1968] S.C.R. 664, a solicitor gave evidence in a trial that disclosed solicitor-client information. There was a dispute about whether the lawyer had objected to the evidence, and that the failure to object amounted to waiver. The Court allowed the appeal and ordered a new trial. As observed by Spence J., no objection is necessary and evidence that is in violation of the privilege should not be received (pp. 670-671). This is still the law (see: *Lavalee, supra* at para. 49).

[69] This means that if the Supreme Court of Canada were to grant leave and subsequently allow the appeal, then all of the privileged information upon which Mr. Cameron relies to ground his intended causes of action would be inadmissible and his claim could not proceed. During oral argument, counsel for the applicants appropriately conceded that this would be the result.

[70] Disclosure of the solicitor-client information over which the applicants waived privilege would in no way "rob them of their right of appeal" nor "may make any appeal hearing moot".

[71] The only harm articulated by counsel would be to the general concept or reputation of solicitor-client privilege. It is an important privilege, even one that amounts to a principle of fundamental justice, but it is a robust privilege and it would not be harmed, let alone irreparably so, in the circumstances. I am not in the least satisfied that the applicants would suffer irreparable harm.

Balance of convenience

[72] In light of that conclusion, I need not embark on an indepth balance of convenience analysis. I would say this: the respondent's June 7, 2019 affidavit sets out the harm he would suffer if the stay were to be granted. I expunged and disregarded certain paragraphs of his affidavit. However, his evidence about the impact of a further stay was not challenged.

[73] What remains in Mr. Cameron's affidavit is evidence of the clear harm if he were not at liberty to proceed with his intended claim against the appellants, hamstrung by a further stay of execution. The only harm that I see to the applicants is embarrassment from Mr. Cameron putting into the public domain his allegations and evidence that challenge the notion that he advanced an argument on behalf of the Province without or contrary to instructions. Counsel for the applicants, of course, appropriately eschews the notion that embarrassment should be or is in any way a factor.

[74] The balance of convenience favours the respondent.

SUMMARY AND CONCLUSION

[75] Justice Murphy's August 7, 2018 Order encapsulated his conclusion that the applicants had impliedly waived solicitor-client privilege. He ordered: enumerated paragraphs of Mr. Cameron's Notice of Intended Action could be disclosed by Mr. Cameron; solicitor-client privilege had been waived with respect to other enumerated paragraphs; and, privilege had been waived by the applicants with respect to the evidence set out in Mr. Cameron's September 15, 2017 affidavit and attached exhibits.

[76] The Order further provided that only a redacted version of Justice Murphy's reasons for judgment was released with a deadline for full release, absent a confidentiality order from a judge of the Nova Scotia Court of Appeal.

[77] The effect of the August 7, 2018 Order was stayed for 15 clear days. An interlocutory stay and accompanying sealing order was issued by Justice Farrar pending the appeal.

[78] On May 16, 2019, this Court unanimously dismissed the appeal. The applicants seek to stay the effect of this judgment and maintenance of the sealing orders pending their application for leave to appeal to the Supreme Court of Canada.

[79] To obtain a stay, the applicants must demonstrate it is in the interests of justice to order a stay. This requires a judge to be satisfied that: an applicant has an arguable issue for leave to appeal; if a stay is not granted they will suffer irreparable harm; and, the balance of convenience favours a stay.

[80] I have considerable doubt that the applicants have articulated an arguable issue of national or public importance. Even if such an issue exists, there is no evidence that they will suffer irreparable harm if a stay is not granted, and the balance of convenience favours the respondent.

[81] The application for a stay of execution is dismissed. The stay of execution with respect to Justice Murphy's Order of August 7, 2018, as ordered by Justice Farrar, will end on July 18, 2019, two weeks from this decision and order.

[82] The parties agreed that a costs award of $5,000.00 would be appropriate. The applicants are ordered to forthwith pay the respondent $5,000.00 in costs.

Beveridge, J.A.