



HALLETT, J.A.

This appeal arises as a result of an application by the Town of Amherst for an injunction to prevent the CBC from disclosing the contents of three documents which had come into the CBC's possession. The documents are letters and a report from the Town's solicitor giving it legal advice respecting a claim the Town might have against the Amherst Business Improvement District Commission and others respecting a failed development project in which the Commission was involved. The CBC had scheduled a broadcast to detail the circumstances surrounding the failure. The Town took the view that if the CBC broadcasted the contents of the communications it would do irreparable harm to the Town's claim against the Commission. As a result the Town sought and obtained, over the objection of the CBC, an interim and then a permanent injunction preventing the CBC from broadcasting information respecting the said communications between the solicitor and the Town. The CBC has a wealth of material relating to the failed project. The Town did not seek to prevent publication of anything except the three communications from its solicitors.

The grounds of appeal are set out in the CBC's notice of appeal as follows:

1. That the Learned Trial Judge erred in law in failing to allow the Appellant to adequately respond to the application for injunctive relief brought by the Respondent, when His Lordship prevented the receipt of evidence and argument relating to the status of the purported privileged communications as evidence of civil fraud;
2. That the Learned Trial Judge erred in law in holding that the Respondent was entitled to a permanent injunction preventing the Appellant or its affiliates from broadcasting or disseminating directly or indirectly the contents of the purported privileged information when His Lordship failed to hear and adjourned the Appellant's argument with respect to civil fraud;
3. That the Learned Trial Judge made a palpable and over-riding error in finding that the rights of the Respondent in other legal proceedings would be prejudiced if the Appellant published information from the letters that purported to be privileged communications between the Respondent and its solicitors, when the evidence presented did not support such a finding.
4. That the Learned Trial Judge erred in law in failing to recognize the constitutionally guaranteed rights accorded to the Appellant under s. 2(b) of the Canadian Charter of Rights and Freedoms;
5. That the Learned Trial Judge erred in law in failing to properly

apply the Oakes test when considering s. 1 of the Canadian Charter of Rights and Freedoms;

6. That the Learned Trial Judge erred in law in finding that the request for an injunction was rationally connected to the objectives of the common law right protecting privileged communications based on the circumstances of the case before His Lordship;
7. That the Learned Trial Judge made a palpable and over-riding error in finding that the potential damage to the Respondent was substantial as compared to the limited curtailment of the Appellant's right to publish the documents in question;
8. That the Learned Trial Judge erred in law in finding that if the Appellant were to publish the information contained in the purportedly privileged documents, the Respondent would be irreparably harmed;
9. That the Learned Trial Judge erred in law in failing to consider the Respondent's standing to seek equitable relief given evidence before His Lordship as to deficits and errors in the evidence presented by the Respondent in order to obtain an interim injunction; and
10. That the Learned Trial Judge erred in law in finding that communications between a solicitor and client which are in the hands of a third party are privileged.

Grounds of appeal 1 and 2 can be dismissed summarily. The comments that are in the communications from the Town's solicitor that are relied on to support the CBC's allegation that the communications contain evidence of fraud are of such minimal import that the comments do not even come close to the sort of evidence that would warrant overriding the solicitor/client privilege in the interest of uncovering fraudulent conduct. Therefore, the failure of the trial judge to hear argument on this issue is moot.

With respect to the ninth ground of appeal, it too is without merit; the minor defects and errors in the evidence presented in support of the interim injunction application are of such little consequence that the Town should not be barred from seeking the equitable relief of an injunction.

I will now deal with the main issues.

There are only two limitations on a superior court's jurisdiction to grant injunctive relief, whether interlocutory or final:

- i) The court must have personal jurisdiction in that the defendant is amenable to the jurisdiction of the court, and
- ii) The plaintiff must have a cause of action.

(See **Channel Group Limited et al. v. Balfour Beatty Construction Ltd. et al.** (1993), 1 A.E.R. 664 H. of L.)

Although older authority indicates that the solicitor/client privilege is only a rule of evidence and that a third party who comes into possession of confidential solicitor/client communications can make whatever use of them that the party chooses, I am satisfied those authorities are no longer persuasive since the Supreme Court of Canada decision in **Descôteaux v. Mierzwinski**, [1982] 1 S.C.R. 860 where Lamer J., after reviewing the law as to confidentiality of communications between solicitor and client and, after reviewing the decision of the Supreme Court of Canada in **Solosky v. The Queen**, [1980] 1 S.C.R. 821 stated at p. 875:

"It is quite apparent that the Court in that case applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of

protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively."

Therefore, the law has evolved to the point that the Town's right to confidentiality respecting its communication with its solicitor is a substantive right which may be enforced against third parties who have come into possession of documents protected by this right.

It is not fatal that the Town chose to enforce its right by an application *inter partes* rather than by an originating notice (action). The affidavits filed in support of the application for the injunction clearly show that the Town was asserting its right to confidentiality.

There cannot be any question that the injunction infringes the CBC's right to broadcast news it has gathered as contained in the three communications from the Town solicitor. It is not necessary to decide if the **Charter** applies to court orders that encroach on the freedom of expression as guaranteed by **s. 2(b)** of the **Charter** as, assuming the **Charter** applies in the circumstances of this case, I am satisfied that the injunction, as granted, is a reasonable limit prescribed by law within the parameters of **s. 1** of the **Charter** as interpreted by the relevant Supreme Court of Canada decisions and as found by the trial judge.

Furthermore, the application of **Rule 2** as enunciated by Lamer J. in **Descôteaux**, *supra*, seems to dictate the result arrived at by the learned trial judge that the CBC be restrained from broadcasting the contents of the three confidential communications from the Town's solicitor.

Injunctive relief in cases of this nature is clearly an appropriate remedy. The remarks

of Sharp in his text Injunctions and Specific Performance at para. 5.180, although made in respect to the granting of interlocutory injunctions, are relevant to the issue in these proceedings; he stated:

"Confidential information is explicitly not for publication and by recognizing the existence of a confidential relationship, the law clearly places the plaintiff's right to keep information secret above any interest the public may have in knowing that information. Once the information is disclosed, that interest is destroyed and damages to reflect the degree of hurt involved in having one's private affairs broadcast are much less satisfactory than an injunction preventing publication in the first place. A damages award cannot make secret again matters divulged in breach of confidence."

Proof that irreparable harm that cannot be compensated in damages will be the result if an injunction is not granted, while often a consideration in determining whether or not to grant injunctive relief, is not essential. The court's jurisdiction is by design and precedent very broad and is only limited to the extent indicated in the **Channel Tunnel** decision of the House of Lords (see Sharp, *supra*, para. 1.1170).

Given the importance of the fundamental right to confidentiality arising from the solicitor/client relationship and the need to protect that right, I would not interfere with the trial judge's exercise of his discretion to grant the permanent injunction in the circumstances of this case. In granting the injunction it was not necessary for the trial judge to make a finding that the rights of the Town in other legal proceedings would be prejudiced if CBC published information from the communications. Whether the evidence supported the finding is irrelevant. Appeal Ground 3 is therefore without merit.

The CBC should have respected the Town's right to confidentiality of solicitor/client communications. Had it done so the application would not have been necessary. The appeal is dismissed with costs to the Town for the hearings before the Supreme Court Judges and this Court in the total amount of \$4,000 plus disbursements.

Hallett, J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.

C.A. No. 94-101923

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

CANADIAN BROADCASTING )  
CORPORATION, a body corporate )  
 )  
Appellant )  
- and - )  
THE TOWN OF AMHERST )  
 )  
Respondent )  
 )  
 )  
 )  
 )  
 )  
 )

REASONS FOR  
JUDGMENT BY:  
HALLETT, J.A.