IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cushing v. Hood, 2007 NSSC 97

Date: 20070410
Docket: S.Y.6512; 180082
Registry: Yarmouth

Between:

Wendy Cushing, Future Group Realty Limited and Russell Cushing

Plaintiffs

v.

S. Clifford Hood

Defendant

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	December 18 at Barrington and December 20, 2006 at Yarmouth, N.S.
Written Decision:	April 10, 2007
Counsel:	Rubin Dexter for the Plaintiffs S. Bruce Outhouse, Q. C., for the defendant

By the Court:

INTRODUCTION:

[1] This case is about the sometimes difficult question of when solicitor-client privilege arises; made more difficult by the fact that two associated lawyers from the same firm and one of their wives are involved in the pertinent conversations. The plaintiff, Russell Cushing, practiced law as an associate with the defendant, S. Clifford Hood, from 1992 to 2000. In December of 1998, Wendy Cushing, Russell Cushing's wife, was contemplating leaving her employment as a real estate broker with Tinkham Real Estate (Tinkham). Mr. Hood and Mr. Cushing had a conversation and one of the topics discussed was whether Ms. Cushing should give notice to Tinkham. Mr. Hood thought that some notice should be given. Mr. Cushing told Ms. Cushing that she should give notice and he told her what Mr. Hood's thoughts were on the subject. Ms. Cushing was apparently not inclined to listen to what Mr. Cushing had to say. A short time later Ms. Cushing was in Mr. Cushing's office and Mr. Cushing asked Mr. Hood to come in and basically repeat the conversation the two had had previously regarding Ms. Cushing leaving Tinkham. Ms. Cushing subsequently left her employment with Tinkham without giving notice and she has been sued by Tinkham. In November of 2000, Mr. Hood

discussed the general nature of his conversations with the Cushings with Tinkham owner, Sharon Fraser and with Tinkham's lawyer, Kevin MacDonald. The Cushings have now sued Mr. Hood for breach of solicitor-client privilege and they seek an injunction and punitive damages.

BACKGROUND FACTS:

[2] Wendy Cushing had been employed as a real estate agent with Tinkham Real Estate since February of 1994. She became a real estate broker in 1996 - 97 and continued in that capacity with Tinkham until she left abruptly on January 7, 1999. During November or December of 1998, Ms. Cushing had had discussions with Richard Hurlburt regarding the possibility of her leaving Tinkham and forming a real estate business relationship with Mr. Hurlburt. Ms. Cushing was apparently growing dissatisfied with her employment at Tinkham and she was considering her options.

[3] During early December of 1998, Ms. Cushing telephoned Mr. Cushing, who was vacationing in Maui at the time, and told him she had been speaking with Mr. Hurlburt about forming her own company. Mr. Cushing told her not to do

anything and to wait until he got back home so the two could talk about the matter. After Mr. Cushing's return from Maui there was a meeting between Ms. Cushing, Mr. Hurlburt, Mr. Furman and Mr. Cushing regarding possible options for Ms. Cushing. Ms. Cushing testified that she and Mr. Cushing had many discussions about her leaving Tinkham during the latter part of 1998. This was before she met Mr. Hood in Mr. Cushing's office. She said Mr. Cushing was not keen on her leaving Tinkham. She said that Mr. Cushing had told her that Mr. Hood agreed (presumably with Mr. Cushing) that she should give notice. Ms. Cushing said she told Mr. Cushing that "that's not the way it's done".

[4] Mr. Cushing testified that he most likely told Ms. Cushing that notice to Tinkham was appropriate. He said that Ms. Cushing was "not buying the notice part of it". He said he did not think that she had any idea how to end her employment with Tinkham correctly. He said he did not think that she was aware of the potential for problems.

[5] Mr. Cushing testified that around the time of the meeting with Mr. Hurlburt and Mr. Furman he had a conversation with Mr. Hood concerning Ms. Cushing leaving Tinkham. He said he spoke to Mr. Hood during their day to day operations

as associated lawyers in the same firm. He said he wanted Mr. Hood's "two cents worth". He said he told Mr. Hood that Wendy had been approached by Mr. Hurlburt. He said he was curious to know Mr. Hood's views of Mr. Hurlburt as far as being in business with him was concerned. Mr. Cushing said he also asked Mr. Hood what Wendy should do to keep out of trouble. Mr. Cushing said Mr. Hood told him he was not aware what notice may be required, but that some notice should be given, and that he suggested one month. Mr. Hood also told Mr. Cushing that Ms. Cushing should "not mess with the listings" or "solicit the agents". Mr. Hood told Mr. Cushing that things should be done properly, especially when doing business in a small town like Yarmouth. Mr. Hood suggested that a letter to Sharon Fraser, the principle of Tinkham, would be appropriate. Mr. Cushing testified he prepared such a letter for his wife and showed it to Mr. Hood who said it was fine; but Mr. Hood did not appear to recall seeing such a letter. Mr. Cushing said he expected this conversation with Mr. Hood to remain confidential because he was getting legal advice for his wife; but he did not tell Mr. Hood this was what he was requesting.

[6] As I mentioned earlier, Mr. And Ms. Cushing apparently had many discussions during the latter part of 1998 about her leaving Tinkham. Mr. Cushing

testified that Ms. Cushing was not listening to his counsel or advice on the proper way to proceed with such a move. He said she told him that giving notice was "not the way it's done in the real estate business". Mr. Cushing told Ms. Cushing that Mr. Hood agreed notice should be given, but she was still apparently unswayed.

[7] Ms. Cushing testified in direct examination that during the latter part of December 1998 she met with Mr. Hood to get his advice on how to leave her employ. She said this meeting had come about because Mr. Cushing had told her during their discussions that Mr. Hood had advised on how to leave her employ. She said that Mr. Cushing arranged a meeting with Mr. Hood. Ms. Cushing said she went to Mr. Cushing's office and that he called Mr. Hood into his office and all three met in Mr. Cushing's office. She testified that, "as her lawyer" she thought Mr. Hood would keep their discussion in confidence "because he was giving legal advice". She testified that Mr. Hood said she should give notice but she was unsure of how much notice period was suggested. She said Mr. Hood also suggested she should have a letter ready for the Tinkham sales agents "in case they got wind of her leaving". On cross-examination, Ms. Cushing testified that Mr. Cushing had arranged a meeting with Mr. Hood so the latter couuld say the same thing directly to her that Mr. Cushing had been saying. Ms. Cushing testified she

did not think that she would be billed for legal advice because Mr. Hood was Mr. Cushing's employer. She said there was no discussion of legal fees or a legal retainer of any kind. She said she was never billed for this matter. It does not appear that she had any intention of retaining Mr. Hood as her lawyer.

[8] Ms. Cushing testified that she abruptly left Tinkham on January 7, 1999, "in a huff", without talking to anybody or giving notice, and without going back to Mr. Cushing, Mr. Hood, or anyone for advice. She testified that Mr. Hood had never acted as her lawyer before. Mr. Cushing incorporated a new company, Future Group Realty Limited, for Ms. Cushing; the effective date of incorporation being January 15, 1999. Mr. Cushing did this work through Mr. Hood's law firm, but Ms. Cushing was not billed any legal fees and none were paid.

[9] With regard to the meeting in Mr. Hood's office between Mr. and Ms. Cushing and Mr. Hood, Mr. Cushing testified that he agreed it was best for Ms. Cushing to give notice, especially in a small town like Yarmouth and that he had told this to Ms. Cushing. He said that Ms. Cushing did not listen to him and he wanted her "to hear it from the horse's mouth". Mr. Cushing testified he "thought

that Wendy did not understand the seriousness of the matter" and that it was best for her to hear it from Mr. Hood.

[10] Mr. Cushing said he told Wendy he would get her in to talk to Mr. Hood. Mr. Cushing testified that he did not know how it transpired that Wendy came to be in his office. He said he just knows that Wendy was in his office and he got Mr. Hood to talk to her. Mr. Hood has testified that he was leaving the office on his way to lunch and Mr. Cushing asked him into his office. Mr. Cushing said the conversation took place in an office, but he could not recall which office, and that the same topics he had talked about with Mr. Hood were discussed. Mr. Cushing testified he did not know that Wendy would be leaving Tinkham and start a real estate company on her own. Mr. Cushing said the purpose of the meeting was to get Mr. Hood to give advice to Wendy; however there is no evidence that this meeting was prearranged. It appears to have occurred purely by chance. Mr. Hood again stated that he thought Ms. Cushing should give some notice, not mess with the listings of Tinkham, nor solicit its agents.

[11] In cross-examination Mr. Cushing said he thought in his own mind that notice to Tinkham might be appropriate. He said he probably told Ms. Cushing

that notice was required, but that he wanted Mr. Hood's two cents worth. Mr. Cushing admitted that he did not tell Mr. Hood he wanted to hire or retain him as legal counsel and/or obtain a legal opinion from him. He said he asked Mr. Hood "what to do to avoid a pissing match". Mr. Cushing testified that Mr. Hood said notice should be given and suggested a month and that Mr. Hood also said, "should not mess with the listings nor solicit the agents of Tinkham". Mr. Cushing said Mr. Hood did not research the matter and get back to him later, but that Mr. Hood's comments were "just off the cuff". Mr. Cushing said the discussion was less than one half hour and some part of it was about Mr. Hurlburt and what kind of a person and businessman he was. Mr. Cushing said that, because Mr. Hood and Mr. Hurlburt were associated with the same political party, he thought they would know each other.

[12] Mr. Cushing said that Ms. Cushing had no idea of fiduciary duty, and that this was not discussed with Mr. Hood.

[13] Neither Mr. Cushing nor Ms. Cushing mentioned anything about the matter to Mr. Hood until around April of 1999 when Mr. Cushing, Ms. Cushing and Future Group were sued by Tinkham and its owner, Sharon Fraser (The Tinkham

action). Mr. Cushing was acting as counsel on his own behalf in the Tinkham action; however, it is not clear if he was solicitor of record for all three defendants, that is, himself, Wendy Cushing and Future Group. It appears that counsel for the plaintiffs was objecting to Mr. Cushing acting in such a capacity. It transpired that the plaintiffs in the Tinkham action were not consenting to an extension of time for the filing of a defence and Mr. Cushing filed a chambers application for that purpose. Just before the scheduled chambers application it became apparent that Mr. Cushing was in a difficult position being a party, an affiant and a legal counsel on the application. Mr. Hood was asked to step in and assist on the chambers application, which he did. It does not appear that Mr. Hood at any time became counsel of record for the defendants or that he was in any way retained as counsel for the defendants or provided any legal advice in the Tinkham action. Mr. Cushing testified that he and Ms. Cushing were by then getting "help" (presumably legal) as to how to handle the lawsuit by Tinkham and Ms. Fraser. Mr. Cushing testified that, later in the year (1999), he and Ms. Cushing got a lawyer from Halifax to formally represent them in the Tinkham action. Mr. Cushing said that, a short time prior to discoveries in the Tinkham action, he received a call from Kevin MacDonald, legal counsel for the plaintiffs in that action, stating that he had met

with Mr. Hood. Mr. Cushing said Mr. MacDonald told him that, as a result of what Mr. Hood had said, “he had the goods on Mr. Cushing”.

[14] By November of 2000, Mr. Hood had already terminated Mr. Cushing’s employment for what Mr. Hood considered improper business dealings with a client of Mr. Hood’s firm. Mr. Hood sent a letter of complaint to the Nova Scotia Barristers Society (the Society) dated February 22, 2001. The Society filed a formal complaint against Mr. Cushing in January of 2002. That complaint resulted in a discipline committee ruling dated March 11, 2004 which suspended Mr. Cushing from the practice of law for a period of nine months, plus significant costs to be paid by Mr. Cushing.

[15] In November of 2001, the within action against Mr. Hood was commenced. Around that time the Cushings also filed a complaint against Mr. Hood with the Society. That complaint is in abeyance pending the termination of the within action.

[16] Mr. Hood testified that Mr. Cushing told him during one of their day to day conversations that Ms. Cushing was planning to leave her employment with

Tinkham. He said Mr. Cushing asked him what he thought. Mr. Hood said he knew that Ms. Cushing was a broker at Tinkham and that he thought she should give some notice, even if technically or legally none was required. Mr. Hood said he did not indicate that he knew what notice may be required and that he was not asked to research or check into the matter or provide a legal opinion. Mr. Hood testified he also said that Ms. Cushing should not "mess" with the listings. Mr. Hood could not recall if there was any discussion about other agents of Tinkham during that first conversation, which he thought lasted ten to fifteen minutes. Mr. Hood said that they also discussed Mr. Hurlburt during that conversation.

[17] With regard to the second conversation, Mr. Hood testified that, as he was leaving for lunch, Mr. Cushing called him into his office. He said Ms. Cushing was there and that they had the same kind of conversation as he had had previously with Mr. Cushing. He said Mr. Cushing did the talking and asked the questions. Mr. Hood said he repeated that he thought there should be adequate notice given to Tinkham, probably one month. Mr. Hood testified that the recollection of his impressions at the time is that the Cushings were "kicking tires about what to do or not do" and that Mr. Cushing wanted his "two cents worth". Mr. Hood said there was no discussion about remuneration or being retained as the Cushing's legal

advisor or counsel. Mr. Hood said he did not take notes, open a file or have any intention of billing anyone. Mr. Hood testified that he did not consider that a solicitor-client relationship was established. He said it was just a casual conversation, primarily to lend support to Mr. Cushing, and that he was not asked to provide a legal opinion of any kind.

[18] On cross-examination, Mr. Hood said he was still of the belief that a solicitor-client relationship had not been established during either of the previously mentioned conversations. Mr. Hood disagreed with the suggestion that the Cushings had approached him for legal advice. Mr. Hood said he believed that Mr. Cushing wanted him to help in his position vis-a-vis Ms. Cushing. Mr. Hood also testified on cross-examination that he did not consider his conversations with the Cushings any more confidential than his conversations with Ms. Fraser or her lawyer, Mr. MacDonald. Mr. Hood said it was his impression that Mr. Cushing was looking to him to back up Mr. Cushing in his advice to his wife. Mr. Hood admitted that there was mention of what to do to avoid being sued and that he said, "sued over what?" Mr. Hood testified that he told the Cushings that he was not aware of the legal requirements for notice, but, that, if he were in their shoes, it would probably bode well to give notice. Mr. Hood said he was aware Ms.

Cushing was the broker at Tinkham but that fiduciary duty was not discussed or considered during either conversation. He said he did not research any legal issues because he had not been asked or retained to provide a legal opinion. Mr. Hood said he would not have gone out and told Ms. Fraser what he had heard about Ms. Cushing's plans because it was obvious that Ms. Fraser was not aware of those plans. Mr. Hood agreed that, to that extent, he would have regarded the conversations as confidential between friends or with an associate and his wife.

[19] During the latter part of 2000, Mr. Hood received a telephone call at home from Ms. Fraser. Mr. Hood testified that during that telephone conversation he told Ms. Fraser that "if they (the Cushings) had listened to me there would likely not have been a law suit". Mr. Hood also received a telephone call from Mr. MacDonald, Ms. Fraser's and Tinkham's lawyer, and he told Mr. MacDonald the same thing he had told Ms. Fraser. Mr. Hood was asked to meet with Ms. Fraser, Mr. Pfister and Mr. MacDonald, which he did, and he told them what he had told the Cushings regarding the appropriateness of giving notice, not messing with the listings or the agents of Tinkham. Mr. MacDonald has provided an affidavit regarding his conversations with Mr. Hood, and Mr. Hood testified he takes no issue with the contents of that affidavit. Mr. Hood said he did not feel he was

breaking any solicitor-client privilege because he was of the view that a solicitor-client relationship did not exist at the time of his “casual” conversations with the Cushings. However, after the issue was raised, Mr. Hood agreed to and gave an undertaking to not testify in discoveries or at trial until the matter had been resolved by an order of the court. Mr. Hood has abided by that undertaking, but he said he could not consent to a permanent injunction as requested by the Cushings because he was of the opinion that that could be usurping the function of the court. Mr. Hood testified that he never volunteered any information, that people sought it from him.

[20] The Cushings have now sued Mr. Hood requesting that the Court grant a permanent injunction and award punitive damages against Mr. Hood for breach of solicitor-client privilege. The plaintiffs have abandoned their claim for compensatory or general damages.

ISSUES:

[21] 1. Were the two conversations which occurred during mid-December of 1998 between the Cushings and Mr. Hood concerning Ms. Cushing's prospective departure from Tinkham subject to solicitor-client privilege?

2. If solicitor-client privilege applies, what are the appropriate remedies?

THE AUTHORITIES:

[22] The criteria or tests which the authorities indicate are to be used when deciding if solicitor-client privilege exists are well established and they are not really being contested by the parties in this action. It is the application of those criteria or tests to particular circumstances which poses a challenge for courts and judges, and it is where the disagreement or dispute is centered in the present case.

[23] Solicitor-client privilege is of vital importance for the functioning, and probably the survival, of our legal system. This fact has been long recognized and accepted at common law. The importance of this principle is underscored by Mannes and Silver in **Solicitor-Client Privilege in Canadian Law** (Butterworths Canada 1993) p.1:

> The seeking of legal advice is inextricably wrapped up in the concept of a normative body of law encompassing a system of substantive and procedural rights, dedicated to the provision of a fair trial. As such, solicitor-client privilege can be seen as the crux of an advanced legal system. Its development represents the departure from the era of the Star Chamber, trial by ordeal, and the Inquisition.
>
> Solicitor-client privilege protects the integrity of the relationship most vital to the continuing operation of the legal system. In this sense, the law of solicitor-client privilege can be seen to have survival value for the legal system– for it is the law's method of safeguarding itself and its processes in an adversarial system.
>
> Obviously, confidentiality is pivotal – indeed, it is the objective behind solicitor-client privilege. That objective is to facilitate solicitor-client consultation, maximize the use of the solicitor by the client, and so to foster the continued operation of the legal system.
>
> Clearly, the main purpose for the existence of the courts of justice is to discover and establish the truth. Yet, however valuable and important these objectives, they cannot be pursued fairly without moderation. Solicitor-client privilege is the centrepiece of that moderation . . .

[24] Major J. In *R. v. McClure*, [2001] 1 S.C.R. 445 commented on the importance of solicitor-client privilege at para. 2:

> ¶2 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

[25] Our courts have recognized two basic categories of privilege. One is class privilege, which provides a *prima facie* presumption of protection; the other is assessed on a case-by-case basis. With regard to these categories, Lamer, C.J.C. said the following at para. 26 of his judgment in, *R. v. Gruenke*, [1991] 3 S.C.R. 263:

> ¶26 Before delving into an analysis of the issues raised by this appeal, I think it is important to clarify the terminology being used in this case. The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (ie., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category (see: Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 and Solosky v. The Queen, [1980] 1 S.C.R. 821). The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case. [Emphasis added]

[26] From the above passage it seems clear that the present case is one of "class privilege". Therefore, if the communications are the result or product of a

solicitor-client relationship, the presumption is that they are excluded unless the opposing party can show why the communications should not be privileged. *Gruenke* was a case involving religious communications and whether they were protected by "class privilege" or "case-by-case privilege". In *Gruenke*, the Court considered the "Wigmore test", after having rejected that the communications were protected by "class privilege". It appears that it is with regard to the second class, that is "case-by-case privilege", that the "Wigmore test" is most applicable to the analysis; although, many of the principles enounced in that test obviously apply to solicitor-client relationships as well.

[27] The Supreme Court of Canada considered when the solicitor-client relationship and the resulting privilege may arise in the case of *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860. Lamer J., as he then was, stated at page 9 of his judgment:

> The following statement by Wigmore (8 Wigmore, Evidence, para. 2292 (McNaughton rev. 1961) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communication relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

. . .

> There are exceptions. It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication. Communications made in order to facilitate the commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith. [Emphasis added]

Lamer J. further commented on the privilege as a substantive rule as opposed to a rule of evidence at pages 10 and 11 of his judgment:

> 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 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.
>
> . . .

With regard to confidentiality, Lamer J. said the following at pages 7 and 8 of *Descôteaux*:

> It is not necessary to demonstrate the existence of a person's right to have communications with his lawyer kept confidential. Its existence has been affirmed numerous times and was recently reconfirmed by this Court in Solosky v. The Queen, [1980] 1 S.C.R. 821 . . .
>
> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (Solosky, supra). It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others. Like other personal, extra-patrimonial rights, it gives rise to preventative or curative remedies provided for by law, depending on the nature of the aggression threatening it or of which it was the object. Thus a lawyer who communicates a confidential communication to others without his client's authorization could be sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them [See Note 2 below].
>
> Note 2: I am dealing here generally with the effects of the right to confidentiality. In its present state, the rule of evidence, which I shall discuss later, would not prohibit a third party from making such a disclosure (see 8 Wigmore, Evidence, at pp. 633 and 634 - McNaughton rev. 1961).

Lamer J. also commented on when the right to confidentiality arises at pages 11 and 12 of *Descôteaux*:

> In the case at bar the principal issue is to determine when the solicitor-client relationship, which confers the confidentiality protected by the substantive rule and the rule of evidence, arises.
>
> The Superior Court judge, as we have seen, was of the view that this relationship, and consequently the right to confidentiality, did not arise until the legal aid applicant had been accepted, that is, until the retainer was established.
>
> When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.
>
> The items of information that a lawyer requires from a person in order to decide if he will agree to advise or represent him are just as much communications made in order to obtain legal advice as any information communicated to him subsequently. It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (Minter v. Priest, [1930] A.C. 558; Phipson on Evidence, 12th ed., 1976, p. 244, No. 589; 8 Wigmore, Evidence (McNaughton rev. 1961, p. 587, para. 2304).

Lamer J. further commented on when and how the privilege can arise at page 14 of *Descôteaux*:

> It is also clear that solicitor-client privilege can extend to conversations in which a person makes disclosures while seeking to retain a solicitor, though in fact the retainer is not perfected. In Minter v. Priest, [1930] A.C. 558 at p. 573 Viscount Dunedin said:
>
> > Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or

> expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion.
>
> It follows from the authorities referred to above that conversations with a solicitor's agents held for the purpose of retaining him would also be privileged, even though the solicitor was not then, or ever, retained. In my view, the principle protects from disclosure a conversation between an applicant for legal aid and the non-lawyer official of the Legal Aid Society who interviews him to see if he is qualified. [Emphasis added]

[28] Thus communications with agents seeking legal advice on behalf of third parties can also give rise to solicitor-client privilege. Also, it is not necessary that a retainer be perfected for the privilege to arise. Also it is not necessary that a statement of account be rendered by the lawyer in order to invoke the privilege, as can be noted in the subsequent authorities.

[29] In *Re. Markovina,* [1991] B.C.J. No. 2147, Skipp J., of the British Columbia Supreme Court provides fairly concise statements regarding when and how a solicitor-client relationship is formed and how or when the resulting privilege arises. He said the following at pages 3 and 4 of his judgment:

> The right to confidentiality does not automatically attach to every communication between a solicitor and his or her client. There are substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality. Wigmore (8 Wigmore, Evidence, para. 2292 (McNaughton rev. 1961) summarizes these conditions as follows:

> "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived."

In Descôteaux (supra), with respect to this same issue, Lamer, J. stated at p. 873:

> "It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. A communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication."

Mrs. Markovina visited the offices of lawyer Livingstone to obtain legal advice with regard to the status of the receivership order made by Master Kirkpatrick in respect of the property of Mr. Markovina.

In paragraph 9 of his affidavit lawyer Livingstone deposes that he did not open a file for Mrs. Markovina and that he did not send her a statement of account. The latter statement was erroneous and in fact, lawyer Livingstone had sent a $75.00 statement of account to Mrs. Markovina for the legal advice that he provided to her during her visit to his office in the month of August, 1990.

I interject here that even if he had not submitted a statement of account to Mrs. Markovina, a lawyer client relationship would still have existed as she attended upon him for the express purpose of consulting him in his professional capacity.

A solicitor/client privilege can extend to conversations in which a person makes disclosures while seeking to retain a solicitor, though in fact the retainer is not perfected. In Minter v. Priest [19303, Appeal Cases 558 (H.L.) . . .

Minter v. Priest was considered by the Supreme Court of Canada in Descôteaux. Mr. Justice Lamer said at P. 877:

> "It has long been recognized that even if the lawyer does not agree to advise the person seeking his services, communications made by the person to the lawyer or his staff for that purpose are nonetheless privileged (Minter v. Priest . . .)"

Mr. Justice Lamer concluded that the right to confidentiality arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice, regardless of whether or not a retainer has been established at the moment of the communications.

> It follows from the authorities noted above that the conversations held by Mrs. Markovina with lawyer Livingstone were privileged whatever view one might take of them as there can be no doubt that she retained him in a professional capacity and that he, for reward, gave her professional advice. [Emphasis added]

Justice Major, in **R. v. McClure**, supra, at paras. 35 to 37, also concisely stated the requirements for solicitor-client privilege to arise:

> ¶ 35 However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> ¶ 36 Not all communications between a lawyer and her client are privileged. In order for the communication to be privileged, it must arise from communication between a lawyer and the client where the latter seeks lawful legal advice. Wigmore, supra, sets out a statement of the broad rule, at p. 554:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

> ¶ 37 As stated, only communications made for the legitimate purpose of obtaining lawful professional advice or assistance are privileged. The privilege may only be waived by the client. See M. M. Orkin, Legal Ethics: A Study of Professional Conduct (1957), at P. 84:
>
> > It is the duty of a solicitor to insist upon this privilege which extends to "all communication by a client to his solicitor or counsel for the purpose of obtaining professional advice or assistance in a pending action, or in any other proper matter for professional assistance" [Ludwig, 29 C.L. Times 253; Minet v. Morgan (1873), 8 Ch. App. 361]. The privilege is that of the client and can only be waived by the client. [Emphasis added]

ANALYSIS:

[30] Issue 1. Were the two conversations which occurred during mid-December of 1998 between the Cushings and Mr. Hood concerning Ms. Cushing's prospective departure from Tinkham subject to solicitor-client privilege?

[31] In order to decide this question, one must first decide if a solicitor-client relationship existed "at the exact moment of the communications" (See Descôteaux case). The essential facts are not significantly in dispute. It is the interpretation of

those facts which is in dispute. Mr. Cushing asserts that he spoke to Mr. Hood (the first conversation) as agent for Ms. Cushing and in order to obtain legal advice or a legal opinion for her. However, this assertion was never communicated to Mr. Hood. Mr. Cushing agrees that the conversation was "off the cuff" and occurred during and as part of everyday conversations between he and Mr. Hood, as associated lawyers. A good part of that rather brief conversation concerned Mr. Hurlburt and the kind of person and business associate he might be. Mr. Cushing said he wanted to bring up the matter of Ms. Cushing's prospective leaving of Tinkham to get Mr. Hood's "two cents worth", to "see what he thought". Mr. Cushing never indicated that he was requesting or wanted legal advice or a legal opinion on behalf of Ms. Cushing. It appears he was just as interested in obtaining information about Mr. Hurlburt. At no time did Mr. Cushing indicate to Mr. Hood that he wanted the advice to pass on to Ms. Cushing or that he wanted to bring Ms. Cushing into the firm offices to obtain legal advice or a legal opinion from Mr. Hood.

[32] Ms. Cushing testified that she went to see Mr. Hood to "obtain legal advice" from him. However, there was never any arrangement or appointment made for her to meet with Mr. Hood. Mr. Cushing testified that he did not know how Ms.

Cushing came to be in his office when he intercepted Mr. Hood on his way to lunch and asked him to come into his office. Ms. Cushing did not even recall what notice period Mr. Hood indicated may have been appropriate. In fact, Ms. Cushing testified Mr. Hood had never acted as her lawyer and that she had no intention of retaining him as her lawyer with regard to her prospective leaving of her employment with Tinkham. The conversation (second conversation) between Mr. Hood and Mr. and Ms. Cushing happened purely by chance and again, a legal opinion was not requested of Mr. Hood. Mr. Hood did not at any time indicate a legal requirement for notice or anything else during this *ad hoc* conversation. Mr. Hood simply told the Cushings what he thought would bode well for proper or ethical practice in a small business community like Yarmouth. It is not surprising that Mr. Hood did not make notes of these two conversations, did not open a file and had no thought of billing for his services. His professional services were simply not sought by the Cushings and they had no intention of doing so at any time. To try to so package those conversations at this time, after the fact, is to try to package casual conversations as a solicitor-client relationship in order to profit from whatever propitious results make flow from that categorization. The fact that Mr. Hood would not have disclosed Ms. Cushing's somewhat clandestine plans, and kept them confidential, at least until they had been executed, does not a

solicitor-client relationship create. Mr. Hood said he would have done the same for any friend or associate.

CONCLUSION:

[33] I find that the plaintiff's have failed to prove, on a balance of probabilities, that a solicitor-client relationship existed at the time of the two described conversations in mid-December of 1998. In my opinion, the pertinent facts do not establish that contention; if anything, they establish the opposite contention. One party cannot put a different "spin" on the facts because it may be beneficial or advantageous at a later time. I find that Ms. Cushing did not directly, nor through Mr. Cushing, seek Mr. Hood's professional legal advice in his capacity as their legal adviser. "It is not sufficient to speak to a lawyer for everything to become confidential from that point on . . . The relationship must be a professional one at the exact moment of the communication" (See Descôteaux). There was no professional relationship existing at the time of the two conversations in mid-December of 1998 and the Cushings did not intend nor seek such a relationship with Mr. Hood. In fact, Ms. Cushing testified she had no intention of ever retaining Mr. Hood, and when the time came, they sought other legal advice or

counsel. I am conscious of the fact that a retainer does not have to be perfected for solicitor-client privilege to arise, but it is necessary that the prospective client be at least that, and that the lawyer's professional opinion he sought in his capacity as such (see Wigmore at p. 554). I find that even this minimal requirement has not been established in this case. Ms. Cushing has indicated that she was not a potential client of Mr. Hood (See Descôteaux). The plaintiffs have failed to establish that Ms. Cushing attended at the office of Mr. Cushing (regarding the second conversation) in order to obtain a consultation from Mr. Hood in his professional capacity. There was no meeting arranged with Mr. Hood and the casual conversation occurred purely by chance.

[34] Ms. Cushing did not say to Mr. Hood that she was there to obtain his professional legal advice. Also, Mr. Hood did not indicate what may be legally required but he simply gave his common sense thoughts on what may be a proper or ethical way to conduct business in a small town like Yarmouth. As I said, in the final analysis, the plaintiffs have failed to prove that a solicitor-client relationship existed at the relevant times.

[35] The claim of the plaintiffs is accordingly dismissed. Having said that, I continue to be somewhat puzzled by the vigorous pursuit of this action, especially since Mr. Hood has not, to my knowledge, discussed or commented on any details or specifics which the Cushings may have said (if any) during the two conversations in question; except for what his thoughts were at the time, and what testimony was required of him in this action. Mr. Hood continues to abide by his undertaking not to discuss this matter, even in the Tinkham action, without being ordered by the court. These proceedings have placed in the public forum significantly more than was revealed by Mr. Hood's general comments to Ms. Fraser and Mr. MacDonald in late 2000.

[36] I will grant an order dismissing this action, prepared by counsel for the defendant and consented as to form by counsel for the plaintiffs. If the parties cannot agree on costs, I will hear them in chambers on this issue, at a mutually convenient time.

Boudreau, J.