

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: A.B. v. Home of the Guardian Angel, 2008 NSSC 9

Date: 2008/01/11

Docket: S.H. No. 170184

Registry: Halifax

Between:

A.B. and C.D.

Plaintiffs

and

Home of the Guardian Angel, Her Majesty The Queen in Right of Nova Scotia, Dr.
Robert Grant, Izaak Walton Killam Grace Health Care Center for Children,
Women and Families, a body corporate, and Dr. Doris Stinson

Defendants

and

Izaak Walton Killam Grace Health Care Center for Children. Women and Families,
a body corporate, and Doris Stinson

Third Parties

Judge: Justice N. M. Scaravelli

Heard: December 4, 2007, in Halifax, Nova Scotia

Counsel: Raymond F. Wagner, for the Plaintiffs
Robert G. Belliveau, Q.C. for the Defendant,
Home of the Guardian Angel
Terrance D. Potter, for the Defendant,
Her Majesty the Queen in Right of Nova Scotia
Carman G. McCormick, Q.C. , for the Defendant,
IWK Health Care
Brian W. Downie, Q.C., for the Defendant,
Drs. Grant and Stinson

By the Court:

[1] This matter involves an Interlocutory Application by the Defendant, Home of the Guardian Angel, supported by the Defendants, Dr. Robert Grant and Dr. Doris Stinson, for an Order pursuant to *Civil Procedure Rule 18.09* requiring the Plaintiffs' former solicitor to answer certain questions put to him during discovery examination. The specific questions were not answered on the basis of solicitor/client privilege.

[2] *Civil Procedure Rule 18.09* provides in part as follows:

(1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.

...

(3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.

Background

[3] This action was commenced by Originating Notice (Action) on March 22, 2001 and centers around a child born in 1990 who was adopted shortly after birth by the Plaintiffs. The adoption was arranged through the Defendant, Home of the Guardian Angel. Following the adoption, the child began demonstrating health issues and within approximately a year of his birth was diagnosed with cerebral palsy.

[4] The Plaintiffs have brought this action against the Home of the Guardian Angel, the hospital where the child was born, the doctor involved in the birth, the doctor retained by the Home of the Guardian Angel to examine the child, and the Province of Nova Scotia, who through the Department of Community Services, regulates the adoption process.

[5] All Defendants plead (*inter alia*) the action is barred by the *Limitations Of Actions Act*, R.S.N.S., 1989, c. 258.

[6] Following discovery of the Plaintiffs, the Defendants discovered Peter Landry, a solicitor contacted by the Plaintiffs for legal advice in 1995. Mr. Landry was discovered on June 8, 2007. During his examination, Mr. Landry was directed by present counsel for the Plaintiffs, to refuse to answer a total of 11 questions based on solicitor/client privilege. Copies of a portion of the discovery transcript containing the questions and refusals were attached to the Affidavit by counsel in this Application.

[7] The questions directed to Mr. Landry are briefly stated as follows:

1. ... what is in your file; not the contents of each document, but a list of what the documents in your file are?
2. How many times did you meet with Ms. Woulff?
3. Now when Ms. Woulff met with you, did she bring with her any medical records or files?
4. Were you advised by her as to what medical records or files she had in her possession, when she first met with you?
5. Was it your understanding, when she first met with you, that she brought with her all of her medical records and files that she had in her possession at that time?

6. Did you review any medical records or files that she brought to you, either in the initial meeting or subsequently?
7. Did you review any medical records yourself at any time in this matter, other than the medical records which were forwarded to you by the Grace Maternity Hospital?
8. Did Ms. Woulff provide any medical files, records or documents to you, at any time, for your review directly, as opposed to documents which you obtained yourself from the Grace Maternity Hospital?
9. Did you keep any handwritten notes of the medical records which you received from the Grace Maternity Hospital or from Ms. Woulff?
10. Why did you request those medical records that you did obtain from the Grace Maternity Hospital?
11. Do you have any medical or clinical records in your file today other than fetal heart tracings?

[8] The question to be determined is:

Should Mr. Landry be compelled to answer the questions at issue?

The answer, of course, requires determination of whether the information sought is protected by solicitor/client privilege.

Law

[9] Our *Civil Procedure* discovery Rules 18, 19 and 20 allow for full production and disclosure of relevant evidence, subject to privilege, prior to trial. This enables the parties to become informed of and to prepare for the case they have to meet. In *Global Petroleum Corp. v. CBI Industries Inc.* (1988), 172 N.S.R. (2d) 326 (C.A.) the Court of Appeal stated at paragraph 16:

The rules respecting procedure and discovery in civil matters should be liberally interpreted to give effect to full disclosure prior to trial. The object is to avoid surprise, save expense, and encourage settlement. See *Westminer Canada Holdings Ltd. v. Coughlan* (1989), 91 N.S.R. (2d) 214 (N.S.C.A.), at 221; *Soke Farm Equipment Ltd. v. New Holland of Canada Ltd.*, [1990] 2 W.W.R. 762 (Sask. C.A.), at 768.

[10] The interests protected by solicitor/client privilege are communications between them that enables a client to obtain legal advice. As stated by Manes and Silver in *Solicitor-Client Privilege in Canada Law* (Markham- Butterworth, 1993) at page 7:

Types of Communications Falling into Solicitor-Client Privilege

...

(a) Legal Professional Privilege: The Direct Communication

- 1.01 Historically, for the communication between solicitor and client to be privileged, it had to be made in contemplation of litigation. That is no longer the case. PRIVILEGE WILL NOW ATTACH TO ALL DIRECT COMMUNICATIONS BETWEEN A SOLICITOR AND CLIENT FOR THEIR AGENTS/EMPLOYEES MADE FOR THE PURPOSE OF OBTAINING PROFESSIONAL LEGAL ADVICE.**

...

(b) Contemplated Litigation Privilege: The Derivative Communications

- 1.02 The contemplation of litigation as a basis for privilege is required for derivative communications, such as:**

- (I) Communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice; or**
- (ii) Communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice, or**
- (iii) Communications which are created at their inception by the client including reports, schedules and documentation, etc.**

[11] Not everything communicated between solicitor and client is subject to privilege. In *Maranda c. Québec* [2003] 3 S.C.R. 193, Deschamps J. reviewed the scope of privilege at paragraph 42:

Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Dickson . (as he then was) in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, still apply:

(I) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential between the parties.

[12] There is a distinction between communications for the purposes of obtaining legal advice and communications of matters of pure fact as well as acts. Manes and Silver at page 127:

Legal Advice v. Fact

1.01 There is a distinction between a privileged communication and a communication regarding a matter of fact. Where a communication to a solicitor is made for the purpose of conveying or receiving information on matters of fact, the communication is not privileged.

[13] At page 133:

Acts not Privileged

2.01 Acts are not privileged. A solicitor must disclose a client's acts done in the solicitor's presence. The disclosure of such information does not interfere with the objective of solicitor-client privilege.

Similar to the treatment given to matters of fact, acts have been recognized from early on as not falling within the ambit of privilege. The objective of solicitor-client privilege is to enable an uninhibited relationship between the solicitor and client. In that way, the solicitor will be of maximum use to the client and the operation of the legal system will be facilitated. The revelation of matters of fact or acts (as distinct from the content of the confidential communication) does not jeopardize that objective, because such a disclosure does not affect the way in which a client relates or discloses information to the solicitor. Matters of fact or acts exist for all the world to see, and their possible release is unlikely to interfere with the solicitor-client relationship. If matters of fact or acts were to be privileged, this would only prevent fuller disclosure to the other side, without contributing towards the overall objective of the privilege.

[14] The onus of proving that communications are privileged lies with the party who asserts the privilege. *Global Petroleum Corp., supra.*

[15] The Respondent in this Application filed a brief Affidavit of counsel referring to Mr. Landry's evidence on discovery wherein he stated that he was first

contacted by the Plaintiffs on or around May 24, 1995. This Affidavit relates, presumably, to the Limitations issue.

[16] In support of the position of privilege, the Respondent in this Application referred to legal authorities including the decision Lamer, J in *Descôteaux v.*

Mierzwinski (1982), 70 C.C.C. (2d) 385 (S.C.C.) at p. 413:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, ...

[17] The Nova Scotia Court of Appeal considered the context of this quotation in *Global Petroleum, supra*, at paragraph 28:

The issue in that case was the validity of a search warrant to obtain allegedly false statements that an applicant for legal aid made with respect to his means. An exception to the general principle of confidentiality of communications existed where the communication was criminal or made with a view of obtaining legal advice to facilitate the commission of a crime. The Supreme Court of Canada did, in general, affirm the principle of confidentiality of solicitor/client communications, but did not hold that the facts communicated, if otherwise relevant, might not be subject to disclosure. In submitting that this case is authority for such a proposition, the appellants are taking a sentence out of context. The underlined sentence in the context of the court's decision clearly relates to the communication itself and the terms in which the facts are communicated, not the facts which may be relevant. If the appellants' assertion were correct, no relevant fact would be discoverable because a party could merely assert that it had been divulged to its solicitor.

[18] In the present case the Limitation defence gives context to the relevance of questions relating to the medical information that was made available at the time the Plaintiffs consulted with Mr. Landry. That issue will have to be determined at trial. Clearly, in terms of discoverability, privilege does not extend to documents given to a solicitor as all relevant documents have to be identified under the *Civil Procedure Rules*. Communications between solicitor and client regarding the medical documentation for the purposes of obtaining legal advice are protected by privilege, the fact of the existence of the medical documentation or where it came from is not.

[19] I am satisfied the questions at issue regarding medical documentation, on their face, elicit answers relating to facts, that is, the existence of medical documentation, as well as acts in relation to the obtaining and reviewing of the medical documentation. Similarly, questions relating to the list of documents in Mr. Landry's file (and not their contents) including the existence of handwritten notes, and the number of times solicitor and client met are matters of fact. There was no evidence before me that the questions would elicit information about

communications between solicitor and client for purposes of obtaining legal advice.

[20] Counsel for the Respondent argues that to allow even these factual questions to be asked would result in further questions that would infringe on the solicitor/client relationship. Clearly, a caution light exists where a solicitor is being examined regarding solicitor/client communications and the protection of privilege always remains available.

[21] Accordingly, I allow the Application to require Mr. Peter Landry to re-attend for discovery examination on a date agreed upon by counsel within 45 days of the date of the Order, to answer the questions as listed in the Application, as well as any follow-up questions relating thereto not subject to solicitor/client privilege.

[22] The Plaintiff shall pay costs of this Application in the amount of \$500.00.

J.