SUPREME COURT OF NOVA SCOTIA

Citation: Cornwallis Financial Corporation v. Nova Scotia (Attorney General), 2008 NSSC 341

Date: 20081119
Docket: SH 274325
Registry: Halifax

Between:

Cornwallis Financial Corporation

Applicant/Plaintiff
and Defendant by Counterclaim

and

The Attorney General of Nova Scotia

Respondent/Defendant
and Plaintiff by Counterclaim

and

ElizabethMills

Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: October 24, 2008, in Halifax, Nova Scotia

Counsel: Douglas W. Lutz, LL.B. and John D. Rice, LL.B., on behalf of the Applicant/Plaintiff

Michael T. Pugsley, LL.B., on behalf of the Respondent/Defendant

By the Court:

[1] This is an application by Cornwallis Financial Corporation (henceforth "Cornwallis"). Cornwallis is seeking an order pursuant to ***Civil Procedure Rule 18.09***. If granted, the order would require Mr. Joseph Pettigrew (henceforth "Mr. Pettigrew") to attend at a time and place agreed to by the parties for a further discovery examination with instructions to answer certain questions posed previously on discovery and objected to on the basis of solicitor-client privilege.

[2] Cornwallis also seeks a declaration of its right to disclosure, a declaration of the proper limits of the Province of Nova Scotia's claim of solicitor-client privilege with respect to the discovery evidence of Mr. Pettigrew, and such further and other relief as this Honourable Court deems just.

FACTUAL BACKGROUND

[3] The Government of Canada and the Province of Nova Scotia (henceforth "the Province") executed the "Canada and Nova Scotia Agreement on Provincial Nominees" on August 27, 2002. Subsequently the Province created the "Nova Scotia Nominee Program" for the purpose of promoting immigration to Nova Scotia.

[4] On or about December 9, 2002 the Province entered into an agreement (henceforth "the agreement") with Cornwallis. In its statement of claim, Cornwallis alleges that under the terms of its agreement with the Province:

> a. Cornwallis was designated the worldwide marketing coordinator for the Nova Scotia Nominee Program ("NSNP");
>
> b. Cornwallis was appointed "Program Coordinator for the designing, processing and securing of provincial nominees, and locating of qualified businesses in rural areas of the Province of Nova Scotia...";
>
> c. Cornwallis was to oversee and coordinate all aspects of the NSNP including the design and structuring of the NSNP and the implementation of the NSNP including the identification of appropriate target numbers of provincial nominees, screening of nominees, receipt and presentation of complete applications for Provincial approval, and promotion for the benefits of the NSNP to industry, commerce and of business throughout Nova Scotia and achieve targets, all as agreed between the parties.

[5] Cornwallis maintains that at all material times it was in substantial compliance with the terms of the agreement but, despite this, the Province unilaterally terminated it on June 30, 2006 without any or proper notice. As a result of the alleged unlawful termination of the agreement, Cornwallis seeks compensation for damage to its reputation, loss of revenue and loss of interest income.

[6] Cornwallis also claims against the Province and Elizabeth Mills, as an employee and agent of the Province, for injury to its professional and business reputation and to its standing in the community for stating or publishing allegedly false and malicious words amounting to defamation.

[7] The Province filed an amended defence and counterclaim on September 18, 2008. The defence lists a host of alleged breaches of the agreement by Cornwallis along with conflict of interest and breach of a duty to act in good faith, all of which the Province says disentitled Cornwallis to a renewal of the agreement.

[8] The Province's recently-amended counterclaim seeks damages for loss of reputation resulting from the numerous alleged breaches of the agreement by Cornwallis.

[9] Cornwallis filed a defence to the Province's initial counterclaim in which it denies the allegations contained therein. It has yet to file an amended defence to the latest counterclaim.

[10] In support of its application, Cornwallis filed an affidavit of its president, Mr. Stephen Lockyer (henceforth "Mr. Lockyer"). A further affidavit of Ms. Sheila A. Strong, a non-practising member of the Nova Scotia Barristers' Society employed as a Law Analyst for Cornwallis' legal team, was also filed. Attached to each affidavit were a number of exhibits including the transcript of the discovery examination of Mr. Pettigrew.

[11] Mr. Pettigrew declined to answer a number of questions that were put to him by Cornwallis' legal counsel on the basis of solicitor-client privilege. In his affidavit Mr. Pettigrew described himself as "a solicitor with the Department of Justice." As part of his initial responsibilities he provided legal advice to his employer regarding the agreement with Cornwallis. Eventually Mr. Pettigrew took on an expanded role. He began having direct contact with Mr. Lockyer. He also met with Mr. Lockyer to

discuss certain proposed amendments to the agreement. These amendments are found in Appendix B to the agreement.

[12] Mr. Pettigrew states in his affidavit that he "...informed Mr. Lockyer when I met him that I was the lawyer for the Province...". Mr. Lockyer admits knowing that Mr. Pettigrew was a lawyer but states in his affidavit that "... I was not informed that he was acting as a lawyer in regard to the Agreement." Mr. Lockyer was cross-examined on this point by the Province's lawyer. He maintained the position which he had expressed in his affidavit. Regardless, Mr. Pettigrew did nothing to hide the fact that he was a government lawyer, a fact that Mr. Lockyer was fully aware of.

ISSUE

> To what extent does the exclusionary rule of privilege, within the professional solicitor-client relationship, protect from disclosure certain confidential information shared between a solicitor and his client?

LAW AND DISCUSSION

[13] In the Law of Evidence in Canada by Sopinka, Lederman & Bryant (Second Edition), Butterworths Canada Ltd, 1999, p. 713, para 14.2, the authors wrote:

> § 14.2 In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are based upon confidential communications. Normally, these communications are not disclosed to anyone outside that relationship.

[14] One of the most fundamental underpinnings of the solicitor-client relationship and, indeed, the administration of justice generally is that of solicitor-client privilege. In **Solosky** v. **Canada**, [1980] 1 S.C.R. 821 (S.C.C.) at pp. 833-6, Dickson, J. (as he then was) wrote:

The concept of privileged communications between a solicitor and his client has long been recognized as a fundamental to the due administration of justice. As Jackett C.J. aptly stated in *Re Director of Investigation and Research and Shell Canada Ltd.* [(1975), 22 C.C.C. (2d) 70 [1975] F.C. 184], at pp. 78-9:

> ...the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see *Berd v. Lovelace* [(1577), 21 E.R. 33] and *Dennis v. Cocrington* [(1580), 21 E.R. 53]). It stemmed from respect for the 'oath and honour' of the lawyer, duty-bound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell* [(1833), 39 E.R. 618], at p. 620:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia* [(1976), 2 Ch. 644], at p. 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

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

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods* [[1891] P. 286], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton* [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

[15] According to The Law of Privilege in Canada by Hubbard, Magotiaux and Duncan, Canada Law Book, January, 2006 (looseleaf text):

> 11.30 Solicitor-client privilege attaches to oral or written communications between a client and a lawyer in the following circumstances:

1. where a client seeks advice from a lawyer;

2. where a lawyer provides advice in his or her professional capacity;

3. where the communication between the client and the lawyer relates to legal advice;

4. where the communication between the client and the lawyer is made in confidence.

[16] There are a myriad of cases dealing with the issue of solicitor-client privilege. Saunders, J. of the Ontario High Court of Justice, in the case of **Mutual Life Assurance Co. of Canada** v. **Canada (Deputy Attorney General)** (1998), 28 C.P.C. (2d) 101, at p. 104, dealt with the issue in circumstances similar to those found in the case presently before me. He wrote:

> The communications are privileged if they concern the employee's function as a lawyer and are not privileged if the lawyer is performing a business or other function.

[17] Government lawyers are no different than the in-house counsel of large corporations. This has been recognized by the Supreme Court of Canada. In **R.** v. **Campbell and Shirose**, [1999] 1 S.C.R. 565, at para. 50, Binnie, J. writing for a unanimous court had this to say:

> 50 It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. **Advice given by lawyers on matters outside the solicitor-client relationship is not protected.** A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), per Rehnquist J. (as he then was), at pp. 394-95. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. **No solicitor-client privilege attaches to advice on purely business matters even**

where it is provided by a lawyer. As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:

> It is not sufficient for the witness to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.

Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), per Lord Denning, M.R., at p. 376:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

[Emphasis added]

[18] In a case from the Nova Scotia Court of Appeal called **Global Petroleum Corp. et al**. v. **CBI Industries Inc. et al.** (1998), 172 N.S.R. (2d) 326; 524 A.P.R.

326 (N.S.C.A.), Chipman, J.A. had this to say about solicitor-client privilege at paragraph 21 on p. 331:

> 21 It is beyond dispute that privilege cannot be used to protect facts from disclosure **if those facts are relied on by a party** in support of its case. It is immaterial that the fact was discovered through the solicitor or as the result of the solicitor's direction. **If it is relied on it must be disclosed**. [Emphasis contained in original decision.]

At paragraph 23, Chipman, J.A., wrote:

> 23 In my opinion, the appellants' argument loses sight of the distinction between confidential communications on the one hand and a relevant fact which must be disclosed on the other...

And at paragraph 26, he added:

> 26 Mr. Faneuil gave advice to Global in connection with some of the transactions that are in issue in this litigation. He was actively involved in these events. He was ordered to answer questions that sought facts he acquired in such involvement as opposed to advice to the client. The mere fact that the witness testifying was Mr. Faneuil rather than his client is not relevant in determining whether the facts (as opposed to the privileged communications) should be disclosed. This point was grasped by the court in *Dusik v. Newton et al.* (1983), 38 C.P.C. 87 (B.C.C.A.) at p. 92. What is privileged is the communication. The facts that are not privileged may be elicited from either the solicitor or the client. Mr. Faneuil's position as a witness is no different than any of the other witnesses. If the client is obliged to disclose the fact, so is he.

[19] Earlier in the decision, Chipman, J.A., under the general heading of “Evidence Versus Facts”, wrote the following at paragraph 17:

> ...As I have pointed out, Hamilton, J. drew a distinction between facts or acts on the one hand and communications and advice on the other, in determining the extent of the privilege as it applied to any particular question. The privileged communication itself need not be disclosed nor need a party disclose the evidence on which he will rely to prove his case at trial in the sense of disclosing trial strategy. However, facts of which the appellants were aware that relate to the allegations in their statement of claim - whatever the source, including lawyers - must be disclosed. The source need not be.

[20] The appeal in **Global Petroleum Corp et al.** v. **CBI Industries Inc. et al.**, *supra*, was from a decision of a judge in Chambers. The Chambers judge was presented with a series of questions which counsel for the defendants wished to put to certain witnesses for the plaintiffs. In all, she had to deal with 45 objections to questions and determine whether the question should be answered either in whole or in part. It was agreed on argument of the appeal that three questions should be deleted from the order requiring answers. The Court of Appeal agreed with the approach and the decisions made by the Chambers judge respecting the other 42.

[21] In the matter that is before me counsel have filed a copy of the transcript of Mr. Pettigrew's discovery examination. The transcript consists of 250 pages. In all, I have identified 16 instances of questions which went unanswered based on solicitor-client privilege.

[22] In the Chambers decision of Hamilton, J. (as she then was) in **Global Petroleum Corp.** v. **CBI Industries Inc.**, [1998] N.S.J. No. 559, of the approximately 29 questions intended for Mr. Edward Faneuil (in-house counsel for one of the plaintiffs), Justice Hamilton ordered 13 to be answered. In so doing she distinguished between questions that related to facts or to acts which are not privileged and those that involved legal advice which attract privilege.

[23] I will attempt to deal with each of the 16 instances in which Mr. Pettigrew either refused to answer or was advised by his counsel not to answer a particular question based on solicitor-client privilege. I will attempt to heed the caution found at p. 123 of the Second Edition Supplement to the Law of Evidence in Canada, Sopinka, Dederman, Bryant (Lexis Nexis / Butterworths, 2004) which states:

> The Supreme Court of Canada in *Maranda v. Richer* cautioned about drawing the line too fine between facts that are not privileged and communications that are.

[24] The Court must also not lose sight of the defence and counterclaim filed on behalf of the defendants. The plaintiff is entitled to elicit the facts on which they are based. This does not mean, however, that the defendants' witness need answer questions during discovery that call for disclosure of evidence revealing trial strategy.

[25] I will now review each question as it was put to Mr. Pettigrew on discovery as taken from the transcript.

Thursday, May 29, 2008:

1. P. 25 / lines 6-13:

> **Q.** Okay. So, when you told me earlier that you received from your client an agreement from Cornwallis to review, did you consider that that was a new topic for discussion between Economic Development and Cornwallis?
>
> Did you know anything, that there had been a history of almost two years leading up to that document? Well, you don't have to look at him.

[26] After much discussion amongst counsel which unfortunately did nothing to resolve the issue, the question was once again put to the witness but in a somewhat rephrased way:

P. 29 / lines 8 - 13:

> **Q.** So, when you were asked by your client, Mr. Pettigrew, to review an agreement between the Department of Economic Development and Cornwallis Financial, was that document put in front of you as a matter of first instance, or did you understand there was a history behind it?

[27] This question might not have to be answered. Clearly, Mr. Pettigrew was presented with the agreement by his client. He was acting in his professional capacity as a lawyer. Any communication he might have had with his client regarding the history behind the agreement would be privileged. If, however, Mr. Pettigrew has knowledge of any such history gleaned from a source independent of his client's communications, then he should provide the information requested along with the source if that is asked of him.

2. P. 38 / lines 21 - 23

> **Q.** I didn't ask you about what you assumed. Did you have some information that told you that there had been a history here of almost two years?

[28] Refer to the approach taken for question 1.

3. P. 50 / lines 5 - 7; lines 11 - 12; line 15:

Q. Did you understand that at least Ms. Wolfe was very keen to get moving with Mr. Lockyer's proposal?

Q. Did you know – sorry. Did you know that in December of '02?

Q. As you reviewed the contract?

[29] If, indeed Mr. Pettigrew had knowledge of what was being asked of him and provided his sole source for such knowledge was his client and that such information was provided to him in confidence for the purpose of obtaining legal advice, then he should not be required to answer it. Unfortunately, neither the discovery transcript nor Mr. Pettigrew's affidavit provides sufficient background information to determine this. This will have to be further explored when the discovery resumes at some future time. Depending on the information provided the question might have to be answered.

4. P. 52 / lines 2 - 6:

Q. As you reviewed the proposed contract between the Province and Cornwallis in December of '02, did you understand that the context of the contract was that the Province would be incurring no additional costs or personnel, in order to run the Immigration program?

[30] The question is not framed in a way that requires Mr. Pettigrew to divulge his client's understanding of the contract but rather his own. He should be able to say one way or the other what his understanding was.

5. P. 52 / lines 16 - 22:

Q. If you'd look at Document NS00032.003. Mr. Pettigrew, that document is dated December 7, 2000, and it is, in fact, the – I don't know what you'd call it, but it is a memo to the Deputy, Mr. L'Esperance, concerning the Provincial Nominee Program, the actual formal document.

Was this a document with which you were familiar in December of '02?

[31] This question is designed to elicit a fact. It should be answered.

6. P. 54 / lines 1 - 3:

> **Q.** Mr. Pettigrew, did you know that the Province took the view that the contract with Cornwallis was subject to public policy of the Province?

[32] This question is designed to explore the position taken by the defendant as part of its defence. Mr. Pettigrew played a key role in negotiations resulting in the incorporation of Appendix B to the agreement. This question does not require Mr. Pettigrew to disclose a confidence. He should answer it.

7. P. 56 / lines 4 - 8:

> **Q.** Mr. Pettigrew, would you look at Nova Scotia Document 00039, please?
>
> As you looked at the proposed agreement between Cornwallis and the Province in December, '02, were you familiar with this memorandum?

[33] The question seeks to establish a fact. Was Mr. Pettigrew familiar with the memorandum – a copy of which was shown to him – or was he not? He should answer this.

8. P. 66 / lines 3 - 6:

> **Q.** That's fine. When you were asked to review the proposed agreement between – did you have any understanding that the Cornwallis proposed agreement was related in any fashion to the Federal Provincial agreement?

[34] Mr. Pettigrew initially refused to answer this question based on solicitor-client privilege. But after a series of further questions he does appear to link Cornwallis to the immigration program at p. 68 / lines 7 - 9. It does not require any further direction from the Court other than a comment to confirm that there was no basis for refusing to answer it.

Friday, May 30, 2008:

9. P. 6 / lines 10 - 17:

> **Q.** Okay. Can I ask you then to quickly look at the terms of this Agreement? In particular, paragraph 3 on page 2 talks about "Nova Scotia issuing on a timely basis, certificates to provincial nominees after interview and

> letters of approval to qualifying Nova Scotia businesses". Did you have an understanding as to what that meant as you participated in the drafting of the Agreement with Cornwallis? Did you know how that would happen?

[35] Similar to question 8, Mr. Pettigrew initially declined to answer it based on solicitor-client privilege. Eventually, after further discussion amongst counsel and some further clarifying questions, Mr. Pettigrew answered the question as he should have in the first instance.

10. P. 35 / lines 7 - 10; lines 21 - 23:

> **Q.** Is it not correct, Mr. Pettigrew, that to your knowledge, Cornwallis was asked to stop marketing the Nova Scotia nominee program because of the complaints of Glen Dexter.
>
> **Q.** Are you aware, Mr. Pettigrew that Cornwallis was instructed to stop marketing the Nova Scotia nominee program in that period up to March 20th, '03?

[36] These questions were objected to initially based on privilege but it was also argued that it was irrelevant in that it sought knowledge of a lawyer's state of mind. Neither objection is sustainable at least not at the discovery stage and so the question(s) should be answered.

11. P. 41 / lines 24 - 25; P. 42 ; line 1:

> **Q.** Alright. When you read that, having received this letter, did that seem to you to be inconsistent with the contract between Cornwallis and NSNP?

[37] The letter is a communication between Mr. Lockyer of CFC and Mr. Pettigrew and Francis Wolfe. It is not a privileged communication between solicitor and client. Hence it is not objectionable based on privilege although it could be resisted as one requiring the witness to express an opinion and not fact.

12. P. 130 / lines 8 - 11:

> **Q.** So between March of '04 and let's take a date, March of '05, are you aware of the Province of Nova Scotia taking any steps to implement the business about the sole control from paragraph 2 of Appendix "B".

[38] It is unclear if Mr. Pettigrew's communication from his client was for the purpose of obtaining a legal opinion. If it was simply to advise him of certain steps that were taken, then it is not privileged. Further questions need to be asked in order to ascertain the circumstances under which this information came to the attention of Mr. Pettigrew and specifically, if it was for the purpose of seeking legal advice and intended to be kept confidential. If all four "Wigmore" criteria are met, it is privileged. Absent waiver by the client, it should not be answered.

13. P. 139 / lines 17 - 25; p. 140 / lines 1 - 3:

> **Q.** Because at the point where this document was created, Mr. Pettigrew, we know now that there was an escrow agreement which had been in operation for quite some time. And we also know that it required only the signature of Cornwallis. And we also know that one of the terms of the escrow agreement were that the interest is paid to Cornwallis. So I'm wondering and I don't think you're going to be able to answer this, because I think you're going to tell me it's solicitor/client privilege. Whether at this meeting, anyone made the point that there was an account agreement in place which provided that the interest goes to Cornwallis.

[39] Based on the discussion that occurred between counsel after this question was posed, it is clear they both recognized the relevance of the various items referred to in the document as well as the number of different individuals who were apparently involved in the meeting and who were included on the distribution list of those who received the document. If the dominant purpose was not to obtain legal advice and if the distribution of the document was so extensive as to rule out confidentiality, then questions pertaining to the document and the meeting which was attended by Mr. Pettigrew would have to be answered.

14. P. 145 / lines 8 - 16:

> **Q.** Well, let me toss out what you're looking for, just so you're not looking for a needle in a haystack. What I'd like to know ultimately is whether, in the case of you, if you were a participant, whether you, whether anyone, you in particular, as part of those consultations, turned your mind to the question of how the immigration strategy would affect the role of Cornwallis Financial as set out in the contract between Cornwallis and the Province.

[40] This question arose out of an undertaking by Mr. Pettigrew to check his records to determine if he had played "a role or were [sic] involved in some fashion" with work undertaken by the Province "around immigration strategy, that there were public meetings and representations being received." (Refer to p. 143 / lines 14 - 24). The answer provided by Mr. Pettigrew at p. 145 / lines 17 - 18 simply invokes solicitor-client privilege. If Mr. Pettigrew turned "his mind to it" or if he did not he should be required to provide the answer. He might not be able to say what was going through someone else's mind at the time unless it was communicated to him. If that is the case, he might have been right to invoke privilege provided all four of the "Wigmore" criteria exist. This latter scenario will have to be further explored on discovery.

15. P. 148 / lines 4 - 9:

> **Q.** I have a pretty good idea what you're going to tell me, Mr. Pettigrew, but at this meeting in respect of the discussion around Schedule "B", did you advise the group about the debate with Mr. Lockyer, around the effectiveness of Schedule "B" and the conditions upon which he said it was delivered?

[41] If Mr. Pettigrew was providing legal advice, his communications with his client(s) would be privileged. I agree that he need not answer this question.

16. P. 160 / lines 21 - 25; P. 161 / lines 1 - 3:

> **Q.** In the middle of the screen right now, Mr. Pettigrew, there's a statement of Mr. – I'm not sure what this is. I have a feeling it's a draft letter but I'm not sure. But it says, "When the program was being designed, it was believed that the entire process for the nominee through the employment contract with the business manager would be much faster. Was that something that you knew was thought about?

[42] This is a rather confusing situation. The nature of the document and the identity of its author were not established. Any questions directed to Mr. Pettigrew pertaining to it lacks a foundation on which to determine if he can properly claim privilege. For now he cannot be shown to be wrong. Perhaps any questions pertaining to the document should be left for its author once his or her identity has been established.

CONCLUSION

[43] The law pertaining to solicitor-client privilege has evolved over time. It is now recognized as a fundamental right of the client that, unless waived, protects from disclosure communications exchanged between the client and his or her lawyer and vice versa. This class privilege is not absolute, but as Major, J. stated in **R.** v. **McClure**, [2001] 1 S.C.R. 445 (S.C.C.), at p. 459:

> ...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.

[44] If the four "Wigmore" criteria are met there is a *prima facie* assumption that the communications are privileged. If even one of the four criteria had not been established, then the class privilege does not protect the communication. It might still be open to the party claiming privilege to use the case-by-case analysis. The so-called "Wigmore test" would have to be utilized with the party asserting the privilege having the onus of establishing its existence. The four criteria of the "Wigmore test" are:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

In the case of **R.** v. **Fosty** (subnom. **R.** v. **Gruenke**), [1991] 3 S.C.R. 263 (S.C.C.), Lamer, J. (as he was then) wrote this at p.286:

> 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.

This will provide some general guidance to counsel when discovery resumes.

[45] The application to require Mr. Pettigrew to re-attend for further discovery is granted. He is to answer all questions that are relevant pertaining to the issues in dispute save for those that are protected by solicitor-client privilege. All four criteria needed to establish solicitor-client privilege must exist before the privilege can be claimed. If any further dispute arises regarding the issue of privilege, counsel will have to draft the questions and submit them to the Court for vetting. This should only be resorted to as a very last means of resolving an impasse. The Court should not have to micro-manage the file to that degree. Counsel are encouraged to co-operate with one another in an effort to properly apply both the rules of evidence and of procedure.

[46] As it is counsel's wish, I will leave the matter of costs to a future day.

Justice Glen G. McDougall