

SUPREME COURT OF NOVA SCOTIA

Citation: Peach v. Nova Scotia (Transportation and Infrastructure Renewal),
2010 NSSC 91

Date: 20100309
Docket: Hfx No. 316675
Registry: Halifax

Between:

Nora T. Peach

Appellant

and

Department of Transportation and Infrastructure Renewal

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: December 16, 2009

Counsel: Brian K. Awad, for the appellant
Sheldon Choo, for the respondent

Moir, J.:

Introduction

[1] Ms. Peach inquired about the legal status of the Lower Cross Road at the head of Saint Mary's Bay in Digby County. She received a response that included a statement by an official of the Department of Transportation summarizing an opinion given by a solicitor at the Department of Justice. She requested a copy of the opinion itself.

[2] Transportation refused to release the opinion. It relied on s. 16 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 and claimed solicitor and client privilege.

[3] The issue is whether the opinion remains privileged despite the release of the summary of it. More specifically, I must determine whether the release was inadvertent as that word is understood in the context of waiver of privilege and, if not, whether the official who prepared and released the summary had authority to waive the privilege.

Facts

[4] Ms. Peach wants to know whether the Lower Cross Road is private or public and, if it is public, which level of government has responsibility for maintaining it. The condition of the road was a subject for discussion among municipal councillors in late 2007. Ms. Peach asked the chief administrative officer of the Digby Municipal District about the status of the road.

[5] The chief administrative officer provided Ms. Peach with a copy of an email that had been sent to her by Mr. Stone in October, 2007. Mr. Stone is the area manager for the Department of Transportation for district operations in the Digby area.

[6] The chief administrative officer had sent an email to Mr. Stone requesting information on the Lower Cross Road. It said:

At the meeting on the 5th [of November, 2007] the issue of the condition of the Marsh Road will be addressed. Going through some correspondence, I found a letter (attached) from you to Brian Cullen where you asked for a review to determine if the road was a public highway or not. Do you have the results of that review?

The Lower Cross Road is sometimes called the Marsh Road.

[7] The first paragraph of Mr. Stone's email reads:

The information was forwarded to our Acquisition and Disposal section in Halifax who reviewed aerial photographs from the 1960's and 70's and onward. They sent all documented information to Department of Justice for a Legal Review and ruling.

The second paragraph begins "It was Justice's opinion that...".

[8] I am not reproducing all of the second paragraph. The Department of Transportation claims that it, too, is privileged and moves for it to be redacted. Although I am finding against the department and refusing its motion, I will avoid publicizing the opinion so that the department's position can be maintained if it chooses to appeal.

[9] I will say this much about the second paragraph. It states the solicitor's opinion on the status of the road and obligations for maintenance. It also summarizes the reasons for the opinion. And, the final sentence reads "Information on this matter was also forwarded to Department of Agriculture to address the concerns of the local marsh association".

[10] The final paragraph of Mr. Stone's email says that the "results of this report was also brought back to the Municipal Council at a subsequent meeting with TPW." The acronym TPW stands for Transportation and Public Works, one of the recent names of the respondent.

[11] The job description for an area manager in the Department of Public Works was made an exhibit. Mr. Stone must "[m]anage the delivery of highway and bridge maintenance".

[12] An area manager must also:

Coordinate and manage the expectations of internal and external stakeholders by assessing requests for services and balancing priorities to meet public expectations by acting as liaison between the Department and internal and external stakeholders.

Respond to requests from stakeholders and ensure responses are consistent and compliant with Government Acts, Regulations and Department policies and directions while communicating professionally and ethically in person, by phone or through written correspondence.

That is to say, he must communicate with, and deal with, interested parties about road maintenance and respond to requests for services in accordance with law and departmental policy.

[13] The job description also contains a section titled "Decision Making". It says "The usual types of decisions made in this job and types of decisions that must be referred to a supervisor include:". This is followed by a lengthy paragraph that does not, as far as I can tell, distinguish between the two types of decisions. In any event, the inclusive description does not mention waiving privilege.

[14] I have unsealed, read, and resealed the opinion letter. It is addressed to Mr. Stone. Also, an affidavit filed on behalf of the department shows that the letter was written to provide legal advice, was copied only to government officials, and was intended to be confidential.

[15] The Chief Administrative Officer requested a copy of the opinion not long after Mr. Stone summarized it. Mr. Stone said he asked the Department of Justice whether he was permitted to do so. Eventually, Ms. Peach applied under the

Freedom of Information and Protection of Property Act. After exhausting the process for review and recommendation, she appealed to this court under s. 42.

Whether Privilege Was Waived?

[16] Mr. Choo referred me to *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. 16 at para. 15 where Justice Major repeats the three elements of solicitor and client privilege in *Solosky v. The Queen*:

- (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 by the parties.

[17] The letter to Mr. Stone was subject to solicitor and client privilege.

[18] Mr. Awad referred me to this passage from the decision of Justice McLachlin, now Chief Justice of Canada, in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. 1499 (S.C.) at para. 6:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost...

[19] Mr. Awad also referred me to *Chapelstone Developments Inc. v. Canada*, [2004] N.B.J. 450 (C.A.). The New Brunswick Court of Appeal accepted this passage from Sopinka and Lederman and para. 54:

Where the disclosure of privileged information is found to have been inadvertent, recent Canadian cases have chosen not to adhere to the principle in *Calcraft v. Guest*, holding that mere physical loss of custody of a privileged document, does not automatically end the privilege. With rules of court now providing for liberal production of documents, the exchange of large quantities of documents between counsel is routine and accidental disclosure of privileged documents is bound to occur. A judge should have a discretion to determine whether in the circumstances the privilege has been waived. Factors to be taken into account should include whether the error is excusable, whether an immediate attempt has been made to retrieve the information, and whether preservation of the privilege in the circumstances will cause unfairness to the opponent.

The court went on to say, at para. 55:

In summary, the general rule is that the right to claim privilege may be waived, either expressly or by implication. However, inadvertent disclosure of privileged information does not automatically result in a loss of privilege. More is required before the privileged communication will be admissible on the ground of an implied waiver. For example, knowledge and silence on the part of the person

claiming the privilege and reliance on the part of the person in receipt of the privileged information that was inadvertently disclosed may lead to the legal conclusion that there was an implied waiver. In the end, it is a matter of case-by-case judgment whether the claim of privilege was lost through inadvertent disclosure.

[20] There are two things that must be proved for an implied waiver: knowledge of the existence of the privilege and a voluntary evincing of an intention to waive the privilege. The evidence from the department makes it clear that the parties intended the communication to be confidential. Mr. Choo argues that Mr. Stone did not intend, by summarizing the opinion, to waive privilege in the Department of Justice letter.

[21] Mr. Stone's seeking of permission from the Department of Justice for release of the letter itself is said to show that he did not intend to release the privilege. I have difficulties with that. Firstly, implied waiver does not turn on the subjective intent of the disclosing party. The question is about what intention the disclosing party "voluntarily evinces". To produce a summary of the opinion for a municipality, and apparently to provide a summary for use in discussions with a marsh association, and to discuss the opinion with municipal councillors evinces an intention to waive confidentiality.

[22] Secondly, the privilege was not so much in the letter as it was in the legal advice that happened to be communicated by letter. Mr. Stone was concerned about releasing a letter prepared by a Justice Department solicitor. He does not appear to have been at all concerned about communicating the solicitor's opinion and reasons.

[23] The waiver was not inadvertent. It was deliberate. This was not a case in which the client disclosed part of a privileged communication not knowing that privilege in the rest may go the same way. Mr. Stone disclosed the heart of the opinion. As I said, it was deliberate, not inadvertent.

[24] I am satisfied that privilege in the contents of the letter was impliedly waived, if Mr. Stone had the authority to do so.

Whether Mr. Stone Had Authority to Waive Privilege?

[25] The Transportation Department submits that Mr. Stone lacked authority to waive privilege. Mr. Choo refers me to *Nova Scotia (Attorney General) v. Nova*

Scotia (Police Review Board), [1999] N.S.J. 235 (S.C.) varied on other grounds [1999] N.S.J. 418 (C.A.).

[26] In that case, police included information in a Crown sheet on an opinion given to them by a prosecutor. Later, the Police Review Board had to determine a complaint arising out of the same incident to which the Crown sheet pertained. The board subpoenaed the prosecutor.

[27] At para. 24, Justice Oland, who is now of the Court of Appeal, pointed out that the prosecutor represented the provincial Crown under the *Public Service Act*, R.S.N.S. 1989, c. 376. She said:

The Attorney General and those working for him as legal advisors have as their client the executive branch of government: *Canada (Attorney General) v. Central Cartage Co.* (1987), 10 F.T.R. 225 (Fed. T.D.), affirmed (1990), 35 F.T.R. 160 (note) (Fed. C.A.), Leave to Appeal to S.C.C. refused (1991), 126 N.R. 336 (note) (S.C.C.). Since privilege can only be waived by the client, neither the Board nor the officers complained against nor their employer, the Halifax Regional Police Service, had the authority or the ability to waive privilege in this case.

She also referred, in para. 26, to "Her Majesty the Queen in the Right of the Province" as being the only entity entitled to waive privilege in the advice given by the prosecutor to the police.

[28] This view of the solicitor and client relationship when a prosecutor gives advice to police may need to be reconsidered in light of *R. v. Campbell*, [1999] S.C.J. 16, which was released shortly before Justice Oland's decision and after the case was argued.

[29] Mr. Choo argues that it takes an order in council to waive privilege owned by the provincial Crown. Justice Oland did not say that only cabinet could waive privilege. She only said that the waiver had to come from the executive branch.

[30] The decision to which Justice Oland referred, *Canada (Attorney General) v. Central Cartage Co.*, provides some detail on what is meant by the executive branch. Justice Reed wrote this at para. 105:

The Attorney General and those working for him as legal advisors are solicitors for the purposes of advising the executive branch of the government of Canada. Since the Minister of Justice is *ex officio* the Attorney General (see section 3 of the *Department of Justice Act*) one usually finds these persons referred to as legal advisors who are members of the Department of Justice. ... The client in its broadest sense is the executive branch of the government of Canada. At the apex is the Governor in Council including more particularly the Minister of Industry, Trade and Commerce. Entities such as the Foreign Investment Review Agency and the Interdepartmental Committee on the International Bridges are branches of the client.

[31] The authority to receive, and to release, legal advice follows the distribution of authority throughout the apparatus of government. For several reasons, it cannot be concentrated in the governor in council.

[32] Firstly, the cabinet is by no means the ultimate source of all authority in the executive branch, although it may be at the apex of the branch. Departmental authority is largely created by statute, by the legislative branch of government. The *Public Highways Act*, R.S.N.S. 1989, c. 371 is a case in point. It gives the Minister of Transportation "the supervision, management, and control of the highways": s. 4. The Department of Justice gives advice to the Department of Transportation and all other government departments: *Public Service Act*, R.S.N.S. 1989, c. 396, s. 29(1)(c). Thus, the authority to obtain legal advice about highways rests with the department, not cabinet alone. Authority to obtain confidential advice implies authority to waive the confidence.

[33] Secondly, there are vast categories of confidential information known to employees of the executive branch from which cabinet is strictly excluded. One example is confidential information in the Public Prosecution Service. Another is confidential information in the judicial branch, and in the independent boards and

commissions, known to support staff who are provincial employees. The authority to release those confidences does not rest with cabinet. Indeed, the confidence works against disclosure to cabinet. Thus, the governor in council cannot be the sole authority for release of privilege.

[34] Thirdly, it is necessary to good government that the authority to release solicitor and client privilege is distributed throughout the apparatus of government with the division of areas of authority. The concept of distributed governmental authority was recognized in *Carltona Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560 (C.A.) and accepted by the Supreme Court of Canada in *R. v. Harrison*, [1976] S.C.J. 22 at para. 14. Marshall, J.A. of the Newfoundland Court of Appeal wrote of the gridlock that would result if it were not for the *Carltona* principle: *R. v. NDT Ventures Ltd.*, [2001] N.J. 363 (C.A.) at para. 47.

[35] Most of the case law on waiver and inadvertence comes out of litigation, often after a blunder made in the course of litigation. As Mr. Choo points out, protection of solicitor and client privilege is fundamentally important. However, the ability to voluntarily waive privilege is so often necessary to good business and

good government that Justice Marshall's point about gridlock is applicable to reserving waiver to the authority of cabinet, or even a minister.

[36] Every day people negotiating contracts must, directly or through their lawyers, choose to divulge legal advice in order to explain their position on some term under negotiation, as do people performing contracts in order to explain why some action does or does not constitute performance, as do fiduciaries who must fully explain why they did or did not do something. There are endless examples in business, and ordinary life, of situations in which to waive privilege is good judgment.

[37] It is Mr. Stone's job to communicate with, and deal with, individuals, municipalities, associations, or others about whether, or how, a highway will be maintained by the provincial government. That must involve deciding whether to tell others about a legal opinion he has acquired on ownership of a highway.

[38] In my assessment, Mr. Stone's authority to waive privilege in a Department of Justice opinion is coextensive with his authority to acquire the opinion in the first place.

Conclusion

[39] I have determined, under s. 42(1) of the *Freedom of Information and Protection of Privacy Act*, that the Department of Justice letter to Mr. Stone is not within s. 16 of the statute because privilege in the communication has been waived through the deliberate exercise of Mr. Stone's judgment and authority. I will make an order under s. 42(5)(a) for disclosure of the letter to Ms. Peach without conditions.

[40] Under Civil Procedure Rule 85.06(4), I have sealed, and will personally keep control of, the letter and Ms. Peach's affidavit for thirty days.

[41] The parties may make submissions in writing on costs.

J.