SUPREME COURT OF NOVA SCOTIA
Citation: Smith Estate v. Sears Canada Inc., 2011 NSSC 231

Date: 20110613
Docket: Hfx. 304304
Registry: Halifax

Between:

Haley & Associates Inc., as Trustees for the Estate of Angela L. Smith in Bankruptcy

Plaintiff

v.

Sears Canada Inc. and Electrolux Canada Corp.

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	May 11 and 31, 2011, in Halifax, Nova Scotia
Decision Date:	June 13, 2011
Counsel:	Philip M. Chapman, for the plaintiff Ian Dunbar, for the defendants

By the Court:

[1] This is an application by the plaintiff, Haley & Associates Inc., as Trustees for the Estate of Angela L. Smith in Bankruptcy, for an order under Rule 14.12 to compel the defendant, Electrolux Canada Corp. to produce all documents relating to expert advice and consultation provided by Alain Theriault of Pyrotech BEI to Electrolux Canada Corp.

[2] Rule 14.12(1) permits a judge to make an order for production:

> 14.12(1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

[3] Rule 14.08 creates a presumption that full disclosure of relevant documents is necessary in order for justice to be served in a particular proceeding:

> 14.08(1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

Background:

[4] This matter involves a house fire that occurred on October 1, 2007. The fire allegedly started in a clothes dryer sold to Angela L. Smith by Sears. Electrolux is the manufacturer of the dryer.

[5] Ms. Smith is a bankrupt and is represented in this proceeding by the trustee, Haley and Associates.

[6] At the time of the fire Ms. Smith was insured with Metro General Insurance Company. Metro determined through its adjuster that the clothes dryer was a source of the fire and notified Sears of the loss on October 22, 2007. Sears appointed SCM adjusters who notified Electrolux of Sears' potential claim against it on November 30, 2007. Elextrolux notified its insurer who appointed Cunningham Lindsey as its adjusters to investigate the matter.

[7] After the fire the unit had been sealed, moved from the scene and held for inspection in premises belonging to Mark Wentzell, an engineer retained by Ms. Smith's insurers.

[8] It was understood and agreed between the adjusters for all three parties, that is, Sears, Electrolux and Ms. Smith's insurer, that they would have engineers attend to represent their respective interests at an initial inspection of the unit.

[9] On February 19, 2008 Ben Lapierre, the adjuster for Cunningham Lindsey, retained Alain Theriault of Pyroteck BEI, a fire investigation company resident in Quebec, to inspect the unit on behalf of Electrolux. Mr. Theriault and the experts for the other parties physically examined the dryer on April 15, 2008.

[10] Mr. Theriault reported his observations to Mr. Lapierre. These observations were not shared with the other parties, apart from Electrolux and its counsel. I have viewed these documents which were provided to me by counsel for Electrolux.

[11] According to Electrolux, Mr. Theriault was hired to inspect the unit to aid in prospective litigation. Electrolux maintains his findings and any other documents created as a result of his retainer are subject to litigation privilege.

[12] The plaintiff brought action against Sears on November 25, 2008 and Electrolux was added as a defendant on October 29, 2009. Sears retained counsel on January 14, 2009 and Electrolux on November 17, 2009. Sears produced an expert report prepared by Contrast Engineering. Electrolux refuses to produce any of the information generated by its expert, Alain Theriault, claiming that such documentation is protected by litigation privilege.

[13] *Civil Procedure Rule* 14.05 allows a judge to determine whether privilege is correctly claimed over documents:

> (4) A judge may determine a claim for privilege, except the information and confidences referred to in sections 37 to 39 of the *Canada Evidence Act* are determined under that Act.

[14] The first issue to determine is whether the documents and expert report prepared by Mr. Theriault are relevant. This court may determine whether a

document is relevant under *Civil Procedure Rule* 14.01. Rule 14.01(1)(a) sets out the meaning of "relevant" an in the context of the Rules dealing with disclosure and discovery:

> 14.01(1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

[15] The meaning of "relevancy" was considered r by LeBlanc, J. in *Halifax Dartmouth Bridge Commission v. Walter Construction Corp. et al.*, [2009] N.S.J. No. 640, where he stated at para. 18:

> ... As to what is meant by relevancy, in *Sydney Steel v. Mannesmann Pipe* (1985), 69 N.S.R. (2d) 389 (S.C.T.D.), Hallett, J. (as he then was) stated, at paras. 14-18:
>
> [14] As stated earlier, relevancy, not legal privilege, is in issue in this application. The foregoing is merely intended to illustrate the trend of legal thinking with respect to the production of documents.
>
> [15] As relevancy is the issue on this application, it would not be inappropriate to consider what constitutes relevancy. The most accepted meaning of the word relevancy seems to be that made by Stephen in his *Digest of the Law of Evidence* and referred to by *Cross on Evidence,* Fourth Edition, at p. 16 where Sir Rupert Cross states:
>
> > "It is difficult to improve upon Stephen's definition of relevance when he said that the word 'relevant' means that:
> >
> > 'any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.'"

> [16] P.K. McWilliams, Q.C., in *Canadian Criminal Evidence*, Second Edition, at p. 35, in a section dealing with the meaning of relevance, makes reference to this quotation from Stephen's Digest and goes on to state:
>
> > "Relevancy is also defined simply as whatever is logically probative or whatever accords with common sense." McWilliams goes on to state that one must keep in mind that the decisions on issues of fact are left to the common sense of the jury and therefore it is pointless to attempt to arrive at a precise or philosophical definition of relevancy.

[16] Evidence must be demonstrably relevant to an issue at trial to be produced.

[17] The plaintiff submits that any of Mr. Theriault's investigations, factual findings and opinions are clearly relevant to the substance of the claim. They say that the cause of the fire is essential to the issue in dispute and that any redacted information contained in documentation that has already been disclosed, as well as any further documentation that discusses the findings of the expert, are also clearly relevant.

[18] Electrolux says that an expert must provide a report, be duly qualified and be offered for cross-examination in order to provide a relevant opinion on an issue such as the cause of a fire allegedly occurring in a mechanical appliance such as a washer. They say that the opinion of an expert that is not so qualified is irrelevant. They say that they have informed counsel for the plaintiff that Mr. Theriault will not be offered as an expert at trial and, therefore, his opinions are irrelevant to this proceeding notwithstanding the issue of litigation privilege.

[19] With respect, I disagree. I am satisfied the documents relating to expert advice by Mr. Theriault are relevant even though Electrolux has elected not to call Mr. Theriault as an expert. The question then becomes whether these documents are subject to litigation privilege and, if so, whether in the circumstances of this case that privilege has been waived.

Litigation Privilege - Contemplated Litigation:

[20] Electrolux submits that the expert file of Mr. Theriault is subject to litigation privilege and Electrolux should not be compelled to produce it.

[21] To establish litigation privilege, the party claiming the privilege must prove that the document was requested for the dominant purpose of contemplated litigation. In *Leslie et al. v. S&B Apartment Holdings Ltd*., 2009 NSSC 57, at para. 16, Justice Wright outlined the test as follows at para. 16:

> 16 The dominant purpose test is discussed at length in the well-known text *Solicitor-client Privilege in Canadian Law* written by Manes & Silver in 1993. At page 93, the authors identify the following three elements of the test, each one of which must be met:
>
> (1) The document must have been produced with contemplated litigation in mind;
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> (2) The document must have been produced for the dominant purpose of receiving legal advice or as an aid to the conduct of litigation (i.e., for the dominant purpose of contemplated litigation);
>
> (3) The prospect of litigation must be reasonable, meaning that there is a reasonable contemplation of litigation.

[22] The point at which the dominant purpose becomes that of contemplated litigation will be determined by the facts. Electrolux bears the burden of showing that the dominant purpose for which Mr. Theriault's expert file information was produced was for contemplated litigation.

[23] Counsel for the plaintiff takes the position that there is insufficient affidavit evidence tendered by Electrolux to support its claim of litigation privilege. Electrolux points to the letters attached as Tabs A and B to Mr. Lapierre's affidavit, para. 4 of his affidavit, and the retainer letter for Mr. Theriault which was submitted to me in the sealed documents for review, as well as the correspondence from Mr. Lapierre to Mr. Campbell dated February 22, 2008 and the general circumstances surrounding the retainer of Mr. Theriault.

[24] Electrolux submits that Mr. Theriault's file was created with contemplated litigation in mind. He was retained to conduct an inspection of the unit on February 5, 2008. They first became aware of the fire on November 30, 2007 via notice from Sears indicating that Sears would pursue Electrolux for any amount it may have to pay in respect of the fire. Following these notices of prospective

litigation, Mr. Lapierre retained Mr. Theriault to inspect the unit. Electrolux says that the inspection was not an ordinary course investigation into the cause and origin, such as one would see in a first party loss, where insurers are generally interested in the circumstances of loss for various reasons which could include coverage, potential subrogation and the quantum of damage. In this case Electrolux says it was a third party to the loss and it was solely interested in its potential liability to Sears or the plaintiff. They say that they had no other interest in the fire or its surrounding circumstances. They say there was no need for Electrolux to retain its own engineer if it was simply interested in a routine co-operative investigation into the fire as the plaintiff suggests.

[25] In correspondence from Mr. Lapierre to Graham Campbell of Marsh Adjustment Bureau dated February 22, 2008 Electrolux stated it was attempting to obtain an objective engineer's report in order to provide a "full and complete defence" to any claims made against it.

[26] Electrolux says Mr. Theriault's raw materials all arise from his retention by Electrolux and his inspection of the unit in light of the threatened claim of manufacturers liability. Therefore, it is submitted, all documents created as a result of his retainer were created with contemplated litigation in mind and for the dominant purpose of litigation.

Litigation Privilege - Dominant Purpose:

[27] The second component of the litigation privilege test requires the party claiming privilege to show that the document was created for the dominant purpose of receiving legal advice or to aid in litigation. The "dominant purpose" of an investigation will depend on the facts of a particular situation and should be determined case-by-case. Electrolux submits that the dominant purpose was to aid in litigation.

[28] The plaintiff submits that Mr. Theriault was retained for the same reason as the other two experts had been, that is, to examine the dryer and come up with a reason why it failed. They say that this was part of a routine investigation to determine the cause or origin of a fire to be conducted in co-operation with all interested parties so that everyone had the same information. They say the dominant purpose for Mr. Theriault's retention was to investigate and not to collect information to pass on to counsel in contemplation of litigation. They say that

approximately 18 months passed between the time that Mr. Theriault was retained and the time when Electrolux was joined as a defendant. They say as a result there was clearly no prospect of litigation involving Electrolux for the period of time through which Mr. Theriault conducted his investigations and provided whatever opinions he ultimately did to Electrolux.

[29] Electrolux submits that the timing of Mr. Theriault's inspection shows that its "dominant purpose" was to aid in litigation. They say Electrolux is a third party to the loss and had no reason to investigate coverage. They say they would not have been involved in this matter at all but for the notice of prospective litigation. As a result, Electrolux retained Mr. Theriault to inspect the unit to gather evidence to aid in any litigation arising from the fire. They say there is no plausible explanation for Mr. Theriault's retainer other than to aid in a potential liability claim. They say Electrolux had no reason to investigate coverage as it was not Ms. Smith's insurer. In correspondence referred to previously dated February 22, 2008 from Mr. Lapierre to Graham Campbell of Marsh Adjustment Bureau, Mr. Lapierre made clear the purpose of Mr. Theriault carrying out his investigation:

> While we can certainly understand that time is indeed always of the essence, you must appreciate however, that our client deserves to receive an objective engineering report that is the result of an orderly investigative process. No client deserves any less. Furthermore, they have the right to a full and complete defense.

[30] From this correspondence one can infer that the purpose in retaining Mr. Lapierre was to aid in the defence of any action against Electrolux as they sought an "objective engineering report" which suggests a report prepared specifically for Electrolux.

[31] Electrolux draws a distinction between the retainer of adjusters and experts such as Mr. Theriault in the circumstances. They say that many of the authorities relied on by the plaintiff concern litigation privilege over reports of insurance adjusters, not experts retained for a specific inspection. They say adjusters typically are retained to conduct a broad investigation into the circumstances of a loss for many purposes, some of which were set out earlier. They say an expert's file is not analogous to an adjuster's file. Electrolux's adjuster, Mr. Lapierre, was retained and his file materials have been produced other than those that relate to Mr. Theriault. They say Mr. Theriault was retained as an expert to conduct a

engineering inspection of the unit alleged to be the cause of the fire, which is a different mandate than that of an adjuster and is reflected in several of the cases provided by the plaintiff. Again, as Mr. Lapierre made clear in his February 22, 2008 correspondence, his client sought "an objective engineering report" adding that "they have the right to a full and complete defence".

[32] Electrolux submits that it is a third party manufacturer of an allegedly defective unit, not a first party insurer. Accordingly Mr. Theriault's investigation did not have a dual purpose as was the case in many of the authorities provided by the plaintiff. Electrolux says that as the manufacturer of a washer/dryer unit it is only interested in a potential products liability claim.

[33] As to counsel's involvement, Electrolux submits that it is no longer necessary for counsel to be involved in a matter for litigation privilege to arise.

[34] In *Leslie*, *supra,* Justice Wright made the following comments at para. 20:

> This does not mean, of course, that a solicitor must first be retained, even for general legal advice, before a claim of litigation privilege can be asserted. On the contrary, litigation privilege arises and operates even in the absence of a solicitor-client relationship. In order for the claim of litigation privilege to succeed, however, the information independently acquired by the client must have been prepared or so acquired for the dominant purpose of contemplated litigation.

Litigation Privilege - Reasonably Contemplated:

[35] The third component of the "dominant purpose" test requires the party claiming privilege to show that litigation was reasonably contemplated by the parties when the document was created.

[36] Electrolux submits that litigation was reasonably contemplated from at least November 30, 2007 the date Sears informed Electrolux of its potential claim in correspondence. Therefore, according to Electrolux, litigation was reasonably contemplated by February 2008, the date of Mr. Theriault's retainer.

Summary:

[37] The plaintiff says Electrolux has no basis upon which to withhold Mr. Theriault's report.

[38] Electrolux, on the other hand, submits that the dominant and only purpose of Mr. Theriault's retainer was to gather evidence to assist it in defending any litigation arising from the fire. Therefore, its entire file was:

a) Created with contemplated litigation in mind.

b) Created for the dominant purpose of assisting with and in contemplation of litigation.

c) Created when there was a reasonable prospect of litigation existing at the relevant time.

[39] Electrolux submits that its report is subject to litigation privilege and should not be ordered produced.

Decision:

[40] I am satisfied that although the documents in Mr. Theriault's file are relevant, they are subject to litigation privilege. The reasons for reaching my conclusion can be summarized as follows:

a) Once Electrolux was notified by Sears on November 30, 2007 of its potential liability, Electrolux became concerned about its potential liability to Sears and/or the plaintiff that could arise from the manufacture of the washer/dryer unit.

b) I am satisfied that Mr. Theriault carried out a specific expert investigation of the washer/dryer unit which formed the basis of the claim against it. This is the objective investigation that Mr. Lapierre spoke of in his February 22, 2008 letter to Graham Campbell of Marsh Adjustment Bureau suggesting that the purpose of this document was to have a "full and complete defence".

c) This investigation was instructed by way of a retainer letter from Mr. Lapierre to Mr. Theriault which is contained in the sealed documents.

d) I am satisfied that the circumstances and timing of Mr. Theriault's inspection show that its "dominant purpose" was to aid in litigation, that is, this was not a routine investigation into a cause of a fire as might be carried out by a insurer, but rather was a targeted investigation into the washer/dryer and the possible cause of the fire. This targeted investigation was consistent with the instructions provided to Mr. Theriault and his retainer letter referred to above.

e) Electrolux being a third party to the loss had no reason to investigate coverage as it would not have been involved in the matter, but for the notice of prospective litigation issued by Sears.

Waiver of Privilege:

[41] In the alternative, the plaintiff has argued that Electrolux has waived privilege.

[42] Both parties have cited *Huntley (Litigation Guardian of) v. Larkin* (2007), 259 N.S.R. (2d) 162 (S.C.), at para. 31, wherein the test for waiver of privilege is stated as follows:

> 31 The test for waiver of privilege has been enunciated by Manes and Silver in *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at p. 187, as follows:
>
> > Waiver of privilege is established where it is shown that the possessor of the privilege:
> >
> > (i) knows of the existence of the privilege and
> >
> > (ii) demonstrates a clear intention to forgo the privilege.

[43] Electrolux argues that there is no waiver of privilege in that Electrolux has not "demonstrated a clear intention to forgo the privilege" over Mr. Theriault's file as required by this test.

[44] They say where two parties share the same counsel they can exchange privileged materials under the umbrella protection of solicitor/client privilege without a resulting waiver of privilege. That is, once the Theriault file was

produced to McInnes Cooper, solicitor/client privilege protected that file from a waiver of privilege resulting from counsel's deemed productions of that file to Sears.

[45] As I have said, Electrolux argues that they have not demonstrated a clear intention to forgo the privilege over Mr. Theriault's file as required by the *Huntley*, *supra*, test. They say there is no evidence that Sears has ever actually been provided with Mr. Theriault's file materials.

[46] While Electrolux agrees that litigants sharing the same counsel are deemed to share all privileged documents and information exchanged with counsel, it says that this deemed sharing does not constitute a waiver of privilege in favour of third parties. If it were, then the plaintiff would be entitled to not only Mr. Theriault's file, but also every other privileged communication between Sears or Electrolux and their counsel. They say that where the parties share the same counsel they can freely exchange privileged materials under the umbrella protection of solicitor/client privilege without a resulting waiver of privilege. The only exception, according to Electrolux, is in the context of a joint retainer where the principle of "common interest exception" can apply. That exception contemplates that if a dispute later arises between parties that are jointly retained, solicitor/client privilege may be waived as between the parties. Electrolux says none of the authorities cited by the plaintiff involve two parties that share the same counsel. Because McInnes Cooper was appointed counsel for Electrolux and Sears on October 19, 2010 they say all communications between McInnes Cooper and the clients, Electrolux and Sears, are protected by solicitor/client privilege.

[47] As authority for its position, Electrolux cites *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), where the Ontario Court of Appeal made the following comments:

> ... The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication.

[Emphasis added]

[48] Based on *Dunbar, supra*, Electrolux claims solicitor/client privilege over the Theriault file arguing it is not subject to the plaintiff's suggested waiver of privilege.

[49] The statement in *Dunbar, supra*, was cited with approval by the Supreme Court of Canada in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31.

[50] I agree with the argument of Electrolux that where two parties share the same counsel they can freely exchange privileged materials under the umbrella protection of solicitor/client privilege without a resulting waiver of privilege.

[51] I am satisfied that Mr. Theriault's file is privileged and there has been no waiver of that privilege.

[52] The plaintiff's application is dismissed.

[53] The defendants shall have their costs in the amount of $1,000 payable in the cause.

Pickup, J.