SUPREME COURT OF NOVA SCOTIA

Citation: Hillwood Holdings Ltd. v. Cangra Distribution Inc., 2013 NSSC 27

Date: 20130125
Docket: Hfx. No. 341260 & 333563
Registry: Halifax, NS

Between:

Hillwood Holdings Limited and Howard Dwyer

Applicants

v.

Cangra Distribution Inc., Michael Iosipescu, Philip Whitehead, and Iosipescu, Whitehead and Metlege, a law firm

Respondents

- and -

Nova Scotia Barristers' Society

Intervenor

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 26, 2012, in Halifax, Nova Scotia
Written Decision:	January 25, 2013
Counsel:	Blair Mitchell for Hillwood Holdings Limited and Howard Dwyer Augustus Richardson, Q.C. for Philip Whitehead Robert Dickson, Q.C. for Michael Iosipescu and Iosipescu, Whitehead & Metledge Andrew Neilsen for the NS Barristers' Society

By the Court:

INTRODUCTION

[1] The following is my decision on two (2) Motions for Disclosure filed by the Applicants, Hillwood Holdings Limited and Howard Dwyer against the Respondents, Cangra Distribution Inc. (Cangra); Michael Iosipescu (Iosipescu), Phillip Whitehead (Whitehead), and Iosipescu, Whitehead and Metlege (IWM). The Motions were heard together in Halifax on November 26, 2012.

The Parties

[2] (1) Cangra Distribution Incorporated is a federal corporation with offices in Yarmouth, Nova Scotia. It is engaged in, amongst other things, supplying cabinetry and other products to the construction industry in Atlantic Canada and elsewhere.

(2) Michael Iosipescu, a lawyer of Halifax, Nova Scotia, is a member of the law firm Iosipescu, Whitehead & Metlege. He is also described as a businessman.

(3) Philip Whitehead, a lawyer of Halifax, is a member of Iosipescu, Whitehead & Metlege.

(4) Iosipescu, Whitehead & Metlege is a Halifax law firm advertising and practising in the areas of business, commercial and property law.

(5) Hillwood Holdings Limited is a Nova Scotia corporation with registered offices in Halifax. It is a holding and investment company for interests including those of Howard Dwyer.

(6) Howard Dwyer of Mahone Bay, Nova Scotia, is a principal beneficial shareholder of Hillwood Holdings Limited.

Individuals

[3] (1) Mr. Marvin Block is the owner of a company, Federal Investments Inc., which carried on business in the same building as IWM.

(2) Ms. Dominka Campbell is a legal assistant who at times provided services for the Respondent practitioners and allegedly Mr. Block, also a solicitor.

(3) Ms. Angela Power is a legal assistant at Mitchell & Ferguson, Associates, who has provided Affidavits in support of this Motion.

(4) Ms. Darlene Guite is a former employee and officer manager of Cangra and other entities, who has provided a Statutory Declaration in this matter.

Overview

[4] The Motions were filed by the Applicants on September 28th, 2012. In the Motions the Applicants seek:

(i) Further and better production of documents;

(ii) Directions regarding disclosure of specific documents.

[5] The Motion for Directions is with respect to three (3) boxes of documents (including two (2) compact discs) which were delivered to Mr. Mitchell, Solicitor for the Applicants by a former employee of the Respondent, Cangra. A Statutory Declaration of that employee, Ms. Darlene Guite, has been included in the Motion documents filed by the Applicants. The Respondents take issue with certain of the Affidavits filed in support of the Motion.

[6] It is with respect to the three (3) boxes (the Guite documents) that the second Motion is filed. On that Motion, the Nova Scotia Barristers' Society (the Society) has been granted "intervenor" status, and was permitted to file Affidavit evidence and make submissions regarding any proposed Order. The Order granting the Society intervenor status was granted on November 23, 2012 by ACJ Deborah K. Smith. A copy of that Order is on file in these proceedings.

BACKGROUND

[7] The two (2) Motions arise from two (2) Applications filed by the Applicants. These applications concern two (2) loans made by Hillwood Holdings Limited, which is an investment company owned and operated by Howard Dwyer.

[8] The loans were made ultimately to the Respondent Cangra Distribution Incorporated. Up until the late summer, early fall of 2009, the principal of Cangra was one Ashish Janmega.

[9] The first loan, for $300,000.00, was made in May-June, 2009 by Hillwood Holdings to Century Property Management Inc. (Century), a company owned and operated by the Respondent, Michael Iosipescu. Century then loaned the money to Cangra.

[10] The second loan, for $240,000.00, was made in September 2009 by Hillwood Holdings to Federal Investments Inc. (Federal), a company owned and operated by Marvin Block. Federal then loaned the money to CDI.

[11] The Applicants commenced the within two (2) Applications against the Respondents Cangra Distribution, Iosipescu, Whitehead and IWM.

[12] Notices of Contest have been filed by the Respondents, except for Cangra, who is in default and not entitled to further notice under these Applications. I make no finding as to the loans or the particulars pertaining to same for the purpose of these Motions. I provide these details as background to the Motions. I have further confirmed that Mr. Iosipescu and Mr. Block are both aware of these Motions.

[13] It is clear that Cangra should have a central role, in terms of the Applications and, as well, these Disclosure Motions. The absence of Cangra, in responding to the Motions, including the lack of instructions to or representation by counsel, results in uncertainty around the central issue - disclosure.

[14] The Applicants claim repayment of the loans from Cangra and claim liability in contract and in negligence against the Respondent law firm, IWM, and as well Mr. Iosipescu, and Mr. Whitehead, lawyers in or associated with the firm, in their legal representation of the Applicants.

[15] The Applications are filed as Hfx. No. 333563 and Hfx. No. 341260, each separate Application applying to each separate loan.

[16] The Applicants further allege that in addition to the failure of the “legal” Respondents to take reasonable care, the Respondent Whitehead knew or ought to have known that Iosipescu was prepared to act in a manner adverse to the interest of Cangra and together with IWM failed to take reasonable care or take steps to warn Hillwood Holdings Limited. The Applicants allege Whitehead was under a

duty to report Iosipescu and his conduct (in conflict with interests involving Cangra) to the Society.

[17] The Respondents, Iosipescu, Whitehead and IWM, deny responsibility, largely because any loss as alleged was caused by the failure of Marvin Block to perform his duties. The Respondents deny providing legal services or advice to the Applicants. The Respondents state further that the Applicants failed to take reasonable and timely steps to obtain repayment from Cangra.

ISSUES

[18] 1. What disclosure is the Applicant entitled, under its Motion for further and better production?

2. What disclosure/direction should be given under the Motion related to specific documents?

Issue No. 1 - Further and Better Production Motion

Disclosure Being Sought by Applicants

1. Documents as to status of the firm as a business entity;
2. Documents as to the responsibilities of Ms. Dominka Campbell;
3. Accounting, Client Reporting and Similar Records;
4. Client Files and Related Documents;
5. Specifically Pleaded Documents;
6. Specifically Identified Documents;
7. Failure in Duty to Clients;
8. Electronic Disclosure;
9. Documents Pertaining to "Iosipescu", "Block" and "CPI".

Disclosure Which has been Made by the Respondents

[19] Mr. Dickson argues on behalf of Iosipescu and IWM that the Respondents have complied with document production to date. Attached to Angela Power's Affidavit, as Exhibits A & B, are indexes of the documents produced by the Respondents by way of Affidavit of Documents for Disclosure and Supplemental Affidavit of Documents for Disclosure. (Paragraph 26 of Brief.)

[20] Mr. Mitchell, on behalf of the Applicants, argues that, "Any production which has been made, it would appear, is incidental and not identified or produced

as such." The Applicants' submission, with respect to the documents they are seeking, is as follows: "There is no evidence that any such records are not in the possession or control of the Respondents, that they have ceased to "exist"...or that documents did not exist at one time, or are not in the control of others."

[21] The Respondent Whitehead, counters through his counsel Mr. Richardson, that this pre-supposes the documents exist, and if so that such documents are relevant. Further, proportionality in terms of disclosure at this stage, is appropriate, he argues, under the *Rules* for Applications. There has been, says the Respondent Whitehead, significant disclosure to date. He asks the Court to consider the sworn Affidavit of his client, a barrister of the Nova Scotia Supreme Court, which states at paragraph 11:

> **11. "To the best of my knowledge, I have never had in my control, a written document relevant to any issue in this proceeding except as disclosed in this Affidavit."**

[22] This, says the Respondent, is weightier evidence than the Affidavit of Ms. Power, which the Respondents submit contains hearsay, and therefore not capable of supporting the Motion. Mr. Whitehead's Affidavit is supported by the Certificate of his counsel, which states that his counsel has, "Discussed with the Affiant the kinds of documents and electronic information that may be relevant in this proceeding."

[23] The Respondents, Iosipescu and IWM, state that paragraphs 20, 21 and 26 go to the heart of the evidence and should be struck. They argue also that the documents sought are a "fishing expedition", and in any event are largely irrelevant. The Respondent Whitehead argues that without the Power Affidavit, which should be struck, there is nothing to support the assertion that Whitehead has failed to make appropriate disclosure of relevant documents. Mr. Richardson also argues that the documents sought by the Applicants are irrelevant at this stage of the proceeding.

The Law - Production

[24] The Applicants seek an Order pursuant to *Rules 15 and 16* and, in particular, *Rule 15.02(1)(a)(b)(c)* and *Rule 15.02(2)* together with *Rule 15.06*. Read together, it is apparent that the duty to make disclosure of documents is a significant duty, and one which applies to both a defended action or contested

Application. It is onerous in that it applies to relevant documents which the party not only has, but once had, control of. The party must search for and make diligent efforts to become informed about documents and disclosed documents no longer controlled by the party. In addition, the party must sort them, or claim they cannot be disclosed because they are privileged. The privilege may apply to the party or another person and the party must disclose to the extent possible information without infringing the privilege. A party must also search for, acquire and disclose documents the party controls but does not actually possess.

[25] The Respondents agree with the Applicants summary of the law requiring a party to produce documents which are of trial relevance, based upon the pleadings and evidence known to the judge at the time of determination.

[26] It is with respect to the evidence that the parties differ. The Respondents allege the Power Affidavit in support of further and better production is inadmissible, as it contains "double hearsay", argument and submissions, "thinly disguised as facts".

The Power Affidavit

[27] The Respondents Iosipescu and IWM object to paragraphs 15 to 24 of the Power Affidavit, along with paragraphs 20, 21 and 26.

[28] The Respondent Whitehead also objects to paragraphs 20, 21 and 26, but in addition objects to paragraphs 9 to 14, as do the other Respondents.

[29] I have reviewed and considered these paragraphs and the entire Affidavit. I am aware of the requirements of an Affidavit as stated in *Civil Procedure Rule 39* and the law as stated in **Waverly (Village) v. Nova Scotia (Minister of Municipal Affairs**, [1994] S.C.C.A. No. 411. Briefly put, an Affidavit must be factually based and must not contain submissions or opinion, and take on the nature of a plea. If the information is not within the personal knowledge of the Affiant, they must state the source and their belief in the source.

[30] Applying these considerations to this Affidavit, while there is a difference between "hearsay" and "double hearsay", it is still hearsay. If it is to be admitted, I can see where the weight may vary as between the two (2).

[31] The *Nova Scotia Civil Procedure Rules* state that the *Rules* of evidence applies to Motions, but state also that hearsay evidence is admissible, if the Court is determining a procedural right. (See *Rule 22.15(2)(c).)* The *Rules* state also that a judge has discretion on a Motion (*Rule 96.04),* subject to the discretion afforded in *Rule 2*, if a particular *Rule* limits that discretion.

[32] Paragraphs 9 to 13 of the Power Affidavit are, in my view, admissible because the Affiant discloses the source and her belief in the source, and also because a ruling on disclosure, involves a determination of a procedural right.

[33] Paragraphs 15 to 24 deal with documents and correspondence concerning complaints to the Society. While these present more difficulty in terms of relevance, the Applicants have stated clearly they are not seeking a ruling on the admission of these at this time. Consequently, it is not necessary for me to rule on their admissibility, for the purpose of these Motions.

[34] In terms of paragraph 20 and 21, they are included in the above-mentioned paragraphs 15 to 24, so my ruling (in the preceding paragraph) applies to those paragraphs.

[35] With respect to paragraph 26, it is in effect, a recital of a portion of a letter sent by the Respondent Whitehead's counsel, outlining his position on the "long list of documents" sought. The objection is that it is information for which no evidence was procured.

[36] I think that paragraph 26 is objectionable in the sense that it takes on the nature of a plea or submission, albeit that of an opposing party. There are however, other letters, such as Mr. Mitchell's in response, introduced and attached as Schedule "A" to the submissions of the Respondent Whitehead. It is a matter which can and should go to the weight on the Motion, as I view this as primarily a procedural Motion.

[37] In reviewing the entire Power Affidavit, I do have a difficulty with paragraph 14. It is relevant to the Motion in that it provides a chart of documents in which the Respondents may have, "performed legal services for the interests of or associated with Howard Dwyer." In paragraph 14, Ms. Power states the source of her advice, but does not state her belief in the source, which it required. Also it

does not clearly state who prepared the chart (attached as Exhibit "B"). While the strong implication is that it was Mr. Block, one is left to wonder who prepared it. That should be clear and in my view it is not. Authenticity then is a concern with respect to the chart, which is attached as an exhibit. I am left with a vague impression by this paragraph and for that reason I am striking it (and the Exhibit) from the Affidavit.

[38] This leaves the remaining paragraphs, which are to be admitted and considered, in addition to the pleadings, on this Motion.

Relevance

[39] "Relevant" and "relevancy" have under *Rule 14.01(1)* the same meaning on an Application (or an action) as they would at trial. What a trial judge determines as relevant at a trial, is a question of law. Among other things, it depends on the pleadings and the evidence known, as stated (see **Saturley v. CIBC World Markets Inc.** 2011 NSSC 4, per Moir, J. at paragraph 45, approved by Bryson, JA in **Brown v. Cape Breton (Regional Municipality),** [2011] NSJ No. 164.

[40] The Respondents Iosipescu and IWM disagree with the Applicants' assertions that the documents they seek are relevant. They site **Murphy v. Lawton's Drug Stores Ltd.** 2010 NSSC 289, for authority that this Court ought not to sanction "a fishing expedition".

[41] The Respondent Whitehead argues, there is no evidence that points to or establishes any connection between him and the Applicants. By Mr. Dwyer's own admission, says the Respondent, he never met Mr. Whitehead. I do not think this is a complete answer to the disclosure issue. Schedules A & B of Mr. Whitehead's Affidavit evidences contact between Mr. Whitehead and Mr. Block and between Mr. Whitehead and Cangra. The request of the Applicants however is, in many respects, broad and lacking in scope.

[42] The submission of the Respondents Iosipescu and IWM (as adopted by the Respondent Whitehead) is that the Applicants "themselves would have copies of all account statements/invoices for any work previously done for them as clients". This is an assumption and, while it may be a logical one, it is not a complete answer to the requests for better disclosure.

Decision - Motion for Further and Better Production

[43] Having considered the evidence and submissions, both written and oral, I find there is merit in granting an Order for Further Disclosure, which in substance takes into account what has been agreed upon, with some additional disclosures being ordered.

Matters Agreed to by Respondents

(1) Status of Firm as a Business Entity

[44] At paragraphs 28 to 31 of their Brief, the Respondents Iosipescu and IWM are agreeable to providing documentation which identifies the legal relationship of IWM, including Mr. Iosipescu's annual financial statement, and "will take best efforts to retrieve and produce same". This should include (sample) business cards, letterhead, as well as website and marketing information.

[45] The Respondents object to providing the Income Tax Returns of Mr. Iosipescu, Mr. Whitehead and IWM, stating they are irrelevant and overly intrusive. While I reserve on ruling that they are irrelevant, I do think they are, at this stage, overly intrusive. As further disclosure is made, their relevancy may become more apparent, and if so, a further request/Motion may be warranted. At this stage, however, I find that an Order requiring the Returns to be produced is premature. Consequently they will not be required to be produced at this time.

[46] Paragraphs 28 to 31 of the Respondents' Brief have been adopted by the Respondent Whitehead in his Brief (paragraph 30), in which he refers to them as firm production documents, and business and professional documents. Subject to the limitation and exception(s) described above, I order that the disclosure sought under this category be granted.

(2) Documents as to the Responsibility of Dominka Campbell

[47] The Respondents Iosipescu and IWM are agreeable, as stated in paragraph 32 and 33 of their Brief to providing documents which identify Ms. Campbell's job description and pay-structure. The Respondent Whitehead adopts these paragraphs in his Brief (paragraph 32). The Court, therefore orders the disclosure and production of such documents.

(3) Accounting, Client Reporting and Similar Records

[48] This category will be addressed under matters not agreed upon.

(4) Client Files and Related Documents

[49] This category will be addressed under matters not agreed upon.

(5) Specifically Pleaded Documents

[50] The Applicants are seeking a description of funds by Mr. Iosipescu and transmission of them in respect of the transactions forming the subject matter of the Applicants' claims. The Respondents state they will make best efforts to provide additional documents and produce them, should they exist. Specifically, the Respondents make reference to "the $500.00 payment", as described by the Applicants, stating they will "look again" and have their clients search for "anything else". Paragraphs 44-45 of the Respondents' Brief is adopted by the Respondent Whitehead (at paragraph 36). This Court therefore orders the further disclosure, as described above.

(6) Specifically Identified Documents

[51] The Respondents Iosipescu and IWM's position is that they have already disclosed documents pertaining to communications to Whitehead of any steps Whitehead or any other lawyer with IWM was about to take with respect to the transaction involving Hfx. No. 333563.

[52] This request is somewhat vague in that it references only one (1) of the Applications. The Respondents Iosipescu and IWM in their Brief refer to the "transactions in issue" in regard to this request. The Applicant has accepted to stay the position at paragraph 47 of the Respondent's Brief. Unless a further direction is required from the Court, no Order appears necessary in respect of this item.

[53] I am aware of the "cross references" section of the Applicants' letter of September 28th, and that a reference to a specific pleading is no restriction but only a convenience to describe the types of documents.

(7) Failure in Duty to Clients

[54] This category will be addressed under matters not agreed upon.

(8) Electronic Disclosure

[55] The Respondents Iosipescu and IWM are agreeable, as stated in their Brief, that they will make further attempts to locate and disclose electronic documents not previously disclosed. (Paragraph 50.)

[56] The Respondent Whitehead is agreeable to a discussion on the issue of electronic disclosure as contemplated by *Rule 16*.

[57] The Court hereby directs compliance with the said Rule and affirms that the parties shall avail themselves of the opportunity to reach agreement on electronic disclosure. An attempt by the parties to agree is the first method prescribed to fulfil the duty to disclose under *Rule 16.01(2)(a)*.

[58] I turn now to discuss the matters not agreed upon.

Matters Not Agreed Upon

(3) *Accounting, Client Reporting and Similar Records*

[59] The Applicants seek disclosure of past dealings and practices between the Respondents, and the Applicants and Dwyer family members and entities. How legal work was conducted they say is relevant to the standard of care, and the alleged breach of contractual duty of the Respondents. The Applicants refer specifically to the Notice of Contest (in 333563). They seek any activities for or in relation to any one or more of Howard Dwyer, Hillwood Holdings, Easco Electric, Keith Dwyer or the Dwyer family, for the five (5) years between 2005/2010.

[60] In relation to the same entities they seek reports, in connection with any transaction during the period 2005-2010, as well as all accounting records pertaining to or touching upon these persons or entities and all accounting records in connection with them.

[61] The Respondents Iosipescu and IWM state this request is overly broad, and considering the scope of material requested, this category lacks relevance and probative value. They state also that the Applicants would have copies of all relevant account statements and invoices for any work previously done for them as clients.

[62] The Respondent Whitehead submits this requests lacks relevancy, as evidenced by Mr. Mitchell's position at discovery during questioning of his own witness. Further, he argues, neither Easco Electric or Keith Dwyer are listed as witnesses in the Notice of Application.

[63] The Court questioned Mr. Dickson at some length on this issue and whether a "pattern" of representation was relevant, particularly in relation to the Applicants. The answer forthcoming was simply that the Respondents failed to see the connection between other family members' transactions and the particular matter before the Court.

[64] The Applicants' counsel submits his objection to relevancy was based on his client not having drafted the document he was being questioned on. While I can accept that to some extent, I do think the request he has made under this category is overly broad and loses its relevancy, the further the parties are "removed" from the Applicants themselves. In addition, five (5) years of documents in any way touching upon any one (1) or more of these five (5) entities lacks certainty and, therefore, its probative value is questionable. The test for relevance is more confined than that, even in accepting the Applicants' point about logic and human experience - dictating the approach to what categories of documents one would expect to be disclosed.

[65] I do think there is relevance to the request in terms of the Applicants themselves, but even that should be restricted, in my view, to these transactions for the year prior to 2009 and the year after. In other words, disclosure is ordered for activities during a three (3) year period from 2008 to 2010, with respect to Howard Dwyer and Hillwood Holdings Limited. If the Dwyer family held a trust, that may be relevant to the corporate holdings or to Howard Dwyer, if either was a beneficiary, but there is little or no evidence of that on this Motion. Notwithstanding my ruling, I would not rule out further Motions on this category should evidence present itself on further disclosure or discovery.

[66] At this time therefore, no order for disclosure is granted in respect of Easco Electric, Keith Dwyer, or the Dwyer Family.

(4) *Client files and Related Documents*

[67] This request for client files and related documents is similar to the request for accounting and client reporting. It seeks all documents pertaining to secured transactions by IWM or any one of the firm's members on behalf of the same five (5) entities, including the two (2) Applicants. The request also includes time records, diaries, appt. books, and other references to activities on behalf of any one or more of Hillwood, Howard Dwyer et al, but also includes Marvin Block and Dominka Campbell, for the five (5) year period, 2005-2010.

[68] For reasons similar to the previous category (#3 above), I am not satisfied as to the relevancy of other family members' transactions and their past dealings, contacts, retainers, instructions, relationships and so on. This request lacks focus and has the potential to amount to a real "fishing expedition".

[69] Once again, transactions involving the Applicants themselves is a different matter. Arguably, the Respondents have met their disclosure requirements in this regard. I do not think the period of a year before and a year after the year of the transactions (in 2009) is too onerous and lacks proportion. I therefore order disclosure in relation to the Applicants, Marvin Block, and Dominka Campbell for the three (3) year period of 2008-2010. I decline to order disclosure for other Dwyer family members or entities. Therefore no Order for disclosure is made in respect of Easco Electric, Keith Dwyer, or the Dwyer Family.

[70] It is unclear from the Motion documents whether an order was sought under the previous category(3# above) against any other lawyer at IWM and therefore I have made no such Order.

[71] As previously stated, I would not rule out further Motions, should additional evidence become available. In deciding on this category, I note that paragraphs 38-45 of the Brief of the Respondents Iosipescu and IWM was adopted by the Respondent Whitehead. Those paragraphs promised best efforts by the Respondents to ensure all such time records, dockets, diary appointment books and other references to activities taken by the Respondents in relation to the "transactions at issue", are disclosed. This would include, therefore, Mr. Block and Ms. Campbell in relation to the transactions at issue, for the relevant three(3) year period. Presumably any time record pertaining to the transactions would include any lawyer at IWM, if any are tied to the transactions.

(8) Failure in Duty to Clients

[72] The Applicants seek disclosure of all documents (including any record of communication) pertaining to the efforts of the Respondent Whitehead to warn, or report that the Respondent Iosipescu was prepared to act adversely to the interests of his clients, including Hillwood. Further, they seek all documents showing the efforts of Whitehead in connection with Iosipescu and the Respondent firm being unable to act independently for clients in the position of Hillwood (in respect of Cangra). These requests relate to the duty (as alleged) to take reasonable care for the actions of Iosipescu and including the duty to report any conflict of interest to the Society, and to advise that the client should seek independent legal advice.

[73] I have considered the relevancy of this disclosure request, as it pertains to paragraphs 18-22 of Hfx. No. 333563 and paragraphs 19-23 of Hfx. No. 341260.

[74] Relevancy should be determined by reviewing the pleadings, which in turn determines the facts in issue. Apart from the allegations referred to above, there is little evidence to support the duty to warn as a fact in issue, apart from Whiteheads' denial at paragraph 12 of his Notice of Contest that neither Hillwood or Dwyer were relying upon the advice, services, or due diligence of the Respondents, including Whitehead. The other Respondents state that Iosipescu did not provide any legal services or advice to Hillwood, Dwyer or Federal in relation to matter 341260. In relation to the 333563 matter, the Respondents (all of them) state that none of the documentation was drafted or reviewed by any lawyer at IWM and that any loss was caused in whole or in part by Mr. Block. The Notice of Contest in the 333563 matter states an Affidavit will be produced by Whitehead dealing with his knowledge of the transaction between Federal and Cangra.

[75] The denial by the Respondents puts (legal) representation in issue. The duty to warn and report is an issue for the Applicants but is not borne out by the Notices of Contest to any degree, in terms of a denial. Any documents which go to the obligation to advise of misconduct would incidentally touch upon representation, and would therefore be relevant to that extent. Otherwise, I am not satisfied on the pleadings, that the duty to warn is a fact in issue at this stage of the proceedings. Upon further disclosure being made, it may become clearer that it is a fact in issue, at which time a further and better Affidavit may be required from

the Respondent Whitehead. Until then, there is very little evidence to support going behind his disclosure Affidavit.

Documents Pertaining to "Iosipescu", "Block" and CPI"

[76] The Applicants have requested all documents touching upon or concerning the allegations expressed in Hfx. No. 341802 in respect of the above-named persons. The Affidavit of Mr. Whitehead and (presumably) the disclosure Affidavits of the other Respondents are filed with respect to these proceedings and not any other proceeding. No discoveries have yet taken place in these proceedings, of the Respondents.

[77] Before documents in respect of other proceedings are ordered, I believe the discovery process should be advanced in the present proceedings to the point whether relevancy can be determined through appropriate questioning. I concur with the Respondents that there must be some proportion to the requests. As a result, this request is somewhat premature at this time. Once further production is started, what is available and its relevancy will become clearer. I therefore reject the request for disclosure of these documents at this time.

Issue No. 2 - Motion for Directions - Specific Documents

[78] The second Motion filed by the Applicant seeks direction and production regarding disclosure of specific documents, namely three (3) sealed bankers' boxes and two (2) CDs of electronic information, currently in the possession of Mr. Mitchell, solicitor for the Applicants.

[79] These three (3) boxes of paper documents and two (2) compact discs of electronic records were delivered to the Applicants' counsel on June 13th, 2012 by Ms. Darlene Guite, a former employee and officer manager of Cangra Distribution Inc. The boxes were delivered sealed with masking tape and bearing Ms. Guite's initials. Throughout this Motion, the boxes and CDs came to be referred to as the "Guite documents" and/or the "sealed materials".

[80] Filed in support of this Motion is the Affidavit of Angela Power, sworn to November 9th, 2012. Attached to her Affidavit as Exhibit "B" is the Statutory Declaration of Ms. Guite, sworn to on June 15th, 2012. In it, she explains how she came to have possession of these materials. She was employed by Cangra Distribution Inc. for two (2) years. During her employment, Cangra was forced

from its premises in Black Point, Halifax County. She then worked from her home. At that time, all correspondence, financial records and other records relating to three (3) corporations (including Cangra) were boxed and sent to her house. Her employment with Cangra ended in 2009, but prior to that, she had possession of and had been left with these materials.

[81] Ms. Guite had been contacted by investigating authorities and as a result she sought the consent of Cangra in the spring of 2010 to cooperate, assist and provide documents to the police. To do this, she sought the assistance of Mr. Mitchell. At that time, a waiver of solicitor/client privilege was provided to her by Cangra through Mr. Mitchell. It was signed by Mr. Iosipescu, who in the documents stated he had authority to bind the corporation. I note that the waiver referred to above authorized the release to certain authorities and the release in respect of a certain investigation.

[82] Ms. Guite subsequently in 2012 turned to Mr. Mitchell for assistance in regard to turning over these documents. Notably, Ms. Guite's Declaration was sworn to two (2) days after her delivery of the Guite documents to Mr. Mitchell.

[83] None of the parties know exactly what is contained in the materials. In her declaration, Ms. Guite states in addition to Cangra she managed two (2) additional corporations: (1) Shivji Atlantic Trading and (2) Cangra Natural Stones. She states in her Declaration that the records/boxes sent to her house related to the three (3) corporations, those two (2) and Cangra Distribution Limited.

[84] Cangra Distribution Incorporated is a party to these proceedings. The Registry of Joint Stock's profile (Exhibit "C" to the Power Affidavit) shows that it was revoked on July 6th, 2010 and that its agent and director was Mr. Iosipescu, as of September 10th, 2009. Prior to that, the company was revoked for non-payment on July 6th, 2010.

[85] On this Motion, the Society has intervened having been granted an Order to do so. The stated purpose of the Society's intervention is two-fold. First, they wish to raise before the Court the issue of solicitor/client privilege, so as to ensure it will be addressed in whatever Order is made in respect of the materials. Second, the Society wishes to offer its assistance in the disposition of these issues.

[86] The Court readily accepts and recognizes the importance of solicitor/client privilege and the need to guard against any infringement of this fundamental principle. That it is a "civil right of extreme importance" and a "cornerstone" of the judicial system has not been contested on these Motions. Sopinka, *The Law of evidence in Canada, 3rd ed.,* at 926, citing ***R. v. McClure*** *[2001] 1S.C.R. 445; and* ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health****, [2008] 2 S.C.R. 574.* This Court recognizes without hesitation, that information given in confidence in the seeking, and receiving of legal advice, must be protected, in the public interest, and at all costs.

[87] The extent to which this principle right applies in the present context will depend on the contents of the sealed materials. As stated, while the exact contents are not known, Ms. Guite attempted to describe generally what the material included at paragraph 12 of her Declaration as follows:

> **12. The records which are located in the boxes delivered to Mr. Mitchell include financial and accounting records for Cangra and its affiliates, billing records of Cangra and its affiliates, and other correspondence and materials; the records which are on compact discs consist of accounting records and scanned documents from various financial files, corporate files, correspondence, billings and work procedures.**

[88] I turn now to consider the positions of the parties on this Motion. The Applicants state they placed Cangra on notice of these documents and allowed five (5) months for its sole and controlling shareholder to assert privilege. No claim has been asserted and no caution of any kind has been expressed. Also, the Applicants state there is at least a credible possibility that privilege has been waived through Cangra's 2010 waiver and/or the failure of Cangra to provide advices with respect to same. The appropriate direction therefore, submits the Applicants, is that the Order should simply include a time-frame within which the Respondents must assert privilege, failing which the Applicants shall be free to review same. It has been suggested that none of the parties are in a position to assert privilege (Affidavit of Victoria Rees, paragraph 14, the Society).

[89] The Respondents Iosipescu and IWM's position is that solicitor/client privilege ought to be protected by any Order for Directions and Production. Further, they argue that any costs associated with protecting that privilege should not fall to the Respondents. Mr. Dickson stated he is representing Mr. Iosipescu

in his professional and not his personal capacity. Mr. Dickson advised that he asked his client to speak to his personal lawyer regarding the issue of waiving privilege over the Guite documents. (Exhibit "E", Power Affidavit, specific documents.) No response has been forthcoming.

[90] The Respondent Whitehead takes no position whether specified documents should be produced. He says the documents include two (2) non-party corporations, for whom documents passed between them and their solicitor. For part of the time, this solicitor was Whitehead. Further, he states that the signed waiver by Mr. Iosipescu is limited to those to whom it is addressed. Finally, Mr. Whitehead states that Mr. Mitchell represents interests adverse to the Respondent.

[91] Mr. Richardson, on behalf of his client, submits that someone other than Mr. Mitchell should be retained to isolate and review non-Cangra materials, unless the Court orders all documents produced. This person he says should be agreed upon, failing which the Court should decide who will review the documents and materials for solicitor/client privilege.

[92] Arguably, the cause of the Motion can be said to be Cangra, who did not respond to the Applicants' requests, and did not respond to the Motion itself.

[93] The Society cited several cases outlining the process to be followed in similar circumstances. In **Lavallee, Rackel and Heintz v. Canada (Attorney General)**, [2002] 3 S.C.R. 209, the Court stated, "at the very least" notification and involvement of the Law Society, afforded "independent legal intervention", as a way to protect privilege holders to whom notice is not feasible. **Lavallee** was decided in the criminal and not the civil context. The Society argues the principle applies here, in the civil context.

[94] The role suggested by the Society is that it would act as an independent intervenor to assist the parties and the Court, both in identifying and resolving any issues of privilege. It is more accurate to state that the Society looks to the Court to define its role, if any, beyond the raising of the issue, in terms of how the Society might assist the Court.

[95] The Applicant cited **National Bank v. Potter et al** 2004, NSSC 100 (as did the Society). At paragraph 75 of Potter, Scanlan J. stated:

> **75. As regards what reasonable steps might be taken when privileged documents are discovered or reasonably expected to exist, I make the following observation. In the civil context once the holders of the privilege have been advised of the intended review of documents the parties may well be able to agree on a third party being appointed to review the documents with the view of determining what documents may be protected by solicitor-client privilege. If the holder of privilege does not agree to the appointment, the matter should be referred to the court for direction or determination...**

[96] In its Brief, the Society referred to **Potter** in support of its position at paragraph 24, noting unlike the present case, it did not involve documents under seal.

> **24. In the civil context in Nova Scotia, a somewhat similar intervention was allowed in National Bank Financial v. Potter et al. 2004 NSSC 100. In that matter the Society sought, and was granted, intervention as a friend to the Court to assist in the resolution of a number of complex privilege-related issues. While that matter did not involve documents under seal, it is comparable to the present case in that the Court found that "Solicitor-client privilege is a matter of compelling public interest,"6 and that the public interest would be served by the participation of the Society in determining the questions before the Court."**

[97] The Society has further stated (in paragraph 13 of Ms. Rees' Affidavit) that it considers it possible that some of the material is protected by privilege or is confidential. Further, it has stated that no party believes itself in a position to assert privilege, should it exist in the material. I question whether this is in fact the case with Cangra. Silence does not equate necessarily to a lack of knowledge.

[98] The steps set out in **Lavallee** as summarized by the Society (at paragraph 26) of their Brief, include:

(a) The material being sealed;

(b) No party reviews the materials until issues of privilege have been determined (except for the privilege holder if identified);

(c) Any material found to be privileged shall be returned to the privilege holder or appropriate person designated by the Court;

(d) All other materials shall be dealt with in the normal course of a civil proceeding as determined by the parties or the Court.

[99] In the present case, the privilege holder may be identified as Cangra. It, however, has not responded to notice. Consequently, it must be dealt with as if the privilege holder has not been notified. Further, it is possible there are additional privilege holders.

[100] I have considered the evidence, the pleadings, the positions of the parties, and the submissions, both written and oral. Having done so, I make the following findings with respect to this Motion, which along with all of the foregoing shall constitute reasons for my decision:

(i) The Applicants and Mr. Mitchell come to this Court in good faith, seeking productions;

(ii) The Guite Declaration, and in particular paragraphs 5 and 9, is essentially, uncontroverted evidence;

(iii) No response of any kind from Cangra, either as requested or expressing privilege or a waiver of privilege, has been forthcoming;

(iv) A non-response from Cangra leaves the Applicants, the Court and the Respondents to deal with this issue without the benefit of hearing from this privilege holder;

(v) Applying for directions is an appropriate method for dealing with the three (3) sealed boxes. This is affirmed more or less by the fact that no one has taken issue with Mr. Mitchell having production of the sealed boxes, subject to a ruling on this Motion;

(vi) The position taken by the remaining Respondents is helpful in that no one is directly opposed to a review of the documents as directed by the Court, subject to arguments related to relevancy, privilege and referee costs;

(vii) The wording of waiver of privilege previously provided by Cangra, is insufficient to constitute a waiver of privilege in these proceedings. (Exhibit "A" to Guite Declaration.)

Decision on Motion for Specific Documents

[101] Having considered the caselaw as discussed, and applying the principles enunciated therein, I find it prudent to rule on the Motion as follows:

(1) The Court should appoint an independent referee to examine the sealed material and make submissions to the Court respecting any potential privilege in that material;

(2) The Society will assist the Court in the appointment of the independent referee by submitting three (3) names of lawyers who are willing and capable of acting as the referee for the purposes of the appointment;

(3) The Court will then ask the parties to reach agreement, if possible on the appointment of one of the person's names submitted as the referee, failing which the Court will select the referee from the names submitted by the Society;

(4) The referee in reviewing the sealed materials will separate those documents pertaining to Cangra Distribution Inc.;

(5) The non-Cangra documents and/or documents pertaining to other companies or individuals will be returned to the Society, pending further determination by this Court;

(6) No other party, but for the privilege-holders themselves, if they are identified, should be permitted to examine the sealed material until such time as any issues of privilege have been determined by the Court;

(7) Any material found by the Court to be privileged should be immediately returned to the privilege-holder or another appropriate person designated by the Court, and should not be provided to the parties;

(8) All other material should be dealt with as appropriate in the normal course of this civil matter, as determined by the parties or the Court;

(9) This Order is intended to affect disclosure of documents of Cangra Distribution Inc. relevant to these proceedings except for those protected by privilege or issues of privilege;

(10) Any questions or unresolved issues which arise during this process, may be brought back before the Court (by way of further Motion) for further direction as the parties see fit.

Costs of Referee

[102] I turn now to the important issue of whom shall bear the cost of the referee appointed by the Court. It is a difficult issue in that there is little in the way of precedent.

[103] I have appointed a third (3rd) party to act and not the Society, given the Society's involvement, as regulator with two (2) of the Respondents, Mr. Iosipescu and Mr. Whitehead.

[104] Mr. Dickson, on behalf of his client, states that any costs associated with protecting privilege should not fall to his clients, noting he is not representing Mr. Iosipescu in his personal capacity. Further he states Mr. Iosipescu did not become a director "until afterward", with the company.

[105] Mr. Richardson states that any costs ought to be borne by the moving parties given: 1) disclosure has already been made; and 2) they (the Applicants) are the ones who believe production is necessary.

[106] I believe one must ask, who is the cause of the Motion assuming there are relevant documents to be disclosed? The object here must be to strike a balance between necessary disclosure and the protection of solicitor/client privilege.

[107] Arguably, it is Cangra and perhaps Mr. Iosipescu as Agent and Director that is the cause of the Motion.

[108] The Society's stated position is that it should not bear any costs associated with performing the role of referee. They rely on the case of **R. v. Law Office of Simon Rosenfeld,** [2003] O.J. No. 834. Presumably, this means they also should not bear any costs of the review, even if not appointed referee, as is the case here.

[109] In **Rosenfeld**, the Court found that the Crown, as the party seeking access should bear the cost. The Court in **Rosenfeld** declined to have the Law Society of Upper Canada bear the cost, noting it was not the Law Society's responsibility to protect privilege.

[110] The Society states that **Rosenfeld** is instructive in the civil context, and therefore instructive in the present case. This position aligns itself with the position that the moving parties should bear the costs.

[111] With respect to Mr. Iosipescu, he previously signed a waiver of privilege (on behalf of Cangra), as noted by the Applicants' solicitor, Mr. Mitchell. Further, although he became an Agent and Director later in 2009, the request for disclosure is as of now, after his appointment and presumably while the company is within his control. When he executed the waiver, he stated he had authority to bind the company. Arguably, there is a basis therefore to have him pay for the costs. Finding him liable to pay the cost at this stage however, presumes the contents of the documents will be relevant. Indeed, the Respondents have argued relevance has not been proven. In the circumstances, the Order must be based in part, on the premise that the contents will likely lead to the discovery of relevant evidence/documents.

[112] In terms of the Society they have stated quite clearly in their Brief that they are prepared to assist the parties and the Court in identifying and resolving issues of privilege. Further, the Society cited **National Bank v. Potter et al** 2004 NSSC 100 as an instance where the Society was granted intervention as a friend of the Court, to assist in a number of complex privilege related issues.

[113] The Court in **Potter** found that "solicitor/client privilege is a matter of compelling public interest", and that the public interest would be served by the participation of the Society in determining the questions before the Court. The Society, under s. 4(1) of the *Legal Profession Act,* S.N.S., 2004 c. 28, also has a mandate to uphold and protect the public interest, as regulator of the legal profession in Nova Scotia (paragraphs 18 and 19 of Society's Brief).

[114] In **Rosenfeld** the Crown sought access to the material following its seizure under a warrant from the lawyer's office. In the present case, the sealed materials were voluntarily turned over to Mr. Mitchell by Ms. Guite. Those

materials possibly contained information pertaining to two (2) affiliate companies of Cangra, who are not parties to this proceeding. It is therefore different from the situation where the Society would be appointed, just because the parties were unrepresented. That was a concern in **Rosenfeld**.

[115] In **Rosenfeld** the Court stated also that, "The cost of dealing with those issues are costs naturally associated with the prosecution of the offences."

[116] Unlike **Rosenfeld**, there is no natural or obvious payor for the services of the referee in the case before me. I believe and so find that the Society in the present case does have a role in protecting solicitor/client privilege giving the unique circumstances. The Society thought it appropriate to intervene to ensure the issue was raised. I find that the public interest is being served here by the Society's intervention, a role they acknowledge is theirs by statute.

[117] I have considered the contrary argument that this is private litigation and thus members of a law society should not fund such litigation. I find, however, in the present case that the Society itself has identified a public interest by their own intervention. A review of the **Potter** case did not reveal who was to pay for the intervention in that case. I note that the Society has stated that the case before me is comparable to **Potter**, where the issues were found to be compelling.

[118] This is not a usual case where the Society may levy costs against a member for their involvement in, for example, a disciplinary or trust account matter. Also, the Applicants may have recourse to reimbursement in the seeking of costs at the conclusion of the hearing. For these reasons, I propose to have the costs of the referee shared as between the moving party Applicants and the Society, subject to an allocation.

[119] My rationale for an allocation or sharing of those costs is as follows. It is neither scientific nor mathematically precise. I acknowledge that the analysis could easily be changed to arrive at a different conclusion.

[120] Nonetheless, I find this Motion is primarily a Motion for Disclosure in a private litigation matter out of which the need arose to protect privilege. Until the contents are reviewed, the holders of the privilege and the nature of the legal

representation, is uncertain. On that basis, the starting point would be a 50/50 allocation in terms of the sharing of costs.

[121] Theoretically, while the materials involve three (3) companies, two (2) are related or affiliate companies. Taking this into account, and that it is primarily Cangra documents being ordered to be disclosed, there is a basis for the Society assuming less than 50%.

[122] I find that it would be fair and equitable to order that the costs of the referee will be shared, with the Applicants being responsible for 60% of the costs and the Society being responsible for 40% of the costs. This will allow for contingencies and the unknown in terms of the content of the boxes and the CD materials. I repeat that, should they be successful, the Applicants may seek to review these costs as disbursements or otherwise at the conclusion of the hearing of the Application. That decision of course will fall to the Trial Judge hearing the matter.

[123] Order accordingly.

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J.