SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Herritt*, 2018 NSSC 229

Date: 20180913
Docket: CRH 472498
Registry: Halifax

Between:

Her Majesty the Queen

v.

Anthony Robert Herritt

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Date of Hearing:	September 13, 2018
Oral Decision:	September 13, 2018
Written Reasons:	September 24, 2018
Counsel:	David Schermbrucker, for the Federal Crown Joshua Nodelman, for Mr. Herritt

By the Court (Orally):

INTRODUCTION

[1] On September 13, 2018, I heard the Crown's application seeking a pre-trial ruling as to whether the Crown may use in evidence the forensic analysis of the contents of a Smartphone seized from the accused at the time of his arrest. Having reviewed the written and oral submissions, authorities and affidavits, I ruled in favor of the Crown, promising written reasons to follow. These are my reasons.

BACKGROUND

[2] Anthony Robert Herritt is indicted on a charge of "possession of cocaine for the purpose of trafficking." The date of the alleged offence is May 31, 2017. On the within application the Court received two affidavits from the Crown:

1. Crown Prosecutor Timothy McLaughlin's affidavit deposed April 12, 2018; and
2. Public Prosecution Service of Canada legal assistant Anna-Marie Castellarin's affidavit deposed September 5, 2018.

[3] The affidavits were admitted by consent and the affiants were not cross-examined. Ms. Castellerin, at paras. 3 – 10 of her affidavit provides the background giving rise to the application:

> 3. According to the Crown disclosure, on May 31, 2017, Mr. Herritt along with another person was arrested by police at Halifax and charged with possession of cocaine for the purpose of trafficking. A preliminary inquiry into that charge was conducted at the Provincial Court on January 19, 2018, and Mr. Herritt is now before this Court for trial, to commence September 21, 2018.
> 4. It is alleged that at the time of his arrest police seized from Mr. Herritt a Samsung cell phone. On August 29, 2017, police obtained a search warrant to search the cell phone for among other things, electronic messages in relation to the offence of possession of cocaine for the purpose of trafficking. On a CD dated December 20, 2017, RCMP Tech Crime Unit Cst. Kevin MacDougall provided investigators with an analysis of the Samsung cell phone as per the search warrant.
> 5. At some point between December 20, 2017, and February 22, 2018, counsel at my office Timothy McLaughlin reviewed the cell phone

analysis CD in preparation for disclosure, and found images of correspondence between Nova Scotia Legal Aid counsel and Mr. Herritt, which he presumed would be solicitor-client privileged. This prompted Mr. McLaughlin to stop looking at the CD and seal it, and to advise defence counsel. Counsel of my office Jeff Moors then brought an application to this Court for a determination of solicitor-client privilege.

6. Counsel David Schermbrucker of my office appeared on that motion on May 23, 2018, at which time this matter was scheduled for trial on September 21, 2018, and the privilege motion was adjourned indefinitely so Crown counsel Mr. Schermbrucker and defence counsel Mr. Nodelman could determine how to proceed.

7. On June 21, 2018, Nova Scotia Barristers' Society (NSBS) counsel Ms. Elaine Cumming e-mailed Mr. Schembrucker, apparently in response to some earlier email and telephone discussions, to report that she had consulted the Executive Director of the NSBS and the NSBS was interested in the privilege issue generally but would not become involved in the present case.

8. On July 27, 2018, I drafted a letter for Mr. Schermbrucker to sign and emailed it to D/Cst. Parker McIsaac of the Halifax Integrated Guns and Gangs Unit. The letter said:

   The Samsung cell phone seized from Mr. Herritt on May 31, 2017, was analyzed by Cst. Kevin MacDonald at the RCMP H. Div. Technological Crime Unit. Texts from the phone are necessary to prove possession for the purpose of trafficking.

   However, apparently there are lawyer-client communications on the phone as well, so we cannot use the report.

   Could you, therefore, ask the Tech Crime Unit to rerun the phone data confining it to one week of texts, May 24 – 31, 2017, inclusive? The trial is September 21, 2018, so we need a new report ASAP. [Underlining in the original]

9. In response on August 20, 2018, I received an electronic copy of an Excel spreadsheet ("Samsung Phone; One Week of Texts"), originally from Det/Cst Parker McIssac [sic, McIsaac] of the Halifax Integrated Guns and Gangs Unit. Mr. Schermbrucker instructed me not to review the contents of any text messages but to edit the spreadsheet by removing unnecessary columns (e.g. file-source names) and see how large the resulting file was. I did so, and it is approximately 500 pages long. I printed and bound it and sealed that document in a sealed envelope pending further proceedings in this Court. That envelope is attached to this affidavit as Exhibit A.

10. I saved the electronic spreadsheet "Samsung Phone; One Week of Texts" to a CD which is in my desk drawer in a sealed envelope. I wrote to

> Det/Cst Parker [sic] to ask that he please ensure that he does not have an electronic or paper copy of this spreadsheet. I have examined our physical and electronic file and have verified that the only copy of this spreadsheet is the one on the CD mentioned above.

[4] Ms. Castellarin's affidavit was sent to the Court as an attachment to a September 5th email from Mr. Schermbrucker to my judicial assistant, the relevant part reading:

> I am attaching a copy of an affidavit I propose to file, subject to Mr. Nodleman's [sic] position. The original affidavit has an envelop attached. As Exhibit A.

[5] This led to the following email exchange, initiated by the Court:

> September 10, 2018 8:06 a.m. Justice Chipman to Mr. Nodelman and Mr. Schermbrucker:
>
> I refer to the Sept. 13th Motion and await Mr. Nodelman's position on Mr. Schermbrucker's proposed affidavit of Ms. Castellarin. I also await receipt of pre-Motion briefs from both of you. Finally, is it Mr. Schermbrucker's intention to provide me with a copy of Exhibit A (approx. 500 pages) in advance of Thursday? Yours very truly, Justice Chipman
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> September 10, 2018 8:12 a.m. Mr. Schermbrucker to Justice Chipman and Mr. Nodelman:
>
> Thank you Justice Chipman. It is my intention to ask that the Court direct Mr. Nodelman to review the attachment to the Castellarin affidavit to see if his client wishes to claim privilege over any of it. I do not wish the Court to review it. However this is a topic of discussion at the appearance this week.
>
> September 10, 2018 2:10 p.m. Mr. Nodelman to Justice Chipman and Mr. Schermbrucker:
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> My Lord:
>
> Thank you for your e-mail.
>
> I've reviewed the Casterllarin affidavit filed by my friend. *Prima facie*, I shouldn't be reviewing the 500-page "one week of texts" document myself. I'm very much in the class of people who shouldn't have access to communications between Mr. Herritt and another solicitor. I would, however, immediately change my view were it to turn out that said other solicitor worked at NSLA Halifax South: after all, according to the Nova Scotia Barristers' Society, I'm already presumed to have full knowledge of whatever's in the client file of another lawyer at my own firm. Perhaps Your Lordship could, by consent order following

> Thursday's hearing, refer the 500-page document to a fellow Supreme Court judge or designated independent lawyer simply to confirm or deny if Mr. Herritt's other lawyer(s) were from my own office, on a quick return date? Were the answer is yes, I'd have no issue with doing exactly what Mr. Schermbrucker proposes, that being to review the document as a whole myself and assert privilege on my client's behalf as may be necessary.
>
> …
>
> September 11, 2018 at 7:48 a.m. Justice Chipman to Mr. Nodelman and Mr. Schermbrucker:
>
> Thanks Mr. Nodelman and I wish you a speedy recovery and look forward to submission of the briefs. I wonder if Mr. Schermbrucker is able to advise whether the lawyer in question was from NSLA Halifax South at the material time?
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> September 11, 2018 8:15 a.m. Mr. Shermbrucker to Justice Chipman and Mr. Nodelman:
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> I will inquire with Tim McLaughlin, who is the counsel who saw the letter.
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> September 11, 2018 11:33 a.m. Mr. Shermbrucker to Justice Chipman and Mr. Nodelman:
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> Justice Chipman, Mr. Nodelman…,
>
> 1. I inquired of Tim McLaughlin who is the PPSC counsel who noticed apparently privileged letters on the cell phone analysis; he reports that the counsel who wrote to Mr. Herritt was with Nova Scotia Legal Aid at Dartmouth. He cannot recall counsel's name.
> 2. I attach a PDF copy of a short pre-hearing brief. A paper copy is en route.

[6] Later on September 11th Mr. Nodelman provided the respondent's brief, attaching *R. v. Rudolph*, 2017 NSSC 333.

[7] In Ms. Castellerin's affidavit she states at para. 5 that when Mr. McLaughlin reviewed the cell phone analysis CD he, ".. found images of correspondence between Nova Scotia Legal Aid counsel and Mr. Herritt, which he presumed would be solicitor-client privileged." At first blush I have hearsay concerns about this statement; however, these concerns are nullified given Mr. McLaughlin's affidavit, which offers his account of what happened:

> 11. On February 22, 2018, after speaking with defence counsel, I reviewed the disk with respect to certain text messages he thought were relevant to the

> trial. I opened the disk, opened a folder within the disk, and immediately reviewed several photographs. Upon closer inspection of the photographs I determined they were photographic images of correspondence forwarded to Mr. Herritt from his counsel at Nova Scotia Legal Aid regarding an unrelated case.

[8] Given this evidence it is clear the correspondence in question is from Nova Scotia Legal Aid (NSLA) counsel regarding an unrelated case. Further, in response to questions from the Court, Mr. Schermbrucker allowed that the "unrelated case" may be a family law matter. In any event, the correspondence in question is likely irrelevant to this matter, albeit protected by solicitor-client privilege. The question arises as to how this should be dealt with.

POSITIONS OF THE PARTIES

[9] In their oral submissions counsel expanded upon, but did not deviate from their written submission, as may be excerpted from their briefs as follows:

Crown

> The applicant asks this Court to direct counsel for the respondent/accused Anthony Herritt, Mr. Nodelman, to receive Exhibit A to the Castellarin affidavit – i.e. "Samsung Phone; One Week of Texts" – to review it, and to report back to this Court on whether his client, the respondent Anthony Herritt, claims solicitor-client privilege over any items in that document.

Defence

> Mr. Herritt's counsel should not be conscripted by court order to assist Her Majesty in any aspect of prosecution his client. Rather, the defence takes the position that when apparently solicitor-client privileged material comes in the Crown's position, the Crown has two choices. The first such choice is simply to return the entirety of the material in question to the individual from which it was seized. The second is to make application in court under the *Lavallee* framework.

LAW AND ANALYSIS

[10] Whether the NSLA correspondence (and any texts that relate to that correspondence or any other legal advice) within Mr. Herritt's seized (via search warrant) Smartphone are solicitor-client privileged is at the core of this application. In *R. v. Leggette*, 2015 NSSC 112, Justice Arnold had cause to review the concept of solicitor-client privilege, drawing from *Wigmore* at paras. 89 and 90:

> 89 According to *Wigmore on Evidence* (McNaughton rev. 1961), vol. 8 at s. 2292, at p. 554:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.
>
> 90 *Wigmore* goes on to say, at para. 2285, that the four fundamental conditions necessary to establish a privilege against the disclosure of communications are as follows:
>
> 1. The communication must originate in a confidence that they will not be disclosed.
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[11] In this case the solicitor-client privilege is Mr. Herritt's and during a prior Court appearance (May 7, 2018) this privilege was asserted through counsel. In any event, Mr. Herritt's privilege exists independently and does not require such an assertion (see *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General)); R. v. Fink*, 2002 S.C.C. No. 61 at para. 39).

[12] Both parties referred to *Lavallee*, the seminal case where the Supreme Court of Canada ruled Criminal Code s. 488.1 – providing procedures intended to protect the privilege in the case of a warranted search of a law office – was on several bases, constitutionally deficient. Justice Arbour, on behalf of the majority, concluded her analysis by stating that when police seek to obtain a search warrant for a law office a number of considerations ought to inform the issuing justice (see para. 49). These considerations are sometimes referred to as the "*Lavallee* framework" as identified by Mr. Nodelman in his brief. Indeed, the defence takes the position that the Crown should make their application in accordance with this particular directive (listed at para. 49 of *Lavallee*):

> 7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether

> a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

[13] To buttress his argument that the *Lavallee* framework must be followed, the defence refers to *Rudolph* and especially Justice Boudreau's comments at para. 65:

> 65 When investigating crime, the police must remember that solicitor-client privilege is a constitutional protection, and a principle of fundamental justice. It is the responsibility of law enforcement to seek to avoid breaches of solicitor-client privilege, and to avoid actions that specifically or inadvertently breach same. In the case of law office searches, the *Lavallee* process provides them with a clear and safe road map; in other contexts, law enforcement must develop other safe road maps. The spirit of *Lavallee* must be respected in those other contexts as well; the state must "[take] all required steps to ensure that there is no deliberate or accidental access to information that is, as a matter of constitutional law, out of reach in a criminal investigation." (*Lavallee, supra*, para. 25)

[14] Returning to the facts of this case it is important to remember this was not a law office search. It was a search incidental to the warranted seizure of Mr. Herritt's Smartphone. Presumably, police were looking for evidence relating to the offence of possession of cocaine for the purpose of trafficking. This is a common investigative technique. As Justice Cromwell stated for the majority in *R. v. Fearon*, 2014 SCC 77 at para. 48:

> 48 Beyond the facts of this case, there are other types of situations in which cell phone searches conducted incidental to a lawful arrest will serve important law enforcement objectives, including public safety. Cell phones are used to facilitate criminal activity. For example, cell phones "are the 'bread and butter' of the drug trade and the means by which drugs are marketed on the street": *Howell*, at para. 39. Prompt access by law enforcement to the contents of a cell phone may serve the purpose of identifying accomplices or locating and preserving evidence that might otherwise be lost or destroyed. Cell phones may also be used to evade or resist law enforcement. An individual may be a "scout" for drug smugglers, using a cell phone to warn criminals that police are in the vicinity or to call for "back up" to help resist law enforcement officers: see, e.g., *United States v. Santillan*, 571 F.Supp.2d 1093 (D. Ariz. 2008), at pp. 1097-98. In such situations, a review of recent calls or text messages may help to locate the other perpetrators before they can either escape or dispose of the drugs and reveal the need to warn officers of possible impending danger.

[15] Whereas a law office search is a relatively rare occurrence, Smartphones are routinely searched in criminal investigations. At the crux of this case is what to do when in the process of searching, the Crown uncovers material which is potentially

subject to the accused's solicitor-client privilege. I have traced the background leading up to the within application and find no fault with the Crown's approach. As Mr. Nodelman acknowledged in his remarks, "I cast no aspersions on the Crown or police up to this point."

[16] Returning to the positions of the parties, the defence perhaps not surprisingly did not expand on what was characterized as the "first such choice" of the Crown in this situation, "… simply to return the entirety of the material in question to the individual from which [sic] it was seized." To my mind this option is untenable. Surely the mere presence of legal correspondence within the contents of a legally seized Smartphone cannot then lead to the authorities relinquishing the entirety of what has been seized.

[17] In the result I have focussed on the remaining competing procedures suggested by the Crown and defence. In doing so I have arrived at the following order:

> 1. Counsel for the respondent, Dr. Joshua Nodelman, shall receive the original copy of Exhibit A to the affidavit of Anna-Marie Castellarin, and shall review it in order to determine whether any of its contents are protected by solicitor-client privilege; and
> 2. After his review, Dr. Joshua Nodelman shall then return the original of Exhibit A to this Court; and
> 3. If Dr. Nodelman has identified any material within Exhibit A that he believes is protected by solicitor-client privilege he shall redact that material on a copy of Exhibit A and shall return that redacted copy to this Court, for further consideration by this Court.

[18] As Justice Boudreau makes clear in *Rudolph* (para. 68), solicitor-client privilege is the privilege of the client, not the lawyer. Since the information does not belong to the lawyer, it is not for the lawyer to give. Nevertheless, on the facts of this case, it is surely for Mr. Herritt <u>in consultation with his current counsel</u> to decide what is solicitor-client privileged. To my mind the above approach offers, in the words of Justice Boudreau, a "clear and safe road map" for all concerned. In fashioning this solution I specifically considered but declined defence counsel's invitation to have one of various others review Exhibit A, including another Justice, a designated independent lawyer or Mr. Herritt's (former) NSLA lawyer. In all of the circumstances I felt it best for Mr. Herritt that his current counsel, retained to defend him on the criminal charge before the Court, determine if the

impugned material should be deemed solicitor-client privileged , thus exempt from review by the Crown and kept confidential at the trial.

[19] In granting this order I am cognizant of the various potential concerns expressed by Mr. Nodelman. Among the hypotheticals he presented, the Court was asked what would happen in the event he came upon material incriminating another lawyer. Rather than dealing with any such scenario on a hypothetical basis, I would simply say that the Court is mindful of its supervisory role as overtly recognized through para. 3 of the within order. If a specific concern is encountered in the course of his review, I would invite Mr. Nodelman to bring this to the Court's attention.

[20] In the result I grant the motion sought by the Crown. The Crown may use in evidence the forensic analysis of the contents of the accused's Smartphone seized at the time of his arrest, subject to items identified as solicitor-client privileged. Mr. Herritt's current counsel shall carry out the review in consultation with his client. The Court will maintain its supervisory role by reviewing any redactions identified by defence counsel.

Chipman, J.