

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Murtha*, 2009 NSSC 342

Date: 20091117

Docket: CRH 312005

Registry: Halifax

Between:

Her Majesty the Queen in Right of the Province of Nova Scotia

Plaintiff

v.

Richard Murtha

Defendant

LIBRARY HEADING

Judge: The Honourable Justice David Farrar

Heard: September 28, 2009, in Halifax, Nova Scotia (In Chambers)

Subject: The determination of solicitor/client privilege as it relates to documents seized from the offices of the Nova Scotia Barristers' Society

Summary: On April 24, 2007 the Halifax Regional Police issued a warrant on the offices of the Nova Scotia Barristers' Society and seized records used by the Society in the investigation of one of its members or provided to the Society for the purposes of making a claim pursuant to the Lawyers' Fund for Client Compensation. The Society claimed solicitor/client privilege over the documents, the Crown sought a determination of the claim of privilege asserted by the Society.

Issue: Whether the documents seized from the Society were subject to solicitor/client privilege.

Result: To the extent that the documents represented correspondence between the solicitor and his former clients, the documents were privileged. However, to the extent any solicitor/client privileged documents were provided to the Society for the purposes of seeking compensation from the Fund, the privilege was waived.

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Counsel: Alonzo Wright, for the Crown
Andrew R. Nielsen, for the Nova Scotia Barristers' Society
Richard Murtha (Unrepresented/Not Appearing)

By the Court:

[1] In January 2006 the Nova Scotia Barristers' Society ("the Society") commenced an investigation into complaints against Richard Murtha, one of its members. Mr. Murtha was suspended on January 6, 2006 and a receiver for his practise was appointed by the Society. The Society also retained legal counsel to assist it in its investigation and prosecution and of Mr. Murtha. As a result of the Society's investigation, Mr. Murtha was disbarred on January 4, 2007.

[2] On April 12, 2007, the Society was served with a search warrant that requested the auditor's report; documentation relating to reimbursement claim application forms submitted to the Society; documentation relating to the findings of the Society respecting Mr. Murtha; audio recordings; video recordings; transcripts of the proceedings against Mr. Murtha; and records of payments relating to reimbursement applications.

[3] The warrant was executed on April 24, 2007 at the offices of the Society. The Society on that date identified certain of the requested documents as potentially being subject to solicitor/client privilege. Those documents were placed under seal at the Society, and were delivered into the custody of a third party by representatives of the police and the Society. On May 28, 2009 Her Majesty the Queen in Right of the Province of Nova Scotia ("the Crown") filed an application for a determination of the claims of privilege asserted by the Society over the records seized by the Halifax Regional Police.

[4] On April 18, 2007, the Society, by letter advised the former clients of Mr. Murtha that a search warrant would be executed and requested their written consent to disclose the client information to the police. In all, twenty-four former clients of Mr. Murtha who had made claims under the Lawyer's Fund for Client Compensation ("the Fund") were contacted.

[5] The Society received written consent for disclosure from eleven of the twenty-four former clients.

[6] The Society did not attempt to contact former clients of Mr. Murtha who did not make claims under the Fund.

[7] The Society and the Crown appeared before Justice Kevin Coady on June 25, 2009 at which time the court directed that the Society notify all former clients of Mr. Murtha whose records may be the subject matter of this application. The Society was further directed to advise the former clients of the date of this hearing into the potential privilege of those records and to advise those former clients of their right of participation at the hearing. By letters dated October 10, 2009, all by registered mail, the Society advised the former clients of Mr. Murtha of their right to participate in the hearing .

[8] All but three of those letters were received. Three of the registered letters were returned as undeliverable.

[9] I am satisfied that appropriate steps were taken to comply with the Order of Justice Coady. This matter proceeded as scheduled on September 28, 2009.

[10] The documents that are subject to the application are presently contained in four sealed envelopes. Envelope No. 1 contains documents numbered 1 through 384. Envelope No. 2 contains documents numbered 385 through 797. Envelope No. 3 contains documents numbered 798 through 1149 and Envelope No. 4 contains documents numbered 1150 through 1556.

[11] Prior to the hearing of this matter, the Society provided a comprehensive letter setting forth its position with respect to all of the documents. The correspondence identifies five categories of documents. They are as follows:

- A. Documents which may be disclosed, and over which the Society does not claim privilege, provided appropriate redactions have been made to protect the privilege of former clients of Mr. Murtha (who have not provided explicit consent for disclosure).
- B. Documents that the NSBS cannot disclose because it does not have explicit consent from the former clients of Mr. Murtha.
- C. Documents that the Society can disclose because it has obtained explicit consent from the former clients of Mr. Murtha;
- D. Documents over which the Society claims privilege but which privilege the Society is prepared to waive and therefore will disclose

with redactions to protect the privilege of former clients of Mr. Murtha who have not consented to the release of their information.

- E. Documents that the Society claims privilege over, which privilege the Society does not waive and which the Society should not be required to disclose.

[12] There is a sixth category of documents, email correspondence which is stored on a sealed CD-ROM disc. The emails fall into one of the above noted categories and will be disclosed in accordance with the determination made with respect to the categories.

[13] I will address each of the categories of documents later in the decision.

[14] As a preliminary matter, although it was not contested before me, I accept the position of the Society that the appropriate procedure for the execution of this search warrant is as set out in **Lavallee, Rackel & Heintz v. Canada (Attorney General)**, [2002] 3 S.C.R. 209.

[15] The Court in **Lavallee** set forward the correct procedure and set out ten principles which are to be followed. I will not repeat the ten principles here but rather simply state that the procedure as set out in **Lavallee** was properly followed in this instance.

[16] While the situations addressed in **Lavallee** all involved the execution of warrants on law offices, the **Lavallee** protections are broad and extend to documents in the possession of lawyers, wherever those documents may be physically located. See **Festing v. Canada (Attorney General)**, 2003 BCCA 112.

[17] The documents over which the Society claims solicitor/client privilege in this case were located at the Society's own offices. The offices of the Society represent a place where "such privileged documents may reasonably be expected to be located". As such they are to be afforded the protections set out in **Lavallee**.

[18] I further find that the Society under the **Legal Profession Act**, 2004 c. 28 (the "**Act**"), and in particular, s. 77, has a statutory obligation to maintain any

privilege attaching to any documentation which comes into its possession during the fulfilment of its duties under the **Act**.

[19] I will now address the issues surrounding the disclosure of the documents.

[20] The issue of solicitor/client privilege was dealt with extensively by the Supreme Court of Canada in **Descôteaux et al v. Mierzwinski**, [1982] 1 S.C.R. 860. It was also dealt with in **Pritchard v. Ontario (Human Rights Commission)**, [2004] 1 S.C.R. 809. In **Pritchard**, the Court summarized the law on the issue and set out the following criteria for solicitor/client privilege to attach to a communication:

1. It must be between a solicitor and client;
2. It must entail decision or giving of legal advice; and
3. It must be intended to be confidential by the parties.

[21] The privilege extends to cover any consultation for legal advice whether litigious or not.

[22] The rationale for solicitor/client privilege was examined in detail in Supreme Court of Canada in **Solosky v. The Queen**, [1980] 1 S.C.R. 821 where at 835 the Court held as follows:

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of British Columbia*[10], at p. 649:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept

secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

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

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

[23] I now turn to the categories of documents. I will address each one individually in accordance with the legal principles set out above.

A. Documents which may be disclosed, and over which the Society does not claim privilege, provided appropriate redactions have been made to protect the privilege of former clients of Mr. Murtha (who had not provided explicit consent for disclosure).

[24] Although are not explicitly stated in the category of documents, it is implicit that the Society wishes to redact any information which might identify the clients of Mr. Murtha. To the extent that any such redaction would not adequately protect the client identity the Society takes the position that the document should not be disclosed.

[25] I agree with the position of the Society that to the extent the information would disclose the identity of the client or information provided to that client by Mr. Murtha it should not be disclosed. The fact that Mr. Murtha's clients sought legal advice is subject to solicitor/client privilege. To disclose information which identifies Mr. Murtha's clients or could lead to their identity, would be to breach this confidentiality. An individual should be free to consult with a solicitor of their choice without fear of that consultation becoming known. I find that the solicitor/client privilege is broad enough to encompass the identity of the individual that is seeking advice. One can envision a situation where someone who is having marital problems seeks the advice of a family lawyer. The fact that they have sought that advice should be confidential as much as the advice which was received should be confidential.

[26] If the documents cannot be redacted to protect that identity, then the information should not be disclosed. This is subject to the issue of waiver which I will address later. Therefore, with respect to category No. 1, those documents will be disclosed on the condition that appropriate redactions are made to protect the privilege of Mr. Murtha's former clients.

B. Documents that the Society cannot disclose because it does not have explicit consent from the privilege holder.

[27] It is necessary to deal with each one of these documents individually. I will do so by reference to the envelope and page number of each document.

Envelope 3 — pages 798–820

[28] The Society claims privilege for the documents contained in these pages.

[29] I find that the documents contained at page 798 through to page 804 are privileged as they relate to communications with the Society's solicitor. However, the documents contained at page 805 through to page 819 are not solicitor/client privileged. These documents are documents submitted to the Society for the purposes of making a claim through the Fund. The communications do not fulfill the criteria set out in **Pritchard**, (supra), in that they are not a communication between solicitor/client. The communication is not for the purposes of seeking or giving legal advice and there is no indication that it is intended to be kept confidential between the parties. The documentation does contain some pieces of correspondence between Mr. Murtha and his client; however, to the extent that that correspondence was solicitor/client privilege, that privilege has been waived by the client for the purposes of seeking reimbursement from the Fund.

[30] In **Watkins v. Faught** (1999) 179 N.S.R. (2d) 204, Gruchy, J. referred to Sopinka's *The Law of Evidence in Canada* at ¶ 16 as follows:

Finally I refer to Sopinka's **The Law of Evidence in Canada** where the learned author (as he then was) explored the notion of fairness in relation to solicitor-client privilege. Similarly, Sopinka and Lederman in **The Law of Evidence in Civil Cases** at p. 182:

Two essential elements must be present for a waiver to be established. The holder of the privilege must possess knowledge of the existence of the privilege which he is foregoing and also a clear intention of waiving the exercise of his right of privilege. Although waiver may be expressly given such cases are few. More frequent are those in which the waiver is by implication only. If the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of the communication, then there will be a waiver.

[31] The client has made a request for compensation from the Fund and therefore, a necessary implication, to the extent that solicitor/client information was disclosed, that privilege has been waived.

[32] It is implicit in the communications that the individuals seeking compensation were aware that they were seeking from the Barristers' Society Fund and further, that they were prepared to provide information which would allow the Society to consider their claim.

[33] Further, in the interests of fairness, the information should be disclosed.

[34] The warrant as executed by the police, however, Mr. Murtha is also interested in obtaining the information contained in the documents sought to be disclosed. The documents would be provided to him in due course pursuant to the Crown disclosure obligations and may be necessary to answer the charges which have been laid against him.

Envelope 3 — 821–822

[35] This document appears to be a summary of actions taken by Mr. Murtha on a client file and I find that it is privileged.

Envelope 3 — 857–870

[36] This is another application by a former client of Mr. Murtha's for reimbursement from the Fund. For the reasons set out above with respect to the claim that Envelope 3, page 805, I find that solicitor/client privilege does not attach to these documents.

Envelope 3 — 871–881

[37] The document which is at page 871 is correspondence between Mr. Murtha and his former client. It is solicitor/client privilege. With respect to the remainder of the documents they relate to a claim by a former client for compensation from the Fund. Again, for the reasons set out above I find that these documents are not privileged.

Envelope 3 — 913–1011

[38] The documents which appear at page 913 through to 934 are not solicitor/client privilege. It is correspondence from Mr. Murtha to a third party enclosing a report which Mr. Murtha is seeking. To the extent that there may have been a litigation privilege associated with that document, that privilege has been waived by Mr. Murtha by providing it to a third party.

[39] The documents which are at page 935 through 937 is an opinion provided to the Society by counsel retained by it. This documentation is clearly privileged.

[40] The documents contained at pages 978 through to 1009 are documents provided to the Society in pursuit of a claim to the Fund. Again, for the reasons as set out above, these documents are not subject to solicitor/client privilege, to the extent that they were at one point subject to solicitor/client privilege, that privilege has been waived. The document which appears at page 1010 and 1011 is a letter from the Society to its legal counsel and is clearly privileged.

Envelope 3 — 1036–1074

[41] This is another claim through the Fund for which solicitor/client privilege does not attach for the reasons as set out previously.

Envelope 3 — 1075–1149

[42] The documents which appear at pages 1132 through to 1139 are Mr. Murtha's former clients claim for reimbursement from the Fund. These documents

are not subject to solicitor/client privilege. It appears that some of the documentation contained within pages 1075-1149 may have been provided to the Fund for the purposes of verifying the appropriateness of the reimbursement of Mr. Murtha's former client. However, I am unable to tell on the face of the documents that that is in fact the case and as a result, I find that the remainder of the documents are subject to solicitor/client privilege. I would also note that some of the documentation contained in these pages relates to correspondence between the Society and its solicitor. I find that that correspondence is solicitor/client privilege.

Envelope 4 — 1150–1157

[43] This is a claim to the Fund by a former client of Mr. Murtha and for the reasons set out above I conclude that it is not solicitor/client privilege.

Envelope 4 — 1175–1550

[44] These are documents provided to the Bar Society by the solicitor for a former client of Mr. Murtha. The documents are extensive in detail with dealings with Mr. Murtha by the law firm and/or the client over a period of years.

[45] The documents are provided to the Society for the purposes of making a claim to the Fund and, therefore, are not subject to solicitor/client privilege.

[46] This is an example of a law firm being aware of the issue of solicitor/client privilege and clearly waiving that privilege for the purposes of providing information to the Fund for the purposes of seeking compensation.

Envelope 4 — 1551–1556

[47] This documentation relates to a claim being made on behalf of the former client of Mr. Murtha through his solicitor. The document is correspondence relating to that claim and is not subject to solicitor/client privilege.

[48] That addresses all of the documentation that the Society said it could not disclose because it did not have explicit consent from the privilege holder.

[49] As I have found, in the majority of cases, the documents are to be disclosed.

[50] So there is no confusion, to the extent that there may be documents that are, *prima facie*, solicitor/client privileged, it is my finding that by making a claim to the Society Fund that that privilege has been waived by implication.

- C. Documents that the Society can disclose because it has obtained explicit consent from the privilege holder.

[51] There is no need for me to make any further comment with respect to those documents. They will be disclosed.

- D. Documents over which the Society claims privilege, but which privilege the Society is prepared to waive and therefore will disclose with redaction to protect the privilege of former clients of Mr. Murtha who have not consented to the release of this information.

[52] If the Society was not prepared to voluntarily disclose these documents, I would find that they were privileged. Therefore, if the Society wishes to disclose the documents they may place whatever conditions it wants on that disclosure. The disclosure of these documents, with the conditions placed upon it by the Society, i.e., the redaction of the persons of the information necessary to protect the privilege of former clients of Mr. Murtha, is appropriate. The documents will be disclosed accordingly.

- E. Documents that the Society claims privilege over, which privilege the Society does not waive and which the Society therefore should not be required to disclose.

[53] There is only one document identified under this heading by the Society. It appears at Envelope 1, page 462. It is correspondence between the Society and its solicitor and I agree that it is privileged.

[54] Finally, the email correspondence which has been stored on a CD-ROM will be disclosed in accordance with my rulings under A-E above.

[55] I will hear counsel on any issues arising as a result of my determinations herein.

Farrar, J.