

2013 CarswellOnt 13730, 233 A.C.W.S. (3d) 330

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Nguyen v. O'Donnell

Simon Nguyen also known as Ba Duc Nguyen and 2049870 Ontario Inc., Plaintiffs and John Frederick O'Donnell, Defendant

Ontario Superior Court of Justice

Master Barbara McAfee

Heard: July 22, 2013

Judgment: September 4, 2013

Docket: Toronto CV-12-456774

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Counsel: Bryan Fromstein, for Moving Parties/plaintiffs

D. **Yiokaris**, for the responding party, the defendant

M. Pham, for Non-party

Subject: Civil Practice and Procedure

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Plaintiffs brought action against defendant solicitor for services provided to third parties — Plaintiffs sought production of transactional documents indicating what happened to certain monies — Defendant claimed privilege over these documents — Plaintiffs brought motion for further and better affidavit of documents — Motion dismissed — Documents were protected by solicitor-client privilege — Documents related to seeking, formulating, or giving of legal advice — Documents not created by defendant or his firm related to information provided by his clients to obtain legal advice — Presumption of privilege was not rebutted — There was reasonable possibility that disclosure would directly or indirectly reveal privileged communications.

Cases considered by Master Barbara McAfee:

Chan v. Dynasty Executive Suites Ltd. (2006), 2006 CarswellOnt 4318, 30 C.P.C. (6th) 270 (Ont. S.C.J.) — referred to

Currie v. Symcor Inc. (2008), 2008 CarswellOnt 4525, 244 O.A.C. 3 (Ont. Div. Ct.) — referred to

Fehr v. Sun Life Assurance Co. of Canada (2012), 2012 CarswellOnt 5632, 2012 ONSC 2715, 25 C.P.C.

(7th) 68, 10 C.C.L.I. (5th) 129 (Ont. S.C.J.) — referred to

GJB Enterprises Inc. (Receiver of) v. GJB Enterprises Inc. (2012), 88 C.B.R. (5th) 72, 2012 BCCA 135, 2012 CarswellBC 794, 30 B.C.L.R. (5th) 256, [2012] 7 W.W.R. 660, (sub nom. *Donell v. GJB Enterprises Inc.*) 542 W.A.C. 17, (sub nom. *Donell v. GJB Enterprises Inc.*) 319 B.C.A.C. 17, 348 D.L.R. (4th) 430 (B.C. C.A.) — referred to

Maranda c. Québec (Juge de la Cour du Québec) (2003), 178 C.C.C. (3d) 321, (sub nom. *Maranda v. Richer*) 232 D.L.R. (4th) 14, 15 C.R. (6th) 1, (sub nom. *Maranda v. Richer*) [2003] 3 S.C.R. 193, 2003 SCC 67, 2003 CarswellQue 2477, 2003 CarswellQue 2478, (sub nom. *Maranda v. Leblanc*) 311 N.R. 357, 113 C.R.R. (2d) 76 (S.C.C.) — referred to

Ontario (Ministry of Correctional Services) v. Goodis (2006), (sub nom. *Goodis c. Ontario (Correctional Services)*) [2006] 2 S.C.R. 32, 271 D.L.R. (4th) 407, 2006 SCC 31, 2006 CarswellOnt 4077, 2006 CarswellOnt 4078, 350 N.R. 154, 214 O.A.C. 377 (S.C.C.) — referred to

R. v. Kelleher (2012), 2012 SKQB 440, 2012 CarswellSask 799, (sub nom. *Director of Public Prosecutions (Canada) v. Kelleher*) 410 Sask. R. 109, [2013] 7 W.W.R. 198 (Sask. Q.B.) — referred to

R. v. Lavallee, Rackel & Heintz (2002), 216 D.L.R. (4th) 257, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 167 C.C.C. (3d) 1, 4 Alta. L.R. (4th) 1, 2002 CarswellAlta 1818, 2002 CarswellAlta 1819, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 164 O.A.C. 280, 2002 SCC 61, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 96 C.R.R. (2d) 189, [2002] 11 W.W.R. 191, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) [2002] 3 S.C.R. 209, 2002 D.T.C. 7267 (Eng.), 2002 D.T.C. 7287 (Fr.), 3 C.R. (6th) 209, [2002] 4 C.T.C. 143, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 292 N.R. 296, 312 A.R. 201, 281 W.A.C. 201, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 217 Nfld. & P.E.I.R. 183, (sub nom. *Lavallee, Rackel & Heintz v. Canada (Attorney General)*) 651 A.P.R. 183 (S.C.C.) — referred to

R. v. McClure (2001), 40 C.R. (5th) 1, 195 D.L.R. (4th) 513, 151 C.C.C. (3d) 321, 142 O.A.C. 201, 80 C.R.R. (2d) 217, 2001 SCC 14, 2001 CarswellOnt 496, 2001 CarswellOnt 497, [2001] 1 S.C.R. 445, 266 N.R. 275 (S.C.C.) — referred to

R. v. National Post (2010), 401 N.R. 104, 2010 CarswellOnt 2776, 2010 CarswellOnt 2777, 2010 SCC 16, [2010] 1 S.C.R. 477, (sub nom. *National Post v. Canada*) 254 C.C.C. (3d) 469, (sub nom. *National Post v. Canada*) 318 D.L.R. (4th) 1, 262 O.A.C. 1, 211 C.R.R. (2d) 1, 74 C.R. (6th) 1, 103 O.R. (3d) 398 (note) (S.C.C.) — referred to

Smith v. Jones (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith*) 60 C.R.R. (2d) 46, (sub nom. *Jones v. Smith*) 236 N.R. 201, 1999 CarswellBC 590, [1999] 1 S.C.R. 455, (sub nom. *Jones v. Smith*) 120 B.C.A.C. 161, (sub nom. *Jones v. Smith*) 196 W.A.C. 161, 62 B.C.L.R. (3d) 209, 1999 CarswellBC 3425, [1999] 8 W.W.R. 364, 1999 SCC 16 (S.C.C.) — referred to

MOTION by plaintiffs for order for further and better affidavit of documents.

Master Barbara McAfee:

1 This is a motion brought by the plaintiffs for an order that the defendant deliver a further and better

affidavit of documents listing transactional document indicating what happened to certain monies, an order that the defendant produce his Schedule B documents to the court for inspection, an order that lawyer client privilege does not apply to all or some of the defendant's Schedule B documents and an order that the defendant produce his Schedule B documents to the plaintiffs.

2 The defendant brings a cross-motion for certain direction and relief. The defendant advises that the defendant's cross-motion only needs to be determined if production is ordered. The defendant states that if the plaintiffs' motion in this regard is dismissed, the cross-motion is withdrawn.

3 For the reasons that follow, the plaintiffs' motion for a further and better affidavit of documents and an order that lawyer client privilege does not apply to some or all Schedule B documents and that the Schedule B documents be produced to the plaintiffs is dismissed. I have reviewed the Schedule B documents in making my determination.

4 In this action the plaintiffs sue the defendant, a lawyer regarding legal services the defendant provided to persons who are not the defendant provided to persons who are not the plaintiffs. The defendant provided legal services to a partnership in a 2004/2005 corporate transaction (the Greenbrier matter). Minh Pham and Dave Sukhoo are the two partners of the partnership who retained the defendant.

5 In a separate action commenced in 2006 by the plaintiffs against Ms. Pham, the plaintiffs seek, inter alia, an accounting of certain monies Ms. Pham received from the plaintiffs.

6 The plaintiffs argue that the documents at issue on this motion are not privileged. The plaintiffs further argue that even if the documents are privileged, they cannot be kept from the plaintiff, Mr. Nguyen as Ms. Pham was Mr. Nguyen's lawyer.

7 I am satisfied that the documents at issue are protected by solicitor-client privilege. Solicitor-client privilege has been repeatedly recognized by the Supreme Court of Canada as a "fundamental and substantive rule of law" and as "one of the most ancient and powerful privileges known to our jurisprudence" (see *R. v. National Post*, 2010 SCC 16 (S.C.C.) at para 39, *R. v. McClure*, 2001 SCC 14 (S.C.C.) at para 17 and *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61 (S.C.C.) at para 49).

8 The Supreme Court of Canada has recognized that protecting solicitor-client privilege is of greater importance than the policy of admitting relevant and probative evidence (see *R. v. McClure*, para 34, *R. v. Lavallee, Rackel & Heintz*, para 36).

9 Solicitor-client privilege is not to be interfered with unless absolutely necessary (see *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 (S.C.C.) at para 14, 20).

10 Privilege is generally and presumptively held to apply to the "continuum of communications" leading to the provision of legal advice (see *Currie v. Symcor Inc.*, 2008 CarswellOnt 4525 (Ont. Div. Ct.) at para 46 and *Maranda c. Québec (Juge de la Cour du Québec)*, 2003 SCC 67 (S.C.C.) at para 22).

11 I am satisfied on the basis of the evidence before me and on my review of the Schedule B documents that the documents at issue relate to the seeking, formulating and giving of legal advice. The documents are within the continuum of communication in which the defendant provided advice. Documents not authored by the defendant or his firm relate to information which his clients provided to him to obtain legal advice (and see

O'Donnell Affidavit, para 3335).

12 The plaintiffs argue that certain documents at issue are transactional in nature and therefore not privileged. The plaintiffs rely on *Fehr v. Sun Life Assurance Co. of Canada*, 2012 ONSC 2715 (Ont. S.C.J.), *GJB Enterprises Inc. (Receiver of) v. GJB Enterprises Inc.*, 2012 BCCA 135 (B.C. C.A.) and *R. v. Kelleher*, 2012 SKQB 440 (Sask. Q.B.). I am not satisfied that the presumption of solicitor-client privilege has been rebutted. There is a reasonable possibility that disclosure will directly or indirectly reveal privileged communications. If the information at issue is privileged, it will provide insight into the nature of the legal advice (See O'Donnell Affidavit 31, 33 -35).

13 None of the documents at issue qualifies for any of the defined exceptions to solicitor-client privilege (see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.) at paras 51-59).

14 With respect to the plaintiffs' argument that documents cannot be kept from the plaintiffs because Ms. Pham was the lawyer for the plaintiff, Mr. Nguyen, the plaintiffs are complete strangers to the retainer between the partnership and the defendant. The plaintiffs were not clients of the defendant. While not determinative of the issues on the motion, in 2011 the plaintiffs complained to the Law Society about the defendant. The Law Society closed its file without contacting the defendant because the defendant was not the plaintiffs' lawyer.

15 Ms. Pham has also provided an accounting of the monies at issue (see 2013 Pham transcript p. 10, 21-22, 28, 30-31, 63, O'Donnell affidavit, Exhibit O and 2nd O'Donnell affidavit, para 12, d, e).

16 Ms. Pham is one of the partners of the partnership that retained the defendant. Ms. Pham does not oppose the production sought. However, the other partner, Mr. Sukhoo opposes the production sought and does not waive solicitor-client privilege. Ms. Pham cannot unilaterally waive the privilege (see *Chan v. Dynasty Executive Suites Ltd.*, 2006 CarswellOnt 4318 (Ont. S.C.J.) at para 71).

17 Given my decision on the plaintiffs' motion, the defendant's cross-motion is withdrawn. Order to go as follows:

1. The Plaintiffs' motion for an order as asked at paragraphs a, c and d of the notice of motion is dismissed.
2. The plaintiffs' motion for an order as asked at paragraph b of the notice of motion is granted.
3. The defendant's cross-motion is withdrawn.

18 If any party seeks costs and if costs cannot be agreed upon after reasonable attempts have been made to do so, any party seeking costs shall serve and file brief written submissions on costs of 2 pages or less in length together with a copy of that party's costs outline on or before October 4, 2013. Any responding submission shall also be 2 pages or less in length and served and filed together with a copy of that party's costs outline on or before October 18, 2013. Reply submissions, if any, shall be 1 page or less in length and served and filed on or before October 25, 2013.

19 The material shall be filed with Assistant Trial Coordinator, Conrad Diamante, 6th floor and shall be accompanied with an Affidavit of Service.

Motion dismissed.

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