

CANADA / JUDGMENT

Germain v. Doak Shirreff Lawyers LLP

2016 BCSC 2100

COURT

Supreme Court of British Columbia

DECIDED

15 November 2016

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2016 BCSC 2100 Germain v. Doak Shirreff Lawyers LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Germain v. Doak Shirreff Lawyers LLP,

2016 BCSC 2100

Date: 20161115

Docket: S111032

Registry: Kelowna

Between:

Gregory Stewart Germain

Client

And

Doak Shirreff Lawyers LLP

Solicitor

Before: Master S. Wilson

(as Registrar)

Corrected Reasons for Decision: The reasons for decision were corrected on the front page on November 21, 2016.

Reasons for Decision

Appearing on his own behalf:

G.S. Germain

Counsel for the Solicitor:

Z. Lee

Place and Date of Hearing:

Kelowna, B.C.

November 1, 2016

Place and Date of Judgment:

Kelowna, B.C.

November 15, 2016

- [1] Prior to the commencement of the hearing of this review of the solicitor's accounts under the Legal Professions Act, an application was made to exclude the client's spouse, Ms. Jennifer Nygaard, from the proceeding and for an order to seal the evidence taken during the hearing.
- [2] I ordered that the hearing be closed and that the evidence taken at this hearing be sealed and advised that I would provide written reasons. These are those reasons.
- [3] By way of background, the client Mr. Germain and Ms. Nygaard are spouses and are adverse in family law proceedings. The solicitor Mr. Sinclair represented Mr. Germain between August 20, 2015 and February 12, 2016, in that matter.
- [4] The family law proceedings have been and continue to be extremely acrimonious. I say this not only based upon the information that was provided to me at this hearing but also from my previous observations having heard other matters in which they are involved. I have also been advised that Mr. Germain and Ms. Nygaard are or may be each the subject of ongoing and serious criminal proceedings that could impact upon the family law proceeding.
- [5] Mr. Sinclair advised that there were matters that he may need to refer to on direct evidence and also possibly on cross-examination that were privileged, confidential and sensitive as it relates to the family matter. The evidence about which Mr. Sinclair was concerned included but was not limited to his communications with a criminal lawyer in Alberta retained by Mr. Germain. Mr. Germain echoed Mr. Sinclair's concerns and although the submissions were made predominantly by Mr. Sinclair, both Mr. Germain and Mr. Sinclair sought an order to exclude Ms. Nygaard from this appointment under the Legal Professions Act ("LPA").
- [6] Ms. Nygaard expressed her wish to remain and hear the evidence, and indeed indicated that she may wish to order a transcript in due course.
- [7] This application involves a weighing of the interests of Mr. Germain to assert and maintain solicitor-client privilege with the open court principle.

- [8] Solicitor-client privilege arises when there is a communication between solicitor and client involving either seeking or giving of legal advice that is intended to be confidential. Legal advice includes not only providing the client with information about the law but also with regard to strategies that may be employed to further the client's interests.
- [9] In *Blank v. Canada (Department of Justice)* 2006 SCC 39, Fish J. stated the following about solicitor-client privilege at paragraph 26:

The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

- [10] Major J. in *R. v. McClure*, 2001 SCC 14 at para. 35 stated that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance".
- [11] Mr. Germain's concern is that there may be evidence arising on the assessment of the solicitor's accounts that may be prejudicial to him in his ongoing and as yet unresolved legal issues.
- [12] In some circumstances, the client may waive privilege, either expressly or impliedly. Mr. Germain continued to assert privilege over his communications with Mr. Sinclair; however, in the circumstance of a review of a solicitor's accounts there may be an implied waiver of privilege to the extent necessary to determine the issues on the assessment.
- [13] The competing interest that must be considered in this application is the principle that our courts are open to the public, which has been held to be a hallmark of a democratic society. In *Re: Vancouver Sun*, 2004 SCC 43, Iacobucci and Arbour JJ. held the following at paragraph 25:

25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480] at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

- [14] However, those rights are not unlimited and there are many instances where the public is not permitted to attend a proceeding. Such orders are discretionary and may be made where the public interest in an open court is superseded or displaced by a competing interest.

[15] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, Iacobucci J. held the following regarding an application for a confidentiality order regarding certain documents:

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under Rule 151 [of the Federal Court Rules] should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[16] The propriety of a party attending at a LPA review of the opposing party's former solicitor in ongoing matrimonial proceedings was considered in *Piercy v. Piercy* (1990), 48 BCLR (2d) 145 (BCCA). In that case the respondent husband terminated his first lawyer and retained another in his place. The first lawyer was unpaid and took out an appointment to review the disputed accounts. Counsel for the petitioner wife sent an associate lawyer from his office to attend at the assessment. The associate lawyer introduced herself to the parties at the assessment and then sat in the gallery and took notes throughout the hearing. Following the hearing, the respondent applied for an order for production of the notes taken by the associate, for an injunction to bar the lawyers and the petitioner from disclosing the information received, and the removal of the petitioner's solicitor from the file.

[17] Wallace J.A. writing for the court overturned the injunction granted by the chambers judge and noted that there was nothing improper about the wife's lawyer attending at what was a public hearing. The Court of Appeal's analysis considered the importance of privilege in the context of the petitioner whose solicitor's brief now included information that the respondent sought to prevent the petitioner from using and noted that the injunction would prohibit the solicitor from advising her client on important aspects of the case, which would constitute a marked and unjustifiable interference in the matter in which counsel could represent the client.

[18] There are two important distinctions between the facts in *Piercy* and the facts in this case. First, although the applicant husband in *Piercy* was represented by counsel at the taxation, no claim for solicitor-client privilege with regard to the communications between the husband and his former solicitor was asserted. Second, as noted by the Court of Appeal the taxation hearing in *Piercy* proceeded without counsel for the respondent asking the registrar to order that the wife's counsel's associate leave the room or asking that the hearing be closed. As such, the applicant was essentially seeking orders to undo the harm that had

already been done, or to 'unring' the proverbial bell, the effect of which was found by the Court of Appeal to be an unjustifiable interference with the wife's solicitor's ability to advise the client.

- [19] In this case Mr. Germain asserted his privilege at the commencement of the LPA review, and I have been asked to close the hearing in order to prevent the potential harm from occurring as opposed to trying to fix it afterwards. I do not consider that the Piercy decision would preclude my making an order prior to the commencement of this hearing to exclude Ms. Nygaard by closing the courtroom.
- [20] In weighing the competing interests of maintaining Mr. Germain's right to solicitor and client privilege with the deleterious effect of closing the court to the public, solicitor-client privilege is a fundamental right and one upon which our system depends.
- [21] The hearing in issue in this case is an appointment under the LPA to review a solicitor's account. While public interest in an open court process is also an important principle, the matters in issue between Mr. Germain and Mr. Sinclair are of little or no interest to the public as a whole. I assume that Ms. Nygaard's sole reason to attend this assessment was to see if any of the evidence, which would likely include privileged information, could be used by her in her family law dispute with Mr. Germain.
- [22] In all of the circumstances, I consider that it would be unfair to Mr. Germain and would potentially hinder the parties from conducting a fair and proper hearing at this LPA review if Ms. Nygaard were able to listen to the evidence in this proceeding and then potentially make use of it in other proceedings.
- [23] I therefore ordered that the Court be closed for this LPA appointment, and that the evidence be sealed such that no one be entitled to obtain a copy of any exhibits or a transcript of the testimony given.
- [24] After the order closing the courtroom and sealing the evidence taken at the hearing, the hearing proceeded. Following Mr. Sinclair's evidence in chief but prior to commencement of cross examination I was told that the parties had reached a settlement.
- [25] I was advised that Ms. Nygaard had already obtained a copy of the Appointment and of Mr. Sinclair's affidavit filed June 29, 2016. Ms. Nygaard presumably obtained those documents by way of appropriate means (they would have been available to her at the registry upon request). This order does not have retroactive effect and does not impact upon Ms. Nygaard's use of whatever evidence she was able to obtain from the Court file prior to this order.

"Master S. Wilson"

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