

CANADA / JUDGMENT

R. v. Alkhalil

2023 BCSC 1047

COURT

Supreme Court of British Columbia

DECIDED

20 June 2023

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2023 BCSC 1047 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2023 BCSC 1047

Date: 20230620

Docket: 27393-188

Registry: Vancouver

Rex

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil) and

Larry Ronald Amero

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Before: The Honourable Justice Maisonville

Ruling re Application No. 188 re Litigation Privilege

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J. Oppal

Place and Dates of Hearing:

Vancouver, B.C.

May 17-19, 30, and June 1-2, 2023

Place and date of Ruling with Written Reasons to follow:

June 2, 2023

Place and Date of Written Reasons:

Vancouver, B.C.

June 20, 2023

- [1] The applicant, Larry Amero, is before the Court on sentencing in respect of two guilty verdicts of conspiring to commit murder. During the course of the hearing, Mr. Amero called Dr. Dylan Gatner, a forensic psychologist, to prepare a pre-sentence risk assessment report. Dr. Gatner attended court for numerous days during the months of April and May 2023. Following receipt of Dr. Gatner's report, which had originally been forwarded to Mr. Amero on April 11, 2023, the Crown retained Dr. Stephen Hart to prepare for their cross-examination of Dr. Gatner.
- [2] On June 2, 2023, I ruled that the documents were covered by litigation privilege with reasons to follow. These are those reasons.
- [3] Mr. Amero sought disclosure of the nature of the retainer for the Crown's expert on May 16, 2023 and requested disclosure of the material provided to the Crown as well as correspondence between the Crown and Dr. Hart.
- [4] The Crown responded that the expert was retained solely for the purpose of assisting with the cross-examination of Dr. Gatner and, consequently, asserted litigation privilege over email correspondence and letters Dr. Hart sent to the Crown.
- [5] The two letters chiefly sought are dated May 12, 2023, and its addendum dated May 14, 2023. During the course of the hearing following argument, I was satisfied that the Crown had not waived litigation privilege and the procedure set out in the decision of Justice Sulyma in *R. v. Chan*, 2002 ABQB 287, was adopted.

[6] In Chan, Sulyma J. was considering numerous claims of litigation privilege. The following procedure was put forward with respect to work product privilege also known as litigation privilege:

[102] The following procedures will apply in the voir dire in terms of Crown's claims of work product privilege:

1. The Crown has the onus of establishing that the privilege applies. The Crown and defence may call evidence and make submissions as to whether the information is subject to work product privilege.
2. Where the Crown fails to establish the material is privileged, disclosure will be ordered.
3. If the Crown establishes the privilege, the onus shifts to the defence to establish waiver or that the information sought might possibly affect the outcome of the trial. This is a very broad relevance test. Both the defence and the Crown will be given the opportunity to adduce evidence and make submissions in this regard, with the defence going first.
4. If the Court finds the privilege was waived, disclosure will be ordered.
5. If the Court finds the privilege was not waived but the information sought might possibly affect the outcome of the trial, it will review the privileged communication.
6. After the Court reviews the information, the Crown and defence will be given the opportunity to make submissions on the factors to be taken into account in balancing the right of the Applicants to make full answer and defence and the right to assert work product privilege.
7. Where the Court finds the right of the Applicants to make full answer and defence is paramount in the circumstances, disclosure will be ordered.
8. Before disclosure is ordered in any of these circumstances, the Crown will be given an opportunity to determine whether it wishes to disclose the material and continue with the prosecution or stay the proceedings.

[7] Counsel agree that, in the circumstances of this case, where the procedure in step 5 of Chan refers to possibly affecting the outcome of the trial, here, the question is whether the documents at issue would possibly affect the sentence. I found that the litigation privilege had not been waived but the information sought might possibly affect the sentence and that, consequently, I should review the privileged communication.

[8] The issue for me to determine is whether litigation privilege applied or whether, in order for the defence to make full answer and defence, there had to be disclosure of the requested documents.

[9] After reviewing the documents that were provided to the Court, the original of which is under seal as an exhibit, I found that the documents in question would not impact the sentence and they were solely in the nature of assisting the Crown in the cross-examination

of the defence expert. There was nothing in the nature of an investigation. There was nothing in the nature of information that would constitute Stinchcombe disclosure [see: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326] to be made from the correspondence. The bulk of the materials in the exhibit were in fact used by the Crown in the course of its cross-examination of Dr. Gatner, which is not relevant to the trial nor necessary to make full answer and defence, and would not impact the sentence.

- [10] The right to make full answer and defence is, of course, paramount and would prevail over litigation privilege. Were that to have been the case, disclosure would have been ordered after the Crown had been given an opportunity to determine whether it wished to disclose those materials and continue with the prosecution or stay the proceedings.
- [11] Litigation privilege was succinctly captured in the decision *Blank v. Canada (Minister of Justice)*, 2006 SCC 39:
- [28] R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[]

- [33] In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.
- [34] The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
- [35] Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947)], at p. 516.
- [12] Counsel also referred me to the decision in *R. v. Basi*, 2009 BCSC 772, in which Justice Bennett (as she then was) considered specific instances of the assertion of litigation privilege. Justice Bennett held that the test to determine whether the litigation privilege had been pierced was whether the evidence was "likely or probably relevant" to the accused in making full answer and defence. She wrote, at para. 38:
- [] If, on a balance of probabilities, the evidence is more relevant than not relevant, then it will be disclosed. It seems that the balancing of the interests of a constitutional right to disclosure and the important policy that underlines the privilege, that the test be stated as "where there is a probability of being useful to the accused in making full answer and defence," is a reasonable compromise that places emphasis on the rights of the accused yet also does not permit the piercing of the privilege on a standard of simple "possibility of usefulness".
- [13] There was no reference to exactly what the documents considered were, but both counsel before me relied upon this case for Bennett J.'s consideration of litigation privilege claims over numerous documents. Some were ordered disclosed; some were not. Where disclosure was not ordered, Bennett J. found that the document was not relevant. Where disclosure was ordered, Bennett J. found that the document met the likely or probably relevant test as it related to investigatory matters and positions taken by defence counsel in terms of the charges.
- [14] Defence counsel argues that in *Basi*, it is possible that the documents not ordered disclosed may have lacked any connection to that case whatsoever. I do not agree with this conclusion. Justice Bennett ordered disclosure where a document was likely or probably relevant to investigatory matters and to positions taken by defence counsel in terms of the charges. I take that to mean that the documents not ordered disclosed were consequently lacking investigatory features or correlating to counsel position on charges. While it is possible that they had no connection to the matter, likely there was some correlation, having been

provided to the court for review. In any event, the documents I reviewed were for the purpose of assisting the Crown in cross-examination of Dr. Gatner and not related to investigatory matters or something that should be disclosed in accordance with Stinchcombe.

- [15] In the case at bar, I am satisfied that the materials the applicant seeks disclosure of were prepared to assist the Crown in understanding the expert, Dr. Gatner's evidence and how to cross-examine the expert.
- [16] I find nothing here that would be disclosable on a likely or probably relevant test. The documents sought are clearly covered by litigation privilege, having been created for the purpose of preparation for cross-examination.

"Maisonville J."

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Prepared on 28 October 2026 · Esheria