
CANADA / JUDGMENT

Re: Elsie Jones

2009 BCSC 1306

COURT

Supreme Court of British Columbia

DECIDED

25 September 2009

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2009 BCSC 1306 Re: Elsie Jones

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re: Elsie Jones,

2009 BCSC 1306

Date: 20090925

Docket: S084337

Registry: Vancouver

Between:

The Canada Trust Company

Petitioner

And:

Maureen Rose Ringrose

Respondent

And:

Ronald Jones and Marvin Jones

Respondents

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

In Chambers

Counsel for the Petitioner, The Canada Trust Company, as Committee of the Estate of Elsie Jones:

D.S. Hwang

Counsel for the Respondent, Maureen Ringrose:

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A.E. Frisby

Counsel for the Respondents Ronald Jones and Marvin Jones:

H.L. Jones

V.H. Stewart

Place and Date of Hearing:

Vancouver, B.C.

January 5-7, 2009

and July 24, 2009

Place and Date of Judgment:

Vancouver, B.C.

September 25, 2009

Background

- [1] This is an application for directions regarding disclosure of an estate file in the context of a petition ("the Petition") to set aside a conveyance from Elsie Jones to Maureen Ringrose ("Ringrose"). The action is fully described in *Re Elsie Jones*, 2008 BCSC 1268.
- [2] The position of the respondents Ronald Jones and Marvin Jones is that the conveyance should be set aside as it came about arising from undue influence exerted by Ringrose on her mother, or the conveyance arose at a time when Elsie Jones was not competent. At the time of the conveyance Elsie Jones was represented by a solicitor ("the Solicitor").
- [3] During the course of cross-examination regarding the conveyance the Solicitor acknowledged that discussions between himself and his client included estate matters and he subsequently met with his client regarding her estate. Ringrose says that these events occurred so close in time to the conveyance that they may have a bearing on the matters in issue in the Petition.
- [4] The Solicitor says that the file is subject to solicitor-client privilege. The Solicitor also has a duty of confidentiality in relation to his client's affairs, so that he would not reveal the contents of the file, in any event, absent a court order.

- [5] The initial position of the Respondents was that The Canada Trust Company, the Committee of the Estate ("Canada Trust"), should review the file and determine relevance, and that privilege had been waived. That position was altered and the plaintiff took the position that the Court should review the file for relevance. The respondents did not proceed with their initial position that privilege had been waived. No position regarding the application is taken by Ringrose.
- [6] The Committee of the Estate took the position that the court should review the file to determine relevance. As I interpret its submissions, it did not waive privilege. The Solicitor took the position that the file is confidential, but also that it is subject to solicitor-client privilege and that privilege has not been waived.

Discussion

- [7] There is a duty on lawyers to keep client information confidential. This duty of confidentiality is distinct from and broader than the duty of non-disclosure arising from solicitor-client privilege.
- [8] As noted by the learned authors of *The Law of Evidence in Canada*, 2nd Edition, (Toronto, Butterworths Canada Inc., 1999), at page 716, confidentiality is the "bedrock principle of legal ethics".
- [9] The prescription of confidentiality applies to all information passing within the solicitor-client relationship intended to be confidential and not waived by the client. That said, confidentiality alone does not make a communication privileged from disclosure: *Strata v. Humber River Regional Hospital* (2000), 193 D.L.R. (4th) 680 at p. 698 (Ont. C.A.).
- [10] On the other hand, solicitor-client privilege is a substantive rule of law which protects communications between lawyer and client: see *R. v. McClure*, 2001 SCC 14 at para. 17, applied in *Skogstad v. The Law Society of British Columbia*, 2007 BCCA 310. As noted in *Skogstad*:
- [6] Solicitor-client privilege is a substantive rule of law, a core legal value. The protection of the confidentiality of communications between a lawyer and his or her client is fundamental to our legal system and the privilege of such communications is a fundamental right (*Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Descôteaux et al. v. Mierzewski*, [1982] 1 S.C.R. 860; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Ontario (Ministry of Correctional Services) v. Goodis*, [2006] 2 S.C.R. 32, 2006 SCC 31).
- [7] The purpose of solicitor-client privilege is to ensure that a client may communicate openly and frankly with his or her lawyer, without risking disclosure to others, whether voluntary or compelled, of information imparted to the lawyer in order to obtain legal advice (*Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (Eng. C.A.), cited in *Smith v. Jones*, [1999] 1 S.C.R. 455 at para. 45).

[11] In order for a communication to be privileged it must arise from a communication between lawyer and client where the client seeks legal advice. An assertion of solicitor-client privilege triggers a prima facie presumption of inadmissibility: *R. v. Gruenke* (1991), 8 C.R. (4th) 368.

[12] The right to assert or waive solicitor-client privilege belongs to the client. A committee stands in the place of an incapable person, and therefore has the authority to make decisions with respect to the patient's property, including legal files (section 15, Patients Property Act, R.S.B.C. 1996, c.349):

15 (1) Subject to section 16,

- (a) the committee of a patient as defined by paragraph (a) of the definition of patient in section 1 has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and
- (b) the committee of a patient
 - (i) declared to be incapable of managing his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind,
 - (ii) declared to be incapable of managing himself or herself has the custody of the person of the patient, and
 - (iii) declared to be incapable of managing himself or herself or his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and as well the custody of the person of the patient.

[13] Thus, in *Derlago v. Derlago*, [1994] B.C.J. No. 3333, a firm of solicitors objected to the disclosure of documents prepared in connection with the plaintiff's will. Master Joyce ordered that the documents be disclosed because they were relevant and because the committee of the plaintiff had waived the privilege.

[14] Lawyers working papers and accounts containing descriptions of services are protected by privilege: see *Donald J., as he then was, in Southern Railway of British Columbia Ltd. v. Deputy Minister of National Revenue* (1990), 91 D.T.C. 5081 (B.C.S.C.).

The Documents

[15] The documents contained in the Estate File of Elsie Jones are:

- Correspondence between the solicitor and Elsie Jones relating to the preparation of her will;
- The solicitor's statement of account, containing descriptions of services rendered;
- Draft documents prepared by the solicitor for Elsie Jones' will; and
- Communications between the solicitor and his staff related to the preparation of the will.

Relevance

- [16] In my opinion, both Jones and Ringrose, albeit from quite different perspectives, can successfully argue that the documents in question contain information that might be relevant to the issues before the court, within the extended meaning of "relevance", required for disclosure by Rule 26.

Solicitor-Client Privilege

- [17] Courts have repeatedly held that communications subject to solicitor-client privilege should only yield to disclosure in the most clearly defined circumstances. In *Smith v. Jones* (1999), 132 C.C.C. (3d) 225, 169 D.L.R. (4th) 385, the court noted that the decision to exclude evidence because it is protected by solicitor-client privilege is effectively a policy decision, such that other societal values can prevail in certain circumstances.

- [18] Thus, the field of exceptions is not limited to currently recognized exceptions, such as questions where innocence is at stake, where there are criminal communications, or where safety of members of the public is at risk and a breach of privilege may prevent harm.

- [19] In *Smith*, the Supreme Court of Canada reviewed the basis of the substantive right:

45 The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1874), 2 Ch. D. 644 (Eng. C.A.) at p. 649, the importance of the rule was recognized:

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 recourse to the assistance of professional lawyers, ... 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 ... 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.

46 Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both

integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

47 As Lamer C.J. stated in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.) at p. 289:

The prima facie protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.

48 The solicitor-client privilege was originally simply a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify. Yet now it has evolved into a substantive rule. As Dickson J. (as he then was) wrote in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.) at p. 836, "Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room."

49 Lamer J. (as he then was) expanded on this statement in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.) at p. 875, when he discussed the content of this substantive rule:

It is quite apparent that the Court in [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

1. The confidentiality of the communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

50 As the British Columbia Court of Appeal observed, solicitor-client privilege is the privilege "which the law has been most zealous to protect and most reluctant to water down by exceptions". Quite simply it is a principle of fundamental importance to the administration of justice.

[20] In McClure Major J., speaking for the court said:

35 However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

Conclusion

- [21] In the circumstances it is appropriate that the Solicitor raises the issue of confidentiality. Confidence alone, however, must defer to relevance. The information in the Estate File meets the test of relevance within the meaning of Rule 26. The question of solicitor-client privilege is for the client, which in this case might be exercised by the Committee.
- [22] In my view, absent waiver of solicitor-client privilege, there are no clearly defined circumstances that give rise to an exception appropriate in this case. Even it were possible to construct a clear definition, it is not apposite to do so in this court or in this case.
- [23] In the result, while the estate file meets the test of relevance necessary for disclosure pursuant to Rule 26, it is subject to solicitor-client privilege, which at this point has not been waived. It is therefore not producible in this proceeding.

"The Honourable Mr. Justice Savage"

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