

SUPREME COURT OF YUKON

Citation: *Coyne v. Coyne*, 2014 YKSC 20

Date: 20140331
S.C. No. 06-D3902
Registry: Whitehorse

Between:

JAMES ALLAN COYNE

Plaintiff

And

VIRGINIA RUTH COYNE

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman and Meagan Lang
F. Ean Maxwell, Q.C., and Angela Dunn

Counsel for the plaintiff
Counsel for the defendant

REASONS FOR JUDGMENT (Litigation Privilege)

INTRODUCTION

[1] Counsel for the plaintiff claims litigation privilege for certain documents counsel for the defendant seeks to admit.

[2] The documents consist primarily of email correspondence between counsel for the plaintiff and her witness who is under cross-examination by counsel for the defendant. The witness is a chartered accountant and tax specialist who advises the plaintiff on organizing his business interests which are at issue in this family law case.

[3] The witness is crucial for both the plaintiff and defendant as he was instrumental in creating certain trusts following the separation of the plaintiff and defendant.

BACKGROUND

[4] Production of documents relating to the business interests of the plaintiff has been the subject of an ongoing dispute between counsel for the parties.

[5] The plaintiff commenced the divorce proceeding on January 9, 2007. There was an initial court order dated April 12, 2007, requiring the plaintiff to produce documents and prohibiting him from selling or disposing of assets.

[6] Despite that court order, there were several years of inactivity in document production until 2010 when counsel for the plaintiff objected to the production of documents relating to certain assets that were held in a trust. There was a change of counsel for the defendant when one lawyer retired, and the present counsel for the defendant began to request significant document production in 2012. There were delays in document production and ultimately this Court made specific and detailed orders for the production of extensive documents on April 15, 2013 and May 30, 2013.

[7] The case proceeded to trial in November 2013 and has continued on intermittent dates to January 14, 2014, when it became apparent during the examination in chief of Norm McIntyre that he had more documents to produce. The trial was adjourned to permit counsel for the defendant to inspect the documents.

[8] On January 15, 2014, counsel for the plaintiff requested an adjournment to prepare Mr. McIntyre in light of the significant new documents. Counsel for the defendant requested that counsel for the plaintiff produce additional documents identified at the witness' office. The trial was adjourned on the condition that the plaintiff

pay for the production of transcripts for the previous evidence. Counsel also agreed on providing advanced costs from the plaintiff to the defendant.

[9] Counsel for the plaintiff produced the documents, which included the documents over which she now claims litigation privilege, by way of a memory stick attached to a letter dated February 5, 2014. That letter made no claim for litigation privilege. Some of the emails produced were marked with the standard privilege claim and some were not.

[10] By letter dated February 13, 2014, counsel for the defendant requested the plaintiff's counsel to reply to correspondence sent on February 3, 2014, inquiring whether it was her intention to not produce certain documents. The February 3, 2014 letter referred to specific documents of Mr. Fekete, the plaintiff's lawyer who prepared some of the trust documentation.

[11] On March 4, 2014, counsel for the defendant delivered their client's 7th Amended and Supplemental List of Documents specifically including at paragraph 9.2(a) to (j) reference to the memory stick and additional requested disclosure.

[12] By return letter on March 4, 2014, counsel for the plaintiff claimed privilege over documents listed in 9.2 (g) and 9.2 (h), on the basis of Mr. Fekete's claim for privilege and her claim for privilege for email between herself and Mr. Fekete. There was no claim for privilege for the documents now in issue.

[13] By letter dated March 7, 2014, counsel for the plaintiff responded to counsel for the defendant's letter of February 13, 2014 setting out that she may claim privilege for an entire email or a particular email.

Litigation Privilege

[14] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, the Court explained the distinction between solicitor-client privilege and litigation privilege. Solicitor-client privilege attaches to confidential communications between the solicitor and client and is sometimes referred to as legal advice privilege. It is “as close to absolute as possible” and “a necessary and essential condition of the effective administration of justice” (paras. 24 – 26).

[15] Litigation privilege relates to information and materials gathered or created by the lawyer in the litigation context. Unlike solicitor-client privilege, which is not time limited, litigation privilege expires when the litigation is concluded (paras. 27 – 28).

[16] The *Blank* decision goes on to say that litigation privilege would not protect from disclosure where there has been abuse of process, or significant blameworthy conduct or actionable misconduct in relation to the proceeding (paras. 44 and 45). Neither of these categories is applicable to the case at bar.

Waiver of Privilege

[17] Waiver of privilege has been addressed in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.). McLachlin J., as she then was, stated that the possessor of the privilege must know of the existence of the privilege and voluntarily evince an intention to waive that privilege. Waiver may also occur in the absence of intention to waive where fairness and consistency so require. In some cases, there will be a manifestation of voluntarily intention to waive a portion of a document which then, for fairness and consistency, may require complete waiver.

[18] There are also considerations surrounding inadvertent disclosure, in which there may not be a waiver of privilege. In this case, a judge exercises discretion to determine whether the privilege has been waived. This principle is set out by Bennett J., as she then was, in *R. v. Basi*, 2009 BCSC 777. In that case, the documents at issue had initially been inadvertently disclosed and the inadvertence acknowledged. However, as a result of subsequent repeated disclosure, Bennett J. found if there was not an express intention to waive, there was certainly an implied waiver of privilege (para. 21).

[19] It is also relevant for this case that there are some similarities between this witness and an expert witness. It is well-established that the working file or papers in possession of an expert should be produced. Finch J., as he then was, put it this way in *Vancouver Community College v. Phillips, Barrett* (1987), 20 B.C.L.R. (2d) 289 (S.C.), at para. 28:

It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that previously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his consistency, reliability, qualifications and other matters touching on his credibility.

[20] The witness in this case, while not called as an expert, clearly has a great deal of expertise and knowledge about the plaintiff's business and organization as well as numerous business documents that had to be disclosed on behalf of his client.

DISPOSITION

[21] The relevant *Rules of Court* are found in Rule 25 entitled “Discovery of Documents”:

Disclosure

(3) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this rule whether or not privilege is claimed in respect of the document.

[22] This is the cardinal rule that facilitates the litigation process and avoids costly delays.

Production for inspection

(4) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in this rule unless privilege is claimed in respect of the document.

...

Affidavit of documents

(6) A party to an action shall, within 30 days after the close of pleadings under Rule 23(5), deliver to every other party an affidavit of documents in Form 110 or 111 disclosing to the full extent of the party’s knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party’s possession, control or power.

(a) The affidavit shall list and describe, in separate schedules, all documents relating to any matter in issue in the action

(i) that are in the party’s possession, control or power and that the party does not object to producing;

(ii) that are or were in the party’s possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(iii) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

...

Court may order production

(14) The court may at any time, on the application of a party, order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

Court may inspect to determine claim of privilege

(15) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

[23] I have reviewed the documents in question, and they are relevant. The only issue is whether the privilege should be upheld.

[24] In my view, in the case at bar, the plaintiff's counsel has never made a claim for privilege as required by Rule 25, even after it was expressly inquired about by counsel for the defendant. Accordingly, the claim for litigation privilege was not expressly made as required by the *Rules*.

[25] In the alternative, the failure to expressly claim litigation privilege, in the face of an explicit request for the plaintiff's counsel to state her position, amounts at the very least to an implied intention to waive privilege.

[26] In my view, the disclosure cannot be described as inadvertent. However, if it is inadvertent disclosure, in the context of this case, its disclosure history, and this particular witness, I would exercise my discretion to order disclosure.

[27] To summarize, the documents for which counsel for the plaintiff at this late date claims litigation privilege should be disclosed as they are both relevant and admissible.

VEALE J.