

2005 MBCA 106
Manitoba Court of Appeal [In Chambers]

Histed v. Law Society (Manitoba)

2005 CarswellMan 325, 2005 MBCA 106, [2005] M.J. No. 327, 142 A.C.W.S.
(3d) 874, 18 C.P.C. (6th) 230, 195 Man. R. (2d) 224, 351 W.A.C. 224

**ROBERT IAN HISTED (Appellant / Respondent) and THE
LAW SOCIETY OF MANITOBA (Respondent / Applicant)**

Steel J.A.

Heard: July 27, 2005

Judgment: July 27, 2005 *

Written reasons: September 26, 2005

Docket: AI 05-30-06114

Counsel: J.M. Holmstrom for Respondent / Applicant

Subject: Civil Practice and Procedure; Evidence

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Panel of Discipline Committee of Law Society of Manitoba found H guilty of professional misconduct in relation to his representation of complainant A — H appealed decision — Law society brought motion to have Court of Appeal file sealed on grounds that parts of material contained testimony relating to communications covered by solicitor-client privilege, and that other parts of file contained information that was covered by confidentiality agreement — Motion granted — In general, all court proceedings and all material filed in support of those proceedings should be open to public — Solicitor-client privilege is exception to "open court" principle — A expressly waived her solicitor-client privilege, but panel concluded there was possibility that waiver might affect her ongoing legal proceedings and that she did not fully appreciate consequences of her waiver — Therefore, waiver was not clear and unambiguous — Portions of transcript, factums and appeal book relating to solicitor-client communications sealed pursuant to s. 81(2) of Legal Profession Act — Letters containing substance of negotiations between H on behalf of another client and solicitor representing X, partner in law firm whose members were on Complaints Investigation Committee, fell into category of settlement negotiations — Confidentiality was fundamental part of negotiations between H's client and X, and settlement itself contained agreement as to confidentiality — Given important goal of encouraging settlements, balance favoured protecting integrity of settlement over public's right to have access to information — Portions of factums and appeal book that related to those matters sealed pursuant to s. 77(1) of Court of Queen's Bench Act.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Waiver

Panel of Discipline Committee of Law Society of Manitoba found H guilty of professional misconduct in relation to his representation of complainant A in her dealings with Winnipeg Child and Family Services — H appealed decision — Law society brought motion to have Court of Appeal file sealed on ground that parts of material contained testimony relating to communications covered by solicitor-client privilege which had not been waived by A — Motion granted — In general, all court proceedings and all material filed in support of those proceedings should be open to public — Solicitor-client privilege is exception to "open court" principle — For waiver of solicitor-client privilege to be effective, client

must have clearly and conscientiously intended to waive privilege — Such clear intention should include appreciation of consequences of waiver — When A testified before panel, chair became concerned that she would refer to manner in which file was handled and, in view of ongoing proceedings with respect to apprehension of her children, asked her if she was waiving her privilege — A expressly waived her solicitor-client privilege, but panel concluded there was possibility that waiver might affect her ongoing legal proceedings and that she did not fully appreciate consequences of her waiver — Therefore, waiver was not clear and unambiguous — There was no reason to differ from panel's conclusion — Portions of transcript, factums and appeal book relating to solicitor-client communications were ordered sealed pursuant to s. 81(2) of Legal Profession Act.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — General

Panel of Discipline Committee of Law Society of Manitoba found H guilty of professional misconduct — H appealed decision — Law society brought motion to have Court of Appeal file sealed on ground that parts of file, relating to different client and including H's factum, contained information that was covered by confidentiality agreement — Motion granted — H alleged that reasonable apprehension of bias arose because just before charges were laid against him, he represented another client in civil matter against X, partner in law firm whose members were on Complaints Investigation Committee — Civil matter was settled and parties signed confidentiality agreement barring disclosure of details surrounding allegations or terms of settlement to public — "Without prejudice" and confidential letters containing substance of negotiations between H and solicitor representing X were not protected by solicitor-client privilege, but fell into category of settlement negotiations — Confidentiality was fundamental part of negotiations between client and X, and settlement itself contained agreement as to confidentiality — Very sensitive facts underlying allegations against X came to light only because of disciplinary proceedings against H, and was not information to which public would normally have had access — Confidentiality surrounding settlement negotiations supported goal of encouraging settlements — Such communications are generally protected from disclosure on basis of settlement negotiation privilege — Portions of factums and appeal book that related to those matters were ordered sealed pursuant to s. 77(1) of Court of Queen's Bench Act.

Table of Authorities

Cases considered by *Steel J.A.*:

Apotex Fermentation Inc. v. Novopharm Ltd. (1994), [1994] 7 W.W.R. 420, 95 Man. R. (2d) 241, 70 W.A.C. 241, 29 C.P.C. (3d) 58, 56 C.P.R. (3d) 20, 1994 CarswellMan 142 (Man. C.A.) — considered

Costello v. Calgary (City) (1997), 1997 CarswellAlta 758, 62 L.C.R. 161, 152 D.L.R. (4th) 453, [1998] 1 W.W.R. 222, 13 R.P.R. (3d) 145, 209 A.R. 1, 160 W.A.C. 1, 53 Alta. L.R. (3d) 15, 41 M.P.L.R. (2d) 155, 38 C.C.L.T. (2d) 101 (Alta. C.A.) — referred to

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168, 1994 SCC 102 (S.C.C.) — considered

N. (F.), Re (2000), 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. Fosty (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285 (S.C.C.) — considered

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — considered

Scott v. Scott (1913), [1913] A.C. 417, [1911-13] All E.R. Rep. 1, 82 L.J.P. 74, 109 L.T. 1, 29 L.T.R. 520, Sol. Jo. 498 (U.K. H.L.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522 (S.C.C.) — followed

Smith v. Jones (1999), 1999 SCC 16, 1999 CarswellBC 590, 1999 CarswellBC 591, 169 D.L.R. (4th) 385, (sub nom. *Jones v. Smith*) 60 C.R.R. (2d) 46, 132 C.C.C. (3d) 225, 22 C.R. (5th) 203, (sub nom. *Jones v. Smith*) 236 N.R. 201, (sub nom. *Jones v. Smith*) 120 B.C.A.C. 161, (sub nom. *Jones v. Smith*) 196 W.A.C. 161, [1999] 1 S.C.R. 455, 62 B.C.L.R. (3d) 209, [1999] 8 W.W.R. 364 (S.C.C.) — considered

Solosky v. Canada (1979), (sub nom. *Solosky v. R.*) [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 1979 CarswellNat 630, 1979 CarswellNat 4 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Ontario (2005), 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614 (S.C.C.) — considered

Vancouver Sun, Re (2004), [2004] 2 S.C.R. 332, 33 B.C.L.R. (4th) 261, 120 C.R.R. (2d) 203, [2005] 2 W.W.R. 671, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re*) 322 N.R. 161, 21 C.R. (6th) 142, (sub nom. *R. v. Bagri*) 184 C.C.C. (3d) 515, (sub nom. *R. v. Bagri*) 240 D.L.R. (4th) 147, (sub nom. *Application Under Section 83.28 of the Criminal Code, Re*) 199 B.C.A.C. 1, 2004 SCC 43, 2004 CarswellBC 1376, 2004 CarswellBC 1377 (S.C.C.) — followed

Statutes considered:

Court of Appeal Act, R.S.M. 1987, c. C240

Generally — referred to

s. 36(1) — considered

Court of Queen's Bench Act, S.M. 1988-89, c. 4

s. 77(1) — referred to

Legal Profession Act, S.M. 2002, c. 44

s. 78(1)(a) — considered

s. 78(2) — considered

s. 81(2) — considered

Rules considered:

Federal Court Rules, 1998, SOR/98-106

Generally — referred to

MOTION by respondent Law Society of Manitoba to seal Court of Appeal court file containing testimony relating to communications covered by solicitor-client privilege and information which was covered by confidentiality agreement.

Steel J.A.:

Introduction

- 1 The Law Society of Manitoba (the Law Society) brought a motion to have the Court of Appeal court file in this matter sealed.
- 2 The grounds for the motion were twofold. Parts of the material contained testimony relating to communications covered by solicitor-client privilege which, it was submitted, had not been waived by the complainant. Other parts of the file, relating to a different client, and including the appellant's factum, contained information which was covered by a confidentiality agreement and therefore, it was submitted, should also be sealed.
- 3 The appellant consented to the sealing order and did not appear at the hearing of the motion.
- 4 For the reasons that follow, I ordered the following documents contained in the appeal file to be sealed until the hearing of the appeal, presently scheduled for November 1, 2005:

(1) the transcript of the proceedings at the Law Society held November 8 and 9, 2004, from p. 46 to the end;

(2) the appeal book; and

(3) the factums filed by the parties.

- 5 At the hearing of this matter on the merits, the Law Society is free to make a motion for such other and/or further orders of confidentiality that it feels is appropriate.

Background

- 6 In the main appeal, Mr. Histed is appealing the decision of the Discipline Committee of the Law Society to suspend him from the practice of law for one month and to order him to pay costs in the amount of \$18,000. That decision has been stayed pending the appeal.

- 7 A panel of the Discipline Committee (the panel) found him guilty of two counts of professional misconduct related to his representation of Ms A in her dealings with Winnipeg Child and Family Services (WCFS). In his grounds of appeal, the appellant alleges a reasonable apprehension of bias in the make-up of the Complaints Investigation Committee. As well, he argues that the convictions, credibility findings and findings of fact are unreasonable and contrary to law.

Waiver of Solicitor-Client Privilege

- 8 Ms A, the complainant, testified during the proceedings before the panel. Early on in her testimony, the Chair became concerned that her testimony would contain references as to the manner in which the file was handled and the instructions she gave the appellant in his capacity as her lawyer. The Chair was particularly concerned because there were still ongoing proceedings between her and WCFS with respect to the apprehension of her children. The Chair asked her if she was waiving her privilege. Ms A was prepared to waive privilege, although her waiver lacked clarity.

- 9 For example, she seemed to think that closing the hearing would send a bad signal. She stated:

But I wouldn't necessarily be doing myself or anybody else any favours if it all got clandestine at this point.

10 The Chair remained concerned that she did not fully appreciate the consequences of her waiver. After a short recess, during which the matter was discussed among the panel members, the Chair ordered that the testimony continue *in camera*. This order was made pursuant to the authority of s. 78(1)(a) and s. 78(2) of *The Legal Profession Act*, S.M. 2002, c. 44 — Cap. L107. These sections provide as follows:

Exclusion of members of public

78(1) A committee, panel or court considering a complaint, charge or appeal under this Part may make an order excluding members of the public from a hearing if it thinks that

(a) exclusion is necessary to prevent the disclosure of information that is subject to solicitor-client privilege; ...

.....

How and when order can be made

78(2) The committee, panel or court may make the order on its own motion, or on the application of any person having an interest in the information to be disclosed. The order or application may be made before the hearing begins or at any time during the hearing.

11 The evidence seems to indicate that Ms A suffers from a mental illness. However, after reviewing the transcript, it appears that the reason for the order was not her illness, but the fact that the panel seemed to have been concerned that Ms A did not fully appreciate that the disclosure of her confidences might jeopardize her ongoing legal position with WCFS. In other words, that, as a lay person, she did not fully appreciate the legal consequences of agreeing to waive the privilege.

12 The Law Society has now moved in chambers to seal the transcript of the Law Society discipline hearing on the same basis; that is, it would disclose solicitor-client communications.

13 I am aware that, generally, all court proceedings and all material filed in support of those court proceedings should be open to the public. Those seeking to prevent disclosure bear the onus of demonstrating, as a matter of principle, that disclosure ought not to be made. Sealing orders, as well as publication bans, engage the "open court" principle, freedom of expression and freedom of the press, related concepts that are at the foundation of a free and democratic society. A sealing order curtails the public's right to know and judicial accountability.

14 The open court principle was set out in the House of Lords decision of *Scott v. Scott*, [1913] A.C. 417 (U.K. H.L.), and is now considered authority for the proposition that, subject to certain exceptions, courts must, as between parties, administer justice in public, "both in the proceedings of the dispute, and in the material that is relevant to its resolution" (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41 (S.C.C.), at para. 1, *per* Iacobucci J.). See also, *Apotex Fermentation Inc. v. Novopharm Ltd.* (1994), 95 Man. R. (2d) 241 (Man. C.A.) at paras. 28-29.

15 The Supreme Court of Canada has repeatedly emphasized the importance of the open court principle, most recently in the case of *Vancouver Sun, Re*, [2004] 2 S.C.R. 332, 2004 SCC 43 (S.C.C.) (at paras. 23 and 25):

This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal, supra*, at p. 1336.

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)*, *supra*, 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.

16 But, as Justice Huband pointed out in *Apotex Fermentation Inc.* (at paras. 30-31):

Both the **McPherson** case [[1936] A.C. 177 P.C.] and the **Scott** case make it clear that there are exceptions to the general rule that the courts must be open to all.

This is all consistent with the provisions of ss. 76 and 77 of the **Court of Queen's Bench Act** [S.M. 1988-89, c. 4 - Cap. C280], which calls for open public hearings and open court files, but allows exceptions where there is a "possibility of serious harm or injustice" were the hearing to be open to the public.

17 The jurisdiction to seal court documents in this case may arise in one of two ways. Section 81(2) of *The Legal Profession Act* states as follows:

Disclosure of information in judgment

81(2) In giving reasons for judgment on an application made or an appeal taken under this Act, the court shall take all reasonable precautions to avoid disclosing any information that is subject to solicitor-client privilege and shall, if appropriate, order that the relevant court records be sealed.

18 Although this section refers to a time period when reasons for judgment are given in a matter, giving the section a practical interpretation, it would not make sense to seal court records after judgment if the public had had access to them before judgment and the information had already been disclosed. That would be akin to sealing the barn door after the cow had fled, so to speak.

19 Alternatively, and sufficient for our purposes, *The Court of Queen's Bench Act*, S.M. 1988-89, c. 4 — Cap. C280, gives the court jurisdiction to seal confidential documents under s. 77(1), which states:

Sealing confidential documents

77(1) The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

20 *The Court of Appeal Act*, R.S.M. 1987, c. C240, and rules do not address the power of this court to seal documents filed in court proceedings. Where such is the case, the court is instructed to apply the practice in the Court of Queen's Bench. Section 36(1) of *The Court of Appeal Act* provides that in all matters not expressly provided for in *The Court of Appeal Act* and rules, the practice and procedure of the Court of Queen's Bench may be adopted and applied.

21 Section 77(1) of *The Court of Queen's Bench Act* provides the court with a general power to declare that any document filed in a civil proceeding is confidential and must be sealed. The reach of s. 77(1) goes beyond privileged communications and may be used in any exceptional case where it can be demonstrated that serious harm or injustice would result were the documents to remain open to the public.

22 Exceptions to the open court principle, where the possibility of serious harm or injustice to a person justifies a departure, includes situations where courts have identified social values of superordinate importance to society that justify curtailment of public accessibility. Solicitor-client privilege is one of those exceptions.

23 The importance of solicitor-client privilege to the administration of justice cannot be doubted. See *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), at 289. Although it was originally a rule of evidence protecting communications only to the extent that a lawyer could not be forced to testify, it has now evolved into a substantive rule of law. See *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 836.

24 In *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), Cory J. wrote that solicitor-client privilege is "the highest privilege recognized by the courts" (at para. 44) and that "[q]uite simply it is a principle of fundamental importance to the administration of justice" (at para. 50). Indeed, the court indicated that disclosure of privileged communications should occur only where there was a clear, serious and imminent danger.

25 Of course, the privilege is that of the client, and once waived, the privilege is lost. Has Ms A waived her privilege here? There are two conditions needed to establish waiver:

(1) it must be demonstrated that the client knows of the existence of the privilege; and

(2) the client must demonstrate a clear intention to forego the privilege.

See Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths Canada Ltd., 1993) at 187.

26 Has there been a true voluntary intention to expressly waive entitlement to privilege? For the waiver to be effective, the client must have clearly and conscientiously intended to waive the privilege. Such a clear intention should include an appreciation of the consequences of waiver. There should be evidence of at least some appreciation of what waiving that privilege will mean. In many cases, the client's counsel will have an opportunity to carefully and fully advise the client of the consequences of the contemplated waiver.

27 In the present circumstances, however, Ms A and her counsel were now at odds and she was being asked to make a quick decision during the pressure of testifying. Thus, Ms A stated:

If I'd had a little more time or better yet, even a lawyer to consult about any of it ahead of time I might have been able to give a more definite opinion.

28 The panel, which had the advantage of seeing Ms A testify and asking her questions, concluded that there was a possibility that the waiver of her solicitor-client privilege might affect her ongoing legal proceedings and that she did not fully appreciate the consequences of her waiver. At the hearing of this motion, I was told that there are still ongoing legal proceedings which might be affected by the disclosure of these solicitor-client communications.

29 I see no reason to differ from the conclusion of the panel to the effect that Ms A has not waived her privilege. As privileged communications, this material would never have been open to the public in any case. Although it may be arguable whether the entire transcript need be sealed to effectively protect Ms A, at this point in time, given the fundamental importance attributed to solicitor-client privilege, I am prepared to acquiesce to the request of the Law Society and seal the transcript, beginning at p. 46. The situation might be different if I was being asked to seal the material for a longer period of time or if Ms A's legal matters were finalized.

Communications in Furtherance of Settlement

30 The appellant has argued that he had a reasonable apprehension that the disciplinary proceedings were tainted by bias because members of a certain law firm were on the Complaints Investigation Committee and were involved in citing him for conduct unbecoming a lawyer. The bias arises, he argues, *inter alia*, because just before the laying of the charges against him by the Complaints Investigation Committee of the Law Society, he had represented a client (not Ms A) in a civil matter against X, a partner with that same law firm. The civil matter against X ended in settlement, and X is no longer a partner at the law

firm. As part of the settlement, the parties signed a confidentiality agreement barring the disclosure of the details surrounding the allegations or the terms of settlement to the public.

31 The client is unnamed in the materials and will be referred to here for the sake of convenience as Mr. Jones. There is nothing to indicate that Mr. Jones waived privilege.

32 The question is whether an exchange of correspondence between lawyers which brings out the nature of the allegations made by Mr. Jones against X comes within the parameters of the privilege.

33 The letters at issue are attached as exhibits to the appellant's affidavit affirmed on October 25, 2004. They contain the substance of the negotiations carried out between the appellant and the solicitor representing X. There is also one letter from the managing partner of X's firm. Each of the appellant's letters were marked as being "without prejudice." The letters sent by X's lawyer were marked "personal and confidential." The letter sent to the appellant by the managing partner was not marked as being confidential, but was certainly sent within the context of the ongoing settlement negotiations. The final settlement letter also includes the final release in favour of X.

34 These letters are not communications between a solicitor and client, and therefore s. 81(2) of *The Legal Profession Act*, which speaks expressly of that type of privilege, would not apply.

35 However, the correspondence attached as exhibits to the appellant's affidavit do fall into the category of settlement negotiations. Settlement negotiations are protected from disclosure and are sometimes referred to as "settlement negotiation privilege" or "settlement privilege." Manes and Silver set out the general rule regarding communications for the purpose of settlement and comment on that rule (at p. 115):

Where there is a dispute in existence, the common law generally protects confidential communications made in the context of settlement negotiations conducted to resolve that dispute and accords privilege to them.

36 The basic conditions for recognizing the protection are met here in that a litigious dispute is in existence, the communications were made with the express or implied intention that they would not be disclosed to the court in the event negotiations failed and the purpose of the communication was an attempt to effect a settlement. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths Canada Ltd., 1999) at 810, citing *Costello v. Calgary (City)* (1997), [1998] 1 W.W.R. 222 (Alta. C.A.).

37 The protection afforded settlement communications is less stringent than that afforded solicitor-client privilege. It is not considered a substantive rule of law or a fundamental civil right. Consequently, a court will more likely carry out a balancing of interests to determine whether the circumstances justify a demand for production or, in our case, justify straying from the open court policy.

38 The decision of the Supreme Court of Canada in *Sierra Club of Canada* provides guidance in our attempt to balance the relevant interests. In that case, the court discussed when it would be appropriate to make an order that materials before the court remain confidential and shielded from public view. The court did not distinguish between the court proceedings of the dispute and the material relevant to its resolution. What was being sought in *Sierra Club of Canada* is similar to our case — a confidentiality order in respect of documents, but in that case, pursuant to the Federal Court Rules. The order would prevent the dissemination of the confidential documents to the public, but there would be no restriction on public access to the proceedings and the documents would be available to the parties and the court. In *Sierra Club of Canada*, this type of order was considered a fairly minimal intrusion.

39 Iacobucci J. discussed the proper analytical approach to be applied in the exercise of judicial discretion. Such analytical approach should begin with the principles set out by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although *Dagenais* dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, the similarities are such that the Supreme Court in *Sierra Club of Canada* indicated that the *Dagenais*

framework was to be used in all contexts tailored to the specific rights and interests engaged in the case. See also, *Toronto Star Newspapers Ltd. v. Ontario* (2005), 197 C.C.C. (3d) 1, 2005 SCC 41 (S.C.C.), at paras. 7-8.

40 Iacobucci J., in *Sierra Club of Canada*, stated that a confidentiality order would be appropriate only where such an order was necessary to prevent a serious risk to an important interest and the positive effects of the order outweighed its negative effects. So, the public interest in confidentiality must outweigh the public interest in openness. See *N. (F.), Re*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, *per* Binnie J.

41 With respect to the nature of the risk, three elements had to be satisfied:

(1) the risk had to be real and substantial;

(2) it had to be in the public interest to promote the interest at stake; and

(3) the judge had to not only consider reasonable alternatives to the order, but also how to restrict the order as much as possible while still preserving the valid interest. See also, *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.), at para. 36.

42 Confidentiality was a fundamental part of the negotiations between Mr. Jones and X, and the settlement itself contained an agreement as to confidentiality. The very sensitive facts underlying the allegations against X came to light only because of the disciplinary proceedings against the appellant, and this was not information that the public would normally have had access to.

43 Encouraging settlements is an important goal in the administration of justice. It is in the public's interest that as many legal disputes as possible be settled by the parties themselves in a consensual way. There is a growing recognition that alternative methods of dispute resolution can be faster, more cost effective for the parties and lead to a better result than court-imposed resolutions. The confidentiality surrounding settlement negotiations support that goal.

44 The present trend in the law is to increasingly provide a blanket privilege protecting the disclosure of all communications made in furtherance of a settlement from both the parties to that settlement and any third parties or strangers on the basis of a public policy promoting settlement out of court.

45 Taken together, the balance under these circumstances favours protecting the integrity of the settlement over the public's right to have access to the information.

Conclusion

46 I noted at the beginning of these reasons that all parties had consented to the sealing order. Although the fact that the appellant consented is a factor for the court to consider, it is not determinative in these types of matters. There are other interests to consider. Issues relating to freedom of expression and the interests of the public are also raised, and courts must ensure that the procedures adopted safeguard those interests as well.

47 At the hearing of the motion, I asked counsel for the Law Society to address the question of whether the media should be given notice of the motion. She persuaded me that formal notice need not be given in these circumstances in light of the fact that, in reverse of the normal situation, the material was already considered to be confidential and would not have ordinarily been in the public domain. As well, my order is of a temporary nature and expires in a matter of months.

48 Solicitor-client privilege can be waived by the client. For the waiver to be effective, the client has to have clearly and conscientiously intended to waive the privilege. Ms A did expressly waive the privilege during her testimony, but the panel, in effect, did not accept it because they were not convinced that she fully understood its consequences and, in particular, the consequences publication of the testimony might have on her ongoing legal proceedings. Therefore, her waiver was not clear and unambiguous. For the purposes of this motion, I agree with that conclusion and would seal those portions of the transcript, factums and appeal book that relate to solicitor-client communications.

49 "Without prejudice" and confidential letters sent back and forth between lawyers for the purpose of reaching a settlement of an ongoing or anticipated action are not protected by solicitor-client privilege. Accordingly, s. 81(2) of *The Legal Profession Act* does not apply.

50 Such communications are, however, generally protected from disclosure on the basis of settlement negotiation privilege, and increasingly, this privilege extends to third parties and strangers to the settlement. Consequently, given the various factors considered, it would be appropriate to seal those portions of the factums and appeal book that relate to those matters pursuant to s. 77(1) of *The Court of Queen's Bench Act*.

Motion granted.

Footnotes

* Affirmed at *Histed v. Law Society (Manitoba)* (2005), 2005 MBCA 127, 2005 CarswellMan 390 (Man. C.A.).

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