TAB 2

Transamerica Life Insurance Company of Canada v. The Canada Life Assurance Company et al.

[Indexed as: Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.]

Ontario Court (General Division), Sharpe J. December 15, 1995

Civil procedure — Motions — Evidence — Examination of witness for use on pending motion — Party seeking to conduct examination under rule 39.03 not having to show likelihood that examination will yield helpful evidence — Party merely required to show that examination will be on issue relevant to pending motion and that party to be examined is in position to offer relevant evidence — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03.

Civil procedure — Discovery — Privilege — Solicitor-client privilege — Production of one document from file not waiving privilege attaching to other documents in file unless produced document misleading without additional documents.

Civil procedure — Discovery — Confidentiality — Office of the Superintendent of Financial Institutions Act providing that information regarding business or affairs of financial institution obtained by Superintendent confidential — Act not applying to documents which existed before Act came into force — Statutory guarantee of confidentiality not applying to all documents which came into possession of OSFI after enactment of statute — Statutory promise of confidentiality not constituting absolute bar to compelling production of documents — Confidential information to be produced unless Slavutych v. Baker test met — Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.), s. 22.

Civil procedure — Discovery — Public interest immunity — Whether public interest immunity attaching to documents in hands of Superintendent of Financial Institutions.

The plaintiff brought an action against CLMS after suffering significant losses on mortgage investments. The plaintiff's position was that CLMS undertook to act on the plaintiff's behalf in arranging these mortgage investments and that CLMS owed it both contractual and fiduciary duties, which CLMS breached. CLMS was a wholly owned subsidiary of CLAC, which the plaintiff also sued. The plaintiff sought to attach liability to CLAC on the basis of CLAC's knowledge and control of CLMS. CLAC brought a motion for summary judgment to have the action against it dismissed. The plaintiff served a summons to witness pursuant to rule 39.03(1) of the Rules of Civil Procedure on H of the Office of the Superintendent of Financial Institutions ("OSFI") to examine him in connection with the pending motion for summary judgment. The summons required the production of virtually every communication between the defendants and the OSFI relating to CLMS from the time of its incorporation. The defendants moved to set aside the summons on the grounds that the information sought was not relevant to the issues to be decided on the motion and that the documents and information sought were subject to both common law and statutory confidentiality. The defendants were supported by the Attorney General of Canada, who also moved to quash the summons on the ground of confidentiality, public interest immunity and, if necessary, on the basis of certification pursuant to the *Canada Evidence*

Act, R.S.C. 1985, c. C-5, s. 37. The plaintiff argued that the terms of an undertaking given to OSFI when it began the business of acquiring and servicing mortgage investments and the terms on which CLMS was permitted by OSFI to act represented an important element which would assist it in establishing the capacity in which CLMS was acting, and that, as officers of CLAC were involved in establishing the terms of the undertaking and had knowledge of terms on which CLMS was permitted to carry on business, the undertaking represented an element linking CLAC to CLMS and the alleged breaches of duty committed by CLMS.

Held, the motion should be allowed in part.

A party seeking to conduct a rule 39.02 examination is not required to show some likelihood that the examination will yield evidence helpful to that party. A party resorting to a rule 39.02 examination is required only to show that the proposed examination will be on an issue relevant to the pending motion and that the party to be examined is in a position to offer relevant evidence.

The summons could not stand in its present form. Its scope was so broad that it would require production of documents not relevant to the summary judgment motion. However, the plaintiff had established a basis for sustaining the summons with respect to the terms of the undertaking and regulatory approval accorded to CLMS. If restricted to those issues, the documents to be produced and the proposed examination of H fell within what was permitted by rule 39.03. The summons should be read down accordingly.

Section 22 of the *Office of the Superintendent of Financial Institutions Act* provides that all information regarding the business or affairs of a financial institution that is obtained by the Superintendent is confidential. A similar provision is found in s. 672(1) of the *Insurance Companies Act*, S.C. 1991, c. 47. Neither provision had been enacted at the time CLMS was incorporated and regulatory approval given for its activities. The Acts did not apply retrospectively, nor did the statutory guarantee of confidentiality apply to all documents which came into the possession of OSFI after the enactment of the statutes. Even if the statutory promises of confidentiality did apply to the information sought here, a statutory promise of confidentiality did not constitute an absolute bar to compelling production of the documents and information in the possession and control of OSFI. Confidential information may be subpoenaed and introduced in evidence if ordered by a court. It must be produced unless the test laid down in *Slavutych v. Baker* is met.

The communications at issue originated in a confidence that they would not be disclosed. The element of confidentiality was essential to the full and satisfactory maintenance of the relation between the parties. Given the importance of the regulated institutions and the regulation thereof, the relation was one which ought to be sedulously fostered. That left the fourth element of the *Slavutych v. Baker* test (which also applied to the claims of public interest immunity): whether the injury that would inure to the relation by the disclosure of the communications would be greater than the benefit thereby gained for the correct disposal of the litigation. While as originally framed, the summons would require disclosure that could not be justified on this test, disclosure of information within the narrowed area of inquiry described above as relevant to the motion for summary judgment could be justified. Provided protection was accorded to disclosures to OSFI by third parties and disclosures by the defendants not relevant to the issue on the summary judgment motion, the interest asserted by OSFI was adequately protected.

There was also a motion by the plaintiff for the production of certain documents by the defendants in respect of which the defendants claimed solicitor-client priv-

ilege. The plaintiff argued that, by producing two documents to which solicitor client-privilege attached, the defendants waived that privilege for all the documents. The plaintiff failed to establish waiver. It is not the law that production of one document from a file waives the privilege attaching to other documents in the file. It must be shown that without the additional documents, the disclosed document is somehow misleading. That was not the case here.

Slavutych v. Baker, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. ¶14,263, 55 D.L.R. (3d) 224, **apld**

Biscotti v. Ontario Securities Commission (1990), 74 O.R. (2d) 119, 72 D.L.R. (4th) 385, 40 O.A.C. 129 (Div. Ct.), affd in part (1991), 1 O.R. (3d) 409, 76 D.L.R. (4th) 762, 45 O.A.C. 293 (C.A.), **consd**

Other cases referred to

Canada Metal Co. v. Heap (1975), 7 O.R. (2d) 185, 54 D.L.R. (3d) 641 (C.A.); *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters of Lloyd's of London* (1994), 28 C.P.C. (3d) 269, 135 N.S.R. (2d) 71, 386 A.P.R. 71 (S.C.); *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762 (S.C.)

Statutes referred to

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 37
Canadian and British Insurance Companies Act, R.S.C. 1985, c. I-12
Insurance Companies Act, S.C. 1991, c. 47, s. 672(1)
Loan Companies Act, R.S.C. 1985, c. L-12
Office of the Superintendent of Financial Institutions Act, R.S.C. 1985, c. 18 (3rd Supp.), s. 22
Securities Act, R.S.O. 1980, c. 466, s. 14 — now R.S.O. 1990, c. S.5

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 39.03(1)
Rules of Practice, R.R.O. 1970, Reg. 545, Rule 230

Authorities referred to

Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551, pp. 552-55
Hogg, P.W., *Liability of the Crown*, 2nd ed. (1989), p. 76
Manes, R.D., and Silver, M.P., *Solicitor-Client Privilege* (Markham: Butterworths, 1993), p. 191, para. 104
Wigmore on Evidence (McNaughton Rev., 1961), vol. 8, para. 2285, p. 260

MOTION to set aside a summons to witness under rule 39.03(1) of the Rules of Civil Procedure.

Robert Rueter and *Stephanie N. Willson*, for moving parties (defendants).

Paul J. Bates and *Simon A. Clements*, for responding party (plaintiff).

Peter Southey, for Attorney General of Canada.

SHARPE J.: — The defendants move to set aside a summons to witness to Henry Heft of the Office of the Superintendent of

Financial Institutions (O.S.F.I.). That summons was served by the plaintiff pursuant to rule 39.03(1) of the Rules of Civil Procedure to examine Mr. Heft in connection with a pending motion for summary judgment brought by the defendant The Canada Life Assurance Company (C.L.A.C.) to have the action against it dismissed. The summons requires the production of certain documents as well as an attendance to answer questions.

The defendants take the position that the summons should be set aside on the grounds that the information sought is not relevant to the issues to be decided on the motion for summary judgment and that the summons represents an attempt to obtain discovery from a third party. The defendants further submit that the documents and information sought are subject to both statutory and common law confidentiality. The defendants are supported by the Attorney General of Canada who also moves to quash the summons on grounds of confidentiality, public interest immunity and, if necessary, on the basis of certification pursuant to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 37, that the information sought should not be disclosed on the grounds of public interest.

There is also before me a motion by the plaintiff for the production of certain documents by the defendants which is resisted on grounds of solicitor-client privilege.

I. BACKGROUND

For the purposes of the motions before me, the issues in this complex action may be described as follows. The plaintiff's claim arises from a March 1981 "Mortgage Correspondent Agreement" between it and the defendant Canada Life Mortgage Services Ltd. (C.L.M.S.), a wholly owned subsidiary of C.L.A.C. The plaintiff alleges that, pursuant to this agreement, between 1983 and 1989, the plaintiff invested in over 50 commercial real estate properties in the total principal amount of approximately $120 million. A significant number of these mortgages went into default and the plaintiff claims losses in excess of $54 million. The plaintiff's position is that C.L.M.S. undertook to act on the plaintiff's behalf in arranging these mortgage investments and that C.L.M.S. owed it both contractual and fiduciary duties which C.L.M.S. breached. The plaintiff seeks to attach liability to C.L.A.C. on the basis of C.L.A.C.'s knowledge and control of C.L.M.S.

The defendants dispute the plaintiff's characterization of the capacity in which C.L.M.S. acted in relation to the investments made by the plaintiff. It is their position that C.L.M.S. acted at

all times as agent for the borrower and that there is no basis upon which the plaintiff can establish the alleged breach of fiduciary duty.

For the purposes of this motion, the crucial issue is the relationship between the defendants and O.S.F.I. C.L.M.S. was incorporated as a wholly owned subsidiary of C.L.A.C. in 1974 to carry on business as a mortgage correspondent and general financial agent. Because C.L.M.S. is a wholly owned subsidiary of C.L.A.C., regulatory approval for its activities was required pursuant to the *Canadian and British Insurance Companies Act*, R.S.C. 1985, c. I-12. O.S.F.I. and its predecessor, the Department of Insurance, bore regulatory responsibility during the relevant period.

The plaintiff specifically pleads in para. 7 of the statement of claim that an undertaking was provided to the Superintendent of Insurance in February 1975 when C.L.M.S. began the business of acquiring and servicing mortgage investments:

> 7. By an Undertaking in writing to the Superintendent of Insurance dated on or about February 18, 1975, CLMS undertook, pursuant to section 8 of the Life Companies Investment (Special Shares) Regulations, to:
>
> (i) provide the Superintendent of Insurance with copies of its financial statements and such other information concerning its affairs as he may from time to time request,
>
> (ii) not carry on any business
>
> (A) referred to in paragraphs 65(1)(a) and 65(1)(c) to (f) of the Act,
>
> (B) referred to in paragraph 65(1)(b) of the Act, except with the approval of the Superintendent, or
>
> (C) that is not reasonably ancillary to the business of insurance . . .
>
> . . . . . .
>
> (viii) not provide, except with the approval of the Superintendent, any service ordinarily required by The Canada Life Assurance Company unless it also provides them to that company.
>
> By these provisions, CLMS was to continue the business of acquiring and servicing mortgage investments which was formerly carried on by Canada Life for its own account.

The plaintiff's position is that the terms of that undertaking and the terms on which C.L.M.S. was permitted by O.S.F.I. to act represent an important element which will assist it in establishing the capacity in which C.L.M.S. was acting. The plaintiff further alleges that as officers of C.L.A.C. were involved in establishing the terms of the undertaking and had knowledge of terms on which C.L.M.S. was permitted to carry on business, the undertaking represents an element linking C.L.A.C. to

C.L.M.S. and the alleged breaches of duty committed by C.L.M.S. for purposes of liability.

The defendants take the position that there is no foundation for the argument that the terms of the undertaking to the Superintendent of Financial Institutions has the meaning or effect claimed by the plaintiff. The defendants submit that the undertaking is a "red herring" and irrelevant to the issue of the liability of C.L.A.C. Moreover, the defendants contend, with the support of the Attorney General of Canada who appears on behalf of O.S.F.I., that the information provided to O.S.F.I. and its predecessor was confidential and not the proper subject of a summons.

II. ANALYSIS

1. *Scope of the Summons*

The summons requires production of the following documents and information:

1. All correspondence, reports, filings, and documents of any nature whatsoever provided by The Canada Life Assurance Company, the incorporators of Canada Life Mortgage Services Ltd., Canada Life Mortgage Services Ltd., and any of their respective representatives (including, without limitation, legal counsel), to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) pertaining to the incorporation, organization and continuing existence of Canada Life Mortgage Services Ltd. at any time up to the present.

2. All correspondence, memoranda, reports, guidelines, instructions, policies, and any other documents whatsoever provided by the Office of the Superintendent of Financial Institutions, and all of its predecessors (including the Department of Insurance), to The Canada Life Assurance Company, incorporators of Canada Life Mortgage Services Ltd., Canada Life Mortgage Services Ltd., and to all of their respective representatives (including, without limitation, legal counsel) pertaining to the incorporation, organization and continuing existence of Canada Life Mortgage Services Ltd., at any time up to the present.

3. Without in any way limiting the generality of the items described in paragraphs 1 and 2, a copy of all documents of any nature whatsoever, of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) with respect to the objects of incorporation and business plan (narrative and financial) of Canada Life Mortgage Services Ltd.

4. Without in any way limiting the generality of the items described in paragraphs 1 and 2, a copy of any documents of any nature whatsoever of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) with respect to an Undertaking by the directors of Canada Life Mortgage Services Ltd., to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insur-

ance) concerning the permissible business activity of Canada Life Mortgage Services Ltd.

5. All memoranda, reports, guidelines, instructions, policies, manuals, and other documents of any kind or nature whatsoever of the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) pertaining to policies, procedures and guidelines for:

(a) the incorporation, organization, and continuing existence of a subsidiary of a Canadian life insurance company generally; and

(b) undertakings, guarantees, and any other agreements or undertakings whatsoever necessary or desirable in respect of a subsidiary of a Canadian life insurance company.

6. Without in any way limiting the generality of the foregoing, all memoranda, reports, guidelines, instructions, policies, manuals and other documents of any kind or nature whatsoever of the Office of the Superintendent of Financial Institutions and any of its predecessors (including the Department of Insurance) pertaining to policies, procedures and guidelines for:

(a) section 8 of the Life Companies Investment (Special Shares) Regulation as it existed and may have been amended from 1974 to the present;

(b) the meaning, definition, or description of "a business ancillary to the business of life insurance" or "reasonably ancillary to the business of life insurance" from 1974 to the present; and

(c) the permissible business activity of a subsidiary of a Canadian life insurance company.

The scope of the summons is very broad. It would require production and disclosure of virtually every communication between the defendants and the Office of the Superintendent of Financial Institutions relating to C.L.M.S. from the time of its incorporation to the present.

Mr. Heft has reviewed the O.S.F.I. files and prepared a list of documents which fall within the subject areas set out in the summons. The original list included 57 documents. O.S.F.I. has now waived privilege with respect to three documents which have been produced. O.S.F.I. now states that six of the documents on its original list are not relevant and claims solicitor-client privilege with respect to three documents. The plaintiff does not challenge O.S.F.I.'s claims with respect to these two classes of documents. The remaining documents fall into two categories. First are communications or documents provided by the defendants to O.S.F.I. The defendants have already produced 17 of the documents in this category. The defendants say the balance are irrelevant to the issues in this action. The second category is comprised of internal O.S.F.I. documents. These have not been seen

by the defendants. Accordingly, we are left with two categories of documents which remain at issue: (1) communications from the defendants not yet produced by the defendants which the defendants say are irrelevant and which both the defendants and O.S.F.I. say are confidential; and (2) internal O.S.F.I. documents which OSFI claims are confidential or subject to public interest immunity and which the defendants have not seen, but to the extent that such documents contain information provided to O.S.F.I. by the defendants, the defendants claim confidentiality.

In argument before me, Mr. Bates made no serious attempt to justify the extraordinary sweep of the summons as it now stands. He did submit, however, that it would be appropriate for me to narrow its terms to those matters which are relevant to the issue on the summary judgment motion.

While the defendants' position is that the summons should be set aside in its entirety, they did not resist the suggestion that it is open to me to narrow its scope to what is relevant.

2. *Summary Judgment Motion and Relevance*

As indicated, the plaintiff has pleaded that the undertaking given to O.S.F.I. upon the incorporation of C.L.M.S. and the terms insisted upon by O.S.F.I. in that regard provided a basis for attaching liability to C.L.A.C. in respect of the plaintiff's claim. It is not disputed that Mr. Heft is in a position to provide information as to the nature of the undertaking insisted upon and as to the manner in which the undertaking was interpreted by the regulatory authority to which C.L.A.C. and C.L.M.S. were subject.

The defendants contend that the undertaking and the terms of regulatory approval are irrelevant to the issue on the summary judgment motion. In my view, in light of the pleadings and the stage these proceedings have reached, it would be wrong for me to accept this argument and, in effect, decide now that the undertaking has no bearing on the liability of C.L.A.C. In making this argument the defendants are, in effect, anticipating the summary judgment motion and asking me now to decide the substantive issue of what the undertaking means and whether it provides any basis for attaching liability to C.L.A.C. The issue of the nature and meaning of the undertaking is put squarely in issue by the pleadings and the plaintiff clearly asserts the undertaking as one element in its claim against C.L.A.C. The summons is intended to permit the plaintiff to obtain evidence relevant to that issue. The time to decide the legal and factual issues pertaining to the undertaking and liability of C.L.A.C. is the motion for summary judgment proper, not this preliminary

procedural motion. I hardly need add that in reaching the conclusion that on the pleadings as they stand, the inquiry proposed by the plaintiff is permissible on grounds of relevance, I express absolutely no view as to the ultimate issue of whether the undertaking provides a basis in fact or law to attach liability to C.L.A.C. That is a matter to be dealt with on the summary judgment motion proper.

The defendants further submit that the plaintiff has failed to establish a reasonable factual basis for the proposed examination. They say that on the evidence before me, it is clear that the undertaking does not have the meaning the plaintiff attributes to it, nor is there any reason to suspect that the regulatory authority required or imposed any prohibition upon the activities of C.L.M.S. which could assist the plaintiff in fixing liability on C.L.A.C. They contend that the proposed examination of Mr. Heft is nothing more than an attempt to obtain discovery of a third party and a "fishing expedition" not permitted by the rules.

While I accept the proposition that rule 39.03 cannot be used to conduct third party discovery or "fishing expeditions", I do not accept the argument that that is what is involved here. In effect, the defendants are saying that a party seeking to conduct a rule 39.03 examination must show some likelihood that the examination will yield evidence helpful to that party. In my view, this places too heavy an onus on the party seeking to examine a witness. A party resorting to a rule 39.03 examination is required to show that the proposed examination will be on an issue relevant to the pending motion and that the party to be examined is in a position to offer relevant evidence. I am aware of no authority which requires the party to go one step further and show that the proposed examination will yield evidence helpful to that party's cause. In *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185, 54 D.L.R. (3d) 641 (C.A.), the leading case interpreting Rule 230 of the Rules of Practice, the provision corresponding to rule 39.03 at the time the case was decided, Arnup J.A. stated (at p. 192): "The evidence sought to be elicited must be relevant to the issue on the motion. If it is, there is a *prima facie* right to resort to Rule 230." It may well be that the plaintiff will not elicit helpful information from Mr. Heft, but in my view that possibility does not defeat their right to conduct the examination as the proposed area of inquiry is irrelevant to the plaintiff's theory of liability on the part of C.L.A.C.

It is equally clear, however, that in light of the present state of the pleadings and the allegations made by the plaintiff, the summons cannot stand in its present form. Paragraphs 1 and 2 would require the production of all information provided by the defen-

dants to O.S.F.I. from approximately 1974 to the present. This would almost certainly include matters not relevant to the summary judgment. However, it is also my view that the plaintiffs have established a basis for sustaining the summons with respect to the terms of the undertaking and regulatory approval accorded to C.L.M.S. If restricted to those issues, it is my view that the documents to be produced and the proposed examination of Mr. Heft do fall within what is permitted by rule 39.03. This subject area may be defined by narrowing the language of the summons as follows. Paragraphs 1, 2, 3 and 4 should be read down to include only material pertaining to:

(a) the objects of incorporation and business plan (narrative and financial) of Canada Life Mortgage Services Ltd. and

(b) an Undertaking by the directors of Canada Life Mortgage Services Ltd., to the Office of the Superintendent of Financial Institutions and all of its predecessors (including the Department of Insurance) concerning the permissible business activity of Canada Life Mortgage Services Ltd.

Paragraphs 5 and 6 relate to relevant material and may remain in their original form.

Accordingly, with respect to the first area of attack on the summons, that of relevance and abuse of process, I conclude that the summons should be limited in the manner I have described. What remains is subject to the other grounds relied on by the defendants and O.S.F.I. to defeat or limit the summons, confidentiality and public interest immunity, to which I now turn.

3. *Confidentiality*

(a) *Statutory Confidentiality*

The defendants and O.S.F.I. rely on the Office of the *Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), s. 22, which provides as follows:

> 22(1) All information
>
> (a) regarding the business or affairs of a financial institution or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament,
>
> . . . . .
>
> is confidential and shall be treated accordingly.

A similar provision in the *Insurance Companies Act*, S.C. 1991, c. 47, s. 672(1), is also relied on:

> 672(1) Subject to section 673, all information regarding the business or affairs of a company, society, foreign company or provincial company or persons dealing therewith that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament is confidential and shall be treated accordingly.

Neither provision had been enacted at the time C.L.M.S. was incorporated and regulatory approval given for its activities. Section 22 of the *Office of the Superintendent of Financial Institutions Act* came into force in July 1987 and the *Insurance Companies Act* provision came into force in June 1992. To the extent these statutory provisions do not afford protection, O.S.F.I. and the defendants also rely upon common law confidentiality, a subject I will deal with below.

In my view, these statutory provisions do not advance the case of the defendants or O.S.F.I. for two reasons. First is the question of whether the statutes apply to pre-enactment communications. The plaintiff relies on the role of interpretation against retrospective application. It was argued by the defendants and the Crown that it is not necessary to give the statutes retrospective application for them to apply. They contend that the statutory guarantee of confidentiality applies to any documents which come into the possession of O.S.F.I. after the enactment of the statute. I do not agree with this argument. It suffers from proving too much. It would mean that, however acquired, every bit of information in the possession of O.S.F.I. with respect to a financial institution subject to regulation becomes confidential. Such an extraordinary scope cannot, in my view, have been intended. The essence of confidentiality lies in the terms on which the information was provided, and if the statute is to apply to the information in question here, it would have to be given retrospective application.

Second, and perhaps more fundamental, even if these statutory promises of confidentiality do apply to the information sought here, in my view, a statutory promise of confidentiality does not constitute an absolute bar to compelling production of the documents and information in the possession and control of O.S.F.I. I see no reason to give statutory confidentiality a higher degree of protection that any other form of confidentiality. There is no reason why Parliament should be taken to have adopted the legal category of confidentiality without intending that category to have in its ordinary legal meaning and effect. It is well established that confidential information may be subpoenaed and introduced in evidence if ordered by a court. The general rule is that although

information is confidential, it must be produced unless the test laid down in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, [1975] 4 W.W.R. 620, is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (For discussion of statutes having this effect, see Bushnell, "Crown Privilege" (1973), 51 C.B.R. 551 at pp. 552-55.) I see no reason to impute an intention to accomplish that end where Parliament has adopted a recognized and established legal category which does not have that effect: see Peter W. Hogg, *Liability of the Crown*, 2nd ed. (1989), at p. 76:

> Many statutes contain provisions that expressly make information confidential . . . The scope of these provisions is a matter of interpretation in each case. Those provisions that specifically prohibit the introduction of evidence in court will obviously be effective to withhold the protected material from litigation. More commonly, however, such provisions prescribe confidentiality but say nothing specific about the introduction of evidence in court. Such provisions have been interpreted as not barring either the production of documents in court or oral testimony in court.

(Footnotes omitted)

Counsel for the Attorney General of Canada submitted that *Biscotti v. Ontario Securities Commission* (1990), 74 O.R. (2d) 119, 72 D.L.R. (4th) 385 (Div. Ct.) affirmed in part (1991), 1 O.R. (3d) 409, 76 D.L.R. (4th) 762 (C.A.), stands for the proposition that where information is made confidential by statute, disclosure cannot be compelled in any circumstance. In my view, the case stands for no such proposition. The case concerned the *Securities Act*, R.S.O. 1980, c. 466, s. 14:

> 14. No person, without the consent of the Commission, shall disclose, except to his counsel any information or evidence obtained or the name of any witness examined or sought to be examined under section 11 or 13.

The court concluded that the Commission had failed to consider the interests of the applicants in exercising the discretion conferred by the section and sent the matter back for further consideration. The court quite naturally focused on the discretion of the Securities Commission given the language of the statute. I am asked to infer from the fact that the decision turned on the specific discretion conferred that absent such language, statutory confidentiality is absolute. In my view, this is a strained reading of the case. The issue before me obviously did not arise as it was clear that the statute was intended to provide for a balancing of interests rather than an absolute rule precluding disclosure in any circumstances. I can find nothing in this case to suggest that the law is other than as described in the passage from Prof. Hogg's book, quoted above.

(b) *Common Law Confidentiality*

The affidavit evidence filed on behalf of both the defendants and O.S.F.I. to establish the terms upon which information was provided to O.S.F.I. and its predecessor by the defendants. That evidence clearly establishes that the information the defendants provided to the regulatory authorities in connection with the establishment of C.L.M.S. was given and received on the understanding that it would be treated as confidential. The assertion that this gives rise to a claim of common law confidentiality was not seriously questioned. However, as already noted, disclosure of confidential information may be compelled by summons unless the *Slavutych v. Baker* test is met, a matter to which I will turn in due course.

3. *Public Interest Immunity*

(a) *Common Law*

A claim of public interest immunity is also advanced. The affidavit of Mr. Heft was offered in support of this claim. Mr. Heft indicates that access to full and reliable information from financial institutions is essential to the regulatory work of O.S.F.I. and that such information will be forthcoming from financial institutions only if they are assured of confidentiality. Mr. Heft asserts further that the public interest in the effective regulation of financial institutions requires that a relationship of confidentiality with those institutions be fostered.

This evidence does appear to me sufficient to support a claim of public interest immunity. In light of the other grounds which provide the same level of protection to this material, namely, confidentiality and statutory public interest immunity, it is unnecessary to engage in a detailed analysis of this ground. Assuming the information is covered by common law public interest immunity, counsel for the Attorney General of Canada submitted that the same test is applied on the issue of whether production can be compelled on the basis that the interest in correct disposal of the litigation outweighs the public interest in maintaining confidentiality, namely, the fourth step of the test laid down by the Supreme Court of Canada in *Slavutych v. Baker, supra*, a matter to which I will return below.

(b) *Canada Evidence Act*

The *Canada Evidence Act*, s. 37(1) and (2), provides as follows:

> 37(1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body

with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Subject to sections 38 and 39 [not relevant here], where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

Counsel for the Attorney General of Canada indicated that if the court was not satisfied that the information in issue is privileged from disclosure by virtue of any of the above grounds, then pursuant s. 37 he certified orally on behalf of the Attorney General that the information should not be disclosed on the grounds of the public interest in maintaining confidentiality between O.S.F.I. and financial institutions. It is clear from the language of s. 37 that this claim must be assessed by the court in light of the interest in having the material disclosed. It was counsel's position that the balancing test to be applied is the same as the fourth and crucial step in the test mandated by *Slavutych v. Baker, supra*, to which I turn below in relation to the other claims of confidentiality. I note that I have not yet reviewed the documents in question, a possibility contemplated by s. 37(2).

As noted above, the disputed documents include internal O.S.F.I. memoranda. With reference to the claims of confidentiality and public interest immunity, counsel for the Attorney General of Canada indicated in response to a question I posed in argument that what was resisted by O.S.F.I. was disclosure of information provided to it by regulated financial institutions. Counsel indicated that information as to the position taken by O.S.F.I. or its predecessors as to the terms of regulatory approval or the interpretation of the undertaking would not be regarded as confidential and, hence, production of such information was not resisted.

4. *Application of the Balancing Test*

With reference to the claims of confidentiality, the next step in the analysis is to apply the four-step balancing test mandated by the Supreme Court of Canada in *Slavutych v. Baker, supra*, to determine whether the documents and information sought should be compelled here. As I have already indicated, the fourth step of this test is also applicable to the claims of public interest immunity. In *Slavutych v. Baker*, Spence J., adopting the approach advocated by *Wigmore on Evidence* (McNaughton Revision, 1961), vol. 8, para. 2285, described the test as follows (at p. 260):

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would enure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

(Emphasis in original)

In my view, the evidence establishes that the communications did originate in a confidence that they will not be disclosed and the first step is satisfied. I also find that the evidence establishes that the element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties. I further find that given the obvious importance of the regulated institutions and the regulation thereof, the relation is one which in the opinion of the community ought to be sedulously fostered.

This brings me to the fourth condition which requires me to weigh the injury that would inure to the relation by the disclosure of the communication against the benefit thereby gained for the correct disposal of the litigation. As noted above, this same test is applicable to the claims of public interest immunity, whether at common law or by virtue of statute.

It is my view that while, as originally framed, the summons would require disclosure that could not be justified on this test, disclosure of information within the narrowed area of inquiry described above as relevant to the motion for summary judgment can be justified.

I will deal first with information provided by the defendants to O.S.F.I. It is significant that the defendants have not taken the position that they refuse production of all the documents prepared for O.S.F.I. on the ground of confidentiality. As indicated, they have already produced 17 of the documents in the O.S.F.I. file and resist production of the other documents primarily on the ground that they are not relevant. In light of the pleadings, this is an entirely fair and proper position for the defendants to have taken in light of the issues arising in this action. However, this position is highly relevant to the fourth step of the balancing test. By producing 17 of the O.S.F.I. documents, the defendants have, in effect, admitted that they do not regard the confidentiality as absolute and that they are prepared to reveal information provided to O.S.F.I. where relevant to this action. It may well be that the defendants have already produced all of the documents from

the O.S.F.I. file relevant to the issues on this motion. That was certainly the position taken by Mr. Rueter in argument before me. Having taken that position, I fail to see how the defendants can now resist on grounds of confidentiality further production if indeed there are further O.S.F.I. documents which are relevant as defined by these reasons.

While O.S.F.I. also has an interest in asserting confidentiality, the weight of such claim must be assessed in light of the position of the party who is the principal beneficiary of the promise of confidence. In my view, provided protection is accorded to disclosures to O.S.F.I. by third parties and disclosures by the defendants not relevant to the issue on the summary judgment motion, the interest asserted by O.S.F.I. is adequately protected.

Paragraphs 5 and 6 of the summons concern internal O.S.F.I. documents. The thrust of the confidentiality claim relates to the importance of ensuring that regulated financial institutions will provide full and accurate information to O.S.F.I. As noted above, there is no claim of confidentiality or public interest immunity with respect to the terms of regulatory approval and the policies of O.S.F.I. Indeed, it is difficult to see how the public interest could favour shielding these matters as the public is surely entitled to know the rules under which these institutions operate. Accordingly, the material referred to in paras. 5 and 6 of the summons should be produced subject to this: confidential information from third parties or from the defendants which is not relevant to the summary judgment motion is to be excluded from production. Where part of a document is producible without revealing confidential information excluded by these reasons, it should be produced in edited form.

5. *Solicitor-Client Privilege and Waiver*

The plaintiff seeks production of a number of documents for which the defendants claim solicitor-client privilege on the ground that privilege has been waived. On the examination for discovery of the C.L.M.S. representative, an undertaking was given to produce documents relating to the incorporation of C.L.M.S. and the objects for which it was incorporated. A number of documents were produced and solicitor-client privilege was claimed with respect to 18 additional documents. Among the documents produced was a letter from the solicitors of C.L.M.S. to C.L.A.C. offering the opinion that the proposed objects of C.L.M.S. would not bring it within the definition of a "loan company" in the *Loan Companies Act*, R.S.C. 1985, c. L-12. It would appear that this opinion was required by the Superintendent of

Financial Institutions in relation to the incorporation of C.L.M.S. C.L.M.S. has also produced a memorandum from a member of the C.L.A.C. legal department relating to the purposes for which C.L.M.S. was being incorporated. It is the plaintiff's position that these documents form part of a course of communications relating to the incorporation of C.L.M.S., and that having produced these two items, the defendants have waived privilege with respect to the rest.

It is not suggested that there was an intention to waive privilege. However, the plaintiff relies on the principle that a party is not entitled to disclose only those parts of a privileged document which are to the party's advantage as fairness and consistency may require full disclosure: see *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146 at pp. 148-49, 45 B.C.L.R. 218 (S.C.); Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege* (Markham: Butterworths, 1993), p. 191, para. 1.04. In my view, the plaintiffs have failed to establish waiver and the defendants are entitled to maintain their claim of privilege. With respect to these documents. It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading: *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters of Lloyd's of London* (1994), 28 C.P.C. (3d) 269, 135 N.S.R. (2d) 71 (S.C.). There is nothing before me to suggest that the disclosed documents are misleading without production of all documents in the C.L.M.S. incorporation file. It is understandable that the opinion letter provided to satisfy the regulatory requirements of the Superintendent of Financial Institutions would have been produced and it certainly stands on its own. The memorandum from the internal legal department is self-contained and readily understood and precedes the next document in the file for which privilege is claimed by five months. There is, in my view, no basis for saying that this document presents a misleading or incomplete picture unless it is the case that any time one document is produced, all the others relating to the same subject must also be produced.

The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure. However, a party should not be penalized or inhibited from making the fullest possible disclosure. In my view, too ready application of the waiver rule will only serve to inhibit parties to litigation from making the fullest possible disclosure.

III. CONCLUSION

In my view, the most appropriate and expeditious way to proceed is as follows. O.S.F.I. and the defendants should review the documents which have not yet been disclosed in light of these reasons to reassess their claims of confidentiality and public interest immunity. Any additional documents which are not protected in light of these reasons should be produced to the plaintiff prior to the examination of Mr. Heft. In light of the terms of the *Canada Evidence Act*, s. 37(2), it is open to the parties to ask me to review documents for which a claim of public interest immunity is maintained. The examination should then proceed. If so advised, the plaintiffs may move for further relief following the examination. As the judge hearing this motion pursuant to a direction to deal with motions in this action pursuant to rule 37.15, I will remain seized of the matter should further directions be required with respect to production of documents and the examination of Mr. Heft. If there remain disputed documents following the examination, a review of the documents by me with a view to assessing the claim of privilege remains a possibility.

The costs of this motion shall be dealt with in conjunction with the summary judgment motion unless a party indicates within ten days of the release of these reasons an intention to make submissions to me that the matter of costs should be dealt with in some other fashion, in which case an attendance before me for submissions will be arranged.

Motion granted in part.

Lancaster v. Middlebro

Ontario Court (General Division), Tobias J. January 5, 1996

Limitations — Insurance — Insured's solicitor learning in February 1988 that defendant in motor vehicle action uninsured — Insurer advised in June 1991 of potential claim of insured under uninsured motorist provisions of insurance policy — Insurer advising insured in January 1992 that it would not respond to claim — Two-year limitation period for actions against insurer for recovery of claim beginning to run when insured discovered that claim would not be honoured — Insured moving to add insurer as party defendant to action against uninsured driver within two years of discovering that insurer refused to honour claim — Action against insurer commenced within limitation period — R.R.O. 1980, Reg. 535, s. 8(2).