IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *Canadian Broadcasting Corporation v. Canada (Border Services Agency)*, 2021 NSPC 52

In the Matter of an Application to Vary a Sealing Order,
Criminal Code s. 487.3

BETWEEN:

Canadian Broadcasting Corporation, Canadian Television Network, Global News, The Canadian Press, Globe and Mail, Post Media, Halifax Examiner and Saltwire

(CBC Law Department, Bell Canada, Global News, Halifax Examiner Inc., SaltWire Network, The Globe and Mail, Toronto Star Newspapers Limited)

- Applicants

- and-

Her Majesty the Queen in the Right of Canada (Canada Border Services Agency)

and

Her Majesty the Queen in the Right of Nova Scotia (Royal Canadian Mounted Police)

- Respondents

SOLICITOR-CLIENT PRIVILEGE DECISION

Judge:	The Honourable Judge Laurel J. Halfpenny MacQuarrie
Heard:	March 1, 2021
Decision	Oral Decision: November 26, 2021 Written Decision: December 7, 2021
Counsel:	Mark Covan and Scott Millar, for the Federal Crown Shauna MacDonald and Mark Heerema, for the Provincial Crown David G. Coles, QC, for the Applicants, Jessica Zita for Lisa Banfield

By the Court:

I. The Application

[1] On April 28, 2020, the Canadian Broadcasting Corporation, through its representative Elizabeth McMillan, filed a "Notice of Application" in the Provincial Court, seeking to lift a Sealing Order over Informations to Obtain (ITO's). In particular, it suggested, a general warrant had been issued pursuant to Section 487.01 of the *Criminal Code* permitting the search of property belonging to Gabriel Wortman with an associated Sealing Order.

[2] This application was precipitated by a mass shooting on April 18 and 19, 2020 in rural Nova Scotia, which resulted in 22 people being killed, one of whom was pregnant, others injured, and a Province left in a state of shock. The tragedy encompassed 17 crime scenes and covered a large geographical area.

[3] In her correspondence, Ms. McMillan, referencing the "open court principle" wrote:

> I am a journalist with the Canadian Broadcasting Corporation. I am applying to lift a sealing order that has been imposed over certain records relating to these proceedings...
>
> We believe this matter is urgent because it is possible that the information outlined in the search warrant/affidavits/ITO's could shed light on what police knew and when. There has been considerable focus on why the RCMP didn't send out a public alert to warn people about an active shooter. We believe the public should know what information police had in this case, in the event protocol changes need to be made before the next tragedy. If we wait months for this information, an opportunity to take steps to prevent a similar situation could be delayed.
>
> There is tremendous public interest in understanding the facts regarding the attacks that killed 22 people. This was the largest mass shooting in Canadian

> history, and we believe the public should know why police searched properties belonging to the shooter Gabriel Wortman. *[my emphasis added]*

[4] The Royal Canadian Mounted Police (RCMP) became the Respondents, represented by the Public Prosecution Service of Nova Scotia (PPS) as Her Majesty the Queen in the Right of the Province of Nova Scotia.

[5] Subsequently, the Canada Border Services Agency (CBSA) became a Respondent represented by the Public Prosecution Service of Canada (PPSC), as representing Her Majesty the Queen in the Right of Canada.

[6] Currently, the application has expanded to include 28 judicial authorizations issued between April 20, 2020, and December 21, 2020, with their associated Orders.

II. Legislation and History of Proceedings

Criminal Code

[7] The *Criminal Code* provides the authority for a sealing of Judicial authorizations:

> 487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> *(a)* the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> *(b)* the reason referred to in paragraph (a) outweighs in importance the access to the information.

(2) For the purposes of paragraph (1)*(a)*, an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

[8] An application to "unseal" such orders is set out in Section 487.3(4):

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

Overview

[9] As a result of the RCMP and CBSA investigations into the events of April 18 and 19, 2020, criminal charges were instituted against Lisa Banfield, James Banfield and Brian Brewster relating to the supply of ammunitions.

[10] In the course of this investigation into the killings by Gabriel Wortman, police received information from Kevin Von Bargen, a lawyer in Ontario. It formed part of ITO 20-0706.

[11] The Crown raised concerns these three individuals may have fair trial rights impacted by the unsealing applications. Notice was provided to the three accused, they all retained counsel and a contested hearing on the matter was held.

[12] In relation to Lisa Banfield, issues of solicitor-client privilege also arose. This decision is in relation to it and specifically ITO 20-0706, paragraphs 42.8, 42.16 and 42.17.

III. Position of the Parties

CBC et al.

[13] Solicitor-client privilege, and the protections that are afforded thereto, must be evidence-based. It is a question of fact as to how information is communicated to, and between, a lawyer and client.

[14] Counsel suggests there is no basis before the Court as to the nature of the relationship between Ms. Banfield and Kevin Von Bargen. There is no evidence of Mr. Von Bargen being retained as legal counsel, nor the scope of the retainer. The communication may have been as between friends, one of whom happened to be a lawyer.

Lisa Banfield

[15] Ms. Banfield asserts that the three paragraphs regarding herself and communication with Kevin Von Bargen, a lawyer, is impugned information as it invades her solicitor-client privilege.

[16] Accepting the open court principle, and that she bears the burden, on a balance of probabilities, she argues the paragraphs lie squarely within the category of privileged communications as between a lawyer and client.

[17] The information in issue is business and financial in nature and peripheral to the events of April 2020.

Legal Principles and Analysis

[18] *R. v. McClure* 2001 SCC 14, at paragraph 32 refers to the historic need and role of solicitor-client privilege:

> That solicitor-client privilege is of fundamental importance was repeated in *Jones, supra*, per Cory J. at para. 45:
>
> > That solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649, the importance of the rule was recognized:
> >
> > > 'The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, ...to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence....'

[19] Solicitor-client privilege has a significant place in the justice system. In *McClure* at para 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system....

[20] It is a rare situation where solicitor-client privilege is not protected, and the test is a stringent one. (see para. 5, *McClure*).

[21] Further, in *McClure*, the solicitor-client relationship is protected by 'class privilege' and warrants a *prima facie* presumption of inadmissibility. At para 28:

> For a relationship to be protected by a class privilege, thereby warranting *prima facie* presumption of inadmissibility, the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege...

[22] In support of his position that it is to be assumed, anything, and everything in an ITO is material and was used for the issuance of the judicial authorizations in this matter, Mr. Coles referred to the *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 6983, where Justice Nordhemier stated at paras: 20-23:

> [20] ... What a proper ITO requires are the 'material' facts necessary to satisfy the test for the issuance of a search warrant informed by the requirement to make 'full, fair and frank disclosure'... It must therefore be assumed that if material was included in the ITO, the police officer who swore the ITO considered that the included material was necessary to achieve either or both those purposes. While I am aware that there is a tendency towards being overly inclusive in affidavits used to obtain judicial authorizations, I do not believe that it is proper on an after the fact application such as this one to start parsing out what is or is not 'essential' and thus attempt to restrict public access to portions of an ITO on that basis.

> [21] The fact is that all of this information was placed before the authorizing judge and it is all part of the court record for this proceeding. All of this material is presumed to have informed the authorizing judge's decision to grant the search warrant...
>
> [22] In my view, when it comes to the issue of public access to the material, it is not open to the Crown to attempt to maintain secrecy over portions of that material on the basis that it was unnecessary to the process in the first place... .

[23] He asserts that whether the impugned redactions are protected by solicitor-client privilege is a question of fact, and given the judicial officer received such before issuing the authorizations, makes them subject to the open court principle.

[24] In *Lavallee, Rackel & Heintz v. Canada (Attorney General)* [2002] 167 C.C.C. (3d) 1 (S.C.C.) three law firms, in unrelated matters, challenged the constitutionality of section 488.1 of the *Criminal Code* in relation to documents in their lawyer's possession as being a section 8 *Charter* violation.

[25] At issue was the nature and overriding protection a solicitor-client relationship gives when the police execute a s.488.1 search warrant, and the procedure associated therewith, on a lawyer's file, while investigating possible criminal offences. Justice Arbour, though referring to the particular facts at issue in that case, made general statements regarding the use of solicitor-client privilege information. At para. 49:

> ...justices of the peace will accordingly remain charged with the obligation to protect solicitor-client privilege through application of the following principles that are related to the issuance of search warrants:
>
> 1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege....

[26] Notwithstanding privileged communication was placed before the Presiding Justice of the Peace in ITO 20-0706, such does not lift the blanket of the solicitor-client relationship and privilege attached to it. The nature of the information in ITO 20-0706 is not of the kind or directed to documents as in Justice Nordheimer's matter.

[27] In this matter, the information that is classified as solicitor-client was given to the RCMP by Mr. Von Bargen, the lawyer. This is acknowledged at paragraph 42, ITO 20-0706, which reads in part, 'Kevin Von Bargen provided a statement on April 21, 2020, over the phone to Cpl. Patricia Davis, a member of the RCMP and said the following'.

[28] The privilege is that of the client, not the lawyer. The continuation of paragraph 32 in *McClure, supra*, provides:

> '...that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. ' (emphasis added)

[29] Further at paragraph 39 in *Lavallee, (supra):*

> While I think it unnecessary to revisit the numerous statements of this Court on the nature and primacy of solicitor-client privilege in Canadian law, it bears repeating that the privilege belongs to the client and can only be asserted or waived by the client or through his or her informed consent...The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privileged holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently.... [emphasis added]

[30] Mr. Coles during submissions, stated that if I accept Mr. Von Bargen was retained, I am entitled to consider such as evidence of the solicitor-client relationship. (p. 57-58 transcript March 1, 2021). However, should the information contained therein relate to events of April 2020, it is not sufficient evidence as it is unsworn, and I cannot accept such as evidence.

[31] In *R. v. Angel Acres Recreation & Festival Property Ltd.*, 2004 BCPC 224, the Courts heard an application to unseal ITO's in relation to a search warrant issued for a Hell's Angels clubhouse. The open court principle and the right to privacy were argued.

[32] In considering the type of evidence necessary to bring before the Court to protect the risk of unwarranted stigmatization of innocent persons, the Court held the evidence within an ITO to be sufficient, at paras. 56-57:

> I recognize that the unjust stigmatization of innocent persons constitutes a serious risk to the administration of justice. This would certainly be the case if a person in a relatively small community was to be unfairly accused in public of being a member of an alleged criminal organization. The negative consequences could impact not only that person's reputation but also his livelihood and that of his family. I agree with Counsel for Angel Acres that the court can reasonably reach this conclusion without the tendering of further evidence.

[33] Ms. Zita has been very forthright in her description of the nature, the relationship and also as to the subject matter of the discussions in both her brief and her submissions. She advises the information is of a business nature and unrelated to the mass shooting.

[34] The Court appreciates Mr. Coles does not know the specifics of the 3 paragraphs in question. The Court however does, and it can rely upon the same for this decision.

[35] Ms. Banfield has met the burden. A solicitor-client relationship has been established. In *Solosky v. The Queen*, [1980] 1 SCR 821, Dickson J. stated at page 837:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege – (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. *To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court.* Finally, the privilege is aimed at improper use or disclosure, and not at merely opening. [emphasis added]

[36] The impugned sentence is evidence of the professional relationship between Mr. Von Bargen and Ms. Banfield. This is a proper consideration by the Court.

[37] This Court determines that this was a solicitor-client relationship. It has not been implicitly or explicitly waived by Ms. Banfield, and it is only she who can lift that veil of protection. It need not be expressly claimed, it stands on its own.

[38] The protection of privileged communications between counsel and client is paramount unless circumstances warrant differently. Such do not exist here. It encompasses privacy as well, and it by inference survives the death of the client unless there is an explicit waiver.

[39] Historically regarded as a rule of evidence, solicitor-client privilege has developed into a fundamental civil and legal right and recognized as a right to privacy. (see *Solosky*, page 836, pp. 839-40, *McClure* para. 17, 22.)

[40] I have carefully reviewed all 3 paragraphs and find that paragraphs 42.8 and 42.16 will remain redacted while 42.17 will be released as it does not fall into solicitor-client classification.

[41] I would ask the Crown to prepare the Order.

[42] So as to ensure these paragraphs are properly carried forward in the other ITO's and authorizations, I am attaching a table of concordance with Appendix A, protected paragraphs, and Appendix B, released paragraph.

Laurel Halfpenny MacQuarrie

J.P.C.

Appendix A

Doc. Type	ITO	Location
ITO	20-0706	para 42.8
ITO	20-0706	para 42.16
ITO	20-0711	para 43.8
ITO	20-0711	para 43.16
ITO	20-0715	para 43.8
ITO	20-0715	para 43.16
ITO	20-0716	para 43.8
ITO	20-0716	para 43.16
ITO	20-0717	para 43.8
ITO	20-0717	para 43.16
ITO	20-0718	para 43.8
ITO	20-0718	para 43.16
ITO	20-0743	para 48.8
ITO	20-0743	para 48.16
ITO	20-0744	para 48.8
ITO	20-0744	para 48.16
ITO	20-0761	para 49.8
ITO	20-0761	para 49.16
ITO	20-0767	para 49.8
ITO	20-0767	para 49.16
ITO	20-0960	para 49.8

Appendix A

Doc. Type	ITO	Location
ITO	20-0960	para 49.16
ITO	20-0961	para 49.8
ITO	20-0961	para 49.16
ITO	20-0977	para 49.8
ITO	20-0977	para 49.16
ITO	20-1068	para 51.8
ITO	20-1068	para 51.16
ITO	20-1071	para 51.8
ITO	20-1071	para 51.16
ITO	20-1107	para 51.8
ITO	20-1107	para 51.16
ITO	20-1262	para 49.8
ITO	20-1262	para 49.16
ITO	20-1271	para 49.8
ITO	20-1271	para 49.16
ITO	20-1272	para 49.8
ITO	20-1272	para 49.16
ITO	20-1874	para 53.8
ITO	20-1874	para 53.16
ITO	20-2114	para 53.8
ITO	20-2114	para 53.16

Appendix B

Doc. Type	ITO	Location
ITO	20-0706	para 42.17
ITO	20-0711	para 43.17
ITO	20-0715	para 43.17
ITO	20-0716	para 43.17
ITO	20-0717	para 43.17
ITO	20-0718	para 43.17
ITO	20-0743	para 48.17
ITO	20-0744	para 48.17
ITO	20-0761	para 49.17
ITO	20-0767	para 49.17
ITO	20-0960	para 49.17
ITO	20-0961	para 49.17
ITO	20-0977	para 49.17
ITO	20-1068	para 51.17
ITO	20-1071	para 51.17
ITO	20-1107	para 51.17
ITO	20-1262	para 49.17
ITO	20-1271	para 49.17
ITO	20-1272	para 49.17
ITO	20-1874	para 53.17
ITO	20-2114	para 53.17