Canadian Human Rights Tribunal Tribunal canadien des droits de la personne

BETWEEN:

PATRICK J. EYERLEY

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
SEASPAN INTERNATIONAL LIMITED

Respondent

RULING ON PRIVILEGE

Ruling No. 1
2000/07/21

PANEL: Anne Mactavish, Tribunal Chairperson

[1] At the time of the incidents giving rise to his human rights complaint, Mr. Eyerley was a member of the International Longshoremen's and Warehousemen's Union. The Canadian Human Rights Commission has in its possession a legal opinion given by the firm of Laughton & Co. to the Union. At issue in this motion is whether that opinion must be disclosed to the respondent.

[2] Mr. Eyerley's complaint alleges that Seaspan International Limited discriminated against him by failing to accommodate his disability and by terminating his employment, contrary to section 7 of the Canadian Human Rights Act. A grievance was filed with respect to the termination of Mr. Eyerley's employment, and an arbitration hearing scheduled for November 3, 1997. The day before the arbitration was to take place, the Union advised Seaspan that the grievance was not being pursued. On May 7, 1998, Mr. Eyerley filed his complaint with the Canadian Human Rights Commission.

[3] The Union provided Mr. Eyerley with a copy of his grievance file, which file contained a copy of the Laughton opinion. The opinion, which is dated October 20, 1997 is described by the Commission as relating to the 'grievance over termination of the complainant'. Mr. Engler, speaking for the Union, advises that the Laughton opinion was left on the file in error, and should have been removed before the file was turned over to Mr. Eyerley.

[4] Mr. Eyerley, in turn, provided a copy of his grievance file, including the Laughton opinion, to the Canadian Human Rights Commission during the Commission investigation. Although the existence of the opinion was not disclosed to Seaspan, the opinion was in the possession of the Commission at the time that it made various decisions with respect to Mr. Eyerley's complaint, including the decision to refer the complaint to the Canadian Human Rights Tribunal for a hearing.

[5] Immediately before Mr. Eyerley filed his complaint with the Commission, the Union sent the Commission a copy of a second legal opinion relating to Mr. Eyerley's situation. The opinion, dated April 27, 1998, is from the law firm of McGrady, Baugh and Whyte. The McGrady opinion recommends that Mr. Eyerley proceed by way of a human rights complaint rather than by grievance, as Mr. Eyerley would not likely be successful at arbitration. In the opinion of the McGrady firm, Mr. Eyerley would have a much higher likelihood of success with a human rights complaint.

[6] The Canadian Human Rights Commission has disclosed the McGrady opinion to counsel for Seaspan, but has refused to produce the Laughton opinion.

[7] The Union objects to the disclosure of the Laughton opinion to the respondent. Mr. Engler submits that as the disclosure of the Laughton opinion to Mr. Eyerley was inadvertent, the Union did not waive the solicitor client privilege attaching to that opinion. Mr. Engler contends that the privilege should be maintained, notwithstanding Mr. Eyerley's subsequent disclosure of the Laughton opinion to the Commission.

[8] The Commission supports the Union's position, but for entirely different reasons. According to Ms. Lalumière, the provision of the Laughton opinion to the Commission by Mr. Eyerley during the investigation amounted to an exchange of confidential information between parties with a common interest in anticipated litigation.(1) As such, the Laughton opinion was subject to a common interest privilege, which '... implies the dynamic of parties sharing a united front against a common foe'.(2)

[9] Mr. Eyerley states that he did not realize that the Laughton opinion was not supposed to be in the grievance file until after he had given the file to the Commission, and that he did not have the right to hand it over to the Commission.

[10] Mr. Hunter, for Seaspan, contends that the Commission should be compelled to produce the Laughton opinion as any privilege which may attach to the opinion has been waived by the Union's disclosure of the opinion to Mr. Eyerley. Mr. Hunter further submits that having produced the McGrady opinion relating to the merits of Mr. Eyerley's grievance, the Union cannot now maintain its claim to privilege for an earlier opinion dealing with the same subject matter.

[11] Dealing first with the submissions of the Commission, in my view, the position taken by Ms. Lalumière fundamentally misconstrues the role of the Canadian Human Rights Commission at the investigative stage. During the course of an investigation, the Commission's role is to act as an impartial fact finder. Indeed, the integrity of the investigation process is predicated upon the neutrality of the Commission in discharging this responsibility. The Commission does not, or should not, have a common interest with either a complainant or a respondent while a matter is under investigation. The Commission most certainly should not be 'sharing a united front against a common foe' with a complainant, but rather should be gathering information so as to assist the Commissioners in making decisions under Section 44 of the Canadian Human Rights Act. For Ms. Lalumière to argue that the Commission and Mr. Eyerley were already allied in interest against Seaspan at the time that the Laughton opinion was given to the Commission is a remarkable submission, and is one which I reject in its entirety.

[12] The privilege attaching to the Laughton opinion belongs to the Union and it is therefore the Union's conduct that must be scrutinized to determine whether that privilege has been waived, either by the inadvertent disclosure of the opinion to Mr. Eyerley, or by the disclosure of the McGrady opinion to the Commission.

[13] The traditional common law view is that the inadvertent disclosure of a privileged document to a third party waives the solicitor and client privilege.(3) However, more recent Canadian cases appear to have taken a somewhat softer view of the issue. It has been suggested that where there is inadvertent disclosure of a document that is otherwise privileged, there should be some discretion to determine whether, in the circumstances, the privilege has been waived.(4)

[14] In deciding whether or not to exercise this discretion, Sopinka suggests that a number of considerations are relevant: whether the error is excusable, whether an

immediate attempt has been made to retrieve the information, and whether preservation of the privilege in the circumstances will cause unfairness to the respondent.[(5)]

[15] Based upon the information before me, I accept that the Union disclosed the Laughton opinion to Mr. Eyerley in error. Mistakes do happen, and I am satisfied that this was an excusable error.

[16] While Mr. Eyerley's submissions certainly suggest that he had been aware for some time that he was not supposed to have had the Laughton opinion, we have no evidence from the Union as to when it became aware of the error. Given that this information is uniquely within the Union's possession, it seems to me that the burden is on the Union to establish that it moved swiftly to attempt to retrieve the privileged information once it became aware of the error. In the absence of any such evidence, I cannot conclude that the Union acted promptly. As a result, I decline to exercise my discretion. In my view, the Union has, by its conduct, waived the solicitor and client privilege attaching to the Laughton opinion. I am therefore directing that the Commission provide a copy of the opinion to Seaspan.

[17] In so doing, I recognize that solicitor and client privilege is a fundamental civil and legal right which should not lightly be abrogated[(6)]. In the circumstances of this case, however, I am satisfied that fairness requires that the Laughton opinion (which has already been shared, albeit inadvertently, with Mr. Eyerley and the Commission) be disclosed to the respondent.

[18] In light of this conclusion, it is unnecessary to consider the implications of the Union's disclosure of the McGrady opinion to the Commission.

[19] Having directed that the Laughton opinion be produced, it remains to be determined what, if any, probative value that opinion may have with respect to the issues raised in this proceeding. In this regard, Mr. Hunter has indicated that, depending on what is in the Laughton opinion, he may have brief additional submissions to make in relation to Seaspan's jurisdictional challenge now pending before the Tribunal. In order that the resolution of that challenge not be unduly delayed, the Commission shall be required to fax a copy of the Laughton opinion to Mr. Hunter by the close of business on Tuesday, July 25. Mr. Hunter shall have until the close of business on Thursday, July 27 to file whatever additional submissions he may have with respect to Seaspan's jurisdictional challenge. Mr. Eyerley and the Commission may file any responding submissions before the close of business on Monday, July 31, and any reply from Mr. Hunter must be received by Thursday, August 3.

Anne Mactavish, Tribunal Chairperson

OTTAWA, Ontario

July 21, 2000

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

TRIBUNAL FILE NO.: T565/2300

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RULING OF THE TRIBUNAL DATED: July 21, 2000

APPEARANCES:

Patrick Eyerley For himself

Odette Lalumière For the Canadian Human Rights Commission

Michael Hunter For Seaspan International Limited

Terry Engler For International Longshoremen's and Warehousemen's Union, Local 400

1. Buttes Gas and Oil co. v. Hammer (No.3), [1980] 3 All E.R. 475 (C.A.)

2. Supercon of California Ltd. v. Sovereign General Insurance Co., (1998), 37 O.R. (3d) 597 (Gen. Div.)

3. Calcraft v. Guest, [1898] 1 Q.B. 759 (C.A.)

4. Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (2d Ed.) at p.767

5. Ibid.

6. Solosky v. Canada, [1980] 1 S.C.R. 495, 16 C.R. (3d) 294