Date: 20011115
Docket No.: CA 171715

NOVA SCOTIA COURT OF APPEAL

[Cite as: Huntley v. Larkin , 2001 NSCA 163]

Flinn, Freeman and Oland, JJ.A.

BETWEEN:

JOELLAN LYNN HUNTLEY by her Litigation Guardian, BYRON HUNTLEY, BYRON HUNTLEY and LOUISE HUNTLEY

Appellants

- and -

THEODORE HOGETERP

Respondent

REASONS FOR JUDGMENT

Counsel:	Raymond F. Wagner and Darlene Willcott, for the appellants Michael E. Dunphy for the respondent Theodore Hogeterp
Appeal Heard:	November 15, 2001
Judgment Delivered:	November 15, 2001
THE COURT:	Appeal dismissed with costs as per oral reasons for judgment of Flinn, J.A.; Freeman and Oland, JJ.A. concurring.

FLINN, J.A. (Orally):

[1] This interlocutory appeal is from a decision of Justice Coughlan, in Chambers, denying the appellants' application for the production of two witness statements. The statements were obtained by counsel for the respondent Theodore Hogeterp. The Chambers judge found that the two statements came into existence for the dominant purpose of the subject litigation, and are, therefore, subject to litigation privilege. The Chambers judge also found that the privilege had not been waived.

[2] Counsel for the appellants do not challenge the finding that the statements in question were subject to litigation privilege. His submission is that the Chambers judge erred in deciding, in the circumstances of this case, that the privilege had not been waived.

[3] We agree with counsel for the appellants that s. 49 of the **Evidence Act**, R.S.N.S. 1989, c. 154, which was referred to by the Chambers judge, is not relevant to the issue of whether the privilege was waived. However, we do not agree with counsel for the appellants that the Chambers judge erred in his ultimate conclusion that the privilege had not been waived in the circumstances of this case. Firstly, the giving of copies of the statements to the maker of the statements does not, of itself, amount to evidence of an intention to waive the privilege, and there was no other evidence before the Chambers judge upon which he could conclude an intention to waive the privilege. Secondly, the mere fact that the wife of the giver of the statement was present when the statement was made does not satisfy the onus on the appellants to demonstrate a clear intention to forego the privilege.

[4] We have considered the submissions of counsel for the appellants with respect to general principles of fairness, and we are not satisfied that any patent injustice arises to the appellants from Justice Coughlan's decision.

[5] The appeal is, therefore, dismissed.

[6] The appellants will pay to the respondent Theodore Hogeterp his costs of this appeal which are hereby fixed at $750.00, inclusive of disbursements, payable

forthwith.

Flinn, J.A.

Concurred in:

Freeman, J.A.

Oland, J.A.