Date: 2000 07 05
Docket: CA 00750

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

REASONS FOR DECISION OF THE
HONOURABLE MR. JUSTICE CÔTÉ

IN THE MATTER OF SECTIONS 91 AND 92 OF THE CONSTITUTION ACT, 1867;

AND IN THE MATTER OF SECTIONS 5 AND 37 OF THE CITY OF YELLOWKNIFE ZONING BY-LAW NO. 3424;

AND IN THE MATTER OF SECTIONS 2.9.8.14 AND 2.7.17 OF THE CITY OF YELLOWKNIFE BUILDING BY-LAW NO. 2300 AND SECTION 4.1.1 OF THE CITY OF YELLOWKNIFE BUILDING BY-LAW NO. 3815;

AND IN THE MATTER OF THE PROPERTY ASSESSMENT AND TAXATION ACT, R.S.N.W.T. 1988, c. P-10;

AND IN THE MATTER OF CERTAIN DEVELOPMENT UNDERTAKEN BY ANTHONY FOLIOT ON FEDERAL LANDS AND WATERS ADJACENT TO FOLIOT HOUSEBOAT AND FRONTING BLOCK 201, PLAN 2396 IN THE CITY OF YELLOWKNIFE; MATTHEW GROGONO ON OR ABOUT FEDERAL LANDS AND WATERS; AND GARY VAILLINCOURT ON OR ABOUT FEDERAL LANDS AND WATERS;

BETWEEN:

MATTHEW GROGONO

Appellant
(Defendant)

- and -

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

Respondent
(Plaintiff)

COUNSEL:

A. F. Marshall
For the Appellant

G. P. Wiest
E. Hellinga
For the Respondent

CÔTÉ J.A.:

[1] The City sued Mr. Grogono on July 5, 1996 in order to establish a right to govern and tax houseboats and other vessels on the waters of the lake adjoining the built-up parts of the City. Mr. Grogono moved to have the suit struck out as unauthorized, because admittedly there has never been a resolution of City Council to authorize the particular suit. Mr. Justice Irving heard that motion and dismissed it, holding that a senior administrative official who had instructed solicitors to sue, had sufficient authority to do so. Mr. Grogono appeals, and that appeal has not been heard yet.

[2] In the meantime, Mr. Grogono learned of other documents. In another lawsuit on a related topic, the City's opponents learned that the Council had made a habit of having private briefing sessions to which the public were not admitted. Mr. Justice Irving held that the legislation did not authorize that, and that those were really Council meetings which could not be kept secret, because the statutory proceeding for going into camera had not been met.

[3] Learning of this, counsel for Mr. Grogono wrote to the City's solicitors and asked whether any of the secret meetings had touched on the houseboat question, and if so, asked for copies of the relevant minutes. The solicitors sent copies of such minutes. That correspondence is not in evidence before me, but counsel who appeared before me admitted that it occurred. The minutes so produced are in evidence before me.

[4] Mr. Grogono's counsel now moves before me for two different heads of relief. The first is amendment of the Notice of Appeal to add a second ground of appeal, suppression of evidence. The other relief sought is leave to adduce more evidence on appeal, and to file a supplementary appeal book.

[5] First, the proposed amendment to the Notice of Appeal. I do not appear to have received any written or oral argument against this amendment, and it is possible that the panel hearing the appeal might give some weight to the proposed new ground. I cannot say that it is unarguable. Whether or not I think that it has much weight is not the test for amending pleadings. No prejudice from raising the point at this stage is suggested, and for reasons given below, that is not surprising.

[6] Besides, I have considerable doubts that an appellant is obliged to give any grounds in a civil Notice of Appeal to the Court of Appeal.

[7] Therefore, the amendment to the Notice of Appeal is allowed.

[8] Now I turn to the question of admitting new evidence on appeal. It may seem unusual that one justice of the Court of Appeal sitting alone should hear such a motion, and ordinarily I would not have. However, it had to be arranged from afar, well in advance, to make a Justice of Appeal available. And the facts here are very peculiar. In the first place, this whole motion and cross-motion constitute procedure to the third degree. It is a motion to strike out evidence, or add evidence, on a pending appeal, which appeal itself is about whether a Statement of Claim was properly issued, i.e. properly authorized. In the second place, a panel of the Court cannot decide the appeal without an appeal book and factums, and the fight in

part is about what should go in the appeal book, which in turn governs what will go in the factums. In most cases, those difficulties are easily overcome, but not in this case, for privilege is asserted here. That in turn leads to the third reason. Where there is a dispute about privilege in an ordinary suit, that is decided in advance by a chambers judge at the stage of production, if the issue is seen then. It is not merely left for the trial judge, still less the jury.

[9] A number of the secret minutes so produced are dated after the present lawsuit was commenced, and they speak about the legal proceedings. All the minutes were created after predecessor or parallel litigation began on the same broad question. In some cases, the minutes expressly state that the City's lawyers attended and discussed the litigation with Council. There are also affidavits from the Mayor and a member of Council deposing to the facts necessary to create privilege. Those affidavits were not cross-examined upon, nor really contradicted by any evidence. Obviously litigation was more than contemplated. Therefore, it is plain that much or all of the discussion about houseboats in the minutes would be privileged, apart from any question of waiver of privilege.

[10] However, the solicitor for the City sent the minutes to counsel for Mr. Grogono, and did not then claim privilege for those minutes, and still does not. He says that he probably could have claimed privilege, but did not, and does not now seek to go back on that position, nor to recall those minutes. No one asks me to exclude those minutes from evidence in the ongoing suit in the Supreme Court (and I doubt that I would have power to do so, not being a judge of that Court).

[11] Counsel for Mr. Grogono argues that producing those minutes waived privilege not only for those minutes, but also for

(a) all the communications about houseboats or jurisdiction over navigable waters, at those various meetings, and

(b) all other evidence about those topics, including

(c) two later affidavits by two former members of City Council.

[12] I do not agree. The present suit had progressed to the stage of discovery of documents by the time that the request for these minutes was made. An official statement as to documents had already been delivered by the City. Indeed, counsel for Mr. Grogono complained before me at length that these minutes were not expressly revealed in that statement. Mr. Justice Irving had already ruled that it was legally improper to hold those meetings in private. Even though privilege had apparently not been argued before Mr. Justice Irving, the solicitors for the City doubtless felt understandable reluctance in then further withholding these minutes from Mr. Grogono or other litigants. That would have appeared to be defiance of Mr. Justice Irving's decision, or an attempt to find some way around it. The courts should encourage

compliance with the Rules of Court and demands of discovery, rather than insisting upon repeated orders by a judge.

[13] Therefore, I do not look upon the production of these minutes as having been entirely voluntary.

[14] This is not a case where the City tried to put into evidence only part of the record for its own purposes. In such a case, it is often held unfair to produce only part of privileged papers, and the court orders that the rest be produced. Here the City has not tried to put these minutes into evidence or to take advantage of them. It has merely produced them to the other side under a form of discovery.

[15] It is critical to note that neither side here claims that Council ratified or directly authorized this suit, at these meetings or any other meetings.

[16] Therefore, the only possible type of waiver of privilege which has not been dealt with already is voluntary waiver by voluntary disclosure. But that requires knowing intention to waive one's rights. None of the elements of that are present here.

[17] Therefore, even if the minutes are no longer privileged (a point on which I do not have to rule as no one has claimed it), their production does not waive privilege for other evidence such as the affidavits of the two former members of City Council filed for Mr. Grogono.

[18] I have read those two affidavits, plus the two uncontradicted affidavits by the Mayor and another Council member about privilege since filed by the City. It is very plain that the contents of the affidavits by the two former members of Council are privileged. They involve both solicitor-client communications to give and get legal advice, and also litigation privilege.

[19] I have reread the two affidavits of the two ex-councillors, and cannot see anything in them which is not privileged, apart from a few brief introductory sentences which mean and do nothing on their own.

[20] I also wonder whether counsel for Mr. Grogono had permission from the solicitor for the City to speak to these ex-councillors and get information from them. If he did not, then I am somewhat surprised at the procedure which he followed. It is not generally thought proper for one lawyer to speak to the client of another solicitor without that latter solicitor's consent. It may well be different if the person interviewed is a fairly low-level ex-employee of the client, and he does not possess confidential information. But neither of those conditions is met here. The reported cases given to me by counsel for Mr. Grogono make it clear that members of a municipal council occupy a much more important function than that, and are the persons who make policy and legislate for the municipality.

[21] Some argument was put before me as to whether the members of City Council should be looked upon as its trustees or fiduciaries, a proposition which counsel for Mr. Grogono disputes. This argument was given to me in order to advance the City's argument for privilege. I have found it unnecessary to decide that question in order to rule on privilege, and such a proposition forms no part of my reasoning.

[22] No one suggested that the former City councillors had any power to waive privilege, and plainly they did not at the time that they swore their affidavits.

[23] Therefore, I order the affidavit of January 17, 2000 by Jo MacQuarrie, and the affidavit of December 15, 1998 by Dick Peplow, removed from the files of the Court of Appeal. (I wonder whether the date on the latter jurat is accurate, as it was not filed until May 12, 2000, two days after the MacQuarrie affidavit was filed.) The Registrar will seal these two affidavits in an envelope, and they will not be unsealed or shown to anyone without an order of a judge of this Court. The copies of the same two affidavits which are in the motion record filed May 12, or attached to the letter of May 16 from counsel for Mr. Grogono (filed May 17), will similarly be removed from the Court file and sealed in the same envelope. No copies of these affidavits will be used in any proceedings in the Court of Appeal.

[24] The same motion record contains another affidavit of Dick Peplow sworn April 15, 1999 entitled and filed in the Supreme Court. The May 16 letter referred to above says that the April 15 affidavit is in the motion record in error, and should be substituted. I take it that it has thus been withdrawn from the Court of Appeal, and was originally given in error. Therefore, it will also be removed from the motion record, and sealed in the same envelope under the same conditions.

[25] That leaves the question of what should be done with the minutes of the secret meetings. They are presently found in the same motion record, as exhibits L to V inclusive of the May 10, 2000 affidavit of Mr. Grogono, which affidavit is Tab 2. I do not think that the likelihood of admission of this evidence is strong enough that it would justify a further volume of appeal books.

[26] However, it is customary for decisions on admission of new evidence to be made by the panel hearing an appeal, and I do not wish to seem to foreclose the possibility of a decision to admit such minutes as new evidence on appeal. Therefore, I give Mr. Grogono leave to make returnable before the panel hearing the appeal a new motion to adduce as further evidence those minutes (exhibits L to V) only. Since the City admits their authenticity, it will not be necessary to adduce any affidavit or other evidence identifying them. If counsel for Mr. Grogono wishes, those minutes (which are now exhibits L to V inclusive) may be made an appendix to his factum, or an item in his book of authorities.

[27] As hinted above, I fear that I gave counsel the impression that I would hear to conclusion the motion to adduce new evidence. In the end result, I have only decided parts of

it (privilege, affidavits and physical handling of minutes). I have not decided whether the secret minutes will be received on appeal as new evidence. I apologize to counsel for raising false hopes, and can only rely upon the difficulty in absorbing at a distance the nature of this very bulky and complex matter some time beforehand.

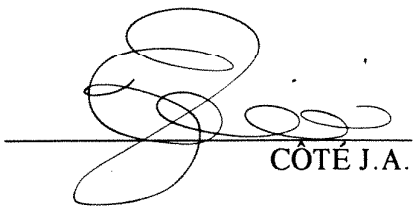
[28] However, no harm has been done, for the preliminary argument about privilege, and directions beforehand as to the appeal book, were all needed, and are now given. Almost all the argument which I heard was necessary for those purposes, and so little or no time or money has been wasted. In this age of word processing, any existing written argument still applicable to a motion to the panel hearing the appeal, about adducing the minutes, or opposing that, can likely be recycled to some degree.

[29] During argument of the motion before me, counsel for Mr. Grogono argued strongly that the formal statement as to documents produced by the City during its discovery of documents in the Supreme Court did not specifically reveal these secret minutes. (That list is exhibit I to the same affidavit of Mr. Grogono, Tab 2.) It is true that nothing is listed in the first (producible) part of the first schedule. But the second (not producible) part of that schedule does list communications between "the Defendant and the Defendant's legal advisors", and between those advisors and third parties for litigation. Plainly "Defendant" must (erroneously) refer to the City; the City would not possess privileged documents belonging to the other side. And I have found that the minutes in question were privileged (as to the relevant parts) until they were produced to Mr. Grogono's counsel. So there was no impropriety in not revealing them earlier. It is true that the description of privileged documents in the statement should have been more particular, such as a numbered bundle.

[30] I mention this topic because it might have been thought relevant to the subject of costs. It does not seem to me that the City has been guilty of misconduct in the subject of this motion. A motion before hearing of the appeal was necessary and desired by both sides. Therefore, there is no reason to deny the successful City costs of this motion. They will be given to the City, payable by Mr. Grogono, in any event, upon taxation. If there is any difficulty about the scale of costs, written submissions may be made to me on that topic.

APPLICATION HEARD on June 19, 2000

DECISION FILED at YELLOWKNIFE, N.W.T.
this 5th day of ~~June~~ July, 2000



CÔTÉ J.A.

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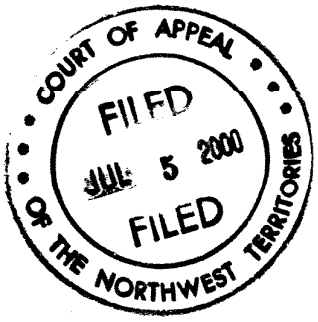

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