

Date: August 18, 1997
Docket: CV 06272

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**NUNA INVESTMENT CORPORATION, ROBY
GAGNON, CHARLIE ASSELIN, YVETTE ST. ARNAUD
and RAYMOND ST. ARNAUD**

Plaintiffs

- and -

**SHELL CANADA PRODUCTS LIMITED, GEORGE
SZTYK, JOHN BYERS and FLORENCE BYERS**

Defendants

Ruling on a claim of privilege with respect to a document sought on production, pursuant to Rule 226.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. E. RICHARD

Heard at Yellowknife, Northwest Territories
on July 25, 1997.

Reasons filed: August 18, 1997

Counsel for the Plaintiffs: Gerald Phillips

Counsel for the Defendant
Shell Canada Products Limited: Gwen Randall, QC

Counsel for the Defendant
George Sztyk: Thomas McCauley

Counsel for the Defendants
John Byers and Florence Byers: Andrew Bevan

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REASONS FOR JUDGMENT

[1] This application made pursuant to Rule 226 concerns a claim of privilege made by the defendant Shell in resisting production of certain documents in its possession.

[2] The plaintiff Nuna purchased a Shell service station business in Iqaluit in 1994 from the defendants Byers. In this action commenced in February 1996 the plaintiff alleges that Byers, Shell, and Shell's employee Szytk negligently made material misrepresentations to the plaintiff to induce the plaintiff to enter into the transaction. In this action the plaintiff seeks rescission of the contract, and damages.

[3] Within this action there exists a *lis* between the defendant Shell and its employee, the defendant Szytk. In his statement of defence, Szytk pleads the doctrine of *respondeat superior*, and asserts that anything he did in connection with the 1994 transaction was done within the scope of his employment with Shell. Shell, for its part,

says that any negligent acts or omissions of Sztyk were done outside the scope of his employment. Shell has filed a third party claim against its co-defendant Sztyk.

[4] Sztyk's position with Shell was Senior Account Manager, Northern Sales. His employment with Shell was terminated on October 4, 1995, following an internal audit and investigation. Sztyk has commenced legal proceedings in the province of Quebec against Shell as a result of his dismissal.

[5] Procedural rules governing discovery of documents in lawsuits in this jurisdiction are contained in Part 15 of the Rules of Court. Pertinent excerpts are as follows:

219. Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Part, whether or not privilege is claimed in respect of the document.

...

221. (1) A party to an action shall, within 30 days after the close of pleadings, file a statement as to the documents that are or have been in the party's possession, control or power and that relate to any matter in issue in the action.

(2) The statement must

(a) be in Form 12;

(b) set out the following information:

(i) the documents in the possession, control or power of the party that the party is ready and willing to produce, excluding the pleadings and proceedings in the action;

(ii) the documents that have been, but are not at the time of making the statement, in the possession, control or power of the party, the nature of those documents, when they were last in the party's possession, custody or control and where they are likely to be found;

(iii) the documents in the possession, control or power of the party that the party objects to produce, the general nature of those documents (which shall be identified with reasonable certainty) and the specific grounds on which the party objects to production; and

(c) be endorsed with a notice stating

(i) the day and time when the documents the party does not object to produce may be inspected, which shall not be later than 15 days after the day the statement is served; and

- (ii) the place where the documents the party does not object to produce may be inspected, which shall be the address for service of the party making the statement unless otherwise ordered.

...

226. (1) The Court may, on the application of a party seeking production from another party, order that the other party

- (a) make production of documents, where the other party neglected or refused to make discovery or production of documents in accordance with this Part;
- (b) file a further or better statement as to documents, where the other party filed or served a statement as to documents that is incomplete or defective; or
- (c) produce a document for inspection to determine if a claim for privilege is valid, where the other party made a claim for privilege in respect of a document.

(2) Where, on an application under subrule (1), privilege is claimed in respect of a document, the Court may inspect the document for the purpose of deciding the validity of the claim for privilege and consider all relevant evidence adduced that tends to establish or destroy the claim for privilege.

(3) On an application under subrule (1), the Court may permit cross-examination under oath of a party on a statement as to documents or any further statement as to documents.

[6] In its Statement as to Documents, Shell states its objection to producing the following documents on the ground that these documents contain “matters of solicitor-client privilege raised in contemplation of litigation”:

- “1. November 17, 1995 Northern Sales Final Audit Report prepared in contemplation of litigation.
- 2. Inter-office memoranda prepared in contemplation of litigation.
- 3. Transcripts of interviews with employees and former employees prepared in contemplation of litigation.

...”

[7] On the present application the plaintiff seeks an order under Rule 226 compelling Shell to produce documents (1) (2) and (3) described above for the Court’s inspection to determine whether Shell’s claim of privilege is valid.

[8] On the conclusion of oral argument I directed Shell; a) to produce document (1) in a sealed envelope for the Court's inspection in private to ascertain the validity of the claim of privilege, and, b) on an interim basis, to file a Supplemental Statement as to Documents providing greater detail or description of the documents referred to as items (2) and (3) above.

[9] I have now received and reviewed document (1), together with the affidavit evidence submitted on the Rule 226 application, and issue these Reasons now at the request of the parties as I understand arrangements have been made for examinations for discovery to take place in Montreal in late August.

[10] It is my view that the claim for privilege is without merit with respect to the November 17, 1995 Northern Sales Final Audit Report.

[11] There are two possible heads of professional privilege:

a) legal advice privilege, i.e., documents prepared in an attempt to get legal advice from a solicitor; and

b) litigation privilege, i.e., documents prepared in contemplation of litigation.

Shell claims privilege under both heads. Either ground of privilege is sufficient to uphold the claim of privilege. See *Singh v Edmonton* (1994) 162 A.R. 13 (Alta. C.A.).

[12] A claim of litigation privilege will be upheld only when litigation was in "reasonable prospect" at the time the document was prepared *and* the dominant purpose of its preparation was to aid in the conduct of the litigation. *Butterfield v Dickson* [1994] N.W.T.R. 228.

[13] Evidence adduced before me indicates that it was in the plaintiff's letter of September 18, 1995 to Shell that the plaintiff first raised its complaint about certain representations having been made by Shell and/or Sztyk at the time of the 1994 transaction. This letter followed Shell's notification to the plaintiff on September 15, 1995 of a price increase to be implemented. It can fairly be said that litigation was a reasonable prospect at that time.

[14] But that does not end the matter. The November 17, 1995 report has its genesis, according to the evidence, in February 1995 when Shell "commissioned an internal audit of the administration and operation of the Northern Sales District" (affidavit of David Frost, para. 2). The document did not come into existence because of the plaintiff's

complaint in September 1995 or the litigation which the plaintiff formally commenced in February 1996. For this reason I find that the “dominant purpose” test is not met.

[15] Mr. Frost’s affidavit makes reference to a separate investigation commissioned by Shell during the currency of the internal audit, an investigation which concerned the possible termination of Sztyk’s employment. Paragraphs 3, 4 and 6 of the Frost affidavit state:

3. I am informed by Brent Way, Manager, Commercial Sales for Shell that as a result of certain information received on an interim basis by the General Auditor of Shell in July, 1995 regarding Nuna Investment Corporation and George Sztyk, Shell commissioned Garry Fotheringham, Manager of Security Operations for Shell, and an employee of Shell, to investigate certain matters with respect to the Northern Sales District, including matters related to the Shell service station in Iqaluit.

4. I am also advised by Brent Way that the investigation was commissioned for the purpose of seeking legal advice from Shell’s in-house solicitors with respect to the continued employment by Shell of George Sztyk, then Senior Account Manager, Northern Sales, for Shell. Shell also sought legal advice from its in-house solicitors with respect to possible criminal charges against George Sztyk and a probable claim by Shell against Sztyk for loss of revenue. Shell also anticipated that litigation would ensue if Shell terminated Sztyk’s employment.

...

6. I am advised by Brent Way that as a result of information gained through the investigation and the advice of Shell’s in-house solicitors, Sztyk’s employment was terminated on October 4, 1995. He commenced proceedings against Shell by filing a complaint on November 1, 1995 for prohibited practices (wrongful dismissal) under the *Quebec Employment Standards Act*.

[16] In the November 17, 1995 report which is the subject of these Reasons, there are no references to the Fotheringham investigation, or to any disciplinary or other action taken or contemplated against Sztyk, or to any answer to any claim made or to be made by Sztyk.

[17] My review of the November 17, 1995 document confirms that it is as described in para. 2 of Mr. Frost’s affidavit - an internal audit of the administration and operation of the Northern Sales District. Sztyk is not mentioned by name, yet there are many references to actions/omissions of the Senior Account Manager, Northern Sales, a

position he held for most, if not all, of the relevant period. The subject matter of the report deals with various accounting irregularities, poor business controls, inadequate documentation, signing authority limits being exceeded, inadequate supervision and review of operations, etc. There are references to the Iqaluit service station account in portions of this audit report. Its contents include specific “findings” and “recommendations”. The recommendations, not unexpectedly, are simply aimed at better administration of Shell’s business in the Northern Sales District in future. The contents of the report indicate that the findings and recommendations had, earlier than November 17, 1995, been communicated to various managers, and included in the report are some responses from those managers (including the Senior Account Manager, Northern Sales).

[18] I thus find on the evidence that in February 1995 when the internal auditor was directed to prepare this report, there was not any reasonable prospect (known to Shell) of litigation involving the Iqaluit service station. Consequently the dominant purpose of its preparation was not to aid in the conduct or defence of a lawsuit but rather to provide to management a detailed picture of the ongoing administration and operation of the Northern Sales District. Accordingly, the claim for litigation privilege fails.

[19] The claim for legal advice privilege is also without merit with respect to this document. On its face, it is not a solicitor/client communication. It is not addressed to any solicitor (in-house or otherwise), and within its contents there is no reference to any solicitor’s advice being sought or to be sought on any topic, nor can any such seeking of advice be implied. The document contains a caption “Inter-Office Correspondence” and purports to be sent from the internal auditor’s office to the offices of five internal managers, with distribution copies to two other managers. In the context of this document, its genesis, its preparation and distribution, the evidence simply does not disclose any solicitor and client relationship to which a legal advice privilege might attach. In this respect the facts of the present case are clearly different from those of certain cases cited by counsel, e.g. *Singh, supra*, and *Proctor & Gamble v Nabisco* (1989) 30 F.T.R. 169 (F.C.C.).

[20] For the foregoing reasons I rule that Shell has no valid claim of privilege with respect to this document. I hereby direct that Shell make production of the document to the other parties pursuant to the Rules of Court.

[21] I direct the Clerk of the Court to return the November 17, 1995 document in the sealed envelope (re-sealed) to Shell’s solicitors.

[22] Rulings on the other aspects of the within application will await compliance with the Court's order for a better description of the other documents in question.

J. E. Richard
J.S.C.

Dated at Yellowknife , Northwest Territories
this 18th day of August, 1997.

Counsel for the Plaintiffs: Gerald Phillips

Counsel for the Defendant
Shell Canada Products Limited: Gwen Randall, QC

Counsel for the Defendant
George Szyk: Thomas McCauley

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