

Date: 1998 01 09
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

MEMORANDUM OF JUDGMENT

[1] This memorandum deals with a claim of privilege with respect to documents sought on production, pursuant to Rule 226, and follows steps taken subsequent to my Reasons for Judgment issued August 18, 1997. The defendant Shell has now filed an Amended Statement as to Documents which includes a more detailed and appropriate description of the documents for which it claims a privilege. Those documents are described in a numbered list of 43 documents which comprise the Second Part of the First Schedule to the Amended Statement as to Documents.

[2] The plaintiffs contest the validity of the claim of privilege for documents 1-13 on that list.

[3] I have now had an opportunity to review the written submissions of both counsel with respect to the claim of privilege for these 13 documents.

[4] Shell says that each of these documents was created in contemplation of litigation. It appears that these documents were created on various dates between June 20, 1995 and September 19, 1995.

[5] As stated in my Reasons of August 18, 1997, the affidavit evidence discloses that there was a reasonable prospect of litigation between the plaintiffs and Shell upon Shell's receipt of the plaintiffs' letter of September 18, 1995. The affidavit evidence does not

disclose any reasonable prospect of litigation between the plaintiffs and Shell before September 18, 1995.

[6] Yet, Shell points to the prospective litigation between itself and its then employee Sztyk, which prospect existed in the months prior to September 18, 1995, and says that this “other” litigation is sufficient foundation for its claim of privilege.

[7] As stated in my earlier Reasons, Mr. Frost’s affidavit indicates that in February 1995, Shell commissioned an internal audit of the administration and operation of the Northern Sales District. Further, during the currency of and arising out of that internal audit, a separate investigation was commissioned by Shell concerning the possible termination of Sztyk’s employment for malfeasance. Sztyk’s employment was indeed terminated on October 4, 1995. Sztyk has commenced legal proceedings in the Province of Quebec against Shell as a result of his dismissal.

[8] Documents 1-13, in the main, are described by Shell as notes of interviews conducted by Mr. Fotheringham during the Sztyk investigation, and inter-office memoranda between Fotheringham and others regarding the Sztyk investigation. [I mention here that I have not examined these documents, but for the moment am accepting each description at face value. If counsel wish me to inspect each of the 13 documents and to reconsider the decisions reached herein in the light of such inspection, counsel can so advise.]

[9] In my view, there is merit in Shell’s submission that a document created for the purpose of the anticipated Shell-Sztyk litigation, if privileged for that litigation, is also privileged for the Nuna-Shell litigation.

[10] I reiterate, from my earlier Reasons, that 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. [For the within decision, I will assume, without inspecting the documents, that the documents meet this test *with respect to the Shell-Sztyk anticipated litigation.*]

[11] This litigation privilege continues to subsist even with respect to other and subsequent litigation that may arise. It only ends when the litigation for which the document was created ends. See *The Law of Evidence in Canada* by Sopinka, Lederman and Bryant, pp.658-659; and *McGregor v Dorn* (1988) 63 Alta.L.R.(2d) 378.

[12] I note that the *lis* between Shell and Sztyk continues, inasmuch as there is, within the present proceedings, a third party claim by the defendant Shell against its co-defendant Sztyk.

[13] Document 1 of the 13 documents in question merits separate consideration. It is described in Shell's Amended Statement as to Documents as "June 20, 1995 - Price Comparison Iqaluit prepared by J.P. Duport, Internal Auditor, Shell for Sztyk investigation". However, this description belies the contents of Mr. Frost's affidavit where he states that Shell commissioned the Sztyk investigation in July 1995. The claim of privilege must fail with respect to this document.

[14] In summary, I uphold the proposition that documents in the possession of Shell that are protected by a privilege for purposes of the Shell-Sztyk litigation are also protected by that privilege for purposes of the Nuna-Shell litigation.

J.E. Richard,
J.S.C.

Dated this 9th day of January 1998

Counsel for the Plaintiffs: Gerard K. Phillips

Counsel for the Defendants
Shell Canada Products Limited: Gwen K. Randall, Q.C.

Counsel for the Defendant
George Sztyk: Thomas McCauley

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

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HONOURABLE JUSTICE J.E. RICHARD
