



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Federation of Newfoundland Indians v. Benoit*,
2019 NLCA 52

Date: August 19, 2019

Docket Number: 201901H0055

BETWEEN:

FEDERATION OF NEWFOUNDLAND INDIANS

APPELLANT/APPLICANT

AND:

SHAWN BENOIT, MATTHEW ANDERSON,
MARIE TAPP MELANSON, BOBBIE TAPP GOOSNEY,
PAUL BENNETT, AND JENNIFER SUE LE ROIX

FIRST RESPONDENTS

AND:

HER MAJESTY THE QUEEN (CANADA)

SECOND RESPONDENT

Coram: Hoegg J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G1147
(2019NLSC116)

Application Heard: July 3, 2019

Judgment Rendered Orally: July 3, 2019

Reasons for Decision: August 19, 2019

Counsel for the Appellant/Applicant: Philip J. Buckingham/Adam Ronan

Counsel for the First Respondents: Keith S. Morgan

Counsel for the Second Respondent: No appearance

REASONS FOR DECISION

Hoegg J.A.:

[1] In *Benoit v. Federation of Newfoundland Indians (Federation)*, 2019 NLSC 116, a Supreme Court Justice ordered that two documents listed in *Benoit's* List of Documents were solicitor-client privileged, but that *Federation* had waived its privilege over them.

[2] The two documents in question had been acquired by counsel for *Benoit* several months before he filed *Benoit's* list of documents. Counsel had acquired them in May 2018 after learning of their availability on an American website to which internet users had access. Also in May 2018, one of the listed plaintiffs, Ms. Marie Tapp Melanson, advised *Federation's* President and several of its board members that the two documents were available on the website. Around the same time, Ms. Melanson acquired the documents herself and posted them on *Facebook*. Upon receipt of that information from Ms. Melanson, *Federation* took no action respecting the availability of the two documents nor did it advise Ms. Melanson that it was asserting privilege over them.

[3] After *Benoit* filed its List of Documents in November 2018, *Federation* applied to the Supreme Court of Newfoundland and Labrador for a declaration that the documents were solicitor-client privileged and various other remedies, including the staying of *Benoit's* action as an abuse of process and removal of *Benoit's* counsel. As noted above, the Judge found that *Federation* had waived its privilege over the documents.

[4] *Federation* accepts the Justice's order that the two documents were privileged, but appealed the Justice's order that it waived its privilege over them.

[5] *Federation* then applied to this Court to stay enforcement of the Justice's order that it waived its privilege over the two documents pending determination

of its appeal. At the hearing, *Federation* asserted that it met the three-part test for a stay established by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and applied by this Court in *Rees v. Royal Canadian Mounted Police*, 2005 NLCA 4, *Weir's Construction Limited v. Warford Estate*, 2016 NLCA 65, and *Tremblett v. Tremblett*, 2013 NLCA 53.

[6] In determining whether a stay ought to be granted, the onus is on the applicant, in this case *Federation*, to address the three criteria set out in the above-noted test:

- (1) that there is a serious issue to be tried on appeal;
- (2) that irreparable harm will result if a stay is not granted; and
- (3) that the balance of convenience favours a stay. In this case, that means that the harm suffered by *Federation* would exceed the harm suffered by *Benoit* should a stay not be granted.

[7] Generally, if there is no serious issue to be tried on appeal, the stay application is dismissed (*E.M. v. Y.C.*, 2018 NLCA 21 and *King v. King*, 2015 NLCA 54). If there is a serious issue to be tried on appeal and irreparable harm has not been established, a stay application is generally dismissed without the need to consider the balance of convenience. If an applicant establishes irreparable harm, a court must go on to assess the balance of convenience as between the parties. Some case law suggests that a weak case for irreparable harm can be resolved by considering it together with the balance of convenience (*Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395).

Serious Issue to be Tried

[8] *Federation* argues that its appeal raises serious issues related to the preservation of solicitor-client privilege in the age of the internet. In particular, *Federation* asserts that whether it waived its privilege in the circumstances of this case and what constitutes waiver of privilege generally in the age of the internet are novel and important issues which should be adjudicated by an appellate court. *Federation* also asserts that its appeal concerns the obligations of a solicitor who comes into possession of privileged documents belonging to an adverse party which were disclosed by persons unknown and which are available to the public on the internet.

[9] *Benoit* argues that *Federation* has not identified any basis on which the Judge erred in her determination that *Federation* had waived privilege over the two documents.

[10] I agree with *Benoit* that *Federation* has not specifically alleged error on the part of the Judge. In this regard I note that just because the Court of Appeal of Newfoundland and Labrador Rules no longer require grounds of appeal to be specifically stated does not mean that error does not have to be alleged on a stay application. It is preferable that specific error be alleged on a stay application. That said, *Federation's* filings and argument show that it does not accept the Justice's reasoning respecting her finding of waiver because, in *Federation's* view, it is wrong in law. In effect, *Federation* argues legal error.

[11] In all of the circumstances, I was of the view that whether *Federation* waived its solicitor-client privilege in the unique circumstances of this case is a serious issue to be tried on appeal. Questions respecting what a privilege holder must do to guard against a finding of waiver or acquiescence, and whose burden it is to establish waiver or acquiescence, are also engaged. As well, the potential impact on the administration of justice, if a court prevents privileged documents from being used in its process when those documents are widely available and their contents widely known, is also a serious issue.

Irreparable Harm

[12] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be cured by money damages or which cannot be cured because one party will not be able to collect money damages from the other (*RJR MacDonald*, at paragraph 64).

[13] *Federation* argues that the use to date of the information and advice contained in the two documents has already constituted irreparable harm to it, saying at paragraphs 32 and 33 of its factum:

Benoit have already utilized the information in the Documents, the factual underpinnings therein analysis and legal advice given by FNI's solicitor and contained within the Documents, which now rest with *Benoit*. This information and insight can neither be unseen, undone, extracted nor rectified. It is the flow of information to the opposing side that it ought not possess that results in irreparable harm to FNI. What has been seen, analyzed and put to use already cannot be erased.

Counsel for *Benoit* cannot discard the knowledge and insight gleaned from the Documents (should the appeal be successful). Even a declared willful attempt at suppression of known privileged information may not prevent particulars, tidbits, and

fragments of that information from seeping, without intent, into counsel's thought-process. It is not beyond reasonable consideration that privileged information that may find its way into a brief, strategy or questions posed during the course of discovery. Should an appeal be successful a stated declaration to abandon the advantage gained from the Documents is of little comfort to FNI, and of no remedy at all.

[14] *Federation* also argues that continued and future use of the information and advice contained in the two documents will result in further irreparable harm. In this regard *Federation* maintains that the information contained in the two documents informed the Interrogatories *Benoit* recently sent to *Federation*, and answers to them would require divulging further privileged information. *Federation* maintains that the privileged information has no pecuniary value, and harm resulting to *Federation* from its divulgence and use cannot be compensated by money damages.

[15] For its part, *Benoit* argues that *Federation* has not exhausted its remedies and therefore a stay is not available to it. *Benoit* says that the documents have been available on the internet since at least May 2019 and they remain publicly available for ongoing use and dissemination. *Benoit* asserts that the only issue is how *Benoit* may use the information in the two documents in advancing its case, and whether such use would negatively affect *Federation*. *Benoit* argues that the proceeding is case managed, and maintains that the case management Justice can direct how information in the documents can be used henceforth, including whether the Interrogatories *Benoit* recently sent to *Federation* need be answered and if so how. *Benoit* points out that the Justice made no decision on admissibility of the documents. Further, *Benoit* says that its "joint interest privilege" argument remains to be decided. This issue was argued on the application before the Justice, but she did not find it necessary to decide given her decision respecting waiver.

[16] I agree with *Benoit*, insofar as future use of the information contained in the two privileged documents is concerned, that all potential remedies available to *Federation* may not be exhausted. In this regard, it is open to *Federation* to refuse to answer the Interrogatories and therefore place the issue of use of the privileged information before the Court again. As well, the "joint interest privilege" issue, while separate in law from waiver of privilege, is a serious issue which could be determinative of *Federation's* position.

[17] While I agree that a short answer may be for *Federation* to decline to respond to some or all of the Interrogatories, this answer addresses only a discrete part of the larger issue to be heard on appeal. Such an answer does not

address the pressing issues of what use *Beniot* may make of the information at present and going forward. Moreover, such an answer would doubtless spawn ongoing, piecemeal legal battles without resolving the main issue.

[18] Accordingly, in my view of the circumstances, irreparable harm which cannot be compensated by money damages could result if this Court accepts *Federation's* position on appeal.

Balance of Convenience

[19] The convenience to *Federation* is to have the Justice's ruling on waiver determined on appeal before further harm to it, if any, occurs. Doing so results in an inconvenience to *Benoit* because of the delay associated with an appeal, which prevents *Benoit* from proceeding with its litigation in a timely manner. I note that pretrial procedures are not completed and that no trial date has been set. In these circumstances, I saw the potential harm to *Federation*, should this Court grant its appeal, as outweighing the harm associated with delaying *Benoit's* case.

[20] Solicitor-client privilege is very important to our legal system. I am therefore of the view that it was incumbent on the Court to be cautious about proceeding given the thorny facts of this case.

[21] For the above reasons, I granted a stay of the Justice's decision that *Federation* had waived its privilege over the two documents in issue pending the decision of this Court respecting *Federation's* appeal.

L. R. Hoegg J.A.