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COURT OF APPEAL FOR ONTARIO

MACFARLAND J.A. (IN CHAMBERS)

BETWEEN:

HER MAJESTY THE QUEEN (ONTARIO MINISTRY OF LABOUR)

Appellant (Responding Party)

And

BRUCE POWER INC., TROY RITCHIE and JOHN BURLEY

Respondents (Applicants)

Mark D. Contini for the applicants

David R. McCaskill for the responding party

Heard: April 28, 2008

On motion for an order under s. 131 of the *Provincial Offences Act* for leave to appeal from the judgment of Justice J.A. Morneau of the Ontario Court of Justice dated November 13, 2007.

MACFARLAND J.A.:

Overview

[1] The applicants seek leave to appeal from parts of the appeal judgment of Morneau J. dated November 13, 2007. That appeal judgment partially reversed a judgment of

Woodworth J.P. given September 6, 2005 and February 17, 2006 which stayed the charges against all three accused under the *Occupational Health and Safety Act* in relation to a workplace accident that occurred on January 21, 2002 at the Bruce Power Station "B" nuclear plant in Tiverton, Ontario.

[2] After the accident occurred, Bruce Power prepared an investigation report to be used, it has been found, in anticipation of pending litigation. Prior to trial, an employee gave a copy of this report to the prosecuting Crown. Bruce Power moved before the justice of the peace requesting that the charges be stayed. The justice of the peace found the report was protected by solicitor-client and litigation privilege and assumed that prejudice arises when the Crown gains access to an accused's privileged documents; in the circumstances, she ordered a stay. The appeal judge, however, set aside the stay of proceedings. She was of the view that an accused must show evidence of real prejudice before obtaining that remedy.

[3] The question for this court is thus: when the Crown has come into possession of a defence document that is protected by solicitor-client and litigation privilege, does the accused bear the burden of proving actual prejudice or will prejudice be presumed? Additionally, in such circumstances must the charges be stayed or is a lesser remedy appropriate? The applicants submit that this issue is worthy of granting leave to appeal. I agree. Neither party can point to any authorities on point and the issue may very well arise in the future in the context of corporate accused.

Background

[4] On January 21, 2002 a worker was seriously injured at the Bruce Power Station. The worker was an employee of Vipond Inc., a sub-contractor for Bruce Power. Immediately following the incident, in-house counsel for Bruce Power contacted external counsel for advice in relation to the incident. It was reasonably expected at the time that charges were likely to be laid. External counsel requested that an investigation report be prepared for the use of both external and internal counsel in providing legal advice to the company and for use in defending any charges laid against the company and/or its employees.

[5] Such a report was prepared and is, it is said, informational in nature. It records statements given by employees, including the individuals who were charged. Those who were interviewed for the purpose of the report were assured that the report would remain confidential and that the information it contained would be revealed to no one except legal counsel. All those involved in the preparation of the report were told of the confidential nature of the report and the importance of not revealing either the report or its content. Further, during the preparation of the report one of the individual accused, Troy Ritchie, gave a statement which may tend to incriminate him. The applicants say in their factum:

> Although the Investigation Report was informational in nature, it set out a number of factual findings and analyses that could be used to the disadvantage and prejudice of the

> Respondents in any trial of charges that might be brought by the MOL [Ministry of Labour].

[6] When the report was completed in its final form all members of the group responsible for it were required to hand in their notes, memoranda and/or any copies of the draft report or other documents that related to its preparation. One member of the group, Ian Ritchie, retained a copy of the draft report which he undertook to destroy.

[7] Ian Ritchie had also, in the course of the MOL investigation, asked the MOL inspector to issue an order requiring Bruce Power to release the report to the MOL. Upon becoming aware of this request, internal legal counsel contacted the MOL inspector and told him the report was privileged, having been prepared in contemplation of litigation and for the use of counsel in defending any charges. The MOL inspector, Mr. Martin, agreed with counsel, at the time, that the report was privileged and did not order the report to be produced.

[8] Later on, the report was released to the Building Trade Unions and the Society of Energy Professionals for the limited purpose of education. It was an express condition of this disclosure that it was for the purpose of education only, and that privilege was not waived for any other purpose.

[9] Ian Ritchie, however, persisted in his efforts to have the report released. After charges were laid and before trial, Crown counsel Bednar and Inspector Martin attended at Ian Ritchie's home to interview him. On that occasion, and contrary to his

undertaking, Ian Ritchie provided the draft copy of the report, which he had undertaken to destroy, to Crown counsel. As part of its disclosure obligation, the Crown provided a copy of the report to counsel for the accused.

[10] Immediate objection was raised to the Crown having the report and counsel advised the Crown they intended to bring a motion before the court in relation thereto. The report was reviewed by Crown Counsel Bednar and Mr. Martin and was also disclosed to Vipond Inc., a co-accused of the applicants. The record is unclear as to whom else the report may have been disclosed.

[11] At the outset of their trial the applicants moved for a finding that the report was privileged and the justice of the peace agreed that it was. The appeal judge also agreed that the report was privileged. No issue is taken with that finding in this court. The Crown has conceded in oral argument that the report is privileged under both solicitor-client and litigation privilege. The justice of the peace had ordered all copies of the report returned to the applicants and the Crown and Vipond Inc. abided by that order. The Crown was in possession of this report for almost eleven months.

[12] Thereafter the justice of the peace determined that the charges should be stayed against the accused on the basis that the Crown's possession of the report had irreparably prejudiced the accused's rights to make full answer and defence and that no remedy short of a stay would be sufficient to cure the effects of the violation. She found that there was evidence before the court showing that the Crown retained and reviewed the report for a

lengthy period despite being well aware of the prejudice to the applicants; that other persons who will be called to give evidence have reviewed the report and it will not be possible for the court to make a determination in some instances whether the knowledge of the document specifically forms the basis for the evidence being presented; and that even though a new prosecutor has taken over the case, there is no accurate indication that the knowledge of the contents of the report have not been used in the preparation of the prosecution of this matter. She further ordered that the Crown was required to pay the accused $38,000 in legal costs.

[13] The Crown appealed the decision and the appeal judge set aside the stay of proceedings and the order for costs against the Crown. The appeal judge found that the conclusion that the rights of the applicants were violated under s. 7 of the *Charter* was premature as no evidence had yet been called. She found that the trial judge who adjudicates this matter in the future will be well equipped to determine if the report plays any part in the prosecution's case if a challenge is made during the course of any witness' testimony. In her opinion, assigning a new prosecutor to the case who had not seen the report was a sufficient remedy. It is primarily the setting aside of the stay of proceedings that the applicants seek leave to appeal. Although the costs ruling is also raised it was not pressed in argument by the applicants.

[14] Essentially and in a nutshell, the justice of the peace and the appeal judge approached the issue of prejudice differently. The justice of the peace assumed that

prejudice arose when the Crown gained access to the accused's privileged documents and held that in the circumstances no remedy short of a stay would overcome that prejudice. The appeal judge, on the other hand, was of the view that no prejudice had been demonstrated and that the stay should be set aside. In her view, the trial should proceed but without prejudice to the applicants' right to move for a stay during or at the conclusion of that trial if prejudice can be demonstrated.

Analysis

[15] The test for leave to appeal to this court is set out in s. 131 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and is an onerous one:

> 131 (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.
>
> (2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

[16] The Crown does not believe this case reaches the very high standard of broad public interest. It submits that the appeal judge correctly applied the existing jurisprudence stating that an accused must show actual prejudice to fair trial rights in order to trigger a stay of proceedings in a criminal matter under the *Charter*. It submits

the Crown frequently comes into possession of prejudicial evidence but the extreme remedy of a stay is rarely employed. Rather, the evidence is simply excluded from trial as, by way of an example, a coerced confession from an accused. In this case, the potential prejudice to the accused has been remedied as all copies of the report have been returned and the case has been assigned to a new Crown who has not read the report. The Crown's position is succinctly set out in para. 31 of its factum:

> The error by the Justice of the Peace on the motion as identified by Morneau J. on appeal was the inference of sufficient prejudice to warrant granting a stay, and the awarding of costs that went with it. Put simply, the issue is the propriety of a stay at the outset of the trial, in the absence of evidence of actual prejudice, and particularly when the defendant is a corporation.

[17] The applicants disagree. They rely on cases from civil law that stand for the proposition that prejudice will be presumed when one party gains access to the solicitor-client privileged documents of another party. In such cases, the remedy is often to remove the lawyers who came into possession of the privileged documents as solicitors of record. The applicants submit that simply excluding a privileged document as evidence at trial ignores the fact that the Crown has gained an unfair advantage and that it fundamentally undermines the accused's right to a fair trial. It is akin to trying to unscramble an egg. There is no way to know how the Crown's knowledge, gained from the report, has informed the prosecution's case against the applicants or how it has altered the evidence of the witnesses who have reviewed it.

[18] Neither counsel were able to point to any case directly on point. While the Crown argues that the justice of the peace erred "...in the application of well-established legal principles", in the same sentence it concedes in relation to those "well-established legal principles" that "... none of which relate to privileged documents specifically".

[19] The issue then for this court is: when the Crown has come into possession of a defence document that is protected by solicitor-client and litigation privilege, does the accused bear the burden of proving actual prejudice or will prejudice be presumed? Additionally, in such circumstances must the charges be stayed or is a lesser remedy appropriate?

[20] In my view, this is an issue worthy of receiving leave to appeal. Neither party has been able to find authorities on point. It appears that this issue has not been adequately addressed in the jurisprudence and is not the subject of a decision of this court. It seems the most similar cases to this one are civil cases that address the inadvertent disclosure of privileged material and criminal cases that address inadvertent non-disclosure. However, neither of these types of cases are particularly on point. Additionally, I believe this is an issue that may well arise in the future in the context of corporate accused, particularly if disgruntled employees are involved. For all these reasons, I would grant leave to appeal in accordance with these reasons.

[21] Costs of this leave application are reserved to the panel hearing the appeal.

MacFarland JA