

95E097 ST LAWRENCE VS YOUNG

IN THE MATTER OF AN ARBITRATION

B E T W E E N

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND
TECHNOLOGY IN THE FORM OF ST. LAWRENCE COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCE of LYLE YOUNG
OPSEU # 95E097

BOARD OF ARBITRATION:

Richard H. McLaren
Sherril Murray, Union Nominee
Richard O'Connor College Nominee

COUNSEL FOR THE COLLEGE:

Anne Burke

COUNSEL FOR THE UNION:

Michael Gottheil

A HEARING IN RELATION TO THIS MATTER WAS HELD AT KINGSTON, ONTARIO, ON NOVEMBER 2, 1995. WRITTEN ARGUMENT WAS CONCLUDED ON DECEMBER 8, 1995.

PROCEDURAL ORDERS

By letter dated May 4, 1995, Exhibit #2, the college advised Professor Lyle Young that he was being dismissed from his employment effective that day. The reasons for this action are summarised in the letter and centre upon the following:

...the College believes that harassment and discrimination based on gender did take place.

In reference to the complaint of Libbie Ramsay, that you created an atmosphere that is offensive to women, intimidating to women, and that your treatment of students is unequal, the College concludes that you failed to fulfil your responsibility of ensuring students a learning environment free of harassment, intimidation and discrimination. You have discriminated against and harassed students based on their gender and have created a negative "poisoned" environment.

In reference to the complaint of Dawn Dulmage, the College concludes that sexual harassment did take place. We believe sexual activity between yourself and Ms. Dulmage did occur on College property. You have used your position of authority to gain sexual favours from a student. The College believes that you have sexually harassed and discriminated against Ms. Dulmage on the basis of her sex. We believe your conduct in the classroom was inappropriate in that you created a negative "poisoned" environment for women in the classroom.

A grievance was filed on May 5, 1995, Exhibit #1, alleging dismissal without cause. On the first day of the hearings set in this matter a series of preliminary matters were raised by Mr. Gottheil, Counsel for the Grievor.

By correspondence Mr. Gottheil requested of College counsel the following items.

1. a copy of the investigation report(s) produced by or for the College in relation to the complaints;
2. a list of all students and/or faculty contacted and/or interviewed by the College in relation to the complaints;
3. **all notes and/or transcripts of interviews conducted by or for the College in relation to the investigation of the complaints, whether such interviews occurred before, during or after the formal investigation into the complaints;**
4. All attendance records, placement records, school transcripts and student files for all students enrolled in Mr. Young's class in the 1994-95 season;
5. evaluation and marking book for the course/class (red binder);
6. all class evaluations completed by students in relation to the grievor's classes during the term of his employment;
7. long distance phone records of Mr. Blaine Mackey, or his office between the dates of September 1994 and May 4, 1995.

Some of these matters were dealt with at the hearing. The counsel resolved some of them and counsel already has the Board's rulings on others of them. Counsel filed written submissions on **item 3** above. It is as a consequence of those submissions that this written set of preliminary orders is issued.

The issue concerns whether notes and witness statements by an employer's solicitor, collected during the course of an investigation concerning an allegation of sexual harassment, are privileged.

The Counsel for the Union submits that a party claiming general privilege must demonstrate that the communications are confidential and would not be divulged and that it was not carried out in aid of existing or contemplated litigation. While solicitor client privilege is not at issue in the dispute the contemplated litigation privilege is in dispute. This latter privilege raises the dominant purpose of the communication. In the alternative it was submitted that if the communications were privileged that it had been waived by the use to which the communications were subsequently made of this information.

In support of its position reference was made to the following cases:

Re Slavutych v. Baker et al., [1975] 55 D.L.R. (3d) 224 (S.C.C.); Re Gruenke v. R., [1991] 3 R.C.S. 263 (S.C.C.); Re Wheeler v. Le Marchant, [1881] 17 Ch.D. 675; Re Waugh v. British Railways Board, [1979] 2 All E.R. 1169 (HL); Re Cousins v. Walsh, [1992] 5 W.W.R. 277 (Sask. Q.B.); An unreported decision between The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU a decision by a Board of Arbitration chaired by Arbitrator Kirkwood dated February 4, 1994; Re C.E.C. Edwards Construction et al., [1987] 60 O.R. (2d) 618 (S.C.O.).

Counsel for the College submits that she was retained for the purpose of giving advice as to the legal characterization and consequences of the facts alleged and the action which the College might wish to take to protect its interests in the matters. There was a second and further purpose to assess the weight of potential evidence, the sufficiency of it, the credibility of potential witnesses and the necessity for further evidence in order to defend itself in the litigation the College believed would arise by action of the Professor. It is submitted that the correspondence, memoranda, records or any other documentary information of counsel are protected by the principle of litigation privilege. Disclosure would undermine the adversarial process. It was further submitted that no waiver occurred either expressly or impliedly.

In support of its position reference was made to the following cases:

Re Slavutych v. Baker et al., *supra*; Re Gruenke v. R., *supra*; Re Wheeler v. Le Marchant, *supra*; R. Sharpe, "Claiming Privilege in the Discovery Process" Special Lectures of the Law Society of Upper Canada, 1984 (Don Mills, Ontario: De Boo, 1984); Re Jesionowski v. Gorecki and Ship Wa-Yas, [1992] 55 F.T.R. 1 (F.C.C.); Re Hickman v. Taylor et. al., [1947] 67 S.Ct. 385; Re Ottawa-Carleton (Regional Municipality) v. Consumers' Gas Co., [1990] 74 O.R. (2d) 637 (Ont.High.Ct.); Re Bell Canada, 25 L.A.C. (2d) 200 (Picher, 1980); An unreported decision between Seneca College and Ontario Public Services Employees' Union, a decision by a Board of Arbitration chaired by Arbitrator Kates dated May 22, 1985; Re Blackstone v. The Mutual Life Insurance Company of New York, [1944] O.R. 328 (Ont.C.A.); Re Vernon v. Board of Education for the Borough of North York, [1975] 9 O.R. (2d) (H.C.J.); Re Werner v. Warner Auto-Marine Inc., [1990] 73 O.R. (2d) 59 (H.C.J.); Re Yri-York Ltd. v. Commercial Union Assurance Co. of Canada et al., [1987] 17 C.P.C. (2d) 181 (H.C.J.); Re Keuhl v. McConnell, [1991] 3 C.P.C. (3d) (Ont.Gen.Div.); An unreported decision between The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU, *supra*; Re: Waugh v. British Railways Board, *supra*; Re Walters v. Toronto Transit Commission, [1985] 50 O.R. (2d) 635 (H.C.J.); Re Davies v. Harrington, [1980] 115 D.L.R. (3d) 347 (Nova Scotia C.A.); Re Geffen et. al. v. Goodman et. al., [1991] 81 D.L.R. (4th) 211 (S.C.C.); Re Stewart v. Walker, [1903] 6 O.L.R. 495 (C.A.); Re Hodgkinson v. Simms, [1988] 3 W.W.R. 132 (B.C.C.A.); Re Western Assurance Co. v. Canada Life Assurance Co., [1987] 63 O.R. (2d) 276 (S.C.O.); Re Hunter et al. v. Rogers, [1981] 2 W.W.R. 189 (B.C.S.C.); Re S. & K. Processors Ltd. etc., [1983] 4 W.W.R. 762 (B.C.S.C.).

DECISION

The College conducted two investigations of the matters alleged in the disciplinary letter. It held one investigation pursuant to its internal procedures conducted by its own employees. It then had a second one conducted on its behalf by its solicitors to advise the College on the outcomes and defense of any litigation launched by a complainant under the Ontario Human Rights Code or by way of grievance under the Collective Agreement in response to its disciplinary actions. In many instances this latter process would be done initially by the College's own employees if the complaint was of a different nature. In the normal course an employer would conduct its own investigation using its own employees before imposing discipline. The actual investigation by counsel involves an element of what the employer would normally do and an element of litigation investigation. The difficulty here is the protection of the College's internal harassment procedure and the litigation process while obtaining disclosure to determine what case the Grievor has to meet. The internal investigation raises issues about privilege of confidential communications generally. The other investigate on raises issues surrounding the litigation privilege. These two privileges are discussed under separate headings below.

In making these determinations the Board has been significantly handicapped by the absence of any evidence or understanding of precisely what went on leading to the disciplinary proceeding. No evidence was called and no explanation was given of the overall process; although some assertions as to what transpired are contained in the written materials of counsel. We have as a consequence been required to deal with these matters somewhat in the abstract in the absence of any facts and a broad and general demand for everything possible from the Union counsel as set out earlier.

Litigation Privilege

Work undertaken by a lawyer in contemplation of litigation has been impressed with the litigation privilege to protect the adversarial process. To operate effectively this process requires and depends upon a thorough investigation and preparation by the parties through their counsel. The disclosure of such work would only encourage lack of diligence on the other side in the expectation of obtaining the research and work of the counsel for the opposite side.

The litigation privilege is described in *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675 at 681:

The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commences or in contemplation, and where they have been made with a view to such litigation, either for the purpose of obtaining advice as to such information which might lead to the obtaining of such evidence.

This privilege may be contrasted with the "Privilege of Confidential Communications Generally" discussed in the second part of this decision. It also may be contrasted with solicitor-client privilege which is not at issue in these proceedings. A comparison of those two privileges may be found in Sharpe, "Claiming Privilege in the Discovery Process" in *Special Lectures of the Law Society of Upper Canada, 1984* (Don Mills, Ont: DeBoo, 1984) at 164-5:

. . . solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a nonconfidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all

citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice. Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer a client).

In the United States the litigation privilege is known by the term "work product" rule. The rationale for the rule is well described in *Hickman v. Taylor* 67 S. Ct. 385 (1947) at 393-94:

in performing his various duties. ..It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . .

This work is reflected, of course in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways-aptly though roughly termed by the Circuit Court of Appeals in this case as the work product of the lawyer. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the client and the cause of justice would be poorly served.

The Board must take the principle and the rationale for the litigation privilege and apply it to this case. The College submits that to require the disclosure of its litigation preparation work would not further the litigation process which the rule is designed to protect. The adversarial process depends upon a through investigation and preparation by the parties and their counsel. Disclosure of that work encourages less diligent conduct by the opposite counsel which weakens the adversarial system which is intended to determine the truth and essence of matters in dispute by parties in conflict.

All of the above having been said there is a need of opposing counsel to know the case they have to meet which does require some disclosure. How are these conflicting positions to be reconciled in a case such as the one before us? The issue is one of drawing the proper line between privilege and disclosure. That exercise may be made more difficult by the fact that a communication may have more than one purpose. It is also dependant upon the fact that this proceeding is a quasi-judicial one imposed on the parties by statute. Under these proceedings the Board has the power to set its own procedure. It is not obliged to follow the civil litigation rules or procedures. The Board ought to heed those rules while being mindful of the need to design a process that is suitable to a grievance and arbitration resolution procedure.

The Grievor and the Union have received the written complaints of the students involved; {filed as Exhibits # 4 & 5} and are advised in the written submissions of the College that they will receive the complaints and the notes of the people interviewed by Betty Boone in her investigation. It ought to be noted here that the Board does not know the facts or details of the internal procedure or even who Betty Boone is.

In her written submissions counsel for the College describes the investigations undertaken by her and solicitors under her direction in the following terms at p. 1:

Counsel was retained in this matter, for two purposes ... Counsel was requested to carry out an investigation for the purpose of giving advise as to the legal characterization and consequences of the facts

alleged and any action the College might wish to make to protect its interests in these matters. **{hereafter referred to as purpose one}** At the same time, however, Counsel were asked to assess the weight of potential evidence, the sufficiency of evidence, the credibility of witnesses or potential witnesses and the necessity of obtaining further evidence in order to defend itself in the litigation it was believed would certainly follow before a Human Rights Tribunal and/ or a Board of Arbitration. **{hereafter referred to as purpose two}**.

In further elucidation of these purposes it is stated that interviews were carried out as close as possible to the events. Thus suggesting that the investigations to some degree were similar to those an employer might take upon itself usually using its own employees to do so before making a disciplinary response. Then it is suggested that rolled into that process was one of assessing witness credibility and corroboration of evidence. However, the Board notes that even an internal employer conducted investigation in a matter such as this one would also have to involve at least a layman's assessment of the same points in order to come to a view and characterization of events. It was asserted at p. 2 that:

None of the foregoing were necessary to giving an opinion on the facts alleged but all of the foregoing were clearly required to prepare for the expected litigation and position the College in the most advantageous position to later defend itself.

The purpose of the investigations were in the Board's view far more like that of an employer making an assessment to determine what discipline, if any, was to be imposed. It merely had the collateral benefit of purpose two because it was the College's counsel who did the investigation. It was essentially purpose one which was being fulfilled. Therefore, in the context of an employment related investigation the dual purpose or substantial or dominant purpose tests are not required to be resorted to in these rulings. The American rationale cited above is instructive on the point of privilege when it refers to the work product of the lawyer. What went on here does not appear to be the work product of a lawyer acting as a lawyer preparing for litigation. It was work product of a lawyer advising on what they believed to be the facts and what the ground for discipline could or should be. Information which arises in the course of such an investigation is very different than asking for the attorney's thoughts and work product on how to pursue or defend the litigation. If information concerning this later point were to be required to be released then the adversarial system and the cause of justice would be affected. They are no so affected for the investigation leading to the action of disciplining the employee.

Aside from the distinction the board draws in the investigations in purpose two the College also submits that sufficient disclosure has been made and no further disclosure is required. This submission is very difficult to accept in the absence of knowing what precisely has been disclosed other than the complainants statements. It is submitted that the involvement of the Union from the very outset of the case and the grievance procedure have given it the information to assist the Grievor; the Union and its Counsel in narrowing the issues and knowing the case they have to meet. Thus, it is argued that there is no overriding policy reasons that would warrant the Board ordering the production of the documents created in anticipation of litigation. The difficulty with this assertion is the documents are as much, or more so, created in anticipation of a disciplinary decision as they are of litigation. If the employer's own employees had undertaken the investigation it would not be the work product of the lawyer in pursuit of litigation. That of itself illustrates that the documents can and should be considered to be ones which ought to be disclosed unless they could have been or should have been requested in the grievance procedure and were not requested.

The grievance procedure of a collective agreement is a distinctive feature of unionised employee relations. It is required by statute and intended to be a process to foster frank discussion of the disciplinary action after it has been taken. Arbitration may follow; but, it may not. Compromise is certainly hoped for in designing the grievance procedure but it is also somewhat akin to examinations for discovery in civil litigation. Although it is also more than such a process and is intended when used to its fullest extent to discuss the case and its possible settlement. Thus, the Board finds that the mere fact that a lawyer has conducted the processes preceding the disciplinary

decision and then subsequent to the grievance procedure litigation by way of arbitration follows does not throw a blanket of privilege over all that has proceeded the grievance procedure. The completion of the grievance procedure may do that for matters that follow the referral to arbitration. Once that occurs what the lawyer does is clearly their work product in contemplation of litigation. The matters preceding referral to arbitration are not necessarily in the same category.

The communications which preceded the grievance procedure must depend upon the principles of Privilege of Confidential Communications Generally and not on those of Privilege in Contemplation of Litigation. The purpose of this general privilege is not to protect the litigation process but that of the relationship involved in the confidential communications.

Privilege of Confidential Communications Generally

The law has for a long time recognised a privilege may arise in connection with a confidential communication or relationship. The courts recognize such a privilege to protect the relationship established when confidential information is communicated. It is important to keep that purpose in mind and to connect it to the subject matter giving rise to the claims of privilege. Here we are dealing with sexual harassment. It can be a tricky and difficult subject matter for most human beings.

Both counsel cite the same cases Slavutych v. Baker, supra, and R. v. Gruenke, supra as establishing the basis of communications that are confidential. These cases cite and rely upon Professor Wigmore's four conditions:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit gained for the correct disposal of litigation.

The communications between students and the College Counsel reflected concern on the students part about the possibility of disclosure to Professor Young in the event that a Human Rights complaint was launched. Students were advised of the law in this area by counsel and given the option of filing a complaint or not doing so. Unless a student filed a complaint, their disclosures to counsel would remain confidential. Thus, the first test is satisfied. The communications originated in a confidence that they will not be disclosed.

In sexual harassment cases witnesses can be discouraged from coming forward and expressing their observation of events. In a setting such as an educational institution the needs of the community also interplay on the considerations. Professors work with members of a community **who are on the whole** much younger than themselves and less **experienced**. They carry out their work in circumstances where they appear very powerful and omnipotent. For a professor there exists with their students a trust borne of the learning environment, age, experience and the learning process. In such a community the disclosure would likely jeopardize an inquirer's ability to seek out relevant information. It is in the interests of the educational community to ensure that concerns about its policy and the conduct of its professors can be brought forward without fear of those concerns being made public in the absence of a subsequent formal complaint. However, there must also be sound checks upon rumour and unfounded allegations. Anonymity can be a dangerous tool to those who wish to foster rumour and unrest. While the contents of the discussions or communications need not be disclosed when the College does not act upon information the names of the persons who participated ought to be disclosed.

Non-disclosure of what is said in the absence of formal complaints is necessary for the full and satisfactory maintenance of the relations in the context of a harassment policy in an educational institution. Thus, the second

test of Wigmore is satisfied. In so finding it is unnecessary that this relationship be between the lawyer and the individual. It can be with others involved in the process of the investigation. It is undoubted in the opinion of the community that the relation ought to be sedulously fostered as described in the third of Wigmore's four conditions.

It is the balancing of the interests which is at the root of the fourth condition. The appropriate balance in the Board's view given the grievance procedure which follows the disciplinary action is dependent upon the actions of those who use the College's internal procedure. They should remain protected privilege unless the College acts upon the complaint or a formal complaint is elected to be filed by the complainant. Then the need for disclosure to enable the Grievor to know the case to be met displaces the privileged communication. Also to be disclosed in that event is the communications with others than the complainant. If they are providing corroborative information or observations then those communications must also be revealed to the Grievor and are not within the privilege of confidential communications. All those communications which remain unacted upon and do not form part of the rationale for the discipline remain in the area of privilege of confidential communications. Those which are acted upon, relied upon in support or corroboration must be disclosed.

ORDERS

Based upon the foregoing analysis the following orders are made.

1. All notes and/or transcripts of interviews conducted by or for the College up to the referral to arbitration are required to be produced if:
 - (a) relied upon by the College to form the disciplinary letter; or,
 - (b) arose because of a formal complaint against the Grievor.
2. A list of the names of all those who were involved in the internal procedure of the College but not what went on within that procedure unless it comes within (1) above.
3. Disclosure of all those items promised in the written submissions of the College.

The production of all of this information is to take place within 24 hours of the date and time of receipt of the fax containing these reasons and orders. Full, complete and timely disclosure at the outset of these proceedings is required.

The absence of specific facts against which to assess the adequacy of the above mentioned orders leads the Board to the following procedure. The parties may make written requests followed by oral submissions for specific rulings as to whether particular matters are within the above orders in the event the counsel are unable to agree as to the application of them in any given specific instance.

DATED AT LONDON, ONTARIO THIS 23rd DAY OF APRIL, 1996.

Richard H. McLaren, C.Arb.

I concur
Sherril Murray, Union Nominee

I dissent
Richard O'Connor, Employer Nominee

WRITTEN DISSENT TO FOLLOW 04/23/96.