1964

*Oct. 19
Nov. 9

THE DEPUTY ATTORNEY GENERAL OF CANADA ..... APPLICANT;

AND

ERIC BROWN ..... RESPONDENT.

MOTIONS FOR LEAVE TO APPEAL

Appeals—Jurisdiction—Taxation—Income tax—Seizure of solicitor's trust accounts books and records—Whether subject to solicitor-client privilege—Motion for leave to appeal—Supreme Court Act, R.S.C. 1952, c. 259, s. 41—Income Tax Act, R.S.C. 1952, c. 148, s. 126A.

In August 1962, in the course of making a "spot check" of lawyers' records, the Minister asked for permission to examine the respondent's trust account books and records. The apparent purpose of such examination related to the respondent's own return of income and not to the returns of any of his clients, and it was not inspired by any suggestion of improper conduct on his part. The permission was refused on the ground that a solicitor and client privilege existed. There was no waiver by any of the clients of their privilege. The procedure laid down in s. 126A of the *Income Tax Act*, R.S.C. 1952, c. 148, was followed, and the books and records were seized, sealed and placed in the custody of the sheriff. The respondent then applied to the Supreme Court of British Columbia for the determination of the question whether his clients had a solicitor-client privilege in respect of those books and records. The Court ruled that such a privilege did exist in respect of all the documents and they were ordered returned to the respondent. An appeal from this decision was quashed by the Court of Appeal for lack of jurisdiction. The Deputy Attorney General then applied to this Court for leave to appeal from the trial judge's order and, alternatively, for leave to appeal the decision of the Court of Appeal.

*PRESENT: Cartwright, Martland and Ritchie JJ.

Held: Both applications should be dismissed.

Section 126A of the *Income Tax Act* was a complete code in itself for deciding the question of solicitor-client privilege relative to documents of a client in the possession of a solicitor. The section, which contains no provision for an appeal, contemplates a speedy determination of the issue of the claim of privilege and thereafter a prompt delivery of possession of the document involved, either to the solicitor or to the officer of the Department. Once that has been done the whole matter has not only been determined, but completed and any order which could be made on an appeal, assuming that an appeal lies, could not have a direct and immediate practical effect, as the document would no longer be in the hands of the custodian. If the order directed delivery to the officer, he would, by the time the appeal was heard, have had the opportunity to inspect it. If delivery was ordered to be made to the solicitor, the Act contains no provision requiring him to surrender it again to the officer or to the custodian.

APPLICATIONS by the Crown for leave to appeal from a judgment of Sullivan J. of the Supreme Court of British Columbia,[1] and from a judgment of the Court of Appeal for British Columbia.[2] Applications dismissed.

D. S. Maxwell, Q.C., for the applicant.

C. C. Locke, Q.C. for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—Two applications have been made by the Deputy Attorney General of Canada (hereinafter referred to as "the applicant") for leave to appeal to this Court, pursuant to s. 41 of the *Supreme Court Act*.

The respondent, Eric Brown, is a barrister and solicitor, practising his profession in the City of Vancouver. On August 24, 1962, an officer of the Department of National Revenue attended at his office and asked him for permission to examine his trust account books and records kept by him. The apparent purpose of such examination related to the respondent's own return of income and not to the returns of any of his clients.

It should be stated at the outset that it is clear that the respondent is a barrister and solicitor in good standing and of high repute and that the proposed examination was not inspired by any suggestion of improper conduct on his part, but was to be made in the course of what both counsel described as a "spot check" of lawyers' records.

After considering the request, the respondent refused permission, on the ground that his clients had a solicitor

[1] [1963] C.T.C. 1; 62 D.T.C. 1331. [2] (1964), 64 D.T.C. 5107.

1964

DEPUTY ATTY. GEN. OF CANADA v. BROWN

Martland J.

and client privilege in respect of those books and records. The officer thereupon seized the documents in question, placed them in a sealed package, which was marked for identification, and then delivered them into the custody of the sheriff of the County of Vancouver.

On September 5, 1962, the respondent applied, pursuant to the provisions of s. 126A of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended, for the determination of the question whether the clients had a solicitor and client privilege in respect of the documents which had been seized. He also communicated to the Minister of National Revenue, as he was required to do by subs. (14) of that section, the names and addresses of the clients last known to him in respect of whom the privilege had been claimed. This list contained the names and addresses of all the respondent's clients for whom he held funds in trust.

The Minister did not communicate with any of the persons whose names were contained in the list to advise that a claim of privilege had been made on his behalf and to afford an opportunity of waiving the privilege as contemplated by subs. (14). The reason was the highly laudable one that such a communication, addressed to each of the respondent's clients for whom he held trust funds, would, in all likelihood, have had a serious effect upon the respondent's standing with his clients. In the result, however, none of the respondent's clients was aware of a claim of privilege having been made on his behalf, unless the respondent communicated with them, as to which there is no evidence before us.

The matter came on for hearing before Sullivan J., who held that a solicitor and client privilege did exist in respect of all the documents in question and who ordered, pursuant to subs. (5)(*b*)(i) of s. 126A, that the sealed package be delivered by the sheriff to the respondent forthwith. The learned judge found that the privilege existed with respect to all of the contents of the respondent's trust account books and records and he did not deem it necessary, in the light of the evidence adduced at the hearing, to inspect them.

Application for leave to appeal from the order[1] of Sullivan J., which was made on September 24, 1962, was made to this Court by notice filed on December 6, 1962.

[1] [1963] C.T.C. 1, 62 D.T.C. 1331.

Upon it appearing that an appeal had been taken from the order to the Court of Appeal of British Columbia, that application was adjourned. Thereafter the Court of Appeal[1], upon a motion to quash the appeal launched by the respondent, quashed the appeal, on the ground that the Court did not have jurisdiction to entertain the appeal, it being the view of the majority that in hearing the application Sullivan J. was acting as *persona designata* and there was no statutory provision for any appeal from his decision.

The applicant has now renewed its application for leave to appeal from the decision of Sullivan J., as being a decision of the "highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed", within the wording of s. 41 of the *Supreme Court Act*. Alternatively, the applicant now seeks leave to appeal from the decision of the Court of Appeal of British Columbia that it did not have jurisdiction to hear an appeal from the order of Sullivan J.

In so far as the latter application is concerned, despite the fact that the application for leave has been made, counsel for both parties submitted that no appeal did lie to the Court of Appeal of British Columbia because, this being a statute enacted by the Federal Parliament, a right of appeal to the Court of Appeal of British Columbia could only have been given by the terms of a Federal statute and no such right had been provided. Whether or not that submission is sound was not determined in the Court of Appeal of British Columbia, which reached its decision for different reasons, and, for the reasons hereinafter given, I do not think it is necessary to decide it here.

Section 125 of the *Income Tax Act* requires every person carrying on a business and every taxpayer to keep proper books and records of account. Section 126 enables a person, authorized by the Minister of National Revenue, to examine the books and records and any account, voucher, letter, telegram or other document which relates, or may relate, to information that is, or should be, in the books or records, or the amount of tax payable under the Act.

Section 126A was enacted in 1956, by c. 39 of the Statutes of Canada of that year, and it deals with documents which are in the possession of a solicitor for which he claims a solicitor and client privilege. The extent of that privilege

[1] (1964), 64 D.T.C. 5107.

1964

DEPUTY ATTY. GEN. OF CANADA v. BROWN

Martland J.

depends upon the law of the province in which the document is situated. The section provides for the placing of the documents, in a sealed package, in the possession of a custodian and for a speedy reference of the issue, as to the existence of the privilege claimed, to a judge of a superior court having jurisdiction in the province where the matter arises, or to a judge of the Exchequer Court of Canada.

The judge who hears the application must hear it in camera and he is required to deal with it summarily. He is further required to order either that the document in question be delivered by the custodian to the solicitor, if he holds that a privilege exists, or be delivered to an officer, or a person designated by the Deputy Minister of National Revenue for Taxation, if he holds that a privilege does not exist.

The section contemplates, not only a decision as to the existence of a solicitor and client privilege, but also a disposition of the custody of the document involved, in accordance with that decision.

The section contains no provision for an appeal.

The relevant provisions of s. 126A are as follows:

126A. (1) In this section

* * *

(*b*) "custodian" means a person in whose custody a package is placed pursuant to subsection (3);

* * *

(*e*) "solicitor-client privilege" means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence.

* * *

(3) Where an officer is about to examine or seize a document in the possession of a lawyer and the lawyer claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(*a*) seize the document and place it, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package; and

(*b*) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if the officer and the lawyer agree in writing upon a person to act as custodian, in the custody of such person.

(4) Where a document has been seized and placed in custody under subsection (3), the client, or the lawyer on behalf of the client, may

(*a*) within 14 days from the day the document was so placed in custody, apply, upon 3 days' notice of motion to the Deputy Attorney General of Canada, to a judge for an order

(i) fixing a day (not later than 21 days after the date of the order) and place for the determination of the question whether the client has a solicitor-client privilege in respect of the document, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(*b*) serve a copy of the order on the Deputy Attorney General of Canada and the custodian within 6 days of the day on which it was made, and, within the same time, pay to the custodian the estimated expenses of transporting the document to and from the place of hearing and of safeguarding it; and

(*c*) if he has proceeded as authorized by paragraph (*b*), apply, at the appointed time and place, for an order determining the question.

(5) An application under paragraph (*c*) of subsection (4) shall be heard *in camera,* and on the application

(*a*) the judge may, if he considers it necessary to determine the question, inspect the document and, if he does so, he shall ensure that it is repackaged and resealed; and

(*b*) the judge shall decide the matter summarily and,

(i) if he is of opinion that the client has a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the lawyer, and

(ii) if he is of opinion that the client does not have a solicitor-client privilege in respect of the document, shall order the custodian to deliver the document to the officer or some other person designated by the Deputy Minister of National Revenue for Taxation,

and he shall, at the same time, deliver concise reasons in which he shall describe the nature of the document without divulging the details thereof.

* * *

(7) The custodian shall

(*a*) deliver the document to the lawyer

(i) in accordance with a consent executed by the officer or by or on behalf of the Deputy Attorney General of Canada or the Deputy Minister of National Revenue for Taxation, or

(ii) in accordance with an order of a judge under this section; or

(*b*) deliver the document to the officer or some other person designated by the Deputy Minister of National Revenue for Taxation

(i) in accordance with a consent executed by the lawyer or the client, or

(ii) in accordance with an order of a judge under this section.

* * *

(11) The custodian shall not deliver a document to any person except in accordance with an order of a judge or a consent under this section or except to any officer or servant of the custodian for the purposes of safeguarding the document.

1964

DEPUTY ATTY. GEN. OF CANADA v. BROWN

Martland J.

(14) Where a lawyer has, for the purpose of subsection (2) or (3), made a claim that a named client of his has a solicitor-client privilege in respect of information or a document, he shall at the same time communicate to the Minister or some person duly authorized to act for the Minister the address of the client last known to him so that the Minister may endeavour to advise the client of the claim of privilege that has been made on his behalf and may thereby afford him an opportunity, if it is practicable within the time limited by this section, of waiving the claim of privilege before the matter comes on to be decided by a judge or other tribunal.

I agree with the view expressed by Lord J.A., in the Court of Appeal, that, in cases to which the section is applicable,

> Section 126A is a complete code in itself for deciding the question of solicitor-client privilege relative to documents of a client in the possession of a solicitor.

It is, of course, clear that the privilege involved is that of the client and not the solicitor and the application to a judge for which the section provides may be made by the client, or by the lawyer on his behalf.

The section contemplates a speedy determination of the issue of the claim of privilege and thereafter a prompt delivery of possession of the document involved, either to the solicitor or to the officer of the Department. It seems to me that once that has been done the whole matter has been not only determined, but completed, and that any order which could be made on an appeal (assuming that an appeal lies) could not have a "direct and immediate practical effect", to use the words of Chief Justice Duff in *The King on the Relation of Tolfree v. Clark*[1]. The document in question would no longer be in the hands of the custodian. If the order appealed from directed delivery to the departmental officer, he would, by the time the appeal was heard, have had his opportunity to inspect the document. If the order appealed from directed delivery to the solicitor, the Act contains no provision which would require him, after the document has been restored to him, to surrender it again to the departmental officer or to the custodian.

We were advised that in the present case, following the delivery of the documents to the solicitor, pursuant to the order of Sullivan J., they were voluntarily returned to the

[1] [1944] S.C.R. 69 at 72, 1 D.L.R. 495.

custody of the sheriff, pending an appeal, but I do not see how such a voluntary delivery can clothe the Appellate Court with power to make a new direction regarding their disposition. They are no longer in the hands of the custodian, pursuant to subs. (3). Furthermore, the custodian, under subs. (7), is obligated to deliver the document only upon a consent, or in accordance with the order of a judge under the section.

In the light of the foregoing, and assuming, without deciding, that this is a case in which an appeal could be brought to this Court, I do not think that it is one in which leave should be granted.

Assuming that the appeal were to be heard, the only issue which could be determined would be as to whether the learned judge was right in holding that the respondent was properly entitled to claim, on behalf of his clients generally, a solicitor and client privilege in respect of all his trust account records. Assuming that this Court did not agree that all such records, per se, were necessarily privileged from production, this would not finally determine the matter. It is each individual client who possesses a privilege, if one exists. Circumstances may vary and the position of each client who desired to claim privilege would still require to be considered. The order which this Court would have to make in such event would be that the position of each client of the respondent, who did not waive a claim to privilege, be examined separately and so the matter would be back practically where it started, more than two years after it began.

In so far as granting leave to appeal from the Court of Appeal of British Columbia is concerned, as previously mentioned, neither counsel contended that an appeal did lie to that Court. If leave were to be granted to appeal from the decision of the Court of Appeal, even if we were to reach the conclusion, on the appeal, that an appeal did lie to the Court of Appeal, the matter would then have to be referred back to that Court to hear the appeal upon the merits. Even if that appeal were to succeed, the Court of Appeal would be faced with the same problems in formulating an order as those which I have already outlined.

1964

DEPUTY ATTY. GEN. OF CANADA v. BROWN

Martland J.

For these reasons, in my opinion, this is not a proper case for the granting of leave to appeal to this Court and I would dismiss both applications with costs.

Applications dismissed with costs.

Solicitor for the applicant: E. A. Driedger, Ottawa.

Solicitors for the respondent: Ladner, Downs, Ladner, Locke, Clark & Lenox, Vancouver.