Case Name:
1784049 Ontario Ltd. (c.o.b. Alpha Care Studio 45) v.
Toronto (City)

Between
1784049 Ontario Limited o/a Alpha Care Studio 45,
Applicant/Responding Party, and
City of Toronto, Respondent/Moving Party

[2010] O.J. No. 764

2010 ONSC 1204

Court File No. 06-CV-320895PD1

Ontario Superior Court of Justice

M.A. Code J.

Heard: August 24 and September 9, 2009; written
submissions, December 22, 2009 and January 18, 2010.
Judgment: February 24, 2010.

(65 paras.)

Counsel:

B. Greenspan and J. Makepeace, for the Applicant/Responding Party.

Cynthia Kuehl, for the Respondent/Moving Party.

REASONS FOR JUDGMENT

M.A. CODE J.:--

A. OVERVIEW

1 This is a Motion brought by the City of Toronto ("the City") seeking the return of a confidential report on grounds that the report is protected by solicitor and client privilege. The Motion arises within an originating Application brought by Alpha Care Studio 45 ("Alpha Care") seeking to quash a City of Toronto by-law. The confidential report has fallen into the hands of counsel for Alpha

Care, one Noel Gerry, and the City alleges that Mr. Gerry has improperly used the report as the basis for launching Alpha Care's originating Application. As a result, the City seeks not only the return of the report but also submits that Mr. Gerry should be removed as counsel and the entire Application should be struck.

2 In the result, I agree with the City that the confidential report is privileged. It is conceded that it has been used extensively in the present Application by Mr. Gerry on behalf of his client, Alpha Care. Mr. Gerry has now been in possession of the privileged report for over three years. He received it at some point between June 26, 2006 and September 20, 2006, prior to launching the Application. The confidential report was apparently "leaked" to Alpha Care by a City Counselor. Alpha Care then provided it to Mr. Gerry. It was only on February 25, 2009, after he had been in possession of the report for over two years, that Mr. Gerry wrote to the City Solicitor to advise that he was in possession of the report and that he was using it in the Application. The City Solicitor immediately asserted a claim of privilege over the report and the present Motion ensued.

3 It was unacceptable for Mr. Gerry to retain possession of the report for over two years, and to use it extensively, before advising the City Solicitor that he had received it. I am not critical of Mr. Gerry for choosing to litigate the issue of privilege. Mr. Gerry recently retained Mr. Greenspan to argue that the report is not privileged and Mr. Greenspan has advanced a formidable argument to that effect. Although I have concluded that the report is privileged, it is a close case.

4 However, it was clear from the face of the report that the City would claim privilege over it. Mr. Gerry had a duty to ensure that the Court decided the privilege issue in a timely way, before he used the report. As a result of his delay in litigating the issue, and his client's extensive use of the privileged report, forceful remedies are required.

B.HISTORY OF THE PROCEEDINGS

5 On October 24, 2006, the Applicant Alpha Care brought an originating Notice of Application against the Respondent City of Toronto seeking, *inter alia*, the quashing of City by-law 1055-2005 passed on December 7, 2005. The by-law in question regulates "body-rub parlours", in particular, by limiting their hours of operation. The previous by-law had allowed "body rub parlours" to remain open from 8:00 am to 1:00 am. The new 2005 by-law only permitted hours of operation between 9:00 am and 9:00 pm and based this restriction on concerns about "nuisance".

6 The grounds for quashing the by-law included the assertion that it is "*ultra vires* the respondent's legislative powers" and violates the *Constitution Act* and the *Charter of Rights and Freedoms*. The basis alleged in support of these grounds included the following:

> The By-law was not passed for one or more of the purposes set forth in Section 151 of the *Municipal Act, 2001*, S.O. 2001 c. 25 and is thus invalid;
>
> The By-law fails to comply with Section 151 of the *Municipal Act, 2001* S.O. 2001 c. 25 in that there was no evidence that body-rub parlours cause or create nuisance before the Council of the Respondent, and is thus invalid;
>
> The By-law fails to comply with Section 151 of the *Municipal Act, 2001* S.O. 2001 c. 25 in that body-rub parlours do not cause or create nuisances, or in the al-

> ternative do not cause or create nuisances that can be prevented by curtailing their hours of operation, and is thus invalid;
>
> The By-law was passed in bad faith and is thus invalid;
>
> The enactment of the By-law is a colourable attempt by the Respondent to use its provincial legislative authority to pass a by-law that is in substance criminal law.

7 The lawyer retained by Alpha Care to file the above Notice of Application was Noel Gerry. A month prior to commencing the Application, Mr. Gerry had written to the City Clerk on behalf of his client Alpha Care. The letter, dated September 20, 2006, was a submission to be placed before City Council which was about to reconsider the by-law at an upcoming meeting on September 25, 2006. The submission made by Mr. Gerry in the letter was to the general effect that the by-law could not be justified. I find as a fact that Mr. Gerry must have already had the confidential report, dated three months earlier, because his letter makes assertions that are virtually identical to those found in the report.

8 City Council did not accede to Mr. Gerry's submission and the present Application ensued. A Motion has now been brought within that Application, by the City, seeking the return of the confidential report as well as certain ancillary remedies. The background to the City's Motion is summarized below.

9 On January 4, 2008, more than 14 months after launching the Application, Mr. Gerry had the sole shareholder and director of Alpha Care swear the Affidavit in support of its Application. The affiant, Christos Nianiaris, began by referring to the assertion in the by-law preamble:

> The preamble of the By-law states:
>
> WHEREAS the City of Toronto has decided that activities carried out in and around Body Rub Parlours have a detrimental impact on the enjoyment of other properties in their vicinity and neighbourhood and that limiting the hours of operation of these businesses will help control this nuisance.

10 The affiant then made assertions, at some length and with some repetition, to the general effect that there was no justification for the by-law. Like Mr. Gerry's earlier letter to City Council, I find as a fact that Mr. Nianiaris must have had the confidential report at the time he prepared his Affidavit because he repeatedly uses language and makes statements that are virtually identical to those found in the report.

11 The case has languished somewhat. The Respondent's materials have not yet been filed, there have been no cross-examinations and no date has been set for the Application to be heard.

12 One final background circumstance relevant to the commencement of the present Motion is that there was another closely related Application before the Court. This other Application was brought by the Association of Body Rub Parlours of Toronto. It was commenced on March 23, 2006, some 7 months before the present Application brought by Alpha Care. It also sought the quashing of the same 2005 by-law but on somewhat different grounds that tended to focus on whether the by-law was "patently unreasonable." This earlier Application was brought by a different

lawyer (i.e. not Mr. Gerry). It was settled and abandoned by the Association on August 1, 2006, prior to the commencement of the present Application by Alpha Care.

13 The City's present Motion arose some twenty-eight months after the Application was launched by Alpha Care. On February 25, 2009, Mr. Gerry wrote to counsel in the City Solicitor's office who had carriage of the file. Mr. Gerry's letter disclosed the fact that he was in possession of the confidential report from the City Solicitor to City Council dated June 26, 2006. The date of the report is important as it precedes the launch of the present Application by four months. In reliance on that report, Mr. Gerry's February, 2009 letter asked counsel for the City to concede the merits of his client's Application and consent to the quashing of the by-law. He stated:

> I have enclosed a copy of a report that my client Mr. Christos Nianiaris (deceased August 23, 2008) received and provided to my office. It is my understanding that Mr. Nianiaris was provided with a copy of the report by a member of City Council ...

14 Mr. Gerry's letter went on to refer extensively to the contents of the confidential report and to draw conclusions of alleged "bad faith" concerning the passage of the by-law. He asked the City Solicitor to consent to the quashing of the by-law. The confidential report was attached to Mr. Gerry's letter. It is stamped both "confidential" and "in camera" and it is headed up "To: City Council. From: City Solicitor." The purpose of the report is stated as "to seek instructions from City Council in this court application." The court application in question is the earlier attack on the same by-law brought by the Association of Body Rub Parlours of Toronto. The one part of the seven page report relied on most heavily by Mr. Gerry is found at page six. In brief summary, and without disclosing its privileged contents, it contains the City Solicitor's assessment of the state of the evidence supporting the by-law. It also makes certain recommendations as to how counsel might conduct the pending litigation with the Association of Body Rub Parlours of Toronto.

15 Counsel in the City Solicitor's office responded to Mr. Gerry's letter the next day, on February 26, 2009, advising that the report was privileged and that, *inter alia*, Mr. Gerry should remove himself from the case and return the report:

> It is evident from your letter that you are in possession of relevant and confidential information attributable to the solicitor-client relationship between my office and City Council. It is equally evident that you have received that confidential information, that you consider it to be relevant to the matters in issue in the application and that you intend to try to use the confidential information to City Council's detriment.
>
> By reason of the above, it is our position that you ought not to continue as solicitor of record. Accordingly, I would appreciate it if you would advise whether you are willing to remove yourself from the record. If you are unwilling to do so, we will seek instructions to bring a motion to remove you as solicitor of record ...
>
> Your review and use of this confidential information is improper. Please return to us all copies of the confidential report you may have in your possession, custody or control and purge your file of all notes or other information which may disclose or reveal the content of the confidential information. If you have disclosed

> the confidential report or any of the confidential information therein to anyone else, please let us know the details of such disclosure.

16 Mr. Gerry responded the next day, on February 27, 2009, advising that the report may initially have been privileged but that "privilege was expressly waived by the member of City Council who provided the report to my client." He further advised that he intended to produce the report and use it in the present Application and that he had retained counsel, Brian Greenspan, to advise him as to the intended use of the report.

17 The City now brings the present Motion which initially sought an Order removing Mr. Gerry as counsel, the return of the report together with any copies, notes or memoranda disclosing the contents of the report, and an Order restraining any further disclosure of the report. During the course of the hearing of the Motion, however, it has become apparent that Mr. Gerry had the report in his possession at the time he wrote his initial letter to City Council dated September 20, 2006, at the time he drafted the Notice of Application dated October 24, 2006 and at the time he prepared his client's Affidavit dated January 4, 2008. In other words, the Application itself is derivative of the report. The conclusion that Mr. Gerry has had the report throughout, which Mr. Greenspan does not dispute, is driven by the fact that the September 20, 2006 letter and the January 4, 2008 Affidavit use language and make assertions of fact that are virtually identical to language and assertions found in the report.

18 As a result of these developments during the hearing of the Motion, the City now seeks additional remedies as follows: that the entire originating Application be struck, given its reliance on the confidential report; and that Alpha Care be at liberty to recommence its Application but only on instructions given to a new solicitor that do not in any way rely on the allegedly privileged information in the confidential report.

19 Mr. Greenspan has responded to the City's Motion, on behalf of Alpha Care, and he has not pressed the point initially taken by Mr. Gerry concerning waiver. Rather, his position concedes that a report such as the one at issue would normally be protected by solicitor and client privilege as it contains advice from a lawyer to the client about a matter before the court. He further concedes that it is unlikely a single City Counselor could waive privilege by secretly releasing or "leaking" the report, assuming that is what happened. This concession would appear to be well taken. See: *Donofrio v. City of Vaughan* 2008 CanLII 37054 (Ont. S.C.J.); *Elliott v. City of Toronto* (2001), 54 O.R. (3d) 472 (S.C.J.); *City of Guelph v. Super Blue Box Recycling Corp.* (2004) 2 C.P.C. (6th) 276 (Ont. S.C.J.); *Imperial Parking Canada Corp. v. City of Toronto,* [2006] O.J. No. 3792 (S.C.J.). Mr. Greenspan's sole argument is that the report lost its privilege or, more accurately, was never privileged in the first place because of the so-called "crime/fraud exception" to solicitor client privilege.

20 Accordingly, there are two issues before the Court on this Motion:

(i) whether the confidential report is protected by solicitor and client privilege or whether it comes within the "crime/fraud exception"?
(ii) if the report is privileged, what are the appropriate remedies where the privileged information has already been used extensively in order to commence the original proceedings before the Court?

C.LEGISLATIVE HISTORY OF THE BY-LAW

21 In order to properly appreciate Mr. Greenspan's central point about the "crime/fraud exception", the legislative history of the 2005 by-law is important. The relevant chronology is as follows:

* On December 7, 2005, the new by-law was passed by City Council. It is a very short by-law that amends the existing licensing regime for "body rub parlours" by further restricting their hours of operation, as noted above. The first recital in the by-law sets out the jurisdiction relied on to enact the amendment, namely, s. 150 of the *Municipal Act, 2001* which "grants local municipalities the authority to license, regulate and govern any business ... for purposes of health and safety, consumer protection and/or nuisance control." The second recital then specifies further that the City "has decided that activities carried out in and around Body Rub Parlours have a detrimental impact on the enjoyment of other properties in their vicinity and neighbourhood, and that limiting the hours of operation of these businesses will help to control this nuisance."
* On April 7, 2006, the Association of Body Rub Parlours of Toronto Inc. responded to the by-law by commencing its Application. The Application sought, *inter alia*, to quash both the new by-law, summarized above, "respecting the hours of operation of body rub parlours" as well as an earlier by-law of general application "respecting business licensing fees." The grounds relied on tend to focus on claims of "patent unreasonableness" and claims that the by-laws are "punitive" and not "regulatory." In his subsequent Affidavit, Mr. Nianiaris of Alpha Care explained that he did not join in the Association's challenge to the two by-laws for various reasons.
* On June 26, 2006, the City Solicitor's office prepared the confidential report to City Council that is the subject of the present Motion. The report sought instructions as to how to proceed in response to the above Application brought by the Association of Body Rub Parlours. Page 6 of the report, as already noted above, set out the City Solicitor's advice concerning the "hours of operation" by-law. The rest of the report addresses the Application's attack on the earlier "business licensing fees" by-law. The City Solicitor set out its assessment and advice concerning that by-law which applied generally to a number of licensed businesses and not just to body rub parlours. The by-law had increased licensing fees for body rub parlours by about 100%, from approximately $10,000 to $20,000. Section 150(9) of the *Municipal Act, 2001*, requires the amount of licensing fees to relate directly to the costs of administering and enforcing the by-law. The City Solicitor's report reached certain conclusions about that provision and made recommendations as to how to respond to the Application's attack on that by-law.
* On June 27, 28 and 29, 2006, City Council met and "adopted the in-camera report from the City Solicitor seeking instructions", according to a recital found in a subsequent set of Minutes. There are no Minutes before the Court setting out what happened at the in-camera portion of the City Council meeting. However, the City did subsequently consent to an Order

in the Association's Court Application declaring the new fees for body rub parlours invalid.

* On July 14, 2006, the City Solicitor's office wrote to counsel for the Association of Body Rub Parlours recommending settlement of the balance of their pending Application. Given the City's consent to the part that attacked the "licensing fee" by-law, all that remained was the attack on "the hours of operation" by-law. The City Solicitor's office recommended to counsel for the Association that this remaining part of the Application be settled by an agreement not to enforce the new hours of operation, pending reconsideration of the by-law at a meeting of the Planning and Transportation Committee on September 5, 2006. At this upcoming meeting the Association could "make deputations" about the new by-law. Counsel for the Association agreed to this recommended settlement.
* On July 25, 26 and 27, 2006, City Council met again "to consider and adopt the staff recommendations contained in ... the confidential report (July 20, 2006) from the City Solicitor." The Minutes do not disclose this further report from the City Solicitor, and it appears not to have been "leaked" to Alpha Care, but the Minutes do state that "the City Solicitor requires further instructions from City Council" in relation to the Application brought by the Association of Body Rub Parlours. It can be inferred that the "further instructions" involved approval of the proposed settlement with counsel for the Association because City Council proceeded to pass two resolutions that relate to the settlement: first, that the "hours of operation" by-law "be re-opened for further consideration" at the September 5, 2006 meeting of the Planning and Transportation Committee; and second, that the new by-law not be enforced "pending consideration by City Council of any recommendations which may be made by the Planning and Transportation Committee on the issue of hours of operation governing body rub parlours."
* On August 1, 2006, the Association of Body Rub Parlours served and filed a Notice of Abandonment respecting its Application, pursuant to the settlement reached with the City Solicitor's office which had obviously been approved by City Council by this point. In his subsequent Affidavit, Mr. Nianiaris of Alpha Care explained his "dismay" at the abandonment of the Application as it meant that the validity of the "hours of operation" by-law remained unresolved.
* On September 5, 2006, the Planning and Transportation Committee met. Counsel for the Association of Body Rub Parlours and two licensed owners of body rub parlours "made deputations to the Committee regarding the hours of operation." In addition, deputations were made by the Adult Entertainment Association of Canada, an entity that does not include body rub parlours. Mr. Nianiaris of Alpha Care describes this Association as "our main competitors, the strip joint industry." This latter deputation appears to have supported restricting the body rub parlours' hours of operation on grounds related to nuisance. The Adult Entertainment Association claimed to have received complaints to this effect and they made reference

to another business association that had also received complaints. The Committee recommended that the City Solicitor consult with this other association, the Emery Village Business Improvement Association.

* On September 20, 2006, Mr. Gerry wrote to the City Clerk. This letter, on behalf of his client Alpha Care, has already been summarized above. It generally submitted that there was no justification for the "hours of operation" by-law.
* On September 21, 2006 the Emery Village Association's solicitor wrote to the City Solicitor's office confirming that they had received complaints of nuisances associated with 5 licensed body rub parlours located within their district. However, the letter tended to suggest that the nuisances occurred mainly after 2:00 a.m., "when the bars ... shut down for the night." This is a time when operation of body rub parlours was already prohibited by the old by-law. The author of the letter noted, in this regard, that "regulating hours of operations ... is only a first step in addressing the nuisance ... These hours of operation must also be enforced." [Emphasis in the original]
* On September 25, 26 and 27, 2006 City Council met again and adopted the recommendations of the Planning and Transportation Committee. These recommendations re-affirmed the more restrictive hours of operation set out in the new 2005 by-law requiring that body rub parlours close from 9:00 p.m. to 9:00 a.m. The recommendation added a "condition that the industry be given an opportunity to come back to Committee with some options to review some possible reforms that will help to eliminate the 'nuisance' factors attributed to the industry."
* On October 24, 2006 the present Application was commenced by Mr. Gerry, on behalf of his client Alpha Care.

D.THE LAW

(i)The positions of the parties

22 Mr. Greenspan's submission in relation to the "crime/fraud exception" to solicitor and client privilege requires, as a first step, that the confidential June 26, 2006 report to City Council be construed in a certain way. He submits, in substance, that the report should be read as concluding that the "hours of operation" by-law could not be legally justified. Nevertheless, he submits, the City Solicitor goes on to advise that the by-law can still be defended in the Court Application.

23 Mr. Greenspan submits that the substance of the legal advice to the City was that the by-law is invalid but, as he put it colloquially in his submission, "we can get away with it". Not surprisingly, Ms. Kuehl disputes this construction of the confidential report.

24 The second step in Mr. Greenspan's argument is to determine how the "crime/fraud exception" applies to a client like the City of Toronto. He submits that the City is obviously an artificial corporate entity, incapable of committing most unlawful acts. But it is bound by its constative statute, the *City of Toronto Act, 2006*, S.O. 2006, c. 11 and by the *Municipal Act, 2001*, S.O. 2001, c. 25. Section 150 of the latter statute, at the time, allowed the City to regulate businesses for only 3 purposes - health and safety, nuisance control and consumer protection. Section 1 of the former statute provides that the City "exists" only for one purpose, namely, to provide "good government with respect

to matters within its jurisdiction." Section 2 goes on to provide that "good government" by the City "must" include "the following things ... ensure that the City is accountable to the public and that the process for making decisions is transparent."

25 Given the above statutory requirements, Mr. Greenspan's main submission is that the City was acting unlawfully by knowingly persisting in the enactment of a by-law that it knew to be invalid. He submits that the City Solicitor was a party to this unlawful conduct by recommending it in the confidential report.

26 Mr. Greenspan's further submission, in the alternative, is that solicitor and client privilege only protects the advice given by the City Solicitor. The confidential report is full of important factual information concerning the state of the evidence relevant to the case. That factual information is subject to ordinary disclosure rules and does not become privileged simply because it is intertwined with legal advice. Mr. Greenspan submits that if the advice was properly privileged, and not caught by the "crime/fraud exception", then it should be severed from the facts. His bottom line position is that the state of the evidence supporting the by-law cannot be privileged and must be disclosed.

27 Mr. Greenspan's alternative submission, that the facts must be disclosed even if the legal advice is privileged, becomes particularly important at the remedies stage of the analysis. If the report is privileged, in whole or in part, and remedies are needed to restore its prior confidential status, there is a certain artificiality to any remedy that orders Alpha Care to disabuse its corporate mind of highly relevant discloseable facts that it now knows.

28 Ms. Kuehl's position for the City is that the confidential report only advises City Council that the evidence supporting the "hours of operation" by-law was weak at the time of the June, 2006 meeting. She further submits that, as a matter of municipal law, the evidentiary basis for a by-law can often be within a City Counselor's "personal knowledge" and need not be found in a report. Accordingly, she rejects the first step in Mr. Greenspan's analysis and submits that there was nothing improper in advising City Council to continue to support the validity of the by-law. She further submits that lawyers routinely advise clients that their case is weak or even that there is no evidence to support a particular position. This is a proper role for counsel and the client's acceptance or rejection of the advice cannot render the advice itself unlawful.

29 In relation to Mr. Greenspan's alternative submission, Ms. Kuehl concedes that the facts referred to in the confidential report, setting out the state of the evidence supporting the by-law, would all be discloseable. Assuming counsel for Alpha Care asked the right questions when cross-examining the City's affiant, these facts would emerge. However, she submits that it was improper to acquire these facts in advance from a privileged document. It is the document that is privileged in its entirety as it incorporates both the facts and the advice that counsel wove together when communicating with the client.

(ii)The "crime/fraud exception" to solicitor and client privilege:

30 The so-called "crime/fraud exception" to solicitor and client privilege is not really an "exception" in the true sense. In the case of *Regina v. Cox and Railton* (1884), 14 Q.B.D. 153 at 167, Mr. Justice Stephen, one of the greatest scholars of the criminal law, explained that communications "criminal in themselves" do not even "fall within the terms of the rule" and that "many apparent exceptions to it are not really within its terms":

> The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment."

31 In spite of the logic of Stephen J.'s approach, communications between solicitor and client that facilitate crime have come to be regarded as an "exception" to solicitor and client privilege. It is simply a convenient expression that refers to certain classes of communications that are discloseable, even though they pass between solicitor and client. Indeed, in *Descoteaux et al. v. Mierzwinski et al.* (1982), 70 C.C.C. (2d) 385 (S.C.C.), the Court unanimously adopted Stephen J.'s analysis in *Cox, supra* as "the most frequently referred to" formulation of the rule concerning "criminal" communications but went on to describe it as an "exception" to the usual privilege between solicitor and client. The Court, per Lamer J. as he then was, described the "exception" in the following terms (at p. 404):

> "... communications lose that character [of confidentiality] if and to the extent that they were made for the purpose of obtaining legal advice to facilitate the commission of a crime."

32 In subsequent decisions, the Court has continued to refer to the principle in *Cox and Railton* as an "exception" to solicitor and client privilege. See: *Smith v. Jones* (1999), 132 C.C.C (3d) 225 at 243 (S.C.C.); *Regina v. Shirose and Campbell* (1999), 133 C.C.C. (3d) 257 at 291 (S.C.C.). These cases continue to describe the "exception" in the same terms as in *Cox, supra* and in *Descoteaux, supra,* namely, that it applies to communications between a solicitor and client that are "criminal in themselves" or that "facilitate criminal activities." In *Shirose, supra* at pp. 291-295, Binnie J. speaking for the Court added the important clarification that clients and lawyers are entitled to discuss "whether or not" a particular activity or transaction is unlawful without losing the protection of privilege. Indeed, these kinds of discussions are common-place and are entirely proper legal advice. It is only where the client "knew or should have known that the intended conduct was unlawful", and the lawyer joins in the unlawful purpose or unwittingly facilitates it, that privilege is lost.

33 It can be seen that the above formulations of the "exception" do not assist Mr. Greenspan's argument because they consistently speak of facilitating "crime". Whatever can be said about the confidential report to City Council it was certainly not facilitating a "crime."

34 However, the case law has slowly expanded the "exception" to capture other unlawful schemes that are not necessarily "criminal". For example, the learned authors of Sopinka, Lederman, Bryant and Fuerst, *The Law of Evidence in Canada,* 3rd Ed. (Lexis Nexis Canada Inc. 2009) state the following at p. 938:

> "There is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortuous conduct which may not become the subject of criminal proceedings."

A considerable body of case law now holds that the "exception" covers any "intended unlawful conduct." See: *Geographic Resources Integrated Data Solutions Ltd. v. Peterson* (2009), 73 C.P.R.

(4th) 238 (S.C. Master); *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (S.C.J.), leave to appeal granted [2007] O.J. No. 5230 (S.C.J.); *Goldman Sachs and Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C.S.C.); *McIntosh Estates Ltd. v. City of Surrey*, [1996] B.C.J. No. 2008 (S.C. Master); *Rocking Chair Plaza Ltd. v. City of Brampton* (1988), 29 C.P.C. (2d) 82 (Ont. S.C.); *Crescent Farm Sports Ltd. v. Sterling Officers Ltd.* [1967] 1 Ch. D. 553; *Hallstone Products Ltd. v. Canada* (2004), 1 C.P.C. (6th) 324 (S.C. Master).

35 The correctness of the above line of authority has not yet been passed upon by the Supreme Court of Canada and there is some controversy about this extension of the "exception." Nevertheless, the logic of these cases can be supported on at least two distinct bases. First, from a criminal law perspective, offences like fraud and obstruct justice found in sections 380 and 139 of the *Criminal Code* have very broad conduct elements. Much of the conduct alleged in the above cases involved dishonestly putting someone's financial interests at risk or concealing evidence or undermining the course of justice in some fashion. This kind of conduct is either criminal under ss. 380 or 139, or it is so closely akin to criminal conduct that it also falls within the logic of the traditional *Cox and Railton* "exception." For example, all of the case law has given a broad and liberal interpretation to what is meant by "fraud", for purposes of the "exception", without exactly following criminal law precedents. Second, from the perspective of principle, the "exception" holds that a lawyer's function does not include facilitating crime. Therefore, a client who deliberately uses a lawyer for this purpose is simply not within the proper functional scope of the privilege. It is hard not to extend this principle so as to include clients who knowingly use a lawyer to facilitate any unlawful conduct. This seems to be equally outside the scope of a lawyer's proper function. As K. J. Smith J. put it in *Goldman Sachs, supra*, at para. 16:

> Accordingly, intended crimes and frauds are but instances of the application of the general principle that the privilege does not attach to communications in relation to intended unlawful conduct. In this context, "unlawful conduct" has a broader meaning than simply conduct that is prohibited by the criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. Breaches of contract and of civil duties are "unlawful" because, although they are not prohibited by any enactment, they cause injury to the legal rights of other citizens and give rise to legal remedies. They are therefore contrary to law.

36 Accordingly, I agree with Mr. Greenspan's broad proposition that the "crime/fraud exception" would be engaged if City Council used the City Solicitor's legal advice in order to knowingly pass or perpetuate an unlawful by-law. This would be a serious abuse of office and a misuse of the lawyer's function.

37 I am also inclined to agree with Mr. Greenspan's initial premise concerning how to construe the confidential report. It is open to the construction that the City Solicitor's preliminary advice was to recommend an adversarial approach to the litigation, to the general effect that counsel for the City can still successfully oppose the Application, even though it likely has merit on other grounds not advanced by counsel for the Association of Body Rub Parlours.

38 This kind of approach might be acceptable in private litigation. It is certainly acceptable when defending a criminal case, given the Crown's burden of proof, the accused's right to remain silent and, most importantly, the principle against self-incrimination. See: *Regina v. P. (M.B.)* (1994), 89

C.C.C. (3d) 289 at pp.303-7 (S.C.C.). However, none of these principles apply in the civil litigation that is the subject of the present Motion. Furthermore, in *Shirose, supra* at p. 290, Binnie J. stated that "the Minister of Justice ... has a special legislated responsibility to ensure that 'the administration of public affairs is in accordance with law' and in that respect he or she is not subject to the same client direction as private clients ... In this country as well, the solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration ..." In a well known article titled "The Role of the Attorney General and the Charter of Rights" (1986) 29 C.L.Q. 187 at 189, the then Attorney General, Ian Scott, stated that his particular office in Ontario "has a positive duty to ensure that the administration of public affairs complies with the law." He described this as a "fundamental obligation."

39 I am inclined to the view that it is equally fundamental that the City Solicitor ensure that City Council "complies with the law." It is not enough to take an adversarial stance in litigation, because opposing counsel's argument is not well framed, if it means that City Council will continue to proceed in a manner that knowingly violates the law. The statutory framework governing municipalities generally and the City of Toronto in particular, as set out above, does not permit this approach. More fundamentally, the importance of the rule of law as a constitutional precept in Canada does not permit this approach to public administration at any level of government. See: *Reference re: Remuneration of Judges (P.E.I.)* (1997), 118 C.C.C. (3d) 193 at para. 99 (S.C.C.); *B.C. v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at paras. 57-8; *Reference re: Manitoba Language Rights*, [1985] 1 S.C.R. 721 at pp. 748-750.

40 The June 26, 2006 confidential report, only if viewed in isolation, could raise concerns as to whether the City Solicitor and City Council were taking a purely adversarial approach that knowingly diminished the rule of law. However, I am satisfied this did not happen when the entire course of relevant conduct is examined. It is common sense that the written advice in the report would likely have been accompanied by oral advice and discussion, between solicitor and client. There is, understandably, no record before the Court of such confidential discussions. Nevertheless, inferences can be drawn from the steps taken by the City Solicitor's office, immediately after presenting its report to City Council. Those steps included consenting to an Order declaring the licensing fee invalid and writing to counsel for the Association and proposing a settlement of the rest of the pending litigation. That proposed settlement included suspension of any enforcement of the new "hours of operation" by-law until a further review of the by-law had been concluded. I am satisfied that there must have been discussions between solicitor and client at the City Council meeting on June 27, 28 and 29, 2006, in order to obtain instructions to take these steps.

41 In other words, when the confidential report is looked at in its full context it becomes apparent that the City Solicitor and City Council were acting with proper regard for the rule of law. One by-law was to be declared invalid and the other by-law was to be suspended, pending further review. These significant steps must have been the product of legal advice given by the City Solicitor about the lawfulness of the two by-laws. I can understand why Mr. Gerry had concerns about the City Solicitor's advice to City Council but he was looking only at the written advice set out in the confidential report. It is unfair to the City to read the written advice in isolation. The confidential report, when viewed in its full context, must have been used as the preliminary basis for a discussion between solicitor and client about whether the by-law was unlawful and about remedial steps. It is important that lawyers have the freedom to advise their clients in confidence about potentially unlawful conduct and to take steps to prevent or remedy such conduct. That is what must have happened in this case.

42 I am therefore satisfied that the confidential report is properly privileged and that the "crime/fraud exception" to solicitor and client privilege is not engaged.

43 As to Mr. Greenspan's alternative submission, that the factual information in the report is not privileged, I agree with Ms. Kuehl that it is the document that is privileged. It contains both factual information and advice communicated in a certain way, from counsel to the client when seeking instructions. The entire communication is privileged. The factual information itself is not privileged but the way in which counsel communicates it to the client, together with legal advice, is privileged. Alpha Care is entitled to obtain the factual information and to use it in this case but it must be obtained from some source other than from the solicitor and client communication. As M. Proulx and D. Layton put it in their leading text, *Ethics and Canadian Criminal Law*, (Irwin Law Inc. 2001) at p. 173:

> ... the privilege applies to the communication itself, [it] does not bar the adduction of evidence pertaining to the facts communicated <u>if gleaned from another source</u> ...[emphasis added]

Or as the authors of the *Law of Evidence in Canada, supra* at p. 931, put it:

> The protection is for communications only and <u>facts that exist independent of a communication</u> may be ordered to be disclosed. [emphasis added]

44 In conclusion, the entire report is privileged although Alpha Care is at liberty to obtain production in the ordinary way of relevant facts referred to in the report.

45 The final issue is determining appropriate remedies. Mr. Greenspan realistically conceded that the remedies are fairly self-evident if the City's claim of privilege over the entire report is successful, as it has been. The normal two part inquiry into whether privileged information has been received by opposing counsel and whether there is a risk that it will be used is unnecessary. Both points are conceded. Indeed, the privileged report has been in Mr. Gerry's possession for over 3 years and it has already been used extensively in the litigation. Although Mr. Gerry's initial receipt of the confidential report was blameless, once he realized that it was potentially subject to a claim of solicitor and client privilege he should not have used it and he should have taken steps to have the Court rule on any disputed claim of privilege. The removal of Mr. Gerry, and the return of the report and all copies and notes referring to the report, are minimum remedies in these circumstances. See: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235; *Celanese Canada Inc. v. Murray Demolition Corp.,* [2006] 2 S.C.R. 189; *Stewart v. Humber River Regional Hospital,* [2009] O.J. No. 1759 (C.A.).

46 The more difficult remedial issue in this case is whether the entire Application should be struck. It has been established that both the Notice of Application and the supporting Affidavit of Mr. Nianiaris were based in part on the privileged report. As Mr. Nianaris is now deceased his Affidavit will have to be replaced in any event. The Application has not been prosecuted with any vigour; no date for a hearing has been set; no responding affidavit has been filed; no cross-examinations have been scheduled; and, now, Alpha Care will need to retain new counsel if it wishes to proceed with the Application. In all these circumstances, I agree with Ms. Kuehl that the appropriate remedy is to strike both the Notice of Application and the supporting Affidavit of Mr. Nianaris without prejudice to Alpha Care's right to commence a fresh Application.

47 If Alpha Care decides to retain new counsel and to instruct that counsel to commence a fresh Application, I order that no such steps are to be taken until all copies of the privileged report, and all notes, memos and documents of any kind referring to the contents of the report, have been returned to the City by Alpha Care and by Mr. Gerry. I further order that Mr. Gerry is to have no communication with the new counsel and that Alpha Care is to make no reference to the contents of the privileged report when instructing new counsel.

48 In relation to this latter point, however, I agree with Mr. Greenspan that it is not possible to purge Alpha Care's corporate mind of its present knowledge or belief that there may be weaknesses in the City's available evidence supporting the 2005 by-law. For greater certainty, I see no problem with Alpha Care instructing new counsel to commence a fresh Application alleging that there is no evidence as to the legal basis for the by-law. This has been a central aspect of the debate about the by-law, both prior to and since its enactment, and the "leaking" of the privileged report should not shield the by-law from a fresh attack on this basis. Ms. Kuehl has properly conceded that the factual information about the state of the evidence supporting the alleged basis for the by-law would all be discloseable, in any event, on cross-examination of the City's responding Affiant. In all these circumstances, I do not think Alpha Care can be enjoined from instructing new counsel to commence a fresh application on the same basis as before. However, Alpha Care must be very careful not to advise new counsel as to the contents of the privileged report. Otherwise, new counsel will be subject to the same disqualification order as Mr. Gerry. It will be a delicate task for Alpha Care to properly instruct new counsel without violating the Court's Order. Alpha Care would be well advised to ask Mr. Greenspan to carry out this task on their behalf.

E.COSTS

49 The City seeks its costs of the Motion on a substantial indemnity basis. Its argument in support of a substantial indemnity scale is that Alpha Care made "totally unfounded" allegations of impropriety against City Council and against the City Solicitor.

50 This submission is not made out on the particular facts of this case. The test for an award of solicitor and client costs, where unfounded allegations of fraud or dishonesty are made, is set out by Arbour J., speaking for the Court in *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at para.26:

> In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219.

51 The allegation advanced by Alpha Care on the Motion was one of "unlawful conduct" and "bad faith". These are undoubtedly very serious allegations that should only be made with care, after serious reflection. They are, however, necessary allegations if a party is to invoke the so-called "crime/fraud exception" to solicitor and client privilege. The real question, in terms of adverse costs consequences, is whether there was an arguable basis for the submission such that it could be advanced responsibly by counsel.

52 As I have found, the submission made by Mr. Greenspan was a "formidable" one, the result on the Motion was "close" and the interpretation that Mr. Greenspan placed on the preliminary advice in the confidential report was generally accepted. The only reason his argument ultimately failed was that I drew inferences, favourable to the City, from the contextual facts surrounding the report. This was not an argument advanced by counsel for the City. Her main submission was to dispute Mr. Greenspan's characterization of the report and that particular submission by the City was unsuccessful.

53 In all these circumstances, Alpha Care's allegations concerning the "crime/fraud exception" do not constitute reprehensible, scandalous or outrageous conduct. There was an understandable basis for the allegation and it was reasonable to make the argument, even though it was ultimately unsuccessful.

54 The real issue in relation to costs is whether to award partial indemnity costs to the City. Mr. Greenspan submits that no award of costs should be made because Alpha Care raised a novel point in the public interest. The argument made by Alpha Care, concerning how to apply the "crime/fraud exception" to a governmental body like the City, was undoubtedly novel. There appears to be no authority directly on point. It is also an argument that advances the public interest, by insisting that public authorities and their lawyers act in accordance with the rule of law. These are undoubtedly appropriate considerations that could result in no costs being awarded against an unsuccessful party who has reasonably raised a novel point in the public interest. See: *Veysey v. Maplehurst Correctional Complex* (2007), 220 O.A.C. 96 (Div. Ct.); *Universal Workers' Union, LIUNA Local 183 v. Laborers' International Union of North America* (2004), 70 O.R. (3d) 435 (S.C.J.).

55 I am concerned, however, by two aspects of Alpha Care's conduct when raising this novel point in the public interest. First, Mr. Gerry kept possession of the confidential report for over two years, and used it extensively in the litigation, prior to advising the City that he had the report and that he intended to use it. It was clear from the face of the report that the City would argue that it is privileged. Mr. Gerry's duty was to raise his novel public interest point in a timely way and prior to using the report.

56 Second, Alpha Care did not disclose to the Court, when the Motion first came on for hearing before me, that Mr. Gerry had been in possession of the report for this lengthy period of time and that he had used it extensively in the litigation. These facts were only disclosed as the hearing proceeded and it eventually required a second appearance on a further date to finally clarify the point.

57 As a result of these two significant deficiencies in Alpha Care's conduct, I am not satisfied that they are entitled to the normal or full benefit, in terms of costs, of having raised a novel point in the public interest.

58 Ms Kuehl's Bill of Costs, on behalf of the City, seeks almost $15,000 on a partial indemnity scale. The rate at which she has set her fees, given her 2000 year of call and her experience, is entirely reasonable ($171 per hour on a partial indemnity scale). The number of hours she has billed

(almost 65 hours) is also reasonable, given the importance of the issue to her client and to the broader public interest, given its novelty and given the multiple appearances and multiple submissions.

59 In all these circumstances, it is fair and reasonable that Alpha Care pay half of the City's costs on a partial indemnity basis. I fix that amount at $7,500.

F.Sealing Orders

60 The initial Judgment on this Motion was released to the parties on November 27, 2009. That Judgment referred extensively to the contents of the confidential report. It was ordered sealed pending further submissions from the parties as to costs and as to whether a permanent sealing order could be justified.

61 The City has now made further submissions seeking a permanent sealing order. However, the City has also made the realistic concession that "a separate set of public reasons could be issued" that edits out references to the privileged contents of the confidential report. Alpha Care has taken no position on this issue.

62 An order permanently sealing the Court's reasons would seriously infringe s. 2(b) of the *Charter of Rights and Freedoms* and notice would have to be given to the media before taking this step. See: *Sierra Club of Canada v. Canada* (2001), 211 D.L.R. (4th) 193 (S.C.C.); *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835; *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512 (S.C.C.); *Re Vancouver Sun [R. v. Bagri]* (2004), 184 C.C.C. (3d) 515 (S.C.C.). Furthermore, a permanent sealing order is not necessary as editing of the privileged material from the Court's reasons is a less rights infringing remedy that is available.

63 Accordingly, this set of reasons has been edited to remove the references to the privileged contents of the confidential report. I am satisfied that it can be released to the public.

64 The previous set of reasons, released on November 27, 2009, shall remain sealed. They contain no difference of substance from these reasons, in terms of the reasoning. The Court file also contains copies of Mr. Gerry's letters dated September 20, 2006 and February 25, 2009, which refer extensively to the confidential report. Mr. Nianciaris' Affidavit dated January 4, 2008 effectively quotes from the confidential report. Finally, the confidential report itself, dated June 26, 2006, is also found in the Court file. These four documents shall all be sealed as they are either privileged or they quote from the privileged report.

65 I wish to thank counsel for the very helpful and professional way in which they conducted this difficult Motion.

M.A. CODE J.

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