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Order F13-15

MINISTRY OF JUSTICE

Elizabeth Barker
Adjudicator

July 24, 2013

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Summary: A law firm requested four agreements related to litigation initiated by the Province under BC's *Tobacco Damages and Health Care Costs Recovery Act*. The Ministry, on behalf of the Province, refused access on the basis that all four agreements were protected by solicitor-client privilege. It also refused access to one of the agreements on the grounds that disclosure would harm the conduct of relations between the Province and other provinces and reveal information received in confidence from other provinces. The adjudicator found that all four agreements were protected by solicitor-client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 16.

Authorities Considered: Order F05-10, [2005] B.C.I.P.C.D. No. 11; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order F07-05, [2007] B.C.I.P.C.D. No. 7.

Cases Considered: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665; *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *Canada v. Solosky*, [1980], 1 S.C.R 82; *Blank v. Canada (Minister of Justice),* 2006 SCC 39; *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172; *R. v. Cunningham,* 2010 SCC 10; *Donell v. GJB Enterprises Inc.,* 2012 BCCA 135; *Municipal Insurance Corporation (British Columbia) v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2534; *Legal Services Society v. The Information and Privacy Commissioner of the Province of B.C.,* 1996 CanLII 1780 (BCSC), [1996] B.C.J. No. 2034; *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2001 BCSC 203 (upheld on appeal); *R. v.* Gruenke, [1991] 3 S.C.R. 263; *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*,[1] [1983]

B.C.J. No. 1499; *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.,* 1988 CanLII 3214, [1988] B.C.J. No. 1960; *Lowry et al v. Canadian Mountain Holidays and Kaser* (1984), 1984 CanLII 378 (BC SC) or 59 B.C.L.R. 137; *Chapelstone Developments Inc. v. Canada,* 2004 NBCA 96; *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs*, 2008 NBQB 112.

Authors Cited: Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law,* (Toronto: Butterworths, 1993).

INTRODUCTION

[1] This inquiry concerns a request for records related to a lawsuit initiated by the Province of BC ("Province") against three Canadian tobacco manufacturers and their foreign affiliates. The lawsuit, under BC's *Tobacco Damages and Health Care Costs Recovery Act*[1] ("BC Action"), is intended to recover health care costs associated with the manufacture, promotion and sale of tobacco products. The applicant, a lawyer representing one of the defendants in the BC Action,[2] has requested copies of certain agreements related to that lawsuit.

[2] There are four records in dispute. Three are agreements between the Province and law firms and relate to legal representation for the BC Action. The fourth is an agreement between the Province and several other provinces concerning the coordination of their respective health care cost recovery lawsuits ("Interprovincial Agreement"). The Ministry of Justice ("Ministry"), on behalf of the Province, refused to disclose all four agreements on the grounds that they are protected by solicitor-client privilege (s. 14 of FIPPA). It also refused to disclose the Interprovincial Agreement because disclosure would be harmful to intergovernmental relations (s. 16(1)(a)(i) and s. 16(1)(b) of FIPPA).

[3] The applicant requested the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision. The matter did not resolve and it proceeded to inquiry under part 5 of FIPPA.

[4] An unsevered copy of the records is included in the materials before me.[3]

ISSUES

1. Is the Ministry authorized by s. 14 of FIPPA to refuse access to the four agreements?

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[1] S.B.C. 2000 c. 30.
[2] Etheridge affidavit, para. 4 and applicant's reply, para. 44.
[3] On October 31, 2012, the Commissioner ordered the Ministry to provide her with an unsevered copy of the records pursuant to s. 44 of FIPPA. The Ministry requested the order believing that voluntarily providing the Commissioner with an unsevered copy of the records would impact their claim of solicitor-client privilege.

2. Is the Ministry authorized by s. 16(1) of FIPPA to refuse access to the Interprovincial Agreement?

DISCUSSION

[5] **The Records**—The requested records are as follows:

1. A 1997 legal services retainer agreement between the Province, Bull Housser & Tupper LLP and Thomas Berger, QC ("BHT Retainer").

2. A 2012 agreement between the Province, Bull Housser & Tupper LLP, Bennett Jones LLP and Siskinds LLP, amending the BHT Retainer ("Side Letter").[4]

3. A 2012 contingency fee agreement between the Province, Bennett Jones LLP and Siskinds LLP ("CFA").

4. A 2011 agreement between the Province and other provinces regarding the coordination of health care cost recovery litigation ("Interprovincial Agreement").

Do the records contain privileged information under s. 14?

[6] Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. Section 14 encompasses both types of solicitor-client privilege found at common law: legal advice privilege and litigation privilege.[5]

[7] For legal advice privilege to apply to information, the following conditions must be satisfied:

1. there must be a communication, whether oral or written;
2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.[6]

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[4] For ease of reference, I use the Province's terminology.

[5] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, para. 26.

[6] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC) and *Canada v. Solosky*, [1980], 1 S.C.R. 82.

[8] Litigation privilege applies to materials prepared by a solicitor, and communications between a solicitor and client or third parties, for the dominant purpose of litigation.[7] It provides parties the necessary privacy to prepare for litigation without the fear of adversarial interference or premature disclosure.

Parties' submissions

[9] The Ministry submits that all four agreements are subject to both legal advice privilege and litigation privilege. It explains that the BHT Retainer, the Side Letter and the CFA incorporate and reflect the content of the Province's privileged and confidential communications with its solicitors regarding litigation strategy and objectives. Further, it submits that all four documents were created for the dominant purpose of the contemplated or ongoing health care cost recovery litigation.[8]

[10] The applicant submits that the rationale for solicitor-client privilege, namely ensuring uninhibited communication between lawyers and clients and preventing self-incrimination, are not engaged in this case; legal fees and financial arrangements are not communications related to the seeking, formulating or giving legal advice; and if privilege applies, the Province waived the privilege.[9]

[11] I will now analyze these submissions against the tests for legal advice and litigation privilege set out in paras. 7 and 8 above.

Communication between client (or agent) and a legal advisor

[12] I find that the BHT Retainer, the Side Letter and the CFA are written communications between the Province and its legal advisors. There was no argument or evidence suggesting otherwise. However, I agree with the applicant that the Interprovincial Agreement is not communication between the Province and its legal advisors.[10] It is a communication between the Province's solicitors, in their capacity as legal counsel representing the Province, and the representatives of several other provinces. I will address the Interprovincial Agreement below at para. 20 with respect to whether litigation privilege applies to it.

[13] The applicant submits that solicitor-client privilege cannot be claimed by a government because the public's need for accountability and transparency in the expenditure of public funds overrides any claim to the privilege.[11] I reject this

[7] *Blank v. Canada (Minister of Justice),* 2006 SCC 39.
[8] Ministry's initial submission, paras. 4.02, 4.13 and 4.49.
[9] Applicant's reply submission, para. 9.
[10] Applicant's reply submission, para. 32.
[11] Applicant's reply submission, paras. 16, 17 and 26.

argument as it is well established that a government may, as a client, claim solicitor-client privilege.[12] The applicant has provided no precedent to the contrary.

Confidentiality

[14] The applicant submits that the element of confidentiality needed to establish privilege does not exist in the circumstances of this case. He believes that none of the communications contained in the requested records were intended to be confidential because the Province publically referred to the agreements when explaining the BC Action.[13] However, I find otherwise. Announcing the fact that a solicitor-client relationship exists, and that there is an agreement governing it, does not mean that the communication captured by the agreement was not confidential. Based on the materials in this inquiry, I am satisfied that the communications between the Province and its solicitors, as reflected in all four agreements, were confidential.

Communication directly related to seeking, formulating or giving legal advice

[15] The applicant also submits that solicitor-client privilege does not apply to retainers or contingency agreements because, in his view, they do not contain communication for the purpose of obtaining legal advice. He submits that such agreements contain information about legal fees and financial arrangements and these are not privileged matters.[14] The applicant relies on three cases to support these arguments: *Imperial Tobacco Co. v. Newfoundland and Labrador (Attorney General),* 2007 NLTD 172, *R. v. Cunningham,* 2010 SCC 10, and *Donell v. GJB Enterprises Inc.,* 2012 BCCA 135.

[16] I do not agree with the applicant on this point. The law in BC clearly provides that the terms of the a solicitor-client relationship contained in a retainer or contingency fee agreement—including information relating to financial arrangements—relate directly to the seeking, formulating or giving of legal advice and are privileged.[15] To the extent that the Newfoundland and Labrador trial court in *Imperial Tobacco* holds otherwise, I decline to follow it. In addition, the

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[12] *Blank, supra*, note 6. Even *Imperial Tobacco*, which the applicant relies upon for much of its argument, acknowledges this point at para. 43.
[13] Applicant's reply submission, paras. 33-35.
[14] Applicant's reply submission, paras. 22-32.
[15] See *Municipal Insurance Corporation (British Columbia) v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 2534, at paras. 25-27, and *Legal Services Society v. The Information and Privacy Commissioner of the Province of B.C*., 1996 CanLII 1780 (BCSC), at para. 18. See also: *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2001 BCSC 203, at para. 23, upheld on appeal, and Order F05-10, [2005] B.C.I.P.C.D. No. 11, at para. 13, where the courts found that disclosing the terms of a retainer would be a breach of solicitor-client privilege.

facts in *Cunningham* and *Donell* differ significantly from those before me, and I do not interpret them to mean that retainers and contingency agreements are not protected by solicitor-client privilege.

Establishing harm is not required

[17] The applicant also submits that the Ministry has failed to show that there is any risk that disclosure will harm the free flow of candid communication between the Province and its lawyers or result in self-incrimination, so the rationale for solicitor-client privilege is not present.[16]

[18] In my view, the applicant's argument is premised on the incorrect assumption that solicitor-client privilege is a harms based exception to disclosure.[17] There is in fact no obligation on a public body to demonstrate harm in order to successfully assert solicitor-client privilege over the records. Solicitor-client privilege is a categorical or class privilege that does not require a case-by-case balancing of competing interests or a weighing of the harm that might result from disclosure.[18] Accordingly, I do not accept the applicant's argument that harm needs to be demonstrated or that the principle of transparency in financial administration overrides the interests protected by the privilege.

Conclusion - privilege applies

[19] I have carefully reviewed the requested records, and I find that the BHT Retainer, the Side Letter and the CFA are protected by legal advice privilege. They are confidential, written communications between the Province and its lawyers, and they are directly related to the seeking, formulating, and giving of legal advice.

[20] The Interprovincial Agreement, on the other hand, fails to meet the criteria for legal advice privilege because it is not a direct communication between the Province and its legal counsel. However, I find that it is protected by litigation privilege which also encompasses communications between a solicitor (or unrepresented litigant) and a third party when the dominant purpose of the communication is litigation.[19] I am restricted in what I may say here regarding the Province's submissions relating to this record as they are appropriately *in camera*. What I can say is the Interprovincial Agreement contains provisions that satisfy me that its dominant purpose is to further the Province's BC Action and facilitate its coordination with similar existing or contemplated action in other

[16] Applicant's reply submission, paras. 12-21.
[17] The applicant again relies on *Imperial Tobacco* as support for its position but, once more, I decline to follow it.
[18] *R. v. Gruenke*, [1991] 3 S.C.R. 263, para. 26.
[19] *Blank*, supra, at para. 27.

provinces. It also has language that establishes that the parties undertook to keep its terms confidential.[20]

Waiver of privilege

[21] In the alternative, the applicant submits that if the documents are protected by solicitor-client privilege, the privilege was waived when the Province publicly mentioned them while explaining the BC Action.[21] The Ministry, on the other hand, submits that the Province made a conscious decision to release very limited information about the records and there was never an intention to waive privilege.[22]

[22] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege knows of the existence of the privilege and voluntarily demonstrates an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.[23]

[23] In this case, on two occasions, the Province issued media releases disclosing information about the disputed records:

1. On January 6, 1998, the Ministry of Health issued a news release entitled *Legal Team Chosen to Lead B.C. Lawsuit Against Tobacco Companies,* along with an accompanying fact sheet. This media release provided background and policy rationale for the BC Action, identified the lawyers selected to represent the Province and explained how they were chosen. It also stated, "The legal team has been retained on a straight fee-for-service basis, unlike most of the U.S. states where similar cases are being prepared under contingency agreements with the law firms."

2. On March 9, 2012, the Ministry of Health and the Ministry of Justice issued a joint information bulletin entitled *B.C. steps up legal action against tobacco companies*, along with one page of answers to questions posed by the press. In this media release, the Province revealed that it had partnered with five other provinces to retain a national legal consortium to prosecute health care cost recovery claims. It identified the law firms involved, explained the rationale for sharing a common counsel, and stated:

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[20] Ministry's initial submission, Etheridge affidavit, *in camera* paras. 20-29.
[21] Applicant's reply submission, para. 36.
[22] Ministry's surreply, para. 17.
[23] *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*.,[23] [1983] B.C.J. No. 1499, para. 6. See also: Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, 1993, pp. 187-191; Order 00-07, [2000] B.C.I.P.C.D. No. 7; and Order F07-05, [2007] B.C.I.P.C.D. No. 7.

> There are many complex elements common to all the claims and that's why B.C. has joined with the other provinces in retaining the consortium on a contingency fee basis. The consortium will receive a percentage of the recovery, with the precise percentages varying depending on the stage at which recovery is achieved and on the amount recovered. The consortium is also bearing most of the costs for items like expert reports and collection costs.

[24] With regards to the first of the two elements required in order to establish waiver, I am satisfied, based on the materials before me, that the Province understood that the disputed records were protected by solicitor-client privilege at the time of these public announcements. There is no suggestion otherwise.

[25] The two media releases or public statements are insufficient to demonstrate an intention on the Province's part to waive solicitor-client privilege over the whole of the disputed records. Public announcements about the existence of the BC Action, the identity of the Province's lawyers, and that a consortium had been hired reveal facts that would, in due course, become part of the usual public record in a lawsuit. On the other hand, by disclosing how the lawyers would be paid (*i.e.,* fee-for-service, contingency basis and percentages), the Province revealed details of communication that would normally not be disclosed outside the solicitor-client relationship. By doing so, I find that the Province waived privilege over that part of the information that pertains to how the lawyers would be paid.

[26] As former Commissioner Loukidelis stated in Order 00-07,[24] a waiver of privilege respecting part of a communication can be held, in the interests of fairness, to require a waiver in respect of the whole communication. Disclosure of the payment information, in this case, is a partial waiver, so I must decide whether fairness dictates a waiver of the remainder of the privileged information. In this respect, the BC Court of Appeal's decision in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*[25] provides the approach to follow. In that case, the Court held that it is preferable to look at all the circumstances of the case and ask whether the conduct in disclosing part of a communication is likely to mislead the other party or the court, so as to require privilege to be lifted with respect to the whole of the communication.

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[24] [2000] B.C.I.P.C.D. No. 7, at para. 24.

[25] 1988 CanLII 3214 or [1988] B.C.J. No. 1960. See also: *Lowry et al v. Canadian Mountain Holidays and Kaser* (1984), 1984 CanLII 378 (BCSC), 59 B.C.L.R. 137; *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order F07-05, [2007] B.C.I.P.C.D. No. 7.

[27] This is also the approach followed in *Hayes v. New Brunswick (Minister of Justice and Consumer Affairs)*,[26] a case raised by the Ministry, whose facts parallel those in this inquiry. In *Hayes*, a consortium of lawyers had been hired on a contingency fee basis for that province's tobacco-related health care cost recovery litigation. In a news release, the province disclosed the identity of its lawyers, the existence of a contingency fee agreement and what the consortium would be paid if the lawsuit was successful at various stages of litigation. Grant, J., determined that the contingency fee agreement was subject to solicitor-client privilege and that disclosure of the payment information was a partial waiver. However, what occurred was insufficient to evince an intention to waive privilege over the whole of the agreement, and he went on to consider whether the partial waiver demanded full disclosure in the interests of fairness and consistency. He ultimately decided that it did not, after determining that the partial disclosure would not be misleading and that it did not give the province any apparent advantage in the litigation.

[28] I make a similar finding in this case. The announcement about how the Province would pay its lawyers was made publically and to the media. It did not take place in the context of courtroom proceedings, and there is nothing to suggest that the information plays any role in the litigation between the parties or provides any unfair advantage in that forum.

[29] I also considered whether the partial waiver might mislead the public in some way or be unfair to anyone outside the court or litigation context, but I found nothing in the materials to indicate that this might be the case. The Ministry does not explain why the Province chose to share this privileged information with the public. However, when read within context of the media releases, it appears to have been driven by a policy of transparency rather than any attempt to mislead.

[30] Striving to keep the public informed about the BC Action is commendable, and exercising its discretion to disclose privileged information with that goal in mind, should not be used to the detriment of the Province. I agree with former adjudicator J. Austin-Olsen who stated in Order F07-05:

> If a public body makes partial disclosure of privileged material in an effort to follow a "policy of transparency", this should not be weighed against it in terms of assessing the public body's conduct for the purpose of determining an intention to waive privilege. In this sense, the underlying motivation of the public body for partially disclosing privileged legal advice, as opposed to its motivation for seeking it in the first place, is relevant to an assessment of whether waiver of privilege has occurred. To hold otherwise would prejudice the public body for taking action which is in fact consistent with

[26] 2008 NBQB 112.

> the express purpose of FIPPA, which is "to make public bodies more accountable to the public."[27]

[31] Therefore, I find that the partial waiver in this case does not, as a matter of fairness, require a full waiver of the solicitor-client privilege protecting the requested records.

CONCLUSION

[32] In conclusion, I find that the BHT Retainer, the Side Letter and the CFA are protected by legal advice privilege as well as litigation privilege. I find that the Interprovincial Agreement is protected by litigation privilege.

[33] Although a partial waiver occurred when the Province revealed details about how it will pay its lawyers, I find that this does not require, as a matter of fairness, a full waiver of solicitor-client privilege over the remainder of the requested records.

[34] Therefore, for the reasons stated above, and pursuant to s. 58 of FIPPA, I find that the Ministry is authorized to withhold the information in dispute under s. 14 of FIPPA. In light of that finding, it is not necessary for me to deal with the applicability of s. 16(1).

July 24, 2013

ORIGINAL SIGNED BY

Elizabeth Barker, Adjudicator

OIPC File No.: F12-49520

[27] [2007] B.C.I.P.C.D. No. 7, para. 26.