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Order F12-14

INSURANCE CORPORATION OF BRITISH COLUMBIA

Michael McEvoy, Assistant Commissioner

October 22, 2012

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Summary: The ARA requested correspondence and associated records between ICBC and the federal Competition Bureau. ICBC withheld some of the information on the basis that it constituted advice and recommendations and it was subject to solicitor-client privilege. ICBC also argued that in accordance with the doctrine of paramountcy of federal legislation, FIPPA did not apply in this case because it was in conflict with federal legislation. The Assistant Commissioner found that the doctrine of paramountcy did not apply because there was no valid federal law that applied with respect to the records in the custody and control of ICBC. The Assistant Commissioner found that solicitor-client privilege applied to all of the records for which ICBC claimed this exception. With respect to the remaining information, the Assistant Commissioner determined that the advice and recommendations exception authorized ICBC to withhold some but not all of the information it claimed under this exception.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14; *Competition Act*, RSC 1985, c. C-34, s. 29(1); *Access to Information Act*, RSC 1985, c. A-1, s. 24(1).

Authorities Considered: B.C.: Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Decision F08-02, [2008] B.C.I.P.C.D. No. 4; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order F05-06, [2005] B.C.I.P.C.D. No. 7.

Cases Considered: *BC (Attorney General) v. Lafarge,* [2007] 2 S.C.R. 86; *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, [2002] B.C.J. No. 2779; *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

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

INTRODUCTION

[1] This case involves the Automotive Retailers Association ("ARA") challenging a decision of the Insurance Corporation of British Columbia ("ICBC") to withhold information in response to a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The ARA had requested correspondence and associated records between ICBC and the federal Competition Bureau. ICBC withheld some information, citing several exceptions to disclosure under FIPPA. The ARA was not satisfied with the response and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Ultimately, the exceptions at issue in this inquiry that ICBC relied upon were s. 13 (advice or recommendations developed by or for a public body) and s. 14 (solicitor-client privilege).

ISSUES

[2] The issues that I must decide in this inquiry are:

1. Whether ICBC is authorized to withhold information under s. 13 of FIPPA because it would reveal advice or recommendations developed by or for a public body.

2. Whether ICBC is authorized to withhold information in order to protect solicitor-client privilege under s. 14 of FIPPA.

DISCUSSION

[3] **Background**—The ARA describes itself as a not-for-profit society representing 1,200 automotive industry businesses in British Columbia. Its main purpose is to promote the interests of those businesses in the province. To that end, the ARA, among other things, has negotiated a number of agreements on behalf of its members with ICBC governing matters such as the pricing of auto glass, collision repair, and towing services. Although these agreements are not binding on each member, there has been, in the words of the ARA's President, almost total acceptance of their terms by industry participants.

[4] ICBC and the ARA agree that the dealings described above ended in 2011. The ARA says the reason relates to certain communications between ICBC and the Competition Bureau. The ARA says ICBC revealed the contents of those communications to certain of its members. ICBC responds that any communications that it made to members of the ARA were confidential and remain confidential. For the purposes of outlining the background and providing reasons in this order, it is not necessary to set out what the ARA says are the details of those communications.

[5] What ICBC does confirm is that it communicated with the Competition Bureau in 2010 and 2011 and that the information that it provided to the Competition Bureau was pursuant to the *Competition Act*. ICBC says that, as a result of these communications, it modified its way of dealing with material damage suppliers, like those that belonged to the ARA, and decided to unilaterally announce the price it would pay to those suppliers for their services.[1]

[6] **Records at Issue**—The records consist of emails and letters, including attachments, between ICBC and the Competition Bureau. The attachments include ICBC's Service Plan; a five-year strategic accord between ICBC, the Insurance Brokers Association of BC and the Credit Union Insurance Services Association; a three-year collision repair industry agreement between ICBC, the ARA and the New Car Dealers Association of BC; a partnership program agreement including auto glass pricing structure; chapter 10 of ICBC's Material Damage Procedure Manual on the subject of towing and recovery; a Towing Agreement between ICBC and the ARA; an agreement between ICBC and the British Columbia Chiropractic Association; an ICBC Autoplan Agency Agreement; a template Accreditation Agreement between ICBC and collision repair shops; a copy of sections of the *Automobile Insurance Act*; and a court decision between ICBC and a collision repair shop.

[7] The records also include communications between employees of ICBC and its legal counsel, as well as notes legal counsel took.

[8] **Preliminary Issues**—Both parties raised new and preliminary issues after the issuance of the notice of inquiry. I will deal with each in turn.

Paramountcy of federal legislation

[9] The OIPC granted ICBC permission to raise a preliminary argument regarding what ICBC says is the application of the doctrine of paramountcy to this case.

[1] ICBC's initial submission, para. 27.

[10] ICBC submits that the doctrine applies in situations of conflict between a federal and a provincial statute. In such cases, the federal statute must take precedence. It submits further that the Supreme Court of Canada has recognized two categories of such conflict. The first is where it would be impossible for a party to comply with both statutes. The second is where compliance with the provincial law would undermine the purpose of the federal law. ICBC contends that both categories of inconsistency apply in this case.

[11] ICBC submits that the federal *Competition Act* and the federal *Access to Information Act* prohibit disclosure of the information at issue. The relevant provision of the *Competition Act* is s. 29(1), which prohibits any official, performing functions or duties under that statute, from disclosing any information that a party has provided voluntarily under the statute. The only exceptions are that the Competition Bureau may disclose information to a Canadian law enforcement agency or to anyone else, if the party that submitted the information consents to the disclosure. The federal *Access to Information Act* requires, under s. 24(1), the head of a government institution to refuse to disclose any information that falls within s. 29(1) of the *Competition Act*.

[12] ICBC contends that, as federal statutes prohibit the disclosure of any information that ICBC provided to the Competition Bureau, the OIPC cannot require ICBC to disclose the same information. I note that ICBC is not claiming that the OIPC lacks the jurisdiction to conduct this inquiry or that FIPPA does not apply to the information at issue. It is merely suggesting that the finding in this inquiry must be consistent with the requirements of the two federal statutes.

[13] ICBC has not persuaded me that the doctrine of paramountcy applies in this case. The Supreme Court of Canada decision in *BC (Attorney General) v. Lafarge*[2] makes clear that, for the paramountcy doctrine to apply, there must first exist both a valid provincial and federal law that apply to the same matter.

[14] The matter here concerns requested records that are in the custody and control of ICBC. Valid provincial legislation in the form of FIPPA clearly applies to these records. ICBC is a public body as defined by that legislation, and, as such, the records in its possession are subject to it.

[15] However, ICBC has failed to establish that a valid federal law applies to the requested records that are in its custody and control. The prohibition on record disclosure under s. 29(1) of the *Competition Act* extends solely to persons performing duties or functions in the administration or enforcement of the *Competition Act*. ICBC is not such a person, and, therefore, records in its possession are not subject to that Act. Similarly, the records in ICBC's custody and control are not subject to the federal *Access to Information Act* because that

[2] [2007] 2 S.C.R. 86.

Act only applies to the head of a government institution, and ICBC does not meet the definition in that Act.

[16] It may be, as ICBC claims, that the ARA has made a request for copies of the same records to the Competition Bureau. With respect to any such request, the Bureau is subject to the federal *Access to Information Act* and BC's OIPC would have no jurisdiction.

[17] There is nothing especially unusual about identical sets of records residing with provincial and federal bodies concurrently. The access to each is guided by the applicable legislation of each jurisdiction governing the particular public body. There is in these circumstances no conflict necessitating the application of the doctrine of paramountcy. As the Supreme Court of Canada stated in *Multiple Access Ltd. v. McCutcheon*:[3]

> In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

[18] ICBC does not face such a predicament here with respect to the ARA's request for records. ICBC and the records in its custody and control are subject to FIPPA. There is no potential for ICBC to be told to do "inconsistent things" with those records in its custody and control because there is no valid federal enactment that governs the ARA's request for those records.

[19] Therefore, I find that the doctrine of paramountcy does not prevent this inquiry from proceeding and does not restrict my ability to make findings with respect to the information at issue.

Public interest paramount

[20] The ARA also attempted to raise a new issue: the application of s. 25 of FIPPA. It argued that disclosure of the information was in the public interest in accordance with s. 25. This was the first time the ARA raised this issue, and, unlike ICBC, it did not request permission to raise the issue or provide any advance notice about the issue.

[21] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage, only if they request and receive permission to do so.[4] The ARA had an opportunity during mediation in which to raise s. 25 of FIPPA.

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[3] [1982] 2 S.C.R. 161.

[4] See for example, Order F10-37, [2010] B.C.I.P.C.D. No. 55; Decision F07-03, [2007] B.C.I.P.C.D. No. 14, and Decision F08-02, [2008] B.C.I.P.C.D. No. 4.

It did not explain why it did not raise the issue prior to its initial submission or why it should be permitted to raise s. 25 at this late stage. I have decided, therefore, not to permit the ARA to raise s. 25 in this inquiry.

[22] Even were I to permit the ARA to raise the issue, I would find that it is without merit. In Order 02-38,[5] former Commissioner Loukidelis established the standard for the application of ss. 25(1)(a) and (b), which I adopt here:

> [53] As the applicant notes, in Order 01-20 and other decisions, I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.

[23] The ARA's submission fails to identify any element of temporal urgency that previous orders have indicated is necessary for s. 25 to apply. Nor does my review of the disputed information support the conclusion that there is an urgent and compelling need for disclosure.

[24] Even setting aside the issue of temporal urgency, my review of the correspondence does not support the ARA's arguments. The matter at issue relates to the process whereby a public insurance corporation sets the prices it will pay to service providers and suppliers for the repairing of its clients' automobiles. I see no compelling public purpose in requiring the immediate public disclosure of the information at issue.

[25] **Would Disclosure Reveal Information Subject to Solicitor-Client Privilege?**—I begin my analysis by considering every instance where ICBC says solicitor-client privilege applies. In some instances s. 14 is the sole exception claimed for this information and in other cases there are concurrent claims of s. 14 and s. 13 of FIPPA to the information in question. Section 14 of FIPPA states:

> The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[26] This provision encompasses two kinds of privilege recognized at law: legal advice privilege which refers to the privilege that attaches to communications between a client and a solicitor for the purposes of obtaining legal advice, and litigation privilege which covers communications and records

[5] [2002] B.C.I.P.C.D. No. 38.

produced for the primary purpose of existing or pending litigation.[6] ICBC argues that the legal advice privilege applies here.

[27] The legal advice privilege protects a confidential communication between a client and a lawyer that is related to the giving or receiving of legal advice, unless the client waives that privilege, either expressly or impliedly. The court in *B. v. Canada* set out the following test that the Commission has consistently applied in its decisions regarding this exception:[7]

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communication (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case.

[28] ICBC says all of the records at issue under s. 14 relate to ICBC's in-house or external counsel's communications with either ICBC staff or Competition Bureau officials. ICBC explains that all of the records were maintained in the client file of its in-house counsel "for the purpose of providing legal advice to ICBC on a number of things including possible future courses of action or for the purpose of seeking such advice from external counsel retained by ICBC. As such, they are properly withheld under s. 14 of FIPPA."[8]

[29] In order to determine whether the legal advice privilege applies to any of the records for which the s. 14 exception is claimed, I have considered the nature and context of the records in question. The records can be categorized as follows:

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[6] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665.
[7] [1995] 5 W.W.R. 374 (BCSC).
[8] ICBC's initial submission, para. 66.

A. Hand written notes made by ICBC's in-house counsel regarding telephone communications with third parties;

B. Emails between ICBC's in-house counsel and ICBC staff or between ICBC's in-house counsel and its outside counsel; and

C. Hand written notations by ICBC's in-house counsel on an email from ICBC's outside counsel to a Competition Bureau official, copied to ICBC's in-house counsel (p. 230).

[30] It is clear that the handwritten notes of ICBC's in-house counsel referred to in A relate to the formulation of advice communicated to ICBC. Therefore, I find that solicitor-client privilege applies to the records in A and they may be withheld under s. 14.

[31] The records in B are direct communications between ICBC's in-house and external counsel and ICBC staff regarding a legal issue for which legal advice, opinion and analysis was being provided. As such, these records are also covered by the legal advice privilege and are properly withheld under s. 14.

[32] Record C (p. 230) consists of handwritten notes on a hard copy of an email from ICBC's external counsel addressed to a Competition Bureau official and copied to ICBC's in-house counsel. When these handwritten notes are read in the context of the email's contents, the record clearly discloses the nature of ICBC's legal concerns and the legal advice provided by ICBC's in-house counsel to ICBC. Therefore, I find that p. 230 can be withheld under s. 14.

[33] In summary, I find that solicitor-client privilege applies to all of the records for which ICBC claimed the s. 14 exception.

Waiver of solicitor-client privilege

[34] The ARA argues in its reply that ICBC has waived its solicitor-client privilege:

> 37. If the Commissioner or her delegate conducting this inquiry does come to an initial finding that the exemption in section 14 of the Act applies to some or all of the records at issue to which ICBC submits that it applies, then the submission of the ARA is that ICBC has waived some or all of its claimed solicitor-client privilege, (presumably, from what ICBC has submitted, legal advice privilege), over any documents or communications submitted by it to the Competition Bureau. This waiver has mostly [*sic*] likely been, in the opinion of the ARA, what is known to the law as an implied waiver of privilege.

[35] R.D. Manes and M.P. Silver, in *Solicitor-Client Privilege in Canadian Law*[9] explain the general principle of waiver:

> Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
>
> …
>
> Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

[36] I have carefully reviewed the records and the parties' submissions on this point, and I find that there is no evidence that ICBC has shared the information in A, B and C with any third party. Consequently, I find that there has been no waiver of legal privilege with respect to these records.

[37] **Would Disclosure Reveal Advice and Recommendations Under s. 13(1) of FIPPA?**—Section 13 is the sole basis for withholding the remainder of the records at issue.[10] That section has been the subject of many orders, including Order 01-15,[11] where former Commissioner Loukidelis said this:

> [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations. …

[38] The British Columbia Court of Appeal has also considered the application of s. 13(1).[12] Order F05-06 noted that a key passage in that decision is that "advice includes expert opinion on matters of fact on which a public body must make a decision for future action."[13]

[39] I have considered the Court of Appeal decision and relevant OIPC orders in reaching my conclusions below.

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[9] Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Toronto: Butterworths, 1993) at pp. 189, 191.

[10] While ICBC says in its initial submission that some of these records are written by its legal counsel, it did not claim they were covered by solicitor-client privilege (nor, I would add, would they be).

[11] [2001] B.C.I.P.C.D. No. 16.

[12] *The College of Physicians and Surgeons of British Columbia v. British Columbia (The Information and Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2779.

[13] [2005] B.C.I.P.C.D. No. 7, para. 16.

[40] To summarize my findings: a very small portion of the disputed information is properly withheld under s. 13 while most of it is not. I am unable to articulate as fully as I might the reasons for this conclusion. This is because the material upon which my conclusions are based was submitted by ICBC *in camera* and properly received as such by the OIPC. What I am able to say from ICBC's out of camera submission is that advice was provided to ICBC about what approach it should take "in relation to its rate setting practices and whether changes to those practices should be initiated".[14]

[41] I would agree that the information found at pp. 227-29 of the records clearly meets the criteria set out in previous orders and the BC Court of Appeal decision for the application of s. 13(1). I have underlined those passages properly withheld by ICBC in red.

[42] I cannot agree with ICBC's submissions that s. 13(1) applies to the rest of the information at issue. The balance of the material is not advice as that term has been defined in previous orders and court decisions. However, that does not end the analysis. The law with respect to s. 13 is also clear that, if the disclosure of the information would enable someone to *infer* the actual advice or recommendations at issue, then that information can be properly withheld. To this I would add generally, the fact that a public body seeks or is given advice, or both, is not by itself excepted from disclosure under s. 13. Again, only where any such disclosure of this fact would infer the actual advice or recommendations, would a public body be authorized to withhold such information.

[43] I have carefully reviewed the rest of this information in dispute and conclude its disclosure would not reveal the advice or facilitate the drawing of inferences about the advice. As noted, I am constrained from providing more detailed reasoning for this conclusion because, as noted above, portions of ICBC's submissions upon which I rest my findings, were received *in camera*.

CONCLUSION

[44] For the reasons mentioned above, under s. 58 of FIPPA, I make the following orders:

1. Section 13(1) of FIPPA authorizes ICBC to withhold some information on pp. 227-29. I have underlined those passages in red that ICBC is authorized to withhold.

[14] ICBC's initial submission, para. 74.

2. ICBC is authorized to withhold all of the information for which it claims solicitor-client privilege under s. 14 of FIPPA.

3. I require ICBC to disclose all of the remaining information.

4. I require ICBC to give the ARA access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before November 30, 2012. ICBC must concurrently copy me on its cover letter to the ARA, together with a copy of the records.

October 22, 2012

ORIGINAL SIGNED BY

Michael McEvoy
Assistant Commissioner

OIPC File No.: F11-46054