OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-02

MINISTRY OF ATTORNEY GENERAL

Michael McEvoy, Adjudicator

January 7, 2010

Quicklaw Cite: [2010] B.C.I.P.C.D. No. 2
CanLII Cite: 2010 BCIPC 2
Document URL: http://www.oipc.bc.ca/orders/2010/OrderF10-02.pdf

Summary: The Ministry made successful representations to the Attorney General of Canada urging it to stay proceedings of a private prosecution launched against it under the federal *Fisheries Act*. The applicant, an environmental group aiding in the private prosecution, sought access to the records between the Ministry and the Attorney General of Canada concerning the stay decision. The Ministry refused on the basis that solicitor-client privilege protected the records. Legal professional privilege does not apply because the records were communications between a lawyer and a third party. Litigation privilege, if it existed, expired because litigation between the parties ended and the possibility of future related litigation was entirely speculative.

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

Authorities Considered: B.C.: Order F10-01, [2010] B.C.I.P.C.D. No. 1; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-28, [2002] B.C.I.P.C.D. No. 8.

Cases Considered: *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.); *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC); *College of Physicians & Surgeons of BC v. BC (Information & Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2774; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39.

Authors Cited: Manes, Ronald D. & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993); Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada*, (Canada Law Book, 2006).

1.0 INTRODUCTION

[1] The case relates to a decision by the Attorney General of Canada ("AG Canada") to stay a private prosecution of alleged violations of the federal *Fisheries Act*. Ecojustice Canada[1] ("applicant"), through its legal counsel, represented an individual who had launched a private prosecution[2] against the Province of British Columbia, the Greater Vancouver Regional District ("GVRD") and the Greater Vancouver Sewerage and Drainage District ("GVSDD"). The applicant alleged these three bodies discharged, or permitted the discharge of, harmful sewage from the Lions Gate sewage treatment plant into Burrard Inlet in Vancouver. AG Canada, through its counsel John Cliffe, indicated it was considering assuming conduct of the prosecution and, if so, deciding whether the prosecution should proceed. Cliffe invited submissions from all of the parties concerned before making a determination. The applicant made a submission to Cliffe urging him to pursue the prosecution and the Province of British Columbia, represented by the Ministry of Attorney General ("Ministry") made a representation to the contrary. Subsequently, AG Canada decided to take carriage of the matter and stay the charges.

[2] The applicant asked AG Canada to disclose the information on which Cliffe based his decision. It refused. The applicant then wrote the Ministry seeking:

> All records in relation to the Lions Gate Waste Water Treatment Plant private prosecution…that were sent or provided by the [Ministry]...directly or through legal counsel, to Mr. John Cliffe of the Federal Prosecution Service, or any such records sent or provided to any other federal government official.
>
> All records in relation to the Lions Gate Waste Water Treatment Plant private prosecution…that were received by [the Ministry] from Mr. Cliffe or from any other federal government official.

[3] The Ministry declined to release any responsive records because it said they were subject to solicitor-client privilege. The applicant asked this Office to review the Ministry's decision. The Ministry later said that, in addition to s. 14, it intended to rely on s. 15(1)(g) of FIPPA.

[4] The applicant asked that this inquiry consider whether the Ministry is required to sever the records in issue, pursuant to s. 4(2) of FIPPA. Mediation did not successfully resolve the issues in dispute and a written inquiry was held under Part 5 of FIPPA. This Office gave notice of the inquiry to the

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[1] Formerly known as Sierra Legal Defence Fund.

[2] Subsequent references to the private prosecution will refer to the applicant as the body responsible for it. The evidence before me is that it was the body effectively undertaking the private prosecution.

applicant and the Ministry along with AG Canada as an appropriate person under s. 54(b) of FIPPA.

[5] The applicant made a similar request to the GVRD for records related to the Lions Gate prosecution. I am issuing my decision on that case (Order F10-01[3]) concurrently. Where the issues in both cases are the same, I have applied the same analysis and reasoning in each Order, though expressing it differently at points to account for some variances in the arguments of the respective public bodies.

2.0 ISSUES

[6] The issues set out in the Notice of Inquiry are:

1. Is the Ministry authorized by s. 14 of FIPPA to refuse to disclose certain records?

2. Is the Ministry authorized by s. 15(1)(g) of FIPPA to refuse to disclose certain records?

3. Can the public body reasonably sever information from the records under s. 4(2) of FIPPA?

[7] Section 57(1) of FIPPA provides that, with respect to issues 1 and 2, it is up to the Ministry to prove that the applicant has no right of access. FIPPA is silent with respect to issue 3 and, as a practical matter, it is up to each party to provide evidence to support its arguments.

3.0 DISCUSSION

[8] **3.1 The Records in Dispute—**The Ministry disclosed additional records after making its initial submission, causing the applicant to be uncertain about what records were still in dispute. Some of these disclosed records were not part of those the Ministry identified previously as being in dispute. In any event, my review of the submissions discloses that the records still in issue are: all those in Exhibit C to the affidavit of Angela Davies, a lawyer with the Ministry; the withheld portions of Exhibits F and G of the Davies affidavit; and all of the records found at Exhibit H to the Davies affidavit. The applicant asserts the redacted material "in the email sent by Ms. Davies to Mr. Cliffe on January 9, 2007"[4] represents a fifth category of undisclosed information. In fact, that information represents a partial disclosure of the records in Exhibits F and G just noted. It is not, therefore, a new category of undisclosed information.

[3] [2010] B.C.I.P.C.D. No. 1.
[4] Applicant reply submission, para. 7.

[9] John Cliffe, legal counsel for AG Canada, describes Exhibit C as a letter to him from the Ministry. Cliffe deposes that he invited Angela Davies of the Ministry to make representations on behalf of the Province of British Columbia concerning the Lions Gate private prosecution. In response, Cliffe states he received the letter from Davies ("Davies letter") and that the "thrust" of the representations in the letter was that the:

> …Private Prosecution against the Province of British Columbia was unmeritorious having regard to the substantial likelihood of conviction and the public interest in having the prosecution proceed.[5]

[10] Exhibits F and G are emails which have been severed and Exhibit H consists of an email appending an eight-page document.

[11] **3.2 Solicitor-Client Privilege—**Section 14 of FIPPA reads as follows:

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

[12] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal professional privilege (sometimes referred to as legal advice privilege) and litigation privilege.[6] The Ministry argues that both branches of the privilege apply here. I will deal with each in turn.

Legal Professional Privilege

[13] The test for legal advice privilege at common law has been applied consistently in decisions of this Office. Thackeray J. (as he then was) put the test this way:[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:
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> 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.

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[5] Cliffe affidavit, para. 12..
[6] See for example Order 01-53, [2001] B.C.I.P.C.D. No. 56.
[7] *B. v. Canada,* [1995] 5 W.W.R. 374 (BCSC).

> 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.

[14] The applicant concedes that the first and second element of the test appear to be present. However, it argues that confidentiality is only one of the elements necessary to prove solicitor-client privilege. The applicant says it does not seek any communications between the Ministry and its solicitors, only communications between the Ministry and AG Canada. The essence of the applicant's submission is that no privilege extends to the latter communications because those are not between the Ministry and its counsel but rather between the Ministry and a third party, outside any solicitor-client relationship. Further, the applicant asserts that these communications were not for the purpose of the "seeking, formulating or giving of legal advice", but rather were "directly related to advocating that a third party, [AG Canada], make a statutory decision in favour of [the Ministry], specifically, directing a stay of the prosecution."[8]

[15] The Ministry submits that solicitor-client privilege protects the Davies letter from disclosure because it contains information provided by the Ministry, in confidence, to its legal counsel, Angela Davies.

[16] The Ministry further argues the Davies letter contains information about the Ministry's position on the likelihood of conviction and whether continuing the prosecution was in the public interest. This information, it contends, is derived from confidential communications that it only agreed to share with its legal counsel for inclusion in the Davies letter because of Cliffe's apparent assurance he would keep it confidential. As such, the Ministry submits the release of any information from Exhibit C would allow someone to infer accurately information that is subject to legal professional privilege. The Ministry makes no argument that this branch of the solicitor-client privilege applies to any other records in dispute.

[17] After carefully reviewing the submissions of all parties, including AG Canada, I conclude that legal professional privilege does not apply in this case.

[18] The Davies letter is correspondence to a third party, AG Canada, a fact the Ministry does not dispute. Solicitor-client privilege protects third-party communications "only where the third party is performing a function, on the

[8] Applicant's initial submission, para. 92.

client's behalf, which is integral to the relationship between the solicitor and the client."[9]

[19] It is clear in this case that AG Canada was not performing any function at all on the Ministry's behalf. Nor do I understand the Ministry to argue this. AG Canada's role was to exercise, independently, its discretion in deciding whether to prosecute or stay charges. Indeed, AG Canada was potentially a party adverse in interest at the time the Ministry made submissions to it.

[20] Comments in *R. v. Bernardo*[10] are relevant in this regard:

> Solicitor-client privilege applies to communications between counsel and the client and to communications that are necessarily incidental to the client's representation. They would not normally apply to a situation such as this where it has been divulged to a party adverse in interest, i.e. the Crown. I am satisfied that the solicitor-client privilege would not apply to the information here sought by the defence.[11]

[21] The Davies letter, whatever gloss the Ministry puts on it, is simply a written argument by a lawyer on a client's behalf. It is counsel's plea to AG Canada to assume conduct of a private prosecution and stay the charges, that much is known from Cliffe's evidence. The Ministry's assertions essentially boil down to a proposition that, because lawyer and client discussed what ought to go into the submission, it is privileged.[12] One could argue on this basis that any representation made by a lawyer on a client's behalf to a court or tribunal would be privileged because it is based on and might reflect prior consultations with the client. Lawyers take instructions from clients; they act only on instructions. One would therefore expect that written arguments, submissions or representations that lawyers make to decision-makers, courts or tribunals reflect client instructions in some sense. That fact, however, no more cloaks the disputed records with privilege than it does the Ministry's submissions to this inquiry. The Ministry is unable to cite any case law supporting its position.

[22] To summarize, legal professional privilege applies only to communications between client and lawyer. The Davies letter is a communication between a client's lawyer and a third party who is not performing a function on the client's

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[9] *College of Physicians & Surgeons of BC v. BC (Information & Privacy Commissioner)* 2002 BCCA 665, [2002] B.C.J. No. 2774 at para. 50.
[10] *R. v. Bernardo*, [1994] O.J. No. 1718 (Ont. Gen. Div.).
[11] The Ministry has not argued that a 'common interest privilege' exists here between it and AG Canada. In any case, for common interest privilege to exist, "the parties must share a common goal, seek a common outcome or have selfsame interest." [*The Law of Privilege in Canada*, by Robert W. Hubbard, Susan Magotiaux and Suzanne M. Duncan, (Canada Law Book, 2006), p. 11-52]. As noted already, far from sharing a common interest with the Ministry, AG Canada's role was potentially adversarial and, at the very least, it was an independent decision-maker.
[11] In particular, paras. 4.23 and 4.24 of the Ministry's initial submission.
[12] In particular, paras. 4.23 and 4.24 of the Ministry's initial submission.

behalf, much less one that is integral to the relationship between the solicitor and the client. I therefore reject the Ministry's argument that legal professional privilege applies to the Davies letter.

Litigation Privilege

[23] The law has long recognized that communications with third parties do not generally enjoy privilege unless they occur in the contemplation of, or for the purpose of, litigation. Litigation privilege protects records where the dominant purpose for creation of the records was to prepare for or conduct litigation under way or in reasonable prospect at the time the records were created.[13]

[24] The Ministry argues the sole purpose for the creation of the records was anticipated litigation, namely, the Lions Gate and Iona prosecutions.[14] While conceding that AG Canada stayed both prosecutions, the Ministry argues that the applicant will continue to seek access to the records in order to assist it in prosecutions like the Lions Gate and Iona prosecutions. It describes this as a "real likelihood". The Ministry submits:[15]

> …the fact that they [the applicant] still seek the records, can lead one to reasonably conclude that the Applicant seeks the Records for the purpose of initiating future prosecutions against the Province.

[25] It cites a letter the applicant wrote to Environment Canada seeking records (not those at issue here) to assist the Iona prosecution. The Ministry argues the applicant is seeking the disputed records "for the same 'legal combat' that it has been waging against the Province and GVRD."[16] As such, it contends the records remain subject to litigation privilege.

[26] The applicant argues that litigation privilege ends with the litigation. Both the Lions Gate and Iona prosecutions have ended and the applicant submits that the "requested records are no longer subject to litigation privilege, if they ever were."[17]

[27] Moreover, the applicant submits:[18]

> …there is no evidence whatsoever that Ecojustice lawyers, or clients of Ecojustice's lawyers, intend to initiate any other private prosecutions in

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[13] Numerous previous orders have affirmed this test. See for example Order 02-28, [2002] B.C.I.P.C.D. No. 8.

[14] The Iona prosecution concerned a similar private prosecution for a different sewage plant. The parties to that matter were the same as those here. John Cliffe of AG Canada entered a stay of prosecution in that matter as well.

[15] Ministry initial submission, paras. 4.49 and 4.50.

[16] Ministry initial submission, para. 4.46.

[17] Applicant reply submission, para. 22.

[18] Applicant's reply submission, paras. 23 and 34.

> relation to Lions Gate or Iona sewage treatment plants. To the contrary, [the applicant's affidavit evidence] confirms that Ecojustice has no plans to commence further private prosecutions of the Province in relation to these sewage plants.
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> There is no factual foundation for the assertion that Ecojustice and the public body remain "locked in legal combat". Apart from this inquiry, there is no evidence of any legal proceedings that are ongoing, pending or anticipated between these parties, let alone in relation to Lions Gate and Iona. While the Province may claim to "apprehend" further such proceedings, that apprehension is unreasonable and unfounded.

[28] It is fair to say that the Davies letter and other records in dispute are not typical of the kinds of records for which litigation privilege claims are made. The need for litigation privilege has been described in *Solicitor-Client Privilege in Canadian Law* like this:[19]

> The contemplation of litigation as a basis for privilege is required for derivative communications such as:
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> (a) Communications between the client (or the client's agents) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;
>
> (b) Communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or
>
> (c) Communications which are created at their inception by the client including reports, schedules, briefs, documentation etc.

[29] It is clear the Davies letter and email records were created because of the private prosecution. However, the purpose of these communications was not to obtain legal advice or to assist the solicitor with the giving of legal advice. The federal prosecutor, John Cliffe, characterizes the communications as "representations" designed to persuade him the private prosecution was "unmeritorious". It was not some kind of information-gathering exercise connected with formulating legal advice. Cliffe's role here is analogous to that of a prosecutor asked by defence counsel to drop charges against his client. Those communications might be in some sense without prejudice, but one would not think of them as covered by litigation privilege. For this reason, I have serious doubts whether litigation privilege would cover the records in dispute. It is not necessary to make a finding on this issue because I have concluded that, even if one assumes for discussion purposes only, as I do, that litigation privilege exists here, it has ended in this case.

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[19] Manes, Ronald D. & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworths, 1993), pp. 89-90, para. 0.01.

[30] The Supreme Court of Canada recently canvassed the issue of when litigation privilege ends in *Blank v. Canada (Minister of Justice)*:

> As mentioned earlier, however, the privilege may retain its purpose - and, therefore, its effect - where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim" (at para. 89): see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
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> At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
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> As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165)….[20]

[31] The Court also stated:

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose—and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.[21]

[32] The outstanding litigation between these parties has ended. There is no dispute that AG Canada stayed the Iona and Lions Gate prosecution.

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[20] [2006] S.C.J. No. 39 at paras. 38, 39 and 40.
[21] [2006] S.C.J. No. 39 at paras. 34 and 35.

[33] I do not accept the Ministry's position as to anticipated related future litigation. The two-year-old Environment Canada letter alluded to by the Ministry merely confirms that the applicant once pursued the Iona prosecution. It predates the applicant's expressed intention not to pursue the matter.

[34] The Ministry's contention that, the fact that the applicant "still seek[s] the records can lead one to reasonably conclude" that it does so "for the purpose of initiating future prosecutions against the Province" is circuitous. The Ministry's arguments are assertions, are not based on sworn evidence or other supporting material, and amount to nothing more than unfounded speculation.

[35] Moreover, the Ministry does not explain what it means when it says the applicant will seek the records to assist in prosecutions "like the Lions Gate and Iona Prosecutions."[22] The cases it cites regarding related litigation all involve situations where there was actual and not "apprehended" litigation ongoing between the parties, which the court found related to the original actions. In this case, not only is there no ongoing litigation between the parties, the Ministry makes no argument about what the future related litigation might be. It does not allege, for example, the existence of other sewage plants as potential targets for prosecution. Even if this were the case and the applicant intended to pursue prosecutions respecting incidents involving those plants, the Ministry does not explain how details about a past prosecution regarding events and circumstances relating to the Iona and Lions Gate sewage treatment facilities have relevance to other plants, events and circumstances for the purposes at hand. In short, the Ministry's claim that the applicant will seek future prosecutions and that such prosecutions would constitute a related cause of action or raise issues common to the Iona or Lions Gate matters is not at all persuasive.

[36] The Supreme Court of Canada specifically addressed this kind of speculative claim in the context of access legislation in *Blank*:[23]

> The extended definition of litigation, as I indicated earlier, applies no less to the government than to private litigants. As a result of the Access Act, however, its protection may prove less effective in practice. The reason is this. Like private parties, the government may invoke the litigation privilege only when original or extended proceedings are pending or apprehended. Unlike private parties, however, the government may be required under the terms of the Access Act to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended. *A mere hypothetical possibility that related proceedings may in the future be instituted does not suffice*. [Emphasis added]

[22] Para. 4.45.
[23] *Blank v. Canada* 2006 SCC 39 at para. 9.

[37] All of this is in contrast to the sworn evidence and supporting material proffered by the applicant. That evidence establishes that the applicant did not seek judicial review of AG Canada's decision to stay the prosecutions. The applicant also states, unequivocally, it does not intend to bring any further proceedings in relation to those two sewage plants. There is no evidence it will do so in future.

[38] For all of the reasons set out above, even assuming for discussion purposes only, as I do, that litigation privilege did exist in this case, it is now at an end and does not apply to any of the records in dispute in this case.

[39] I therefore find that s. 14 of FIPPA does not authorize the Ministry to withhold the records in dispute.

[40] Having found s. 14 does not apply it is not necessary for me to consider the issue of waiver of privilege.

[41] **3.3 Prosecutorial Discretion—**The Ministry says it no longer relies on s. 15(1)(g) of FIPPA. It is therefore not necessary for me to deal with this issue.

[42] **3.4 Severing of Records—**Given the outcome of this case, it is also not necessary to determine whether the Ministry can reasonably sever information from the records under s. 4(2) of FIPPA.

4.0 CONCLUSION

[43] For the reasons set out above, under s. 58 of FIPPA I make the following orders:

1. I require the head of the Ministry to give the applicant access to the information it withheld under s. 14 of FIPPA.

2. I require the head of the Ministry to give the applicant access to this information within 30 days after the date of this order, as FIPPA defines "day", that is, on or before February 18, 2010 and, concurrently, to copy me on its cover letter to the applicant.

January 7, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator