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Order F11-15

COLLEGE OF MASSAGE THERAPISTS OF BRITISH COLUMBIA

Michael McEvoy, Adjudicator

May 12, 2011

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Summary: The applicant, a former Board member of the College, requested certain legal invoices that she said referenced her. The College refused on the basis that solicitor-client privilege protected the responsive records. The adjudicator found that solicitor-client privilege applied to the records and that there was no evidence that the College intended to waive privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14; *Massage Therapists Regulation*, B.C. Reg. 280/2008.

Cases Considered: *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

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

1.0 INTRODUCTION

[1] The applicant is a former Board member of the College of Massage Therapists of British Columbia (“College”). Prior to concluding her term as Board member, she asked the College for copies of invoices related to legal services John Ankenman provided to the College.¹ She said she was especially seeking invoices that referred to her explicitly by name or by inference and, in particular, an invoice that referred to her “machinations.”²

¹ The request covered a period from March 2009 until October 23, 2009, the date of the applicant’s request.

² Applicant’s email to the College, October 23, 2009.

[2] The College replied that it was withholding the records in issue because they were subject to s. 14 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) *i.e.*, solicitor-client privilege.

[3] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the College’s decision.

[4] The mediation process resulted in the applicant narrowing her request to “only the portion of the invoice(s) from John Ankenman that use a derogatory term to describe her or her thought processes, and the date on which he issued that or other invoices.”³

[5] Mediation did not resolve the narrowed request and an inquiry was held under Part 5 of FIPPA.

2.0 ISSUE

[6] The issue in this inquiry is whether the College was authorized to withhold information under s. 14 of FIPPA.

[7] Section 57(1) of FIPPA provides that the Ministry must prove that the applicant has no right of access under s. 14.

3.0 DISCUSSION

[8] **3.1 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.

[9] Section 14 of FIPPA encompasses two kinds of privilege recognized at law: legal advice privilege and litigation privilege. The College argues that legal advice privilege applies to information at issue.

[10] Decisions of this office have consistently applied the test for legal advice privilege at common law. Thackray J. (as he then was) put the test this way:⁴

[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

³ Investigator’s Fact Report, para. 11.

⁴ *B. v. Canada*, [1995] 5 W.W.R. 374 (BCSC).

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.

The parties' arguments

[11] I have carefully read and considered all submissions made by the parties and summarize below the salient portions of these arguments.

[12] The College says that John Ankenman, its general counsel, routinely generates statements of accounts for services, directing them to the Registrar of the College. The College submits the statements detail everything from the date of any legal advice given to a detailed description of the advice, including identification of the person requesting the advice, the work performed to respond to the request and a description of the advice given. The College says the records in dispute here describe matters that would “position” the applicant to know:⁵

- which individual within the College requested the advice
- the nature of the advice
- the work which was performed to facilitate the provision of the legal advice requested
- the manner and nature of the legal advice provided in response to the request.

[13] The College submits that, while the applicant is a former member of the Board of the College, she is not entitled to access its records because the solicitor-client privilege is that of the College and not that of any individual board member. The College says that the Board declined to waive the privilege in this case and continues to do so.

[14] The applicant says that during the time she served on the College Board she observed numerous matters relating to the Board’s governance that concerned her. She independently sought and received two legal opinions that she believes “discomfited” some members of the Board and its legal counsel.⁶ She says that, at some point in 2009, one of her Board colleagues advised her that a “derogatory” notation appeared on an invoice John Ankenman submitted to the College.⁷ She says that the notation was discussed at a public Board meeting and that John Ankenman said that his accounts were meant to be seen by, among others, the

⁵ College’s initial submission, para. 15.

⁶ Applicant’s initial submission, p. 2.

⁷ Applicant’s initial submission, p. 2.

Registrar, the president and Vice-President of the Board.⁸ She provided what she says are audio excerpts of the meeting.⁹

[15] The applicant argues that solicitor-client privilege cannot be asserted against her because, as a member of the Board, she was “in essence, along with the rest of the Board members, [John Ankenman’s] client.”¹⁰ She submits that this entitles her to obtain and review all invoices the Board receives. She said she made the request for the records while she was still a Board member and that her request should not be rejected now because she is no longer a Board member.

[16] The applicant also argues that the invoices fail to meet two branches of the legal professional privilege test set out above. She says they were not confidential because a “broad audience” within the College was permitted to view them and that as noted above they were discussed at a public meeting. It is also for this latter reason she submits that privilege over the disputed records, if it existed, was waived. The applicant also argues that the invoices fail the privilege test insofar as derogatory remarks would not constitute a legal opinion.

[17] The College in reply objects to my receiving the audio evidence the applicant adduced. While the College acknowledges I am not bound by the strict rules of evidence with respect to receiving such evidence, it posits several reasons why I should not do so here, including the selective nature of the recordings, their accuracy and completeness. Finally, the College says that, even if I receive the audio recordings, they provide no support for the applicant’s argument that solicitor-client privilege was waived in this case.

Findings

[18] I reject the applicant’s argument that solicitor-client privilege cannot be asserted against her because she is the client. The evidence satisfies me that the College is the client in this case. The affidavit evidence establishes that the College is established as a corporate entity under the Massage Therapists Regulation¹¹ pursuant to the *Health Professions Act*.¹² As such, it has independent legal status. The College Bylaws,¹³ approved by the Lt. Governor in Council, establish that the College exercises its powers with regard to solicitor-client matters, through the Board of the College (and designated committees and panels) and not individual Board members. Specifically s. 39 of the Bylaws state:¹⁴

⁸ Applicant’s initial submission, pp. 2 and 3.

⁹ In an mp3 format.

¹⁰ Applicant’s initial submission, p. 4.

¹¹ Massage Therapists Regulation, B.C. Reg. 280/2008.

¹² Sections 12(1) and (2)(a)

¹³ The College’s covering email to its initial submission provided the website where the College Bylaws could be found.

¹⁴ Initial submission of College, para. 8.

The Board, or with the consent of the Board, any committee, sub-committee or panel may consult or retain legal counsel for the purpose of assisting the Board or that committee, sub-committee or panel in carrying out any duty or responsibility it may hold under the Act, the Regulation or these Bylaws.

[19] Therefore, only the College, as corporate entity, is entitled to claim the privilege. The evidence here is that it properly did so through the College's Registrar at the direction of the Board.¹⁵

[20] The issue thus is whether the College has demonstrated that the disputed documents meet the four-part test for solicitor-client privilege set out above.

[21] The affidavit evidence establishes the invoices for legal services were communications in writing and were of a confidential character. I reject the applicant's assertion that because non-Board members viewed them they were not of a confidential character. Here, the College's sworn evidence is that the Board President, a Board member with signing authority over the legal invoices and the Registrar viewed the disputed information. The Registrar, a non-Board member, provided evidence that the Board authorized him to view the information and to give instructions on the College's behalf to claim solicitor-client privilege over it.¹⁶ None of this suggests that the record was anything other than confidential.

[22] The affidavit evidence of the College also satisfies the third branch of the test in this case that the communications at issue were between the College and its counsel,¹⁷ a point the applicant does not dispute.

[23] The applicant asserts that the disputed invoice information could not relate to the seeking, formulating or giving of legal advice, the fourth branch of the test, because it contains derogatory remarks about her. This conjectural claim is an attempt to invite a discussion of precisely what the record contains. The College of course makes no comment about the specific contents of the disputed records. For it to do anything else would disclose the very information in dispute. My determination as to whether the information in issue relates to the seeking, formulating or giving of legal advice is based on the evidence before me, not speculative assertions. In this case, the disputed information is described with sufficient particularity to satisfy me that it meets the fourth branch of the solicitor-client privilege test. As noted above, the sworn evidence sets out that the records contain information respecting which individual within the College requested the advice, the nature of the advice, the work which was performed to facilitate the

¹⁵ Affidavit # 1 of Douglas McRae, para. 8.

¹⁶ Affidavit # 1 of Douglas McRae, para. 8.

¹⁷ Affidavit # 1 of Douglas McRae, para. 8.

provision of the legal advice requested and the manner and nature of the legal advice provided in response to the request.

Waiver

[24] The final aspect of the applicant's argument is her contention that the College waived whatever solicitor-client privilege exists in this case because the disputed information was discussed at public meetings. I take the applicant's evidence on this point to be the audio clips she provided with her submission.

[25] The applicant says the audio clips are recordings of public College Board meetings purported to capture the following comments:

- College lawyer John Ankenman stating that the College Board did not require a "second legal" opinion about matters raised by the applicant. The applicant had obtained and presented to the Board two legal opinions in response to certain concerns she had about how the Board was operating.
- The applicant stating that one of the signing officers for the Board saw an invoice from a lawyer that contained a derogatory remark about the applicant.
- A signing officer of the Board stating that until she saw an invoice that made comment about one of her Board colleagues there had been no issue with her signing cheques.
- College lawyer John Ankenman stating that his accounts were meant to be seen by committee chairs, the registrar, president and a vice-president and others who review accounts and authorize them.

[26] The applicant invites me to listen to the recordings and the College says I ought not to. I have decided that it is not necessary for me to listen to the audio clips. That is because, even if I concluded that they contain what the applicant attributes to them, they still would not support the applicant's contention that the College waived solicitor-client privilege in this case.

[27] R.D. Manes and M.P. Silver, in *Solicitor-Client Privilege in Canadian Law*,¹⁸ explain the general principle of waiver:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

...

¹⁸ Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Toronto: Butterworths, 1993) at p. 189, 191.

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.

[28] In my view, none of the statements allegedly made above evinces an express or implicit intention on the part of the College to waive solicitor-client privilege here. First, if John Ankenman stated at a meeting that the Board did not require a second opinion on a matter the applicant raised, it only implies he may have given an earlier legal opinion on the same topic. There is no suggestion of waiver of privilege with respect to that earlier opinion. Moreover, there is no evidence the purported statement related to a "second opinion" even relates to the information at issue here. The other comments attributed to John Ankenman, that certain people such as the Board President and others were authorized to see the invoices, do not demonstrate in any way that those persons intended to disclose them.

[29] Further, I find no evidence that the College evinced an intention to waive privilege over the disputed invoices by discussing their contents at a public meeting. Indeed the applicant's own description of the audio recordings indicates it was she and not the College that put the matter into the public sphere by alleging at a meeting the invoices contained negative remarks about her. As to the apparent remarks of the Board member with signing authority, they speak not to the privilege issue but rather to the matter as to who within the College had signing authority in relation to legal invoices. I therefore find there is no evidence, express or implicit, that the College intended to waive privilege over the disputed information in this case.

[30] For all of the above reasons, I find that solicitor-client privilege applies to the records in dispute and that the College has not waived privilege over those records.

4.0 CONCLUSION

[31] For the above reasons, under s. 58 of FIPPA I confirm the decision of the College to refuse the applicant access to the information at issue under s. 14 of FIPPA.

May 12, 2011

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator