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British Columbia v. British Columbia (Information and Privacy Commissioner)

Between
Municipal Insurance Association of British Columbia, petitioner, and
The Information and Privacy Commissioner for the Province of British Columbia and the Corporation of the District of North Vancouver
And between
Corporation of the District of North Vancouver, petitioner, and
The Information and Privacy Commissioner for the Province of British Columbia and the Municipal Insurance Association of British Columbia, respondent

[1996] B.C.J. No. 2534

143 D.L.R. (4th) 134

31 B.C.L.R. (3d) 203

71 C.P.R. (3d) 337

68 A.C.W.S. (3d) 194

Vancouver Registry Nos. A954022 and A954033

British Columbia Supreme Court
Vancouver, British Columbia

Holmes J.
(In Chambers)

Oral judgment: October 15, 1996.

(19 pp.)

Crown -- Examination of public documents -- Freedom of information, bars -- Solicitor-client privilege.

This was an application for judicial review for an order to set aside a decision of the Information and Privacy Commissioner. The city refused to provide information requested as to the amount of the total legal bill incurred in the defence of a lawsuit. The Commissioner ordered access to an invoice from the insurance association listing the legal defence costs.

HELD: The application was allowed. The decision was set aside. The record of the lump sum interim billing of legal services to the city by its solicitors as reflected in the invoice was privileged from disclosure. Section 14 of the Information and Privacy Act accorded solicitor-client privilege paramountcy over any other provisions of the Act permitting access. Section 14 of the Act was a statutory statement as to the preservation of the common-law right of solicitor-client privilege.

Statutes, Regulations and Rules cited:

Information and Privacy Act, ss. 14, 17, 21.

Counsel:

John Singleton and Jane Ingram Baker, for the petitioner.
Susan Ross, for the respondent, Information and Privacy Commissioner.
Joseph Arvay, for the intervenor, Law Society.

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1 **HOLMES J.** (orally):-- The petitioners, Corporation of the District of North Vancouver and the Municipal Insurance Association, seek judicial review for an order to set aside a decision of the Information and Privacy Commissioner dated November 1, 1995, Order No. 61-95.

2 The respondent, Watts, a resident of North Vancouver, requested by letter of April 4, 1994 that North Vancouver provide him with the amount of the total legal bill incurred to that date by North Vancouver in the defence of the lawsuit commenced by Dennis and Irene LaCharite. That request was denied April 27, 1995, and the denial was based up s. 14 and s. 17 of the Freedom of Information and Protection of Privacy Act.

3 On May 1, 1995, Watts requested the Commissioner hold an Inquiry under the Act in respect of North Vancouver's decision.

4 On July 20, 1995, the Commissioner issued a Notice of Written Inquiry to resolve issues in dispute in respect of Watts' request.

5 On July 28, 1995, M.I.A. requested and was granted third party status to the Inquiry.

6 Watts, North Vancouver, and M.I.A. presented written submissions to the Commissioner.

7 On November 1, 1995, the Commissioner released his decision which required North Vancouver to give Watts access to the record of legal costs incurred by North Vancouver in defending the LaCharite lawsuit.

8 The document the decision requires be released is a one page interim invoice from M.I.A. to North Vancouver dated December 30, 1994, for legal costs incurred in defending the ongoing LaCharite lawsuit.

9 The Commissioner in his decision described that document as:

> ... a simple, straightforward, one page invoice from the Municipal Insurance Association that quotes lump sums and describes none of the services provided. The only information revealed is which firm(s) have worked on the litigation in question and the sum total of their billing.

10 I have viewed a copy of the document (record) in question, with the alleged privileged information excised: see the affidavit of Peter Gill, sworn April 1, 1996, Exhibit "A". I did not feel it necessary to view the original of the document, although I understand the Commissioner did. I am of the view that where privilege is claimed over a document it ought not to be viewed by the Commissioner or the Court unless evidence and argument establishes a necessity to do so to fairly decide the issue. I am not in favour of automatically viewing the document as that in itself weakens the sanctity of privilege.

11 The petitioners, in their submissions to the Commissioner, as well as here, argue against disclosure on three grounds under the Act: one, the document, called "record" under the Act was privileged, s. 14; two, disclosure during the course of ongoing litigation would be harmful to the financial interests of North Vancouver, s. 17; and three, disclosure would reveal sensitive commercial and financial information of M.I.A., s. 21.

12 The Law Society of British Columbia has intervened in respect of the issue of privilege and s. 14 of the Act.

13 All parties to the petition agreed that argument should be directed to the privilege issue first, a decision given, and argument on the remaining two issues then made at an adjourned hearing if solicitor/client privilege is not found.

14 Section 14 of the Act reads as follows:

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

That was one of the grounds cited by North Vancouver in its initial refusal to supply the information requested.

15 The issue of privilege was specifically considered and rejected by the Commissioner on the written Inquiry. Counsel for the Commissioner limited her submissions to the proper record of the proceedings to be considered on this review and matters of jurisdiction. For

present purposes, I accept her submission that affidavits containing evidence or opinion not before the Commissioner ought not to be now taken into account. Counsel properly made no submission in respect of the merits of the Commissioner's decision.

16 Counsel for Watts argued strongly in support of the Commissioner's decision on the basis of the original argument presented to him on behalf of Watts, on the grounds cited by the Commissioner in reaching his decision, and on further and other grounds.

17 The standard of review applicable to a decision of the Commissioner in respect of s. 14 of the Act is that of "correctness". There is no issue of curial deference to expertise of the Commissioner in this respect. The Commissioner must act in accordance with the law, and if he errs in law his decision must be set aside.

18 The common law principles of solicitor/client privilege are incorporated into the Act, and any decision of the Commissioner at variance with the common law principles are subject to correction by the Courts under its review jurisdiction under the Judicial Review Procedure Act, see Minister of Environment, Lands, and Parks (Cypress Bowl) v. The Information and Privacy Commissioner, [1995] B.C.J. No. 2594 (12 December 1995), Vancouver Registry No. A943843 (B.C.S.C.), a decision of Thackray, J., page 17.

19 For purposes of deciding the issue of privilege under s. 14 of the Act, counsel for all parties have agreed the proper standard is that of correctness. Counsel for the respondent Watts and for the Commissioner do not agree that standard applies in respect of the further issues under s. 17 and s. 21 of the Act.

20 The Commissioner considered decisions in which accounts of solicitors were privileged. For example, Mutual Life Insurance Company of Canada v. Deputy Attorney General of Canada (1984), 42 C.P.C. 61 (Ont.S.C.), Taves v. Canada, [1993] B.C.J. No. 1713, (5 August 1993), Vancouver Registry No. A932221 (B.C.S.C.), but he found:

> ... the legal account at issue in this inquiry is of a different character in that it does not describe legal services rendered to the client.

In making that decision, the Commissioner was imposing a very narrow and restrictive test as to privilege attaching to a legal account, and in my view he fell into error.

21 Counsel for the respondent Watts argues in support of the Commissioner's decision that the document in question is not a communication between solicitor and client, rather one between insurer and insured and that the information in the document does not relate to legal advice but only the lump sum amount of legal services rendered.

22 I see no merit to the position that there is no communication between solicitor and client. North Vancouver, M.I.A. and the solicitors are in a relationship by virtue of the special responsibilities and duties created when insurers retain solicitors to represent and advise insureds, and then necessarily deal with those solicitors in certain aspects as principal, in others as agent for the insured. A solicitor has in effect two clients: the insurer and the insured. Information or communications may well be passed through one to the

other. It is obvious that occurred here.

23 Neither do I accept that information as to the lump sum for interim legal services does not relate to legal advice. At least indirectly it may. The litigation to which the account here in question relates is in my view illustrative. Apparently some citizens were attempting to convince North Vancouver its money would be better spent in relocating a lacrosse box which had been objected to by the LaCharites and precipitated their nuisance action against North Vancouver, than it would be to spend it on lawyers and court costs defending legal principles involved. In order to receive, consider and weigh advice as to the prospects of success or failure in defending the action through trial as opposed to seeking a compromise settlement or capitulating, communications from the solicitors as to the status of the costs incurred and to be incurred go beyond mere accounting information or facts and become an integral advice component to be considered and weighed.

24 Viewed in the context of the classic definition of solicitor/client privilege of Wigmore On Evidence is met. I quote:

> ... that the communications between solicitor and client are privileged:
>
> (1) where legal advice of any kind is sought;
> (2) from a professional legal advisor in his capacity as such;
> (3) the communications relating to that purpose;
> (4) made in confidence;
> (5) by the client;
> (6) are at his instance permanently protected from disclosure by himself or the legal advisor, and lastly by exception if the privilege is waived.

25 Communications of course need not contain legal advice to attract privilege, suffice they relate to obtaining advice of a lawyer and are made in confidence: see Legal Services Society v. The Information and Privacy Commissioner (B.C.) and Blaine Gaffney, [1996] B.C.J. No. 2034, (28 September 1996), Vancouver Docket No. 960275 (B.C.S.C.), a decision of Lowry J., at paragraph 13, page 10.

26 An important and obvious breach of privilege, however, in my view occurred here because the information in the document reveals terms of the retainer.

27 The terms of a solicitor client relationship are privileged, although the existence of the relationship in itself is not. The privilege includes but is not limited to financial arrangements between the solicitor and the client: see Solicitor-Client Privilege in Canadian Law (Vancouver: Butterworth's, 1993) R.D. Manes and M.P. Silver, p. 82.

28 I fond the reasoning of Mr. Justice Lowry in Gaffney, supra, compelling in respect of the present circumstances. There have been few precedent cases on the Act regarding privilege. Gaffney has just been decided. The Commissioner did not, therefore, have the benefit of Mr. Justice Lowry's analysis. I believe if he had that benefit he would have realized perhaps a clearer focus upon the aspect of retainer might have given clarity to

existing privilege than the sometimes more misleading view that results from considering what detail of legal advice expressly exists in the document or information, and rejecting privilege if none is apparent on the face of the document.

29 In Gaffney, a reporter requested that the Legal Services Society of B.C. disclose the total amounts paid by the Society to a particular lawyer for services he rendered in two murder cases in which he defended accused persons.

30 The Legal Services Society refused to provide access to its records, inter alia, on the ground of solicitor/client privilege and s. 14 of the Act.

31 The Commissioner held a written and an oral Inquiry and decided against a solicitor/client privilege, and required the Society to provide access to records that would reveal the information sought.

32 The request itself, of course, assumed the accused in question had applied for legal aid, shown financial qualifications of eligibility, that a referral had been made to the lawyer, and that the lawyer had billed and been paid for his legal services by the Society for the defence of the accused. None of those details are matters of public knowledge.

33 Disclosure of records showing any amounts were paid would therefore confirm and give insight as to the retainer under which the accused had been defended. The accused wished this to remain confidential, and did not waive nor wish to waive privilege as to any detail of the retainer.

34 The Gaffney fact pattern and that of the present case are very similar, but there is one notable difference. In the present case, the record to be disclosed would show information that North Vancouver was under some form of insurance coverage from M.I.A. in respect of the litigation in question. That would not be much different than the position of the Legal Services Society's involvement between the accused and the lawyer. I was advised that information was waived by M.I.A.'s intervention, and for purposes of this decision, I accept it was.

35 It appears in Gaffney the Commissioner appreciated the records would disclose details of the lawyer's legal aid based retainer. He felt, however, that did not give rise to privilege because the information the accused gave to the Society to obtain legal assistance would not be disclosed.

36 Mr. Justice Lowry found the Commissioner:

> ... appears [to] ... have seen the issue before him only in terms of what Mr. Gaffney had in fact requested -- billing amounts -- and effectively determined that the records sought should be made available to the reporter because there was nothing privileged about what the society may have been billed.

I perceive much the same concept prevailed in the instant decision.

37 I was advised by counsel that Mr. Justice Lowry was advised this case was pending, and for that reason he limited his decision to the premise:

> On the way in which this case has been argued, I assume without deciding that any records of billings the society may have as Mr. Gaffney contends are not privileged.

He then formulates the protection afforded under s. 14 of the Act and states the question that must be addressed.

38 I agree entirely with his approach, summary and conclusion, and I cannot improve upon the succinct manner in which he expressed it.

39 I quote again from page 9 and 10 of his decision:

> ... it is my view that the protection s. 14 affords extends to all information in the hands of the society, not just to information on the face of the record requested. It appears to me that the section ensures that the protection of a fundamental right is in no way impaired by the extent of access to public records the legislation otherwise affords. The question to be asked must be whether granting access to a record requested will disclose any information directly or indirectly that is the subject of solicitor-client privilege. It is of course communications that are subject of that privilege, the following statement in Wigmore is frequently cited for the conditions precedent for the confidentiality that the privilege affords to the lawyer-client.

40 He then quotes from Wigmore, much the same as the quote that I have earlier given.

> The communication need not contain legal advice to attract the privilege, it is enough if they relate to obtaining a lawyer's advice and are made in confidence.

41 I note that Mr. Justice Lowry considered the decision of Re Russell & DuMoulin and Rieger v. Burgess (1986), 9 B.C.L.R. (2d) 265 in his judgment. He found the former unhelpful, the latter wrongly decided in light of Descoteaux v. Merzwinski (1982), 141 D.L.R. (3d) 590 (S.C.C.). I concur with that view. These decisions were cited to me by counsel for Watts in support of the Commissioner's decision.

42 Mr. Justice Lowry comments that the Commissioner may have fallen into error because of the basis on which he predicated his decision.

43 I quote again from paragraph 24 of the decision of Mr. Justice Lowry:

> It appears to me the Commissioner may have fallen into error because of the basis on which he predicated his decision. His suggestion that the interpretation of s. 14 is a function of assessing how much information

> needs to be released to satisfy the public's desire for knowledge about the cost of defending those charged with criminal offences is not one that I can accept.

44 His statement that the Act has created a new form of accountability for the legal profession such that the goal of openness should to some extent have governed his decision in this case is not, with respect, at all supportable on my reading of the legislation.

> Section 14 is paramount to the provisions of the statute that prescribe the access to records that government agencies and other public bodies must afford. It was enacted to ensure that that would at common law be the subject of solicitor-client privilege remain privileged. There is absolutely no room for compromise. Privilege has not been watered down any more than the accountability of the legal profession has been broadened to serve some greater openness in terms of public access.
>
> ...
>
> However, the question of whether the information is the subject of solicitor-client privilege and whether access to a record in the hands of a government agency will serve to disclose it requires the same answer now as it did before the legislation was enacted. The objective of s. 14 is one of preserving a fundamental right that has always been essential to the administration of justice and it must be applied accordingly.

45 I find within the present decision of the Commissioner similar evidence of taking certain extraneous matters into account. The Commissioner at page 5 notes, for example, that he has taken into account the School Board, a co-defendant to North Vancouver in the lawsuit, did not take the position the information requested was privileged and disclosed it through their solicitor. He found that assisted him:

> ... in evaluating the arguments on both sides and in making the decision rendered below.

46 The actions of the School Board were of no consequence to the decision he was required to make as to solicitor/client privilege claimed by North Vancouver. His statement is therefore troubling and gives cause for concern.

47 I find North Vancouver's being required to disclose the amount of its interim legal costs in the course of ongoing litigation would result in the disclosure of important detail in relation to its retainer and to prejudice its right to communicate with counsel in confidence to obtain information necessary to understand its position in the lawsuit and enable reasoned instructions to be formulated and given.

48 Knowledgeable counsel, given the information as to his opponent's legal costs, could reach some reasonably educated conclusions as to detail of the retainer, questions or matters of instruction to counsel, or the strategies being employed or contemplated.

49 Some examples, certainly not intended as exhaustive, which might be reasonably discerned from knowledge only of the type of information contained in the document record in issue here, being basically the total of interim legal fees to date in a lawsuit, could include:

- the state of preparation of a party for trial;
- whether the expense of expert opinion evidence had been incurred;
- whether the amount of the fees indicated only minimal expenditure, thus showing an expectation of compromise or capitulation;
- where co-defendants are involved whether it appears one might be relying upon the other to carry the defence burden;
- whether trial preparation was done with or without substantial time involvement and assistance of senior counsel;
- whether legal accounts were being paid on an interim basis and whether payments were relatively current;
- what future costs to the party in the action might reasonably be predicted prior to conclusion by trial.

50 I was advised during the course of hearing that the LaCharite litigation had been settled and did not proceed through a trial. I also noted from the Commissioner's decision that apparently North Vancouver had originally offered to release the information requested to Watts following completion of the litigation.

51 I am of the view that the Court's review of this matter should take place on the facts existing at the time of the Commissioner's written Inquiry. I have so confined my review in this matter. The LaCharite litigation was at that time extent, and set for trial some six months hence.

52 I conclude the record of a lump sum interim billing of legal services to North Vancouver by its solicitors in respect of the LaCharite lawsuit was privileged from disclosure. That privilege being extent, s. 14 accords to it paramountcy over any other provisions of the Act which would permit access to the information within the subject record. Section 14 is a statutory statement as to the preservation, unaltered by any provision of the Act, of the common law right of solicitor/client privilege.

53 I find the Commissioner erred at law in his interpretation of the effect of s. 14. The Commissioner is precluded by a proper interpretation of s. 14 from requiring North Vancouver to the respondent Watts access to the record.

54 The decision of the Commissioner is set aside. It will be unnecessary to decide the further grounds of review under s. 17 and s. 21 of the Act as set forth in the petition.

55 The petitioners are entitled to their costs on Scale 3. I would assume the Law Society as intervenor do not seek costs. I would hope the petitioners would seriously consider foregoing their right to costs given the importance of the Act to the public, the difficulty of the issues being resolved without the assistance of clear precedent under relatively new legislation, and the economic imbalance that a citizen faces in trying to pursue the release

of information from a government agency. Is there anything further required counsel?

(submissions from counsel)

56 THE COURT: Everything I have said in respect to the parties taking account of the circumstances of this case as to whether they choose to enforce that right to costs remains.

(submissions from counsel)

57 THE COURT: I was simply going on the basis that Watts was a respondent. So you say the only reason they took part in the proceeding was as an interested party having originally initiated the matter.

(submissions from counsel)

58 THE COURT: What troubles me somewhat, Mr. Singleton, should not Mr. Watts have been a respondent? In these types of matters if persons in the category of Mr. Watts are not made respondent, it is like an ex parte application, there is no one to take the opposite point of view.

(submissions from counsel)

59 THE COURT: That would appear to be so, certainly in view of the hearing itself. I am somewhat troubled by the technicality that he wasn't made a respondent.

(submissions from counsel)

60 THE COURT: I will give a short written memorandum after giving further consideration to costs in this matter.

HOLMES J.

qp/s/jep/DRS/DRS/qlkjg

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