Copyright Board Canada

Commission du droit d'auteur Canada

[CB-CDA 2016-017]

RULING OF THE BOARD DEALING WITH OBJECTIONS TO INTERROGATORIES

Proceeding: Television Retransmission (2014-2018)

April 28, 2016

A. GENERAL COMMENT

[1] The Board's assessment of the relevance of the current interrogatories is circumscribed by the very narrow scope of this interrogatory process, namely the issue of procedural fairness for the members of the Canadian Cable Systems Alliance (CCSA) in relation to the Collectives' rates proposed in June 2015 exceeding the proposed rates published in the Canada Gazette in 2013.

B. WAIVER OF SOLICITOR-CLIENT PRIVILEGE

[2] The Supreme Court of Canada has often stated that the solicitor-client privilege is a principle of fundamental justice, and a civil right of supreme importance that forms a cornerstone of our judicial system.[1]

[3] Privilege may be waived expressly or impliedly. In the present case, there was no express waiver of privilege by the CCSA. We must now decide whether the CCSA's actions, under the circumstances of this case, amounted to an implicit waiver of solicitor-client privilege and, in the affirmative, the scope of such waiver.

[4] In Bank Leu AG v. Gaming Lottery Corp., Ground J. from the Ontario Superior Court said:

> When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a party places its state of mind in issue

[1] *R. v. McClure*, [2001] 1 S.C.R. 445 (S.C.C.); *R. v. Brown*, [2002] 2 S.C.R. 185 (S.C.C.); *Lavallée, Rackel & Heintz v. Canada* (Attorney General), [2002] 3 S.C.R. 209 (S.C.C.); *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 (S.C.C.); *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319 at para 24 (S.C.C.); *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 (S.C.C.); *R. v. Cunningham*, 2010 SCC 10, at para 26 (S.C.C.).

> and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.[2]

[5] Part of the previous quote was referred to by the Collectives in support of their position that the CCSA had "waived any and all privilege that may have existed in any correspondence the CCSA had directly or indirectly with, to or from legal counsel."

[6] There is not a waiver of privilege in every instance where the state of mind is in issue. In the case above, one of the issues to be decided was the liability of counsel in providing legal advice to a party. This is not the case here and the situation with which we are concerned is not comparable. Similarly, in most cases where an implied waiver of privilege was found to have taken place, the existence or adequacy of the legal advice was itself a basis for the claim or the defence.[3]

[7] In *Lavoie v. Hulowski*,[4] the court reviewed several cases dealing with the issue of waiver of solicitor-client privilege based upon the premise that the respondent's state of mind is in issue. Beginning at paragraph 28, Klebuc J. stated:

> [28] It is true, as the applicants contend, that if a respondent puts his or her state of mind in issue, he or she may have waived solicitor-client privilege [...]

[8] However, at paragraph 30, Klebuc J. said:

> [30] Before privilege may be claimed, there must be a close connection between the state of mind put in issue and the communications such that the communications themselves are put in issue. In *Lac La Ronge*, [*Lac La Ronge Indian Band v. Canada*, [1996] 10 W.W.R. 625 Q.B.)], Grotsky J. stated at para. 17: "The privilege has been held to have been waived in these cases because a party has *pleaded reliance on legal advice in justification or mitigation*." [Emphasis in original.] He further noted at para. 19: "It has been held that where the existence or adequacy of the legal advice is not in itself a basis for the claim or the defence, the privilege is not waived by a simple reference to legal advice in a pleading or disclosed document."

[9] Therefore, where the very existence or adequacy of a legal advice is not in itself a basis for the claim or the defence, the privilege is not waived by a simple reference to legal advice in a document such as the CCSA letter in the present case.[5]

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[2] *Bank Leu AG v. Gaming Lottery Corp*. [1999] O.J. No. 3949 at para. 5 (Ont. Sup. Ct), cited with approval by *Apotex Inc. v. Canada (Minister of Health)*, 2003 FC 1480 at para 25.

[3] See for example *Land v. Kaufman* (1991), 1 C.P.C. (3d) 234 (Ont. Gen. Div.); *Simcoff v. Simcoff*, 2009 MBCA 80 (Man. C.A.); *Verney v. Great-West Life Assurance Co*. (1998), 38 O.R. (3d) 474 (Ont. Gen. Div.); *Alberta Wheat Pool v. Estrin* (1986), 49 Alta. L.R. (2d) 176 (Alta. Q.B.), affd (1987), 17 C.P.C. (2d) xxxix (Alta. C.A.); *R. v. Campbell* [1999] 1 S.C.R. 565 (S.C.C.); *Nowak v. Sanyshyn* (1979), 23 O.R. (2d) 797 (Ont. H.C.J.); *Harich v. Stamp* (1979), 27 O.R. (2d) 395 (C.A.), leave to appeal refused (1980), 59 C.C.C. (2d) 87n (S.C.C.); *Lev v. Lev* (1990), 64 Man. R. (2d) 306, (Man. Q.B.); *R. v. Read* (1993), 86 C.C.C. (3d) 574 (B.C.C.A.); *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.).

[4] 2005 SKQB 26.

[5] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th Ed. at § 14.150; *Lac La Ronge Indian Band v. Canada* (1996), 6 C.P.C. (4th) 110 (Sask. Q.B.).

[10] On the fairness issue, the Collectives are not deprived of the opportunity to test the factual foundation of the CCSA letter by not having access to all communications between the CCSA and its counsel on the narrow issue circumscribing the scope of these interrogatories.

[11] Should the Board accept the Collectives' submissions, piercing the privilege could become the norm rather than the exception in the course of the Board's everyday dealings, which in our opinion, would be problematic.

[12] Based on the above, we find that the resulting conflict on solicitor-client privilege must be resolved in favour of protecting the confidentiality and that the CCSA has not waived its privilege. As such, and for all interrogatories, the definition of "Documents" accompanying the interrogatories should be read without the following last note:

"NOTE: Documents <u>includes</u> any and all communications and records of communications to, from, or including inside and outside lawyers and legal advisors."

C. RULING OF THE BOARD DEALING WITH OBJECTIONS TO INTERROGATORIES

[13] **Q1**: The CCSA shall answer this interrogatory only in respect of its members who are not small retransmission systems.

[14] **Q1(d), 1(h)**: The CCSA shall provide the necessary information to allow the Collectives to obtain maps of the service areas of its non-small, non-exempt members.

[15] **Q1(g)**: Objection sustained. The issue of affiliation is not relevant to the impact of the increase in proposed royalties on individual BDUs. Furthermore, the issue of representation of affiliated BDUs has been raised during the hearing and counsel for the BDUs indicated that he did not represent any BDUs other that the Objectors.

[16] **Q1(j)**: Objection sustained. The Board fails to see the relevance of this interrogatory under the current circumstances.

[17] **Q2**: The CCSA shall answer as offered.

[18] **Q3, Q4, Q11, Q12**: Consistent with our comments above under the heading "Waiver of solicitor-client privilege", the CCSA has not, by its actions, waived its solicitor-client or litigation privilege. To the extent that the interrogatory asks for information that is subject to privilege as it extends to communications between the CCSA and its counsel, the objection is sustained.

[19] **Q5**: The CCSA shall answer as offered.

[20] **Q6**: Objection sustained. The Board fails to see the relevance of this interrogatory.

[21] **Q8**: The CCSA answered that "there are no Documents that are in the power, possession or control of the CCSA relating to the information sought." Unless the CCSA wishes to supplement its answer with additional information, the interrogatory is considered answered. The absence of

underlying information or Documents relied upon to base the CCSA's "inferences and conclusions" will go to the weight the Board will attach to such inferences and conclusions.

D. REVISED SCHEDULE OF PROCEEDINGS

[22] The following revised schedule will now apply:

[23] The CCSA's responses to the interrogatories: no later than **Friday May 13, 2016**

[24] Filing with the CCSA of Collectives' motions re: incomplete/unsatisfactory responses to interrogatories: no later than **Friday, May 20, 2016**

[25] Filing with the Board, of replies to the Collectives' motions re: objections to interrogatories**:** no later than **Wednesday, May 25, 2016**

[26] [Board ruling]

[27] Filing of the CCSA's complete/satisfactory responses to the interrogatories: no later than **Friday, June 3, 2016**

Gilles McDougall
Secretary General