CITATION: BIE Health Products v. AG Canada et al. 2015 ONSC544

COURT FILE NO.: 08-CV-362242

Heard: January 20, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **BIE Health Products v. AG Canada et al.**

BEFORE: Master Joan Haberman

COUNSEL: Starkman, P. for the moving party

Tinker, L. for the responding parties

REASONS – DISCOVERY-RELATED MOTIONS

Master Haberman:

[1] I heard and dealt with this motion on January 20, 2015 with Reasons to follow.

BACKSTORY

[2] In August 2012, I agreed to case manage this action in response to a motion by the AG defendants. Thereafter, a number of issues were resolved via telephone case conferences with counsel, and by counsel on their own, without my direct assistance.

[3] It became clear by October 2012, however, that some issues would require court intervention. One of the contentious areas involved the AG's production obligations. The parties were also unable to agree on how much time was needed for the

examination of each party's witnesses. By December 2012, the AG's selection of their discovery witness was also in dispute.

[4] The parties continued to work together, and by May 2, 2013, the issues that would require court intervention had crystalized, so a timetable to assist the parties in preparing for the motion was in order. At that time I made the following timetable order:

1) Motion record to be served by May 21, 2013;
2) **Responding motion record to be served by June 14, 2013;**
3) Reply motion record, if required, to be served by the end of June 2013;
4) Cross-examination to be completed by the end of September 2013;
5) Factums and briefs of authorities to be served by the end of October 2013 (moving party) and the end of November 2013 (responding party).

[5] There was modest delay in complying with the timetable on both sides and the AG served its responding motion record on **June 20, 2013.** This was supplemented by a very brief record, served in October 2014.

[6] BIE's notice of motion sets out the issues they wanted resolved by the court. They sought to examine a different AG witness than the one proposed, and wanted additional discovery time with the AG's designated witness, whoever that may be.

[7] The notice of motion also made it clear that they sought significant relief with respect to documentary disclosure, asking that the AG be ordered to serve a further and better affidavit of documents. Four areas of alleged deficiencies in the initial version were identified.

[8] On a plain reading of the notice of motion, it is clear that BIE Health has, for at least the last 20 months, been seeking:

- All schedule "A" AG documents in their entirety, without the redactions that have been made;
- A list of all Schedule "B" documents in respect of which privilege is claimed, **and the basis for it;**

- All minutes of meetings of the NCC and other related documents from 2000 to-date; and
- All documents referenced in the AG's schedule "A" productions that do not appear to have been produced.

[9] The AG's responding motion record reflects a *de minimus* approach in the context of their onus regarding some of these productions issues and what was at stake in this motion. They filed the-14 page affidavit of Frank Cinanni, a Health Canada compliance analyst since May 2011.

[10] Cinanni devotes only two paragraphs to all of the redacted documents and, peripherally, to the privilege issue, and his evidence on these points is hearsay. He states at paragraphs 37 and 38:

> *I am informed by Dritan Levenaj, Paralegal with the Department of Justice, and do verily believe that all redactions identified at Exhibit "O" of the Affidavit of Trueman Tuck are made pursuant either to claims of privilege or to a governmental obligation to remove the names and addresses of third parties whose private information is not relevant to the issues raised in the litigation.*
>
> *In some cases the information sought by the plaintiff are the names and addresses of members of the public, other than the parties to this action, who have registered complaints against the plaintiff company.*

[11] This evidence appears to be based on the opinion of a paralegal and there is no reason to expect that the actual witness has any knowledge, let alone expertise, in this area. It is also vague and devoid of detail – a somewhat broad-brush overview, only, is provided. There is no chart indicating which redactions fall into which categories. There is no indication which documents are protected under what privilege and on what basis. Reference to the statute and sections numbers thereof relied on as the basis for protecting the privacy of others parties is not provided. In any event, most legislative schemes dealing with freedom of information and protection of privacy contain a provision allowing the court to override the protection of privacy portions of it.

[12] There is nothing further in Cinanni's affidavit that addresses privilege, nor a chart appended, setting out the basis on which each of the documents listed in Schedule "B" is purported to be protected by privilege.

[13] Although the AG filed a supplementary motion record in October 2014, again the issue of privilege is ignored. In all of this time that these issues have been on the table, this appears to have been the best the AG defendants were able to do to support the position they have taken.

[14] Essentially, the AG's position is to the effect that their allocation of documents to schedule "B" of the list of documents should simply be accepted by the court without question or investigation. There appears to be little understanding as to how motions of this kind are dealt with by the court.

[15] Preparation for the motion was soon complicated by an intervening issue that arose. That was resolved by motion heard which I heard in in April 2014.

[16] On June 25, 2014, I finally spoke with counsel for the purpose of completing the timetable. At paragraph 9 thereof I noted:

> *As and when a motion date is set, it will be peremptory to all parties. Adjournments will only be granted in exceptional circumstances.*

[17] The parties completed the remainder of the steps to prepare for this motion and I spoke with them again on December 16, 2014. At that time, we agreed that the motion would be argued on January 20, 2015.

[18] At paragraph 8 of the order, I stated:

> *Counsel for the AG should have the documents over which she claims privilege available for the court's review in unredacted form, in the event that inspection is required. However, my preference, in view of the volume of such documents, is for counsel to describe them and her basis for asserting the privilege claim well enough so that will not be necessary.*

[19] At paragraph 10, I repeated what I had stated earlier about the court's "no adjournment" policy.

[20] Although Ms. Tinker was new to the file at or around the time of this telephone case conference, so may not have had an opportunity to review the file in depth before we spoke that day, she was on the call, yet the AG still provided no list regarding the privileged documents that was requested by way of supplementary evidence or, even in their factum. No explanation has been provided for this lapse.

[21] In the interim, by the time BIE came to draft their factum, the lists of contentious categories of documents had grown to include those over which the AG had claimed privilege pursuant to sections 38 and 39 of the *Canada Evidence Act (the Act)*.

THE LAW

[22] Though counsel generally makes the initial call regarding a privilege claim when they construct their client's affidavit of documents, if the choices they have made regarding privilege are challenged by way of motion, they have to be able to justify those choices. A party who relies on a privilege as the basis for having excluded certain documents from the general rules of disclosure has the onus of demonstrating they are legally entitled to do so (see *Toronto Board of Education Staff Credit Union Ltd. v. Skinner* (1984), 46 CPC 292). The purpose of a motion such as this one is to obviously look behind the claim, so simply repeating it without support is of no value.

[23] Even in cases where the court is dealing with a small enough bundle of documents so can review them individually (and this is certainly not such a case), it was never intended that such an exercise be conducted in a vacuum. It remains the task of the party claiming privilege to back it up factually and to explain legally why the factual matrix presented leads to the application of privilege. The court cannot be asked to step in and effectively do counsel's job by figuring out for counsel why a document might qualify as privileged.

[24] This exercise must be done on a document by document basis - a party cannot simply claim privilege with respect to a group of documents without first establishing their

commonality. A record must be created that addresses each document for the privilege claimed to hold. This is trite law.

[25] When dealing with the redacted documents, some evidence from the AG was required to explain why they redacted portions of each Schedule "A" document produced where this was done. I note that some of these, but not all, were also included in Schedule B.

[26] It was also necessary for the AG to explain the basis for claims of privilege when the rationale for such a claim was not obvious on its face. While BIE counsel was prepared to accept that any documents to or from AG legal counsel Boudreau, created while she filled the role of legal counsel, should be protected by solicitor-client privilege, he was not prepared to simply accept AG counsel's assertion that privilege had been properly claimed after she had left that position without further detail. That was why he brought this motion.

[27] It therefore ought to have been clear to AG counsel that they had to explain the basis for the privilege claim where no counsel appeared to be involved in the exchange.

[28] It also should have been clear to them that they had to demonstrate the basis for their privilege claim with respect to documents created after the April 2005 period that involved Boudreau, as she was no longer counsel.

[29] Even though Michelle Boudreau, who had been in-house legal counsel with Health Canada Legal Services, is mentioned as a sender or recipient of some of these later documents, she moved to two different positions after this date. Privilege would therefore only apply to those communications she had with the client that reflect an exchange between them, with her acting as counsel, for the purpose of giving or receiving legal advice.

[30] In other words, once Boudreau was no longer legal counsel to Health, her communications pertaining to business or other functions of the client could not properly be the subject of privilege. There was no longer any reason to assume these communications involved legal advice – this had to have been the subject of evidence.

The onus was on the AG to make their case (see *Mutual Life Assurance Co. of Canada v. Canada (Deputy AG)* (1988), 28 CPC (2d) 101).

[31] In fact, there is generally no assumption that legal advice was the focus of communications between a client and in-house counsel even when the latter is employed as in-house counsel. As in-house counsel often wear various hats, a factual foundation is required to demonstrate, with respect to each documents sheltered by privilege, that in-house counsel's involvement with the issue as qua-counsel (see *Toronto-Dominion Bank v. Leigh Instruments Ltd.* (1979), 32 OR (3d) 575; *Pryden v. Swiss Reinsurance Co.* (2010), 4 CPC (7th) 358).

[32] BIE adopted a generous stance when they indicated they were prepared to agree that all documents which Boudreau sent or received before April 2005 would be considered by them to be privileged. To expect to go beyond that date without evidence is a different matter. If the AG wanted to protect everything that Boudreau wrote or received after her transition from legal counsel, it was critical for them to have spelled out, document by document, why that was the case.

[33] In terms of the various grounds for asserting solicitor-client privilege, case law that makes it clear that a document needn't be to or from counsel in order for a party to legitimately claim privilege. One example is where one person received a legal opinion and circulates it to others who also need to be aware of it. In such a case, what was sent and received by all would be sheltered, as disclosure of any of the documents in the chain would reveal the legal opinion, thereby defeating the privilege.

[34] It is clear, from a reading of these cases, that evidence must be filed to set a foundation for such a claim, and the legal principle relied on must then be a set out in a factum and supported by case law. No such evidence was filed here nor is there a factum setting out the legal grounds on which the AG might rely, aside from one word: privilege. No analysis at all appears to be been undertaken.

ANALYSIS and CONCLUSIONS

[35] Before the hearing began, I explained to counsel that I had timing concerns. In view of the vast amount of materials filed, it appeared that more than a full day was going to be needed to argue the motion.

The AG's adjournment request

[36] I also advised counsel from the AG that I had serious concerns about her evidentiary record as she had filed no evidence to indicate why each document over which privilege had been claimed, or from which portions had been redacted, had been treated that way.

[37] Despite the concerns I expressed regarding the state of their evidentiary record, AG counsel did not ask to adjourn the motion at the outset. During the course of argument, I returned to the lack of evidence and AG counsel was clearly not in a position to assist. I left the room to give her time to collect her composure and come up with a proposal directed towards resolution of the issue.

[38] When I returned to the courtroom, AG counsel offered to review all of the contentious materials, provide those that was not of concern and return to better support privilege with regard to those documents that were. Effectively, 20 months after the notice of motion was served, and in the course of making submissions, the AG defendants sought an adjournment, without providing any justification for it.

[39] I refused this request, in view of the following:

a. BIE's concerns were first expressed in 2012;
b. This motion was first timetabled in May 2013;
c. BIE's motion record was served later that month, so **20 months ago;**
d. I had made it clear in two orders that there would be no adjournments barring exceptional circumstances; and
e. I had also made it clear in my last order that there would have to be a list that set out the basis for which privilege was being claimed for each document.

[40] I was also aware that all privileges claimed by the AG under the *Canada Evidence Act* have already been found to be wholly unsupportable, as I discuss below.

[41] For the AG to now seek further time to do what should have been done more than a year ago is simply not appropriate. For them to have resisted a motion over all this time without anyone having actually performed the exercise that AG counsel now proposed is of serious concern. Failure to do what ought to have been done does not constitute the kind of situation envisaged when I indicated, in two orders, the rare circumstances in which an adjournment would have been available.

[42] I have to balance the rights of both parties. This is a 2008 action that BIE has been trying to get on with for some time. Obstacles such as these have been placed in their path. Because of the production issues, the additional time needed for this motion qualified it as a "long motion", which required a special appointment. These longer slots are few and far between so it takes longer to get before the court on these longer matters.

[43] In the end, the AG failed to do what was required, so the motion was whittled down to about two hours in duration - a time period that could have been accommodated on a regular list at a much earlier date. A large part of this delay was caused by the AG's resistance to remedying production deficiencies, yet they came to court without being able to articulate an evidentiary basis for those apparent deficiencies. At this late date, I am not prepared to condone further delays caused by their failure to properly prepare.

***Canada Evidence Act*- Claim For Privilege**

[44] I was advised at the outset of the hearing that there had been resolution of one issue, so the hearing time needed would be less than it appeared. The AG had already resiled from asserting privilege based on s. 38 of the *Act*. In order to maintain that privilege, they had to have received authorization from the Privy Council, which, it appears, reviewed the documents that the AG sought to shelter under the section, concluding that it was not applicable. The claim for privilege with respect to these documents was therefore withdrawn.

[45] Further claims for privilege were asserted under s. 39 of the *Act*. They were apparently subject to a different authorization process than those discussed above (AG counsel did not share the details with the court) and wended their way through that process.

Apparently, the AG was also unable to support the claim under s.39 with respect to any of the documents for which it was claimed, either.

[46] AG counsel indicated that she was only advised of this the day before the return of the motion – though the issues were identified in the notice of motion some 20 months earlier. What she was unable to say was when the wheels were set in motion to obtain the approval. I cannot fathom that it generally takes 20 months for this process to run its course and I doubt it did in this case. The dilatory approach to the issue led to unnecessary work by BIE counsel to address an issue that was ultimately withdrawn on the courtroom steps, as well as wasted reading time on the part of the court.

ORDER: As all privilege that had been asserted pursuant to these sections has now been withdrawn, **the AG shall provide to BEI all documents, in their entirety, which they sought to shelter, in whole or part, under s. 38 or 39 of the *Act* within 30 days of receiving the list of same from BIE's counsel.**

Missing attachments

[47] The AG maintains that most of the attachments referenced in documents are there to be found and that is up to BIE to comb through their productions, locate them on their own, and match them up.

[48] This approach demonstrates a fundamental misunderstanding of how a party is intended to go about making documentary disclosure.

[49] It is always important when disclosing documents to maintain the integrity of the client's file. This can be very challenging in government, when multiple ministries, agencies and departments may be involved, but it is also extremely important.

[50] What came before, after or with a document often has meaning in a case, as it can provide important context. "Who knew what and when" turn out to be critical questions in some trials and it is the chain of communications reduced to writing that often tells the tale.

[51] It is therefore up to a party who produces a document to produce it intact, along with whatever was with it or referred to in it when the client handed it over. There is no evidence from the AG as to why that was not done here, or why or how documents became separated from their attachments to begin with. I can only assume that they will be doing this matching up exercise for their own purposes as it could provide them with potentially important information. Why would they therefore not make that information available to BIE?

ORDER: The AG shall provide BIE with a list, using the alpha-numeric designators already created, that matches up all documents with all other documents they were attached to or referred to within 30 days.

Redactions and documents over which privilege has been claimed

[52] Counsel advises that all redactions were done either to protect privacy or on the basis of solicitor-client privilege, essentially echoing Cinanni's evidence. As the party with the onus on this motion, the AG has not come close to setting the stage for making this argument as they have provided nothing factual to describe any of the documents. Instead, they lumped them into two categories, without even indicating which ones fall into which group.

[53] When documents are disclosed in schedule "A" of an affidavit or list of documents, they must be produced in their entirely. If a party wishes to assert privilege, then the document should be disclosed in schedule "B" instead. A party should not be permitted to disclose the portion of a document he wishes to rely on while shielding the rest as privileged, unless the parties have agreed to proceed in that manner.

[54] Further, there is no basis for asserting "privacy" as basis for refusing to comply with a party's documentary disclosure obligations. The AG has not even provided a statutory reference that they rely for this claim.

[55] Finally, to the extent that these individuals whose contact details were redacted have any information about any of the matters in issue, they are potential witnesses, and

such information must be disclosed, in any event, at oral discoveries pursuant to Rule 31.06(2).

[56] After some discussion and after the AG request for an adjournment was dismissed, **the AG agreed to produce all documents that were redacted in their entirety, save those that specifically refer to a legal opinion or that refer to Ms. Boudreau up to April 2005, when she moved to a new position, and they shall do so within 30 days.**

[57] In addition, I made the following order:

ORDER: It is ordered that the AG shall produce all documents over which they asserted privilege, in whole or in part, beyond April 2005, within 45 days as they have produced no evidence to substantiate this claim.

ORDER: The AG shall provide a further and better sworn list of documents to reflect the documentary disclosure and production required by the remainder of this order.

LENGTH of DISCOVERY

[58] Having agreed that three days was an appropriate amount of time for completing the examinations for discovery the AG's designated witness and their named defendant, I must admit I was surprised that they then took a strong position with respect to how much of the three days BIE counsel should be entitled to examine each one of their two witnesses.

[59] AG counsel did make a point of telling me that they had already produced over 4,000 documents and, in view of my rulings, a further list of documents is now in order, one would have thought that 2 days is not an inordinate amount of time for discovery of the AG's designate. AG counsel saw the logic in this.

ORDER: BIE shall have a total of three days to complete the examinations for discovery of the two AG defendants, to be used as he sees fit, not to exceed two days for the AG's designate.

THE AG'S DESIGNATED WITNESS

[60] BIE concedes that they have the onus of displacing the AG's choice of witness. They say they want to examine Boudreau as, in their view, she was involved in the regulatory, policy and procedural developments of what say was a new federal system pertaining to their product, as well as the specific enforcement activities carried out by Health Canada with respect to BIE. BIE also claims that her involvement lasted from 2001 to 2010.

[61] They go on, providing evidence of her role in coordinating approvals for Health press releases, and her involvement in meetings that led to this course of action.

[62] My first concern echoes that of the AG – I have no doubt that Boudreau's involvement in much of this was in her role as legal counsel. By the same token, some of her activities may have been in an entirely different context. I have seen enough of how these parties relate to one another, as the master responsible for case managing this action, to foresee examinations for discovery of Boudreau turning into a series of refusals based on solicitor-client privilege, followed by lengthy and costly motions.

[63] This is a 2008 action. I see no basis for adding a lawyer of complexity to discoveries in an already fractious case.

[64] Further, in view of the fact that this action goes back to events that took place more than 10 years ago in some cases, and as it is not likely to reach trial for at least another two years, I am not terribly impressed by a "personal knowledge" argument in this case. Boudreau moved to two different employment positions in government after being legal counsel with Health. With all the time that has passed, it is doubtful that she would be in any position to testify without a good deal of documentary review and preparation.

[65] BIE has also brought suit against a Health Canada employee, Jim Daskalopoulos, who was involved in the day-to-day events that led to this litigation. To the extent that BIE feels they need to examine someone who was actually involved with the matter at the relevant time frame, they have full access to him.

[66] The AG's choice of designate is Dr. Kent. They point out that she has the scientific expertise to explain the basis for Health Canada's concerns. As a scientist, she understands the composition of the product in issue, can articulate the risks perceived by Health Canada in terms of its distribution and can also explain the regulatory system used in Canada and why they believed a DIN number was required in this case.

[67] This is a libel action, and BIE wants to get behind the scenes to find out how things got to the point that they did. For that, they will have access to Daskalopoulos and undertakings can be sought from him or from Dr. Kent regarding matters they cannot respond to at the table.

[68] As a libel action, it will also be important for BIE to understand the defence, and Dr. Kent is in the best position to provide them with the AG's basis for doing what it did and why, in their view, everything they said publicly was accurate and that is was necessary for them to have taken a public stand.

[69] As the AG has made it clear that Daskalopoulos' evidence will bind the Crown, and as he has personal knowledge of the events complained of, I find that, to the extent that the onus may have shifted back to the AG, they have satisfied it (see *Northern Good Processors Ltd. v. Canadian Food Inspection Agency* [2000] MJ No. 130); *Norway Insulation Inc. v. Parson* [2001] OJ No. 4967).

[70] In the context of the facts of this case, I am of the view that the best approach is to leave the AG's choice of witness as it is. I am not satisfied that this has been displaced by the plaintiff.

ORDER: This portion of the motion is therefore dismissed. I have made it clear to AG counsel that part of the reason I have reached this conclusion is as a result of their evidence on this issue, which stresses Dr. Kent's scientific expertise. In view of that, I expect that questions regarding her scientific knowledge and opinions in the areas touching this litigation will be answered. I have also indicated that to the extent neither witness is sufficiently well informed at discoveries, resulting in the number of undertakings exceeding what one would normally expect, I will entertain a further motion for access to Boudreau as an

AG witness. I do not expect I will have to intervene in that regard in view of these comments.

COSTS

[71] The manner in which the AG handled this case led to unnecessary work as none of their claims under the *Canada Evidence Act* were borne out. Further, it is of concern that it took them as long as it did to reach that conclusion. Whether the delay were with AG counsel, the client or the process, it is inexcusable.

[72] I am also concerned about that fact that the deficiencies in documentary disclosure, pointed out more than about 2 years ago and set out plainly in a notice of motion from May 2013, were never addressed in the AG's responding material. While I accept that their counsel has a legitimate basis for being concerned that these Reasons may result in the release of some documents that are privileged, this ignores the fact that we have a process for establishing that privilege once the matter comes to court that the AG has simply ignored, without explanation.

[73] The AG can hardly be described as an unsophisticated litigant and their counsel must be deemed to know the law in this area. For them to seek an adjournment during the course of the hearing to effectively restart the process by now telling BIE what it really thinks has to be sheltered is too little too late and amounts to them seeking a second kick at the proverbial can, something that I and other members of the court regularly refuse. I see no issue of national importance here to justify a departure from the ordinary rule. The fact that the party involved is the federal AG does not change that, nor should it.

[74] As a result, although the AG had a modicum of success on this motion, in terms of being permitted to retain their designated witness, BIE's position prevailed throughout the rest of the motion. I therefore find that though BIE's request for costs should be adjusted down somewhat, I do not believe it should be adjusted significantly.

ORDER: The AG shall therefore pay costs to BIE, fixed at $15,000 (partial indemnity) within 45 days.

Master Joan M. Haberman

Released: January 26, 2015