CITATION: Bie Health Products v. The Attorney General of Canada et al., 2015 ONSC 3418
COURT FILE NO.: CV-08-362242
DATE: 20150527

SUPERIOR COURT OF JUSTICE - ONTARIO

RE:

BIE HEALTH PRODUCTS O/B 2037839 ONTARIO INC.

Plaintiff

-AND-

THE ATTORNEY GENERAL OF CANADA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF CANADA, JIM DASKALOPOULOS, CANWEST GLOBAL COMMUNICATIONS CORP., THE CANADIAN PRESS, TORSTAR CORPORATION, CTV INC., CNW GROUP LTD., THE ATTORNEY GENERAL OF ONTARIO ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, GOOGLE CANADA CORPORATION, YAHOO! CANADA CO, BRUNSWICK NEWS INC., MEDIRESOURCE INC., THE NATIONAL ASSOCIATION OF PHARMACY REGULATORY AUTHORITIES, THE ALBERTA COLLEGE OF PHARMACISTS, ROGERS PUBLISHING LIMITED, HEALTHWATCHER.NET INC., DR. TERRY POLIVOY MD, WEBBY INC., METRO LAND PRINTING AND PUBLISHING & DISTRIBUTING LTD.

Defendants

BEFORE: F.L. Myers J.

Counsel: Liz Tinker for the appellants The Attorney General of Canada and Jim Daskalopoulos

Paul H. Starkman for the respondent Bie Health Products O/B 2037839 Ontario Inc.

HEARD: May 27, 2015

ENDORSEMENT

[1] This is an appeal from part of the order of Master Haberman dated January 20, 2015. The Master had been case managing the motions that she heard for some 20 months. She was justifiably critical of the conduct of the appellants before her. Perhaps it is naïve to expect the

Government of Canada to hold itself to a higher standard of behaviour as a litigant than some self-interested commercial parties. In theory, the government should only be interested in the fair and just outcome of the case. In reality however, the government is a litigant with a bottomless purse and special rules that it has the ability to stack in its favour. In this case, it sought to take advantage of both.

[2] There is no challenge to the Master's finding of fact that it has been clear for at least the 20 months preceding her decision that the respondent was seeking production of full copies of documents listed in schedule "A" to the government's list of documents without redaction and a list of all documents in schedule "B" of its list of documents for which privilege is claimed including the basis for the claim.

[3] Rather than making full, plain, and true disclosure the government was more than coy. It shifted its position on documents right up to the last minute. It claimed privilege in some cases with no basis. Ultimately, it produced a witness with no knowledge about the subject matter of the privilege claims upon which the government sought to rely. At paragraph 11 of her reasons the Master found the following:

> [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 what redactions fall into what categories. There is no indication which documents are protected under what privilege and on what basis. Reference to the statute and sections [*sic*] numbers thereof relied on as the basis for protecting the privacy of other 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.

[4] The Master specifically discussed the possibility that she might review the disputed documents to assess the claims of privilege herself in para. 8 of her December 16, 2014 case management order as follows:

> 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.

[5] In the same endorsement, the Master made the return date of the motion before her peremptory and made clear that the court had a "no adjournment" policy.

[6] The Master correctly stated that the burden of proving privilege to exclude documents from the general obligation of disclosure is on the party seeking to withhold the documents.

Toronto Board Of Education Staff Credit Union Limited v. Skinner (1984), 46 C.P.C. 292 (O.H.C.J.)

[7] In *Grossman et al. v. Toronto General Hospital et al*, [1983] 0.J. No. 3001, Mr. Justice Reid discussed the need for the party claiming privilege to set out the basis for its claim with sufficient particularity so as to allow the opposite party and the court to make their own assessments. Justice Reid specifically adopted the following statement from Williston and Rolls, *The Law of Civil Procedure* (1970), vol. 2 at p. 898:

> Where privilege is claimed a description of the documents must be given sufficient to identify them and to enable an order for their production to be enforced if the claim of privilege is bad, but no details need be given which would enable the opposite party to discover indirectly the contents of the documents.

[8] The government's counsel conceded at the hearing of the appeal that she had approached the motion from the opposite perspective. She sought to put the burden upon the respondent to prove that there is no privilege in the documents over which the government claimed privilege. In addition, she conceded that, in the main, the descriptions set out in schedule "B" to the government's list of documents and in the answers to undertakings given on the cross-examination of the government's ill-informed witness were insufficient in light of the test set out from *Grossman* above. While the Master may have engaged in hyperbole at paragraph 57 of her decision in which she stated that the government had "produced no evidence to substantiate this claim", it is not seriously contended that the government met the burden upon it. It did not.

[9] In *Grossman*, Justice Reid discussed the risk of abuse of the document disclosure rules in civil litigation as follows:

> 17. Master Sandler has written on the susceptibility of the system to abuse. In *Bow Helicopters v. Textron Canada Ltd. et al; Rocky Mountain Helicopters Inc. et al., Third Parties* (1981), 23 C.P.C. 212, he said at p. 215:
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> > I also observe that under our present system of documentary discovery, the choice as to what documents that are in a party's possession are relevant is, in the first instance, left up to the party itself, and my experience and observations have taught me that nowhere is the abuse of our rules of procedure greater than in this area of documentary production and in the failure of each party to fairly and reasonably disclose and produce to the opposite party all relevant documents, and to disclose the existence of all relevant but privileged documents. (This abuse has been recognized and has attempted to be remedied by the Civil Procedure Revision Committee, chaired by the late Walter B. Williston, Q.C., in draft Rules 31.03(4), 31.06(a), and 31.08 and 31.09 of their Report of June, 1980.)

18. The duty upon a solicitor is now, and always has been, to make full, fair and prompt discovery. Williston and Rolls, in *The Law of Civil Procedure* (1970), vol. 2, put it this way, at pages 892-4:

> A party giving discovery is under a duty to make a careful search for all relevant documents in his possession and to make diligent inquiries about other material documents which may be in the possession of others for him. A solicitor has a duty of careful investigation and supervision and of advising his client as to what documents should be included in the affidavit, because a client cannot be expected to know the whole scope of his obligation without legal assistance. In *Myers v. Elman* [[1940] A.C. 282] a solicitor was ordered to pay costs of the proceedings because his managing clerk was guilty of misconduct in the preparation and filing of an incorrect and inadequate affidavit. Lord Atkin said:
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> > "What is the duty of the solicitor? He is at an early stage of the proceedings engaged in putting before the Court on the oath of his client information which may afford evidence at the trial. Obviously he was explained to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or no more than he chooses to disclose. If he has reasonable ground for supposing that there are others he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge, and if he reasonably decides to believe his client, criticism cannot be directed to him. But I may add that the duties especially incumbent on the solicitor where there is a charge of fraud; for a willful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution."

[10] In Ontario, clients are not only required to swear to the completeness of their documentary disclosure. In addition, in order to protect the integrity of the process, rule 30.03(4) provides that the party's lawyer is required to certify his or her personal fulfillment of duties. The lawyer's certificate is an important circumstantial guarantee of full and fair disclosure of documents in our self-reporting system.

[11] However, in this case, with a government defendant, the requirement of an affidavit of documents is superseded by subsection 8(1) of the *Crown Liability and Proceedings (Provincial Court) Regulation,* SOR/91-604. The regulation provides that government produces its documents by way of an unsworn list of documents. Not only is there no client swearing an oath to the propriety of production, there is no lawyer's certificate required. Presumably, the province felt these requirements were unnecessary for governments given their position in society. Unfortunately, the removal of significant checks and balances from the self-reporting system has enhanced the possibility of abuse of the system.

[12] The Master records that when she expressed her concerns about the evidentiary record to counsel for the federal government, counsel offered to review all of the contentious material again and produce further and better support for the privilege claims. The Master took this to be a request for an adjournment. Before me, counsel said that she was not asking for an adjournment, but rather, was seeking to have the remedy to be ordered by the Master limited to the production of a further and better affidavit of documents.

[13] The Master went on to refuse an adjournment. She was rightly critical of the government's conduct finding, in part:

> [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 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.
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> [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 of 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 these apparent deficiencies. At this late date, I am not prepared to condone further delays caused by the failure to properly prepare.

[14] The Master determined that documents should not be disclosed in schedule "A" of an affidavit or list of documents if they are redacted. Rather, privilege should be claimed for the full document schedule "B." She ruled that there was no proof of any basis to decline production based on privacy and that the government had not proven privilege. Accordingly, she ordered the government to produce all documents over which it asserted privilege, in whole or in part, that are dated after April, 2005 (a cutoff date to which the respondent agreed).

[15] While I agree with everything the Master said up to the point of the remedy ordered, it seems to me that she may have strayed into an error in principle. Rule 30.06 provides:

> **30.06** Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,
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> (a) order cross-examination on the affidavit of documents;
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> (b) order service of a further and better affidavit of documents;

(c) order the disclosure or production for inspection of the document, or a part of the document**, if it is not privileged**; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. [emphasis added]

[16] The Master had a discretion concerning the choice of remedy. I understand her view that the government's request to have a further opportunity to do what it ought to have done months or years previously was tantamount to an inappropriate request for an adjournment. There is no question that the Master was justified and correct determining under the opening words of the rule "that a claim of privilege may have been improperly made." The government plainly did not meet the burden of proving that the documents that it listed were privileged as claimed. However, prior to ordering production of the document under subrule (c), the court must be satisfied that the document "is not privileged." That is, it is not enough to find that a party failed to prove privilege. Disclosure can only be ordered once it is positively determined that a document is not privileged. That may be proven by cross-examination, by seeing the details of an appropriately particularized further and better affidavit, or by inspection of the document by the court. I am certainly not to be taken as finding that a court is obliged to conduct a document-by-document inspection of every document over which a far-fetched claim of privilege is made. Far from it. In most cases, knowing the parties to the document, the date, the subject matter, and the nature of the privilege asserted will likely be sufficient. Where it is not, further description can be ordered and, of course, cross-examination is available (provided it is not used to indirectly enable the opposite party to discover the information prematurely).

[17] In this case, the Master was rightly concerned that the government had had its chance to perform as required. She was of the view that it was not fair or appropriate to give it a further kick at the can or to reward it with yet another chance to get it right. I would agree with her but for one consideration - the subject matter at issue. Lawyer client privilege is too important to be eroded by gamesmanship and procedural abuse. In ordering the government to produce all documents for which privilege was claimed and unproven, the Master may have been unwittingly ordering production of privileged documents. This cannot be done.

[18] In *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), at para. 44, Cromwell J. wrote:

> The core principle of the decision is that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance": *Lavallee*, [*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209;] at para. 36. This means that there must be a "stringent" norm to ensure its protection, such that any legislative provisions that interfere with the privilege more than "absolutely necessary" will be found to be unreasonable: para. 36.

[19] Interpreting subrule 30.06(c) to require a positive finding that a document is not privileged before it will be ordered disclosed is consistent with (a) the wording of the rule itself; and (b) the fundamental importance of protecting lawyer client privilege. There are other ways

to punish bad behaviour by a party in litigation other than stripping it of privilege. Documents over which privilege is claimed cannot be ordered disclosed without a finding that they are not privileged. If the party has not provided enough disclosure to make such a finding, then it can be ordered to do so at its own cost and protecting the other parties' costs too for example. Tight time limits are certainly appropriate. Rule 30.06 provides many alternatives. So too does the broad power to attach terms to any order provided by Rule 1.05. The certification by counsel is relevant to this assessment as well. Government litigants who take advantage of unsworn and uncertified lists of documents will no doubt be required to prove their claims by other admissible evidence.

[20] It follows that in my respectful and most reluctant view, the Master made an error of law or principle in failing to provide a remedy short of ordering wholesale disclosure of all documents over which the government claimed privilege.

[21] Under s.134(1) of the *Court of Justice Act*, R.S.O. 1990, c.C.43, on an appeal the court may make any order that ought to have been made by the court below. In light of the inappropriate amount of time that the government has taken to try to prove its claims and the Master's view that it should not be heard from again, I determined that I would review the documents over which the government asserts privilege and make the determinations under rules 30.04(6) and 30.06(d). As there were approximately 50 documents, it took only about one-half hour of time. The exercise was not oppressive. Having done so, I find that all of the redactions and claims for privilege still maintained by the government are correct with one exception. In the redacted memo entitled "NCC Risk Management Committee Issue Sheet", which appears in several places, the entry for September 19, 2003 should not be fully redacted. Only the few words between "Letter drafted" and "sent by Jean-Marc" should be redacted. In all other respects the remaining documents over which privilege is claimed should not be disclosed.

[22] There was also an appeal by the government from an *obiter* comment by the Master indicating that she would entertain a motion requiring a particular lawyer to attend for examination if the witness put forward by the government does not provide proper discovery. There was no operative order made and nothing therefore to appeal. If the government's witness performs well, the issue may never arise. If the plaintiff moves for further oral discovery, the issue of the propriety of ordering the lawyer to attend can be fully canvassed. Lawyers are not immune from being examined for discovery subject to privilege. This aspect of the appeal is dismissed.

[23] The respondent succeeded on two of the three issues on the appeal. The appeals from the Master's decision that the government did not prove its claims of privilege and from the *obiter* regarding discovery were both dismissed. The appellant did succeed on setting aside the disclosure remedy ordered. However, the government plainly brought this entire process on

itself by mis-using its powers as a litigant. In my view the appellants should pay the respondent its costs of the appeal on a partial indemnity basis forthwith in the amount of $13,000 all inclusive.

F.L. Myers J.

Date: May 27, 2015