June 29, 2018

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Dear Ms. Jensen, Mr. Dawson, Mr. Waller and Mr. Dale:

Re: LRB Files No. 012-17 and 022-17; Employee-Union Disputes
Jason Rattray v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9841, Unifor National and Saskatchewan Government and General Employees' Union

Notice of Motion to Quash Subpoena issued to Marcus Davies

OVERVIEW:

[1] Mr. Rattray has filed with the Board two applications alleging contraventions of sections 6-58 and 6-59 of *The Saskatchewan Employment Act* by two Unions: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers

International Union (United Steelworkers) Local 9841 (successor union to Unifor Local 481) ("Union") and Unifor National. In preparation for a hearing scheduled to commence June 5, 2018, Mr. Rattray applied to the Board for and was granted six subpoenas, including one addressed to Marcus Davies. Mr. Davies is a lawyer that Unifor National engaged to provide them with a legal opinion "as to the viability of running a grievance arbitration(s) pertaining to several grievances culminating in the termination of the employment of Jason Rattray by his employer, SGEU". This is a direct quote from that legal opinion, which was admitted at the hearing as Exhibit A-60.

[2] The Union applied to the Board to quash the subpoena directed to Mr. Davies, on the following grounds:

1. *Evidence from Mr. Davies with respect to the advice he provided to the respondent union is not admissible in legal proceedings because of solicitor-client privilege, as well as a solicitor's duty to keep information related to client matters confidential. The union does not waive privilege.*

2. *Any evidence provided by Mr. Davies is not relevant to the issues before the Board, in that the Labour Relations Board does not monitor or review the quality or correctness of any legal opinion provided in the course of the local union's processing of grievances and representing its members.*

[3] The Unifor Local 481 bylaws set out the procedure for grievances in Appendix D: Grievance and Arbitration Policy. The Grievance Committee reviews grievances and makes recommendations to the Local Executive as to whether a grievance should proceed to arbitration. While it is unclear at this point in these proceedings whether the Grievance Committee or the Local Executive made the decision, what is clear is that a decision was made not to proceed to arbitration with Mr. Rattray's termination grievance. Then, as the bylaws allow, Mr. Rattray appealed that decision to the Union membership.

[4] Mr. Rattray noted in argument that his purpose in issuing a subpoena to Mr. Davies was not to question him respecting the content of the legal opinion. Instead, the purpose was to question him respecting the process he followed in preparing the opinion*, e.g.*, why there was such a disparity in the process of conducting interviews in Mr. Rattray's case as opposed to the process followed in a previous case; whether, as part of its preparation, he was in contact with members of the executive of the Union, two of whom were respondents to internal charges made under the Unifor Constitution by Mr. Rattray.

[5] The Union argues that any knowledge Mr. Davies has relating to Mr. Rattray's grievances, or the manner in which they were processed, is because of his retainer to provide legal advice to the Union. They point to the Law Society of Saskatchewan's Code of Professional Conduct, chapter 3.3 which states that lawyers cannot be compelled to disclose communications between the lawyer and client without the client's consent (subject to certain exceptions that are not applicable here). They also referred to three cases that in their opinion support their application: *R. v. Husky Energy Inc.*, 2017 SKQB 383; *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510, 163 A.C.W.S. (3d) 40; *MacNeill (Re)*, 2005 CanLII 63107 (SK LRB).

[6] Mr. Rattray argued that the Union has waived or lost privilege over Mr. Davies' opinion. The Union admitted that they sent the opinion to all of their members (approximately 60 people) by email. The email did not require the members to hold the opinion in confidence or return it after the membership meeting at which Mr. Rattray's grievance was considered. If the waiver was inadvertent, Mr. Rattray argues, there are steps that the Union could have undertaken to reverse that waiver, and they have taken no steps to do so. Knowledge of the disclosure and silence in its face constitutes implied waiver.

[7] In reply the Union argued that disclosure to the membership was not disclosure to a third party. In the alternative they noted that the interview techniques used by Mr. Davies are not subject to review by the Board and therefore Mr. Davies' testimony on such issues is not relevant.

[8] The subpoena in question was issued pursuant to clause 6-111(1)(c) of *The Saskatchewan Employment Act*:

> *Powers re hearings and proceedings*
> *6-111(1) With respect to any matter before it, the board has the power:*
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
> *(i) to summon and enforce the attendance of witnesses;*
> *(ii) to compel witnesses to give evidence on oath or otherwise; and*
> *(iii) to compel witnesses to produce documents or things;*

ANALYSIS AND DECISION:

[9] There are three issues before the Board:

(a) Is the information proposed to be asked of Mr. Davies subject to solicitor-client privilege?
(b) Has that privilege been waived or lost?
(c) If the information is not subject to solicitor-client privilege, is the requested information relevant to the issue of whether the Unions breached their duty of fair representation owed to Mr. Rattray?

Is the information proposed to be asked of Mr. Davies subject to solicitor-client privilege?

[10] Section 3.3-1 of the Code of Professional Conduct of the Law Society of Saskatchewan states:

> *3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:*
> *(a) expressly or impliedly authorized by the client;*
> *(b) required by law or a court to do so;*
> *(c) required to deliver the information to the Law Society; or*
> *(d) otherwise permitted by this rule.*

[11] This may appear to address the question in this case. However, the Commentary to this Rule states, at paragraph 2:

> *This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.*

In other words, this rule cannot be relied on to answer the question before the Board.

[12] In *R. v. Husky Energy Inc.*, 2017 SKQB 383 (CanLII) ("*Husky Energy*"), Kalmakoff J provided a summary of solicitor-client privilege, at paragraphs 16 to 20. His conclusion, at paragraph 20, is particularly relevant to the current issue:

> *The bottom line is this: if a communication forms part of that necessary exchange of information, the object of which is the giving or receiving of legal advice, it is protected by solicitor-client privilege: Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner), 2013 FCA 104 (CanLII), 360 DLR (4th) 176.*

[13] The evidence sought by Mr. Rattray from Mr. Davies falls exactly within that description and is therefore subject to solicitor-client privilege.

Has that privilege been waived or lost?

[14] The second question is whether the Union has waived or lost that privilege. The burden of proving waiver rests with Mr. Rattray. The Union denies having waived the privilege. Under the Union bylaws, all members were entitled to vote on Mr. Rattray's appeal that asked the Union to take to arbitration the grievance respecting his termination. For the purpose of fully considering the issue, they required all of the information before the Union, including the legal opinion. Since the distribution of the opinion did not go outside the Union membership, it could not be considered to have been given by the Union to a third party. While it may have been prudent for the Union to ask their membership to keep the opinion in confidence, the fact remains that the Union did not provide the opinion to a third party. There is speculation, but no evidence, that it was distributed further.

[15] It must be kept in mind that the information proposed to be asked of Mr. Davies is not the legal opinion (which, as noted earlier, has already been admitted as an Exhibit in this hearing). The questions Mr. Rattray intends to ask Mr. Davies are with respect to the process he followed in preparing the opinion, *e.g.*, why there was such a disparity in the process of conducting interviews in Mr. Rattray's case as opposed to the process followed in a previous case; whether, as part of its preparation, he was in contact with members of the executive of the Union, two of whom were respondents to internal charges made under the Unifor Constitution by Mr. Rattray. There is no suggestion by Mr. Rattray that the Union has expressly waived privilege over that information.

[16] Paragraphs 29 to 35 of *Husky Energy* provide a summary of waiver. Paragraphs 31 and 32 state:

> *[31] An express intention to waive solicitor-client privilege is not always required, however. Waiver of solicitor-client privilege may also occur in the absence of an intention to waive it where fairness and consistency require waiver. For instance, where a litigant relies on legal advice as an element of his or her claim or defence, the privilege which would otherwise attach to the advice is lost: S & K at para 10; Petro Can Oil & Gas Corp. v Resource Service Group Ltd. (1988), 59 Alta LR (2d) 34 (Alta QB).*
>
> *[32] In order for waiver of solicitor-client privilege to be implied, the party's state of mind must be in issue, and that state of mind must be relevant to the determination of the case. If the client puts the substance of the legal advice into issue, and attempts to rely on it to establish an element of his claim or defence, waiver will occur: Doman Forest Products Ltd. v GMAC Commercial Credit Corp. – Canada, 2004 BCCA 512, 245 DLR (4th) 443; ProSuite Software Ltd. v Infokey Software Inc., 2015 BCCA 52, 382 DLR (4th) 698.*

[17] In this case the Union is relying on the substance of the legal advice as part of their defence of Mr. Rattray's claims[1]. The Union did not object to its being tendered as evidence. The next question, then, is whether this implied waiver extends to the evidence that Mr. Rattray proposes to ask of Mr. Davies. On this point, again, *Husky Energy* is instructive:

> *[34] Disclosure by a party of a portion of a privileged document does not necessarily amount to waiver of the entire document or the rest of the information subject to privilege. For instance, mere references to an opinion contained in a confidential report, or to privileged investigation reports do not necessarily amount to waiver of privilege in the entire contents of those reports, unless fairness and consistency requires their production: 3464920 Canada Inc. v Strother, 2001 BCSC 949 [Strother]; British Columbia v Canadian National Railway, 2004 BCSC 283, 24 BCLR (4th) 175 [CNR].*

[18] In *3464920 Canada Inc. v Strother,* 2001 BCSC 949 (CanLII), the Court stated, at paragraph 11:

> *Even if the law requires an interference with confidentiality, that interference should be limited. Disclosure should be made only where absolutely necessary.*

[19] In *Husky Energy*, paragraph 16 echoes this caution:

> *Solicitor-client privilege is fundamental to the proper functioning of our legal system, and a cornerstone of access to justice. It is to be jealously guarded, and should only be set aside in the most unusual circumstances. It must remain as close to absolute as possible, and should not be interfered with unless absolutely necessary.*

[20] It is not absolutely necessary to interfere with the solicitor-client privilege that attaches to the evidence Mr. Rattray is proposing to obtain from Mr. Davies. If Mr. Rattray is concerned that members of the Union executive interfered in what he considers the proper production of the legal opinion, he can question them about their role in its preparation.

[21] As a result, the Board finds that solicitor-client privilege has not been expressly or impliedly waived over the information described above that Mr. Rattray is proposing to obtain from Mr. Davies. Since that information is available from other sources, fairness and consistency do not require that the implied waiver extend to those communications.

[1] Union Reply para 5(f), (g) and (l).

If the information is not subject to solicitor-client privilege, is the requested information relevant to the issue of whether the Unions breached their duty of fair representation owed to Mr. Rattray?

[22] Given the finding that the information sought by Mr. Rattray from Mr. Davies is subject to solicitor-client privilege, that has not been waived or lost, Mr. Davies is not required to testify. More to the point, without his clients' consent, which has not been granted, he cannot testify. Therefore, the Board does not need to answer this question.

[23] An Order will issue quashing the subpoena addressed to Marcus Davies.

Yours truly,

Susan C. Amrud, Q.C.
Chairperson