Saskatchewan
Labour Relations Board

AMENITY HEALTH CARE LP and/or 7169320 MANITOBA LTD. operating as TIM HORTONS, Applicant v WORKERS UNITED CANADA COUNCIL, Respondent

LRB File No. 014-21; September 27, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Mike Wainwright

Counsel for the Applicant, Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons: Brent M. Matkowski

Counsel for the Respondent, Workers United Canada Council: Heather M. Jensen

Production Application – Section 6-111 of *The Saskatchewan Employment Act* – Solicitor-Client Privilege – Principles of Implicit and Express Waiver of Privilege – Waiver not Established – Application Dismissed.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: The Employer, Amenity Health Care LP o/a Tim Hortons, has brought an application for the production of documents. The Union, Workers United Canada Council, opposes the application. The application has arisen partway through a hearing on an application for assistance with a first collective bargaining agreement, made by the Union pursuant to section 6-25(6)(b) of *The Saskatchewan Employment Act* [Act]. The Employer objects to the application for assistance on the basis that the Union has failed to bargain in good faith. The Employer suggests that the Union has engaged in receding horizon bargaining and that the production request is relevant to this issue.

[2] The request for production arose in response to the testimony of Vas Gunaratna, a union representative who had signed the previous application for assistance in which the appointment of a conciliator had been sought. In completing the application, Gunaratna declared that the submissions were true by virtue of the *Canada Evidence Act*, as was required by the Regulations at that time. Among the documents appended to that application was Appendix 5, the "proposed collective agreement (the last offer) that the applicant is prepared to sign". The Employer believes that the contents of Appendix 5, contrasted with the history of proposals, are indicative of the Union's bad faith bargaining.

[3] The essence of the testimony in chief was as follows. Gunaratna testified that he was asked by a lawyer to sign the application. He told the lawyer that he did not have his notes with him (in B.C.) and that the information could be obtained through two other union representatives (in Winnipeg). The lawyer proceeded to send him the application and Gunaratna signed it before a second lawyer in B.C. He did not review Appendix 5 before signing the application. He said that he does not know if the information contained in Appendix 5 is accurate or if it contained all of the items and proposals that the Union wanted in the collective agreement.

[4] The Employer asked a number of questions in cross examination. In response, Gunaratna stated that he did not read the application, other than the signature page. He assumed he could rely on the lawyer to ensure that the contents were accurate.

[5] The Employer's request is for the following:

> *All correspondence (hard copy or digital), from or to the Union and Mr. Gunaratna from the Union's legal counsel's offices, Plaxton Jensen Lawyers or Caroline Law, regarding the February 20, 2020, application for first collective agreement assistance (in draft or final form).*

[6] The Employer makes this application pursuant to the Board's power contained in section 6-111(1)(b) of the Act:

> *6-111(1) With respect to any matter before it, the board has the power:*
> *…*
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;*

[7] The contents of the production request raise issues of privilege, namely, litigation privilege and solicitor-client privilege. Solicitor-client privilege is a cornerstone of the legal system, and for this reason is to be carefully protected. The Board in *CB, HK & RD v Canadian Union of Public Employees, Local No. 21*, 2017 CanLII 68786 (SK LRB) summarized the different categories of privilege, including solicitor-client privilege:

> *1. Solicitor-Client Privilege*
>
> *[31] Of all the objections advanced at the hearing, solicitor-client privilege is the most well-known and most established.*
>
> *[32] Over the past three (3) decades, protection of solicitor-client privilege has evolved from a rule of evidence to a "fundamental and substantive rule of law": R. v McClure, 2001 SCC 14, [2001] 1 SCR 445, at para. 17. It applies to any communication that (a) is a communication between solicitor and client; (b) entails seeking or giving legal advice; and (c) is intended to be confidential by the parties. The Supreme Court of Canada has insisted*

> *that solicitor-client privilege "must remain as close to absolute as possible": Lavalee, Rackel & Heintz v Canada (Attorney General), 2002 SCC 61, [2002] 3 SCR 209, at para.36. And, as the Supreme Court acknowledged, "it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis": McClure, supra, at para. 35. The most commonly recognized exception to solicitor-client privilege is "in order to allow an accused to make full and answer and defence": R. v. Ward, 2016 ONCA 568, at para. 32.*

[8] Solicitor-client privilege was also considered in *Jason Rattray v United Steel Workers International Union, Local 9841*, 2018 CanLII 68438 (SK LRB). There, the Board considered and applied the principles described by the Court in *R. v Husky Energy Inc.*, 2017 SKQB 383 (CanLII) [*Husky Energy*]. In *Husky Energy*, the Court observed that the scope of solicitor-client privilege is broad: "It applies to all communications made with a view to obtaining legal advice": para 17. A communication that is part of the exchange of information necessary for the giving or receiving of legal advice is protected by solicitor-client privilege*: Husky Energy*, at para 20, citing *Canada (Public Safety and Emergency Preparedness) v Canada (Information Commissioner)*, 2013 FCA 104, 360 DLR (4th) 176.

[9] Here, there is no question whether the communications are subject to both solicitor-client privilege and litigation privilege. The main question is whether the privilege can be set aside. Solicitor-client privilege is the more closely guarded of the two, and therefore it makes sense to begin the inquiry there.

[10] While solicitor-client privilege is closely guarded, it is capable of being waived, either expressly or implicitly. The onus of establishing that the privilege has been waived is on the party asserting the waiver. The Court in *Husky Energy* explains how to identify if a waiver has occurred:

> *[30] Privilege may be expressly waived by a party who knows of the privilege and the right to claim it, and voluntarily demonstrates an intention to waive it: S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd., 1983 CanLII 407 (BC SC), [1983] 4 WWR 762 (BCSC) [S & K]; Popowich v Saskatchewan, 1998 CanLII 13799 (SK QB), [1998] 8 WWR 355 (Sask QB); Canada (Citizenship and Immigration) v Mahjoub, 2011 FC 887 [Mahjoub].*
>
> *[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), 1988 CanLII 3474 (AB QB), 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.*
>
> *[33] An implied waiver of litigation privilege may also be found where fairness so demands, for instance, in a situation where the party holding the privilege releases a portion of the material covered by it. Where that occurs, there is an implied waiver of all material necessary to ensure fairness, i.e. to ensure that the other party is not misled: Mahjoub; O'Scolai v Antrajenda, 2008 ABQB 77, 447 AR 357; Wigmore v Myler, 2014 ONSC 6744, 123 OR (3d) 446. In this sense, the standard for finding waiver of litigation privilege is less stringent than the standard for finding waiver of solicitor-client privilege: R v Fast, 2009 BCSC 1671, 90 MVR (5th) 233.*
>
> *[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].*

[11] The first question is whether the privilege has been expressly waived. The witness's evidence cannot be taken as voluntarily demonstrating an intention to waive the privilege. Solicitor-client privilege is to be stringently protected. The waiver is to be express. The witness was not asked about, nor did he provide any evidence about the privilege, generally, or about his knowledge of the privilege. Therefore, it is not clear that he knew about his privilege and his right to claim it. Even if it could be assumed that he knew of the privilege, at no time during his testimony did he indicate that he intended to set it aside.

[12] The next question is whether the privilege has been implicitly waived. According to the foregoing case law, the applicable test consists of three parts: 1) whether fairness and consistency require the production of the documents requested; 2) whether the state of mind is in issue; and, 3) whether the state of mind is relevant to the determination of the case.

[13] The authors of *The Law of Evidence,* 5th ed. state that the test consists of two elements:

> *…Therefore, where the state of mind in question is whether the party acted in good faith or in reliance upon the other party's representations, compelled disclosure of solicitor-client communications requires two elements, namely: (1) that the presence or absence of legal advice is relevant and material to the existence or non-existence of a claim or defence; and (2) that the party who received the legal advice made receipt of it an issue in the case.*[1]

[14] Therefore, it is not enough to demonstrate that the party put in issue the state of mind of the witness; the communications subject to privilege must be relevant and material to the

---

[1] Sidney N. Lederman, Alan W. Bryan, and Michelle K. Fuerst, *Sopinka, Lederman & Bryant, The Law of Evidence, 5th ed.*, LexisNexis (Toronto), March 2018, at 1027-8 (14.161).

existence of the claim or defense, and the Union must have made those communications an issue.

[15] The Employer argues that there are significant differences in the Union's proposals as outlined in the appendices to the first application for assistance and other proposals, and that these differences are evidence of receding horizon bargaining. The Employer says that the Union is putting the accuracy of the first application into issue, and the Employer is therefore entitled to fully test the Union's evidence.

[16] The Union has put into issue the state of mind of the witness around the time that he signed the first application for assistance. The evidence raises questions about whether the Union acted properly, or in good faith, in providing the Board and the Employer with the information contained in the first application, and whether the Union intended to provide that information as being indicative of its position only to then retract that position at a later date.

[17] However, the communications sought by the Employer are not relevant or material to the Union's claim or the Employer's defense. Any advice that the witness might have received, and any communications that he would have engaged in, will not assist the Board in assessing the Union's conduct. The existence or non-existence of any good faith asserted by the Union or any bad faith asserted by the Employer does not depend on the content of the legal advice or the communications which have been sought: see, *Mahjoub*, *supra* at para 18.

[18] Finally, this is not a case like *SJBRWDSU v Pepsi-Cola Canada*, [1997] Sask LRBR 734, in which the legal advice was potentially central to the manner in which the employer had arrived at the decision to terminate the employees.

[19] Given that there has not been express or implicit waiver of solicitor-client privilege, it would not be appropriate for the Board to grant the Employer's request.

[20] For all of these reasons, the application for production is dismissed.

[21] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **27th** day of **September, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson