IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Starrs v. Troczynski,*
2024 BCSC 2267

Date: 20241213
Docket: 238459
Registry: Vancouver

2024 BCSC 2267 (CanLII)

Between:

Anthony Joseph Starrs

Plaintiff

And

Kasia Troczynski and Taylor Janis LLP

Defendants

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Applicant/Plaintiff:	R. Thomas Appearing as Agent for S.A. McCann
Counsel for the Defendants, Kasia Troczynski and Taylor Janis LLP:	D. Winterton
Counsel for the Application Respondent/Attendee, Heidelberg Materials Canada Limited:	A. MacDonald Appearing as Agent for T. Ross
Place and Date of Hearing:	Abbotsford, B.C. May 14, 2024
Place and Date of Judgment:	Vancouver, B.C. December 13, 2024

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[1] The plaintiff applies pursuant to Rule 7-1(18) of the *Supreme Court Civil Rules* [*Rules*] for production of his employment file and investigative reports relating to alleged violations of his employer's drug and alcohol policy.

[2] Production of the employment file is not seriously opposed and that order is made in the terms sought, but production of a certain investigative report is opposed by the employer on the basis of solicitor-client privilege.

BACKGROUND

[3] The plaintiff was employed by Heidelberg Materials Canada Limited ("HMC") from 2004 to 2020. HMC was previously named Lehigh Hanson Materials Limited.

[4] In September 2020, he was suspended and subsequently terminated for alleged breaches of HMC's drug and alcohol policy.

[5] The suspension and termination were, at least in part, based on an Investigation Report ("Report") authored by Integrated Risk Investigations Security Solutions Corp. ("IRISS").

[6] IRISS was retained by the Associate General Counsel, Canada Region, of HMC. The investigation and Report were commissioned for the purpose of advising HMC regarding the management and possible termination of the plaintiff's employment.

[7] IRISS undertook the investigation. They interviewed witnesses including employees of HMC and independent contractors. IRISS assured anonymity to at least some, if not all, of the witnesses it interviewed.

[8] HMC viewed the investigation and the Report as being prepared only for their counsel and management on a "need to know" basis. It is marked as being "Solicitor-Client Privileged".

[9] After IRISS finalized the Report and provided it to HMC's Associate General Counsel, it was reviewed by certain senior management individuals and provided to

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independent external counsel to obtain legal advice in respect of the plaintiff's employment and possible termination.

[10] HMC terminated the plaintiff's employment in due course.

[11] The plaintiff seeks the Report.

[12] The Report contains the identities of the witnesses interviewed by the investigators. HMC says, and it is not actively disputed, that the witnesses are workers in a small, First Nations community in Sechelt and that even if their names are redacted, the identities of these witnesses will be reasonably clear from the surrounding circumstances. HMC says that these people may be at risk of significant reprisal for their involvement in the IRISS investigation which led to the plaintiff's termination.

THE PRESENT ACTION

[13] It is alleged that in May 2022, the plaintiff hired the defendants to pursue a claim against HMC for wrongful dismissal. It is further alleged that the defendants missed a limitation date, thus terminating the plaintiff's ability to pursue his claim against HMC.

[14] The plaintiff then retained his present counsel to pursue action against the defendants for solicitor's negligence.

[15] The defendants deny liability and deny that any of their actions or omissions caused or contributed to any loss or damage visited on the plaintiff. They allege, among other things, that:

- the plaintiff's employment was terminated for just cause;
- they were retained to provide the plaintiff with legal advice;
- the plaintiff never provided instructions to pursue a legal claim against HMC;

- the plaintiff failed to pay fees rendered on account; and,
- they terminated their retainer on notice to the plaintiff.

[16] If the termination was justified and for cause, the plaintiff's claim of solicitor's negligence may fail.

[17] It is clear, and counsel for HMC acknowledges in submissions, that the Report is or may be relevant to the issue of the termination of the plaintiff's employment.

LAW AND DISCUSSION

Claim of Solicitor-Client Privilege

[18] Counsel for HMC advised throughout submissions that their privilege claim in respect of the Report is firmly based on solicitor-client privilege, not litigation privilege.

[19] Their position is quite simple. The Report was commissioned by corporate legal counsel to gather information relative to the plaintiff's actions. The Report containing that information was to be, and in fact was, provided to external legal counsel so that counsel could provide legal advice to HMC regarding the employment status of the plaintiff, his position with HMC, and his possible termination.

[20] HMC received legal advice based on, at least in part, the Report and it acted on that legal advice.

[21] Not every communication between a third party and a lawyer which assists in giving or receiving legal advice is protected by solicitor-client privilege: *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321 at para. 106, 1999 CanLII 7320 (O.N.C.A.) [*Chrusz*].

[22] To determine whether solicitor-client privilege attaches to the Report, I must assess whether IRISS, a third party, prepared the Report for the purpose of seeking

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or providing legal advice, opinion, or analysis: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 31.

[23] Importantly, solicitor-client privilege extends only to third party communications that are "in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client": *College of Physicians* at para. 48. For instance, when a third party acts as a channel or conduit of information between the lawyer and client (e.g., the third party acts as a messenger, translator, or amanuensis), those communications are protected by the privilege: *Chrusz* at para. 106.

[24] In this context, the Ontario Court of Appeal has characterized privileged communications as those which arise when the third party is standing in the shoes of the client: see *Chrusz* at paras. 120–122.

[25] Moreover, when a third party is tasked with gathering information from outside sources and passing that information to a lawyer so that the lawyer can advise his or her client, the third party's function "is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected": *Chrusz* at paras. 120–122.

[26] Here, when IRISS undertook its investigation and prepared its Report, it simply gathered information to pass to HMC's counsel. It did not act as a channel or conduit of information between HMC and its counsel.

[27] IRISS was not standing in HMC's shoes as an agent or messenger. Thus, the communications between IRISS and HMC's lawyers were not essential to the operation of the solicitor-client relationship.

[28] For the foregoing reasons, I find that solicitor-client privilege does not attach to the Report.

Documentation from non-parties

[29] Rule 7-1(18) provides:

> Documents not in possession of party
>
> (18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:
>
> > (a) production, inspection and copying of the document;
> >
> > (b) preparation of a certified copy that may be used instead of the original.

[30] The use of the word “may” provides this Court with discretion to make an order for disclosure of the requested documents. I am not required to make such an order.

[31] Master Harper (as she then was) commented on the test for production under this rule in *MacKinnon v. Rabeco Holdings (1989) Ltd.*, 2014 BCSC 1703:

> [15] The test for production of records from a third party is different under Rule 7-1(18) than it was under the former rule, therefore, care must be taken not to import caselaw decided under the old rule into an application under the current rule.
>
> [16] As Master Taylor put it in *Dosanjh v. Leblanc and St. Paul’s Hospital*, 2011 BCSC 1660 at para. 21: “Whereas the old rules required the court to consider whether the documents had relevance, the test now as set out in Rule 7-1(1)(a)(i) is whether or not the documents can prove or disprove a material fact.”

[32] It is noteworthy, however, that even when dealing with a production application prior to the change in the *Rules*, when the test was relevance under the long-standing *Peruvian Guano* standard, Justice Dorgan noted in *Park v. Mullin,* 2005 BCSC 1813:

> [21] That the issue of privacy is a robust and real issue should be taken into account on an application such as this. In ***A.M. v. Ryan***, *supra*, McLachlin J. commented on a party’s privacy interests in the context of an application for third party clinical records under Rule 26(11). In determining whether the records at issue were privileged, McLachlin J. stated the following at para. 30:
>
> > … the common law must develop in a way that reflects emerging Charter values … One such value is the interest affirmed by s. 8 of the Charter of each person in privacy. ...
>
> And further at para. 38:

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> ... I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.
>
> In my view, similar privacy concerns should be considered in a determination under Rule 26(10) where the order sought is so broad it has the potential to unnecessarily "delve into private aspects" of the opposing party's life.

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[33] In the present case, it is the non-party document holder, HMC, which actively opposes production of the Report, not either of the parties themselves.

[34] In *Willard v. Mitchell*, 2010 BCSC 1438, Justice Brooke said:

> [29] Where the court is satisfied of the relevance of the document, it should order production unless there are compelling reasons not to; for instance, the document is privileged or "grounds exist for refusing the application in the interest of persons, not parties to the action, who might be embarrassed or affected adversely by an order for production", including the custodian of the document […]. Before denying production on the grounds of embarrassment or adverse effect on a third party, the court should be satisfied that (1) the probative value of the information contained in the document is slight; and (2) production would cause such embarrassment or adverse effect that it would be unjust to require production.

[35] In *Logan v. Hong*, 2013 BCCA 249, the Court of Appeal considered an order which required doctors who were not party to the litigation to provide the names, addresses, and contact information of patients to whom they administered injections of a product manufactured by the defendants. The Court of Appeal noted the order disclosed the fact of a particular medical treatment and the patients' addresses and contact information, all of which the patients may have chosen not to broadcast: *Logan* at para. 12. The Court set the order aside, noting that the right of patients to confidentiality of the nature of medical services received and contact information held by physicians trumps the recovery of money: *Logan* at para. 18.

[36] In the present action, I must weigh the privacy interests of HMC and the non-party witnesses against the probative value of disclosing the Report. In doing so, I consider the independent interests of these non-parties whose records are sought: *Kaladjian v. Jose*, 2012 BCSC 357 at para. 53.

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[37] The probative value of the Report is questionable. The content of the Report may not assist the plaintiff in establishing that the defendants did not meet the standard of care required of a solicitor. The defendants did not have access to the Report when they were advising the plaintiff, so its utility in an assessment of professional negligence may be limited.

[38] Moreover, the Report will not support the defendants in proving the other bases on which they deny liability, *i.e.*, the plaintiff did not instruct them to pursue an action against HMC, he failed to pay his legal fees, and the retainer was terminated with notice.

[39] The witnesses are, it seems to me, people who may properly be referred to as whistleblowers. They provided HMC, through the IRISS investigators, with information and details about certain activities at a HMC worksite.

[40] Many of these witnesses were employed by HMC. Others were in a commercial relationship with HMC.

[41] The witnesses were, or at least many of them were, assured of confidentiality. It is clear from the material that many of these individuals would not have provided information but for the assurance of confidentiality.

[42] The risk to these individuals is alleged to be something more than embarrassment or mere adversity. HMC asserts that the lives of the individuals may be at risk if their identities are disclosed.

[43] In my view, the probative value of the Report is outweighed by the prejudicial, adverse effects of its production. I am persuaded that the privacy interests of the witnesses must be protected.

[44] I exercise my discretion under Rule 7-1(18) against disclosure of the Report and I dismiss the plaintiff’s application on that basis.

CONCLUSION

[45] I dismiss the plaintiff's application as it relates to production of the Report.

[46] HMC is entitled to its costs at Scale B as against the plaintiff.

"Caldwell J."

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