

SUPREME COURT OF YUKON

Citation: *Petrie v. AIG Insurance Company of Canada*,
2019 YKSC 45

Date: 20190821
S.C. No. 18-A0150
Registry: Whitehorse

BETWEEN

WILLIAM PETRIE

PLAINTIFF

AND

AIG INSURANCE COMPANY OF CANADA

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:
Laura Jones
James Dowler, Q.C.

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by counsel for AIG Insurance Company of Canada (“AIG”) for production of certain documents based on relevance, solicitor-client privilege and litigation privilege.

[2] The primary issue is whether Mr. Petrie’s statements to his legal team or his doctor were protected by solicitor-client privilege. On August 14, 2019, I ruled that the statements uttered by Mr. Petrie were protected by solicitor-client privilege. As this is a decision that goes somewhat beyond previous Yukon case precedents, according to counsel for AIG, I provide these reasons.

[3] Mr. Petrie claims loss and damages arising out of a motor vehicle accident on August 9, 2014, at the intersection of the Alaska Highway and the South Access Road in the City of Whitehorse.

[4] Without limiting Mr. Petrie's claims, his main injuries are psychological and include post traumatic stress disorder, depression as well as tinnitus. This claim against AIG is for amounts that exceed the available insurance limits of the other parties to the accident; it is commonly referred to as an S.E.F.44 claim against his own insurer.

[5] Because Mr. Petrie was driving a tractor-trailer in the course of his employment, the Yukon Workers' Compensation Health and Safety Board ("YWCHSB") has been paying benefits to him and is entitled by statute to bring an action on his behalf.

[6] Consequently, Mr. Petrie has the YWCHSB counsel, as well as his litigation counsel. In addition, litigation counsel has both YWCHSB and Mr. Petrie as clients.

THE FACTS

[7] The documents for which I have found solicitor-client privilege are briefly described by Mr. Petrie's counsel as follows:

1. Plaintiff's document 5.17 stamped as solicitor-client privilege and described as correspondence between General Counsel for the YWCHSB and Mr. Petrie, dated January 9, 2015;
2. Plaintiff's document 10.67-68 stamped as solicitor-client privilege and described as correspondence from an agent of General Counsel for YWCHSB to Mr. Petrie about the Board's internal legal review of his file;

3. Plaintiff's document 54.04, dated 2018/09/03, stamped as solicitor-client privilege and described as a note from a YWCHSB claims manager that result from and are grounded in discussions with litigation counsel;
4. Plaintiff's document 73.01-03 stamped as solicitor-client privilege and described as correspondence between litigation counsel and its client, YWCHSB;
5. Plaintiff's document 81-01, dated 2019/01/21, partially stamped as litigation privilege and described as updated medical records;
6. Plaintiff's document 85.36, dated 2019/12/18, stamped litigation privilege and described as records by a YWCHSB claims manager of comments made by Mr. Petrie that result from and are grounded in discussion with his litigation counsel;
7. Plaintiff's document 85.38, dated 2019/01/03, stamped as solicitor-client privilege and described as a note by a YWCHSB claims manager of comments made by Mr. Petrie that result from and are grounded in discussion with litigation counsel.

ANALYSIS

[8] These reasons focus on what I find to be solicitor-client privilege for each of the documents set out above, despite the stamp of litigation privilege in sub-paragraphs 5 and 6 above. I concluded that the test for litigation privilege addressed in *Fred v. Westfair Food Ltd.*, 2003 YKSC 39, requiring affidavit evidence of litigation in reasonable prospect and dominant purpose was not required.

[9] The preferred practice in this Court regarding solicitor-client privilege is to have the documents in issue provided to the trial judge pursuant to Rule 25(15) or 25(21) of the *Rules of Court*. That procedure was followed in this application and upon reviewing the documents, I concluded that the documents or partial documents were protected by solicitor-client privilege.

[10] Further, the subject matter was not necessarily a discussion directly between solicitor and client but a staff person or a treating psychologist about a matter that resulted from discussion with counsel or was grounded in discussion with counsel.

[11] In that respect, I preferred the case law for protection of solicitor-client privilege that considers the context in which the claim arises and that solicitor-client privilege is only waived when it is waived deliberately and knowingly and not inadvertently. See *Somerville Belkin Industries Ltd. v. Brocklesby Transport* (1985), 65 B.C.L.R. 260 (S.C.), at 264; *Merritt v. Imasco Enterprises Inc.*, [1992] B.C.J. No. 2319 (S.C.); and *Kemp v. Wittenberg* (1997), 32 B.C.L.R. (3d) 268 (S.C.).

CONCLUSION

[12] I conclude that the solicitor-client privilege on the facts of this case was not knowingly waived, but rather inadvertently, in the contexts at issue.

[13] I order that the claims of solicitor-client privilege are protected and need not be produced. I order that no costs be granted in the circumstance of this application.

VEALE C.J.