Case Name:

Ontario (Ministry of Correctional Services) and O.P.S.E.U. (Knight), Re

[1994] O.G.S.B.A. No. 2

39 L.A.C. (4th) 205

File No. 2421/92

Ontario
Crown Employees Grievance Settlement Board

B.A. Kirkwood, Vice-Chair, E. Seymour, M. O'Toole

Decision: February 4, 1994.

(25 paras.)

Appearances:

I. Anderson, for the union.

M. Blight, for the employer.

DECISION

1 The union forwarded a letter to employer's counsel dated July 7, 1993, requesting copies of certain documents. There was some correspondence, discussion and some disclosure by November 23, 1993. As all the issues had not been resolved by the parties the panel heard argument on the demand for production, at the hearing on November 23, 1993, and subsequently received written submissions on one issue, the issue of privileged documents. The board issued an order and these are the reasons for the order granted.

2 The documents sought by the union as set out in their correspondence of July 7, 1993, were as follows:

1. All documents produced during the investigation and in the preparation of the investigation report, including but not limited to all witness statements, notes taken or prepared by the investigator in the course of his investigation, any documents which

appointed the investigator or in any way defined the scope of his investigation, copies of all correspondence between any ministry or agency of the Crown and the investigator, copies of any correspondence between any witness or potential witnesses and the investigator and any other documents which were obtained, created or produced by the investigator in the course of his investigation.

2. The names, addresses and telephone numbers or any and all witnesses interviewed by the investigator.

3. Copies of any and all directives, guidelines or handbooks used by the investigator in this case or any other investigator employed by the Ministry of Correctional Services to investigate similar cases, whether or not issued by the Crown, including (but not limited to) documents outlining the nature of investigations, the method by which investigations should be carried out, and the duties, role and responsibilities of the investigator. In addition, copies of any instructional material used to train investigators.

4. The opportunity to examine and copy all documents or materials which were removed by the investigator or any other employee of the Crown from Mr. Knight's office in the course of the investigation.

5. A copy of Mr Knight's personnel file.

6. Copies of the criminal records of the witnesses.

3 The union argued that the documents sought ought to be produced as they met the test accepted by the Grievance Settlement Board that they are "arguably relevant" (*O.P.S.E.U. (Hyland) and The Crown in right of Ontario (Ministry of Correctional Services*), G.S.B. 1062/89 (Ratushny); *O.P.S.E.U. (Quinn) and The Crown in right of Ontario (Ministry of Culture and Communications)*, G.S.B. 1054/90 (Kaplan); *O.P.S.E.U. (Hurge) and The Crown in right of Ontario (Ministry of Attorney General)*, G.S.B. 348/92 (Kaplan)). The union agreed that the admissibility and proof of the documents are matters that are to be dealt with in the course of the proceedings.

4 The employer's counsel consented to:

> The opportunity to examine and copy all documents or materials which were removed by the investigator or any other employee of the Crown from Mr. Knight's office in the course of the investigation.
>
> Producing a copy of Mr. Knight's personnel file, and has complied with this request.
>
> Providing a list of all witnesess to be produced, and in the event that she intends to call other witnesses, will provide their names and will provide a summary of the evidence which they expect to state.

5 Employer's counsel agreed to produce existing documents which evidence the investigator's appointment or scope of appointment on a without prejudice basis. Employer's counsel agreed to provide documents which were generated by the inspector and relied upon by Mr. Cornfoot, the superintendent at the Burtch Correctional Centre in disciplining and discharging the grievor and those documents that were considered by Mr. Cornfoot prior to the grievor's termination. Employer's counsel has produced some of the investigator's report.

6 Employer's counsel took the position that the balance of the documents to the extent they existed were privileged and were not subject to production, as they were prepared in contemplation of litigation.

7 The union accepts that some but not all of the documents referred to in para. 1 have been produced.

8 The first issue is whether the documents sought are privileged and therefore do not have to be produced.

9 Proceedings before the Grievance Settlement Board do not have the benefit of the discovery process. The board does not have the power to order disclosure of documents, *per se*, but has the jurisdiction to issue a *subpoena duces tecum*. Employer's counsel has agreed to produce any such documents duly ordered.

10 A *subpoena duces tecum* is issued when documents requested can be shown to be arguably relevant. In applying this test, there has been a recognition that the request must be sufficiently particular, and cannot be a fishing expedition in search of documents that may be found to support or create a position. The underlying principle is that relevant documents be produced in order that the parties and their counsel can review the documents to assist them in the resolution of their cases, narrow the issues and to assist counsel in knowing the case they have to meet.

11 The only Grievance Settlement Board case that counsel presented to the panel that raised the issue of privilege as a defence to production was the case of *O.P.S.E.U. (Basso) and The Crown in right of Ontario (Ministry of Correctional Services)*, G.S.B. 2250/90 (Kaplan). However, the board did not deal with that argument in rendering its decision and therefore that case does not assist us. We therefore look to the courts for guidance in considering the application of privilege.

12 The courts recognize that documents which are privileged are exempted from the general rules of production. Privilege attaches to documents produced by the solicitor and client. Documents, however, that flow from the involvement of a third party, such as investigators' reports, notes or witness statements have been subject to much litigation. Documents which are created in "anticipation of litigation" are privileged and do not have to be produced. This form of privilege flows not from the solicitor-client relationship, but from the "adversary system of litigation by which counsel control fact presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case" (Sopinka, *The Law of Evidence in Canada* (1992), at p. 653).

13 Sopinka states that the "anticipation of litigation" is subject to two pre-conditions:

> First, such communications with third parties must have been made specifically with existing or contemplated litigation in mind and not just in the context of general legal professional advice. Secondly, special regard must be had to situations where the creation of a document or report has a two-fold purpose, one of which is to assist counsel in litigation. In such cases, it has been held in England that the privilege will

only attach if the dominant purpose for the third party communication was to assist in possible forthcoming litigation.

14 Sopinka also recognizes that Ontario courts have been divided in their views since *Blackstone v. Mutual Life Assurance Co. of New York*, [1944] 3 D.L.R. 147, [1944] O.R. 328 (C.A.), which applied privilege if the "substantial purpose" for the preparation of documents was litigation. The development of these two tests have been recognized in *Hall v. Co-operators General Insurance Co.* (1992), 5 C.L.R. (2d) 318, 14 C.P.C. (3d) 355, [1992] I.L.R. [para]1-2869 (Ont. Ct. (Gen. Div.)) (Salhany J.), which finds the difference between the two tests as a standard to be met, but in any event accepts the "dominant purpose" test as the appropriate test. In that case the adjuster's notes were not privileged where the adjuster was investigating and determining whether or not the damage claimed was covered by the defendant's policy.

15 "Anticipation of litigation" has been characterized by *Vemon v. North York Board of Education* (1975), 9 O.R. (2d) 613 (H.CJ.) (Grant J.), as not requiring that litigation be underway or in preparation at the time that a report is made, only that legal proceedings are pending, threatened or anticipated. Many of the cases presented by the parties were determined from the application of this principle to the facts in issue in each case. There was not so much a disagreement with the principle, but a difference in the application of the principle to the facts of each case. In *R. v. Westmoreland* (1984), 14 D.L.R. (4th) 112, 15 C.C.C. (3d) 340, 48 O.R. (2d) 377 (H.C.) (Steele J.), a fatal accident occurred and the courts found that as the insurer had probable cause that there would be litigation as the relatives had contacted the company, even though a solicitor had not yet been retained, the reports on the accident were privileged as it gave the parties the right to gather information in contemplation of the probable litigation. Similarly in *Yri-York Ltd. v. Commercial Assurance of Canada* (1987), 17 C.P.C. (2d) 181 (Ont. H.CJ.) (Callaghan A.CJ.), where the courts found that counsel expected litigation from the outset, the reports were privileged. In *Vemon v. North York Board of Education, supra*, once a claim was made an accident report did not have to be produced as there was a definite prospect of litigation.

16 Flowing from whether documents are privileged as being in anticipation of litigation is the nature of the investigation and the timing of the investigation. Was the investigation being carried out in a fair and open manner to assess the facts in order to make a determination? Until the issues have crystallized or the parties become aware that there is a dispute, the investigation is "fact finding" and is not determinative that there is contemplated or anticipated litigation.

17 Even in *Blackstone v. Mutual Life Assurance Co. of New York, supra*, which applies "substantial purpose" test, recognized the distinction between the production of medical reports that were prepared before and after the likelihood of litigation had crystallized. Chief Justice Robertson stated at p. 150:

> In a case such as the present it would not be in accord with the attitude usually taken by insurance companies of the standing of the defendant, in making inquiries of the character disclosed in the documents in question, to relate them to anticipated litigation. That stage had not been reached ... it is commonly the practice of insurance companies to investigate the claims of their insured with a fair and open mind, and not to anticipate litigation until they have ascertained whether or not there is any basis for it. There is nothing to indicate any expectation of litigation in the documents of which I think production should be made. An entirely different situation existed when, having for some months recognized the plaintiffs claim, a new investigation was started.

18 In the context of the proceedings before the Grievance Settlement Board, the board has ordered production of documents where the documents sought are arguably relevant. The board has moved towards broad disclosure so that the parties may best be able to assess the merits of their respective positions and assess possibilities for settlement. In our view the dominant purpose test is the appropriate test and is most consistent with the approach taken by the Grievance Settlement Board.

19 Applying these concepts to the facts before us, Mr. Cornfoot, the superintendent, directed Mr. Peter Lambert to make an investigation as soon as he heard allegations made by W against the grievor. The purpose of the investigation was not in anticipation of a defence to an action instituted by W but to determine if there was a basis to Ws allegations. The employer was canvassing whether there was any truth to the allegations and was determining its course of action. When the investigation was initiated, the employer was not aware of possible litigation, let alone was the grievor or the union aware of any possibility of litigation.

20 In our view the purpose of the investigation was to determine the basis of the allegations and, secondly, should litigation arise, to assist counsel. In this regard it is similar to the medical reports which are carried out in the ordinary course of business without knowledge of a dispute as in *Blackstone v. Mutual Life Assurance Co. of New York, supra*, or as in *Walters v. Toronto Transit Commission* (1985), 4 C.P.R. (2d) 66, 50 O.R. (2d) 635 (H.CJ.) (Steele J.). In *Walters v. Toronto Transit Commission* the court found that the report of driver of a vehicle who made a report of an accident that was to be used if an action were commenced was not privileged as the dominant purpose of the report was not for the purpose of litigation.

21 Even if the investigator's report was privileged as being created in the anticipation of litigation, this privilege is waived by the partial disclosure of the investigator's report. Employer's counsel argued that it had released some of the investigator's report voluntarily as a result of the *Basso* case and therefore should not be penalized by being considered as waiving privilege by this partial disclosure.

22 Once a document is released the privilege that may have attached to the document is lost. Privilege attaches to the report and to all documents relating to the acts contained in the report. As stated by *Wigmore on Evidence*, vol. 8, para. 2327, p. 636 (McNaughton rev. 1961), applied in *Harich v. Stamp* (1979), 106 D.L.R. (3d) 340 at p. 346, 59 C.C.C. (2nd) 87, 27 O.R. (2d) 395 (C.A.) [leave to appeal to S.C.C. refused D.L.R. and C.C.C. *loc. cit.*, 32 N.R. 447*n*], and quoted by Sopinka, *supra*, at p. 666:

> There is always the objective consideration that when [a party's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.

23 The second issue that arises is, although we have found that privilege does not protect the documents from production, ought the documents requested be produced as being arguably relevant.

24 Documents that are to be produced must relate to the matters that are arguably relevant to this grievance. We find no basis to require production of any documents that relate to other ministries, or other investigators conducting investigations, of similar cases. We find that there is no basis to produce documents that involve other ministries, guidelines etc. and handbooks used in similar cases or by other investigators. Conduct or directions of other ministries or other investigators are not an issue in this case.

25 As this is not a fishing expedition we limited the production of the documents requested. We found that the following documents are arguably relevant to this case and are not protected from production by the application or the principle of privilege. We made an order for the production of the following:

1. The investigator's report, and all documents produced in the investigation and relied upon in the preparation of the investigation report, including but not limited to all witness statements, notes taken or prepared by the investigator in the course of his investigation, any documents which appointed the investigator or in any way denned the scope of his investigation, copies of all correspondence between the Ministry of Correctional Services and the investigator, copies of any correspondence between any witness or potential witnesses and the investigator and any other documents which were obtained, created or produced by the investigation in the course of this investigation, all of which must pertain to the subject-matter of this grievance.

2. The names, addresses and telephone numbers or any and all witnesses interviewed by the investigator.

3. Copies of any and all directives guidelines or handbooks used or relied upon by the investigator in this case.

4. The opportunity to examine and copy all documents or materials which were removed by the investigator or any other employee of the Crown from Mr. Knight's office in the course of the investigation.

5. A copy of Mr. Knight's personnel file.

6. Copies of the criminal records of the witnesses.

7. A list of all witnesess to be produced, and in the event that the employer intends to call other witnesses, the employer will provide their names and a summary of the witness's expected evidence.