TAB 3

C

1999 CarswellAlta 457, 33 C.P.C. (4th) 162, 242 A.R. 326, 88 A.C.W.S. (3d) 762

Alberta Treasury Branches v. Ghermezian

Alberta Treasury Branches, Plaintiff and Nader Ghermezian, Raphael Ghermezian, Bahman Ghermezian, Eskander Ghermezian, 273905 Alberta Ltd., Howard Anson, Mavis Halliday, 218703 Alberta Ltd., 579511 Alberta Ltd., 298936 Alberta Ltd., West Edmonton Mall Property Inc., WEM Holdings Inc., WEM Management Inc., Avista Financial Corporation, 298926 Alberta Ltd., ABNR Equities Corp., Devcor Investment Corporation, Elmer Leahy, Ventana Investments Inc. and Adirondack Investments Ltd., Defendants

Alberta Court of Queen's Bench

Moore C.J.Q.B.

Judgment: May 25, 1999[FN*]
Docket: Calgary 9803-14545

Counsel: *C.D. O'Brien, Q.C.* and *E.B. Mellet*, for West Edmonton Mall.

J.E. Redmond, Q.C. and *T.J. Williams*, for Alberta Treasury Branch.

Subject: Civil Practice and Procedure; Contracts

Practice --- Discovery — Discovery of documents — Privileged document — Documents prepared in contemplation of litigation

Defendant to main action prepared appraisal report for use in appeal relating to municipal tax assessment of defendant's property — Appraisal was submitted in hearing before assessment review board which denied defendant's appeal — Defendant abandoned further appeal — Defendant refused to produce appraisal to plaintiff in main action on ground appraisal was produced in contemplation of litigation — Plaintiff brought motion for order requiring defendant to produce appraisal — Motion granted — In order for litigation privilege to attach to documents prepared in contemplation of litigation, party must demonstrate that opponent has right to access material prepared in contemplation of that proceeding — No evidence that dispute before municipal tax assessment board required parties to exchange relevant documents or make disclosure akin to that in civil action — Even if appraisal was created in anticipation of litigation, privilege once attached to it expired when defendant abandoned appeal, or was waived when it was submitted to board — Even if appraisal was privileged, loans agreement indicated plaintiff had contractual right of access.

Contracts --- Construction and interpretation — General principles

Defendant to main action prepared appraisal report for use in appeal relating to municipal tax assessment of defendant's property — Appraisal was submitted in hearing before assessment review board which denied defendant's appeal — Defendant refused to produce appraisal to plaintiff in main action on ground appraisal was produced in contemplation of litigation — Plaintiff brought motion for order requiring defendant to produce appraisal — Motion granted — Appraisal not privileged as it was not produced in contemplation of litigation — Even if appraisal was privileged, loans agreement indicated plaintiff had contractual right of access.

Cases considered by *Moore C.J.Q.B.*:

"Aegis Blaze" (The), [1986] 1 Lloyd's Rep. 203 (Eng. C.A.) — referred to

Boulianne v. Flynn, [1970] 3 O.R. 84 (Ont. Co. Ct.) — considered

Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co., 28 Alta. L.R. (3d) 79, [1995] 5 W.W.R. 720, 168 A.R. 132 (Alta. Q.B.) — considered

Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 61 Alta. L.R. (2d) 319, 22 C.P.R. (3d) 290, 90 A.R. 323 (Alta. C.A.) — distinguished

Mann v. American Automobile Insurance Co., [1938] 1 W.W.R. 538, 52 B.C.R. 460, 5 I.L.R. 125, [1938] 2 D.L.R. 261 (B.C. C.A.) — referred to

Meaney v. Busby (1977), 15 O.R. (2d) 71, 2 C.P.C. 340 (Ont. H.C.) — considered

Moseley v. Spray Lakes Sawmills (1980) Ltd. (1996), 39 Alta. L.R. (3d) 141, 135 D.L.R. (4th) 69, 184 A.R. 101, 122 W.A.C. 101, 48 C.P.C. (3d) 221 (Alta. C.A.) — applied

Northwestern Utilities Ltd. v. Century Indemnity Co., [1934] 3 W.W.R. 139 (Alta. T.D.) — referred to

Petro-Canada v. "Mary J" (The) (1994), 98 B.C.L.R. (2d) 139 (B.C. Master) — considered

Western Canadian Place Ltd. v. Con-Force Products Ltd. (1997), 50 Alta. L.R. (3d) 131, 31 B.L.R. (2d) 97, 202 A.R. 19, 9 C.P.C. (4th) 165 (Alta. Q.B.) — referred to

Wujda v. Smith (1974), 49 D.L.R. (3d) 476 (Man. Q.B.) — considered

MOTION by plaintiffs for production of appraisal report.

***Moore C.J.Q.B.*:**

Introduction

1 Alberta Treasury Branches ("ATB") seeks an order requiring the Defendants ("WEM") to produce an Appraisal Report and related material (collectively, the "Appraisal") prepared by Colliers International Realty Advisors Inc. ("Colliers") which WEM used in appeals relating to the municipal tax assessment of the Mall for the years 1993 to 1997. The Appraisal was submitted in a hearing before the Assessment Review Board, who denied WEM's appeal. Although WEM subsequently appealed to the Alberta Municipal Government Board, this appeal was abandoned. WEM has refused ATB's request to produce the Appraisal in the present action.

2 ATB suggests that the Appraisal is relevant to the issue in the main action to determine if the value of the Mall is sufficient to cover the debt owing to ATB. WEM disputes this suggestion on the ground that since the Appraisal covers only a specific period (1993 to 1997), it is not relevant to the present value of Mall which is the issue in this action.

3 As the test for relevance in document production is very broad, I find that Appraisal is relevant, and the weight which may attributed to it will be determined by the trial judge. The only question that remains is whether the Appraisal is privileged.

Issues

1) Was the Appraisal created in anticipation of litigation, thereby attracting privilege?

2) If the Appraisal was created in anticipation of litigation, did that privilege expire when the tax appeal was abandoned?

3) If the Appraisal was created in anticipation of litigation, did WEM waive that privilege by submitting the Appraisal in the appeal before the Assessment Review Board?

4) Is WEM contractually obligated to produce the Appraisal?

Parties' Positions

1) Was the Appraisal created in anticipation of litigation, thereby attracting privilege?

4 The parties agree that the onus of proving privilege lies on the party asserting the privilege; *Moseley v. Spray Lakes Sawmills (1980) Ltd.* (1996), 39 Alta. L.R. (3d) 141 (Alta. C.A.). As such, I will begin with WEM's argument as to why the Appraisal is privileged.

WEM's Position

5 WEM states that the Appraisal Report is confidential and privileged on the ground that the Appraisal was prepared in contemplation of litigation. The test for litigation privilege is whether the documents are prepared for the dominant purpose of contemplated litigation. WEM says that it is clear that the Appraisal was prepared by Colliers for the purpose of WEM's property tax appeal and as such, it was prepared in contemplation of litigation and is therefore privileged.

6 WEM argues that an appeal of a tax assessment should be characterized as litigation. It refers to *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 22 C.P.R. (3d) 290 (Alta. C.A.) at 296-297 where the court found that it was not appropriate to take "too narrow a view of the term 'litigation'". WEM suggests that a matter becomes litigation when there exists a *lis*, which is defined in *Black's Law Dictionary* (6^{th} *ed.*) as "a controversy or dispute; a suit or action at law". WEM says that since a property tax appeal heard by the Assessment Review Board is a controversy or dispute, a sufficient *lis* existed between WEM and the City of Edmonton to constitute litigation.

7 WEM also indicates that bringing the matter before the Assessment Review Board was the only avenue of relief available to it in that case, since the appeal procedure is prescribed by statute. As such, WEM could not

have resolved the matter by bringing an action in court. WEM says that in any event, had it pursued all avenues of appeal, the appeal could have ended up in court system by way of judicial review.

8 WEM also says that documents need not be prepared by a solicitor to be covered by litigation privilege. In *Moseley v. Spray Lakes*, *supra*, the Court of Appeal held

> Litigation privilege is broader in scope [than solicitor-client privilege], in that it attaches even to communications with, or documents prepared by, third parties. (at 146-147).

9 WEM states that the involvement of solicitors is not necessary for litigation privilege to attach. The Court in *Moseley* further held at 148:

> There may even be relatively rare situations where a party intends to represent himself or herself throughout the litigation proceedings, and gather statements and documents specifically for the contemplated litigation. Privilege may well attach to such material, even where no lawyer is to be "briefed". That question, however, is not at issue in this case and need not be decided now. Thus, at the time of creation, preparation for litigation must be the dominant purpose.

WEM says that the present situation is one of the "relatively rare" situations to which Conrad J.A. refers to in this passage.

ATB's Position

10 ATB says that the Appraisal is not privileged. Litigation privilege requires *inter alia* that a document is either prepared by a lawyer, or prepared for the purpose of submitting it to a lawyer. ATB says that it is significant that although Conrad J.A. left open the possibility that a lawyer's involvement is not necessary to create litigation privilege, she specifically declined to make a determination on that issue.

11 ATB asserts that no solicitor was involved in the WEM's appeal. Colliers represented WEM before the Assessment Review Board, and continued to do so until the subsequent appeal to the Alberta Municipal Government Board was abandoned. As the subsequent appeal was abandoned, the Appraisal was never forwarded to WEM's solicitor. As such, ATB says that WEM cannot assert litigation privilege over the Appraisal.

12 ATB further argues that an appeal before the Assessment Review Board should not be treated as litigation for the purpose of finding litigation privilege. It says that this situation is distinguishable from that in *Ed Miller Sales*, *supra*. In *Ed Miller*, the court held that

> ...litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many possible procedures. Some under the Act had possible penal consequences; some were civil ... all involve the same issues. (at 297)

13 ATB indicates that in WEM's case there is no question of whether WEM must pay tax; the only issue in dispute was the amount of the tax which WEM must pay. ATB says that this is quite different from the situation in *Caterpillar* where actual civil and criminal proceedings were anticipated. ATB also says that the mere possibility that the matter may end up in court by way of judicial review does not justify characterizing the matter as "litigation". ATB suggests that although many administrative tribunals may be subject to judicial review, not all proceedings before these tribunals necessarily constitute litigation.

Disposition

14 As mentioned above, the onus of establishing privilege is on the person seeking to rely on that privilege. I find that WEM has not discharged this onus. I am not persuaded that a hearing before the Municipal Tax Assessment Review Board is "litigation" for the purposes of claiming litigation privilege.

15 *Black's Law Dictionary* (6^{th} *ed.*) defines "litigation" as:

> A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law.

16 This definition clearly includes matters which involve actual court proceedings, such as criminal trials and civil actions in the court system. Conceivably there may be other types of hearings which constitute litigation in a less traditional sense. However, whether a particular hearing is "litigation" must be determined in light of the surrounding circumstances, and the purpose for which the characterization of litigation is sought should also be taken into account.

17 I agree with Conrad J.A. that there may be circumstances where litigation privilege is found although no solicitor was involved. As such, I do not find that the presence or absence of a solicitor is necessarily determinative of this issue.

18 In determining whether these particular proceedings constitute litigation for the purpose of establishing litigation privilege, it is necessary to understand why litigation privilege exists in the first place. The purpose of granting privilege over documents made in anticipation of litigation is to allow a party to freely prepare its case. This privilege is also necessary to override the requirement in civil litigation that parties exchange all relevant documents. If a party is not afforded the protection provided by litigation privilege, it would be required to forward to its opponent unfavourable information which it has developed while preparing its case. As stated in *The Law of Evidence in Canada* (Sopinka J., J. Lederman and A. Bryant, Toronto: Butterworths, 1992):

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine its truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel.... Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forego conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel. (at 654)

19 However, if there is no requirement that a party provide all documents to the other side, the need for litigation privilege disappears. The mandatory disclosure requirement is an important aspect of "traditional litigation" insofar as the entitlement to litigation privilege is concerned. Therefore, for litigation privilege to attach to documents prepared in contemplation of a proceeding which is not traditionally classified as litigation, a party must demonstrate that his opponent has a right to access any material prepared in contemplation of that proceeding. If a certain proceeding does not have a sufficiently similar disclosure requirement to that of "traditional litigation", it follows that it should not be characterized as "litigation" for the purpose of finding litigation privilege.

20 There is no evidence before me that parties involved in a dispute before the Municipal Tax Assessment Board are required to exchange relevant documents or make any type of disclosure akin to that in a civil action.

As such, the policy justifications underlying litigation privilege are not brought into play in this case. WEM was free to gather any information it required to prior to the hearing, and was able to choose which information it disclosed to the City and to the Board. There is no need for privilege because a party is not required to exchange documents with the opposing parties.

21 Under this test, it is possible that the material may become privileged if at some point in the regular course of the proceedings the parties become obliged to disclose all relevant documents to the other side. At that point the rational for instigating litigation privilege would come into play. However, the proceedings in this action did not reach a point where there was any requirement of disclosure, and it is unlikely that such a requirement would ever have come into existence. As such, I find that the Appraisal is not covered by litigation privilege.

2) If the Appraisal was created in anticipation of litigation, did that privilege expire when the tax appeal was abandoned?

ATB's Position

22 ATB says that even if the Appraisal was at one time subject to litigation privilege, that privilege ended when WEM abandoned the property tax appeal.

23 ATB says that there is an important distinction between solicitor-client privilege and litigation privilege. While solicitor-client privilege clearly lasts beyond the termination of litigation, litigation privilege is alive only during the currency of the litigation. As stated *The Law of Evidence in Canada*:

> Unlike solicitor-client communications, the privilege for third party communications in preparation for litigation does not last indefinitely. It ends with the litigation for which the reports or other communications were prepared subject to any undertaking of confidentiality. (at 660-661)

24 ATB indicates that this is the accepted principle in Canada, and points to a line of cases which follow this principle. See *Boulianne v. Flynn*, [1970] 3 O.R. 84 (Ont. Co. Ct.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (Ont. H.C.); and *Petro-Canada v. "Mary J" (The)* (1994), 98 B.C.L.R. (2d) 139 (B.C. Master). ATB also says that this approach was recently adopted by McMahon J. in *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 28 Alta. L.R. (3d) 79 (Alta. Q.B.), where he held:

> Also a privilege is lost when the other suit is ended, subject to the same exception as to solicitor client communications, but counsel correctly rely upon an Ontario decision *Boulianne v. Flynn*, [1970] 3 O.R. 84 (Co. Ct.) for the position, and I accept the accuracy of the law therein stated. (at 83)

25 ATB concludes that in this case any litigation privilege which may have attached to the Appraisal ended when the tax appeals were withdrawn. As such, the Appraisal is no longer privileged and should be produced.

WEM's Position

26 WEM concedes that the majority of cases in Canada follow the principle in *Boulianne, supra*, that litigation privilege ends when the litigation for which the document was prepared ends. However, WEM indicates that there is no appellate authority for this proposition. WEM also says that the principle that litigation privilege ends when the litigation ends is inconsistent with the purpose of litigation privilege. Litigation privilege is de-

signed to encourage candour and the pursuit of all potential avenues of support in preparation for litigation. WEM suggests that a party may be reluctant to zealously pursue its case if it fears that it may have to disclose privileged information in a future action which is completely unforeseen.

27 WEM submits that the better view is that followed in English authorities and pre-*Bouilianne* cases in Canada. These cases hold that material prepared in anticipation of litigation in one action retains privilege in subsequent litigation, even if that subsequent litigation is entirely unrelated to the original action. See *"Aegis Blaze" (The)*, [1986] 1 Lloyd's Rep. 203 (Eng. C.A.); *Northwestern Utilities Ltd. v. Century Indemnity Co.*, [1934] 3 W.W.R. 139 (Alta. T.D.); and *Mann v. American Automobile Insurance Co.*, [1938] 1 W.W.R. 538 (B.C. C.A.). WEM says that the principle in these cases is consistent with the purpose of litigation privilege, as it allows parties to candidly prepare their cases without fear that the information they develop will harm them in the future.

Disposition

28 I do not accept WEM's proposal that I disregard the line of Canadian authority in this matter and follow the approach used in England. I see no reason to depart from the line of Canadian authority in this area, which has recently been approved in our court in the *Canada Southern Petroleum Ltd.* case. Litigation privilege will attach only when a party has developed material in anticipation of litigation. To find that a party may claim privilege over material which was not developed in anticipation of that litigation is in itself inconsistent with the basic principles of litigation privilege. The concern expressed by counsel for WEM that a party may not be free to pursue its case it alleviated by the wide approach which the courts have taken to what constitutes "anticipated litigation". The Canadian cases have held that privilege exists not only for the specific litigation for which it was developed, but it is also for future litigation which is even remotely connected to the original litigation.

29 Therefore, I find that even if the Appraisal was created in anticipation of litigation, the privilege which once attached to it expired when WEM abandoned its appeal.

3) If the Appraisal was created in anticipation of litigation, did WEM waive that privilege by submitting the document in the appeal before the Assessment Review Board?

ATB's Position

30 The second ground of argument put forth by ATB if the Appraisal is found to be privileged is that WEM waived privilege when it submitted the Appraisal to the Assessment Review Board. It is trite law that when an expert's report is presented to the court, any privilege attaching to that report is waived. WEM voluntarily disclosed the Appraisal to the Assessment Review Board and the City of Edmonton, who were WEM's adversaries on the appeal. As such, ATB says that WEM intended to waive privilege over the Appraisal Report and should produce it in this action.

WEM's Position

31 WEM says that it did not waive privilege by submitting the report to the Assessment Review Board, as it expected and intended that the materials submitted at the hearing would be treated in confidence. As such, any waiver which may result from submitting the Appraisal to the Board was of a limited nature only and does not act as a waiver *vis-a-vis* ATB in this action.

32 WEM refers to *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, *supra*, where the Laycraft C.J.A. said:

> Secondly, to hand a privileged document to one party to litigation for the purpose of settlement or any other purpose, does not, in my opinion, show any intention that the privilege is thereby to terminant as to other parties or in related litigation. (at 297)

33 WEM also refers to McMahon J.'s decision in *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 202 A.R. 19 (Alta. Q.B.) where he accepted the principle of limited waiver. He further held that in the dominant test for determining whether there has been waiver is fairness.

Disposition

34 In my view WEM waived privilege over the Appraisal Report when it submitted it to the Assessment Review Board. I do not see *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, *supra* as overruling the principle that a party waives privilege by submitting documents in a public proceeding. As indicated by Laycraft C.J.A. at 297:

> It must first be noted that the director's inquiry is not a public proceeding. The director hears witnesses in private and even in the absence of other subjects of the inquiry and their solicitors.

35 Although counsel was not able to advise whether hearings before the Assessment Review Board are held in private, in my experience property tax appeal hearings are open to the public. Again, the onus of proving privilege lies on the person asserting privilege. There is no evidence before me to suggest that WEM's hearing was held in private. As such, this case is distinguishable from *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, *supra*.

36 Further, in my view it is fair to find that WEM waived privilege over the Appraisal by submitting it to the Board. Had the Board accepted the Appraisal it would have assessed the property tax accordingly, and this amount would have been publicly available via the Municipal Tax Roll. As such, the amount of the Appraisal would have been easily ascertainable through simple calculation. Therefore, at the time WEM submitted the Appraisal to the Board, it must have intended to waive any privilege attaching to the Appraisal as the information in the Appraisal clearly had the potential to become public knowledge. WEM cannot now claim that by virtue of the Board's rejection of the Appraisal, its original intention of waiving privilege is somehow vitiated.

37 I find that by submitting the Appraisal to the Assessment Review Board, WEM waived any privilege which it may have been able to claim over the Appraisal.

4) Is WEM contractually obligated to produce the Appraisal?

ATB's Position

38 ATB says that even if the Appraisal is privileged, the Loan Agreements give ATB a very broad power to inspect all of WEM's records regarding the Mall. In addition, the Loan Agreement has a specific provision covering property taxes:

> Article 7.01 "Covenants Relating to the Mall": The Mortgagor covenants with that Mortgagee that the Mortgagor shall:

. . . . .

(4) deal with property taxes, providing that they must be paid and provide evidence that they have been paid, or if WEM contests the tax assessment in good faith by appropriate proceedings, shall give notice to ATB prior to commencing such proceedings;

. . . . .

39 The same article also provides that:

(7) at all reasonable times (as well after as before the security hereby constituted has become enforceable and the Mortgagee has determined or become bound to enforce the same), permit the Mortgagee or its authorized representatives access to, and to examine, copy or make abstracts from, any or all records of the Mortgagor, whether or not located in the Mall, relating to the Mall or any part thereof and to make senior officers of the Mortgagor available to discuss the business and affairs of the Mall with authorized representatives of the Mortgagee. (The underlining is mine.)

40 ATB says that these provisions require WEM to produce the Appraisal Report as an appraisal of the Mall is a matter relating to the Mall and constitutes a record of the Mall within the meaning of Article 7.10 (7). ATB suggests that this contractual provision wherein WEM agreed to permit ATB access to any relevant document overrides any claim of privilege that WEM might have over the Appraisal.

WEM's Position

41 WEM argues that a narrow interpretation should be given to the contractual right which ATB has to examine records of the Mall. WEM suggests the parties intended to limit any right of access to books and records of an accounting or financial nature to assure ATB that the monies are handled in accordance with the Loan Agreements. WEM says that this intention is clear when the Loan Agreements are examined in their entirety. For example, section 8.01 (c) says:

Mallco group of companies shall (i) keep proper books of records and account [sic] in which entries in conformity with generally accepted accounting principles or as otherwise required under any loan document and under all requirements of law shall be made if all dealings and transactions in relations to its business and activities, and (ii) upon reasonable notice, exercise their rights under leases to permit representatives of the directing party and/or its accountants to visit and inspect the mortgaged property and examine and make abstracts from any of its books and records at any reasonable time and as often as may reasonably by the directing party...

42 WEM argues that section 7.01 does not specifically say that ATB may examine documents relating to tax appeals, and that it is significant that the section dealing with contested property tax matters does not specifically give ATB access to the materials used therein. WEM says that if the parties had intended to give ATB access to materials prepared for property tax assessments, the Agreement would have contained specific provision to that effect.

43 WEM further says that it is against public policy to interpret the Loan Agreements in such a way as to require WEM to produce privileged documents. Privilege is an important right which should not be "frittered" away. WEM states that any contractual provision purporting to give a blanket waiver of privilege must do so in

clear and unambiguous terms. As no such provision exists in this case, WEM says that it has no contractual obligation to produce privileged documents.

Disposition

44 In my view the Appraisal falls within the category of documents to which ATB has a contractual right of access. The right of inspection given to ATB in Article 7.01 (7) encompasses a broad range of documents, being "any or all records of the Mortgagor, whether or not located in the Mall, relating to the Mall or any part thereof". Clearly a property valuation of the Mall would fall into this category.

45 It may be that a broad provision such as this one is not sufficient to compel a party to produce privileged documents. However, since I have found that the Appraisal is not privileged, I need not address this issue.

Conclusion

46 I find that WEM must produce the Colliers Appraisal and other related material which was submitted to the Assessment Review Board.

47 Each party will bear their own costs.

Motion granted.

FN* Errata dated May 28, 1999 correcting counsel has been incorporated herein.

END OF DOCUMENT

TAB 4

Sanagan's

Encyclopedia of

Words and Phrases Legal Maxims

Canada

5th Edition

Compiled and Edited by:

JOHN D. GARDNER, B.A., LL.B.

And

KAREN M. GARDNER, Dip. C.S.

Volume 3

J to P

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Tri-Tex Co. c. Gideon (1999), 1 C.P.R. (4th) 160 (Que. C.A.).

LITIGANT

See PARTY
PERSON ADVERSE IN INTEREST

LITIGATION

See also LITIGATION PRIVILEGE

(Can.) Under a clause in a will, the testator purported to disentitle any person to a share in his estate "if the person shall institute or cause to be commenced any *litigation* in connection with this. . . my will". The term "litigation" encompasses the act of carrying on a "legal proceeding", i.e. one in which resolution by a judicial tribunal is sought of an issue between two parties. Clearly, an application for relief under the Wills Variation Act, R.S.B.C. 1979, c. 435 is included within the scope of the term "litigation" under the clause. The clause is therefore void as being contrary to public policy.

Kent v. McKay (1982), 38 B.C.L.R. 216 (S.C.).

(Alta.) For purposes of the applicability of "litigation privilege", the term "litigation" refers to any proceeding in which one party is required to make prior disclosure of its documents to the other party or parties.

Whitehead v. Braidnor Construction Ltd., 19 M.V.R. (4th) 44, 2001 CarswellAlta 1500, 2001 ABQB 994 (Alta. Q.B.).

LITIGATION GUARDIAN

See also GUARDIAN *AD LITEM*

(Can.) "A litigation guardian is responsible for commencing, maintaining or defending an action on behalf of a person." (Per Major, J. at para. 18 [W.W.R.].)

Gronnerud (Litigation Guardian of) v. Gronnerud Estate, [2002] 6 W.W.R. 203, 2002 CarswellSask 248, 2002 CarswellSask 249, 2002 SCC 38, 211 D.L.R. (4th) 673, 43 E.T.R. (2d) 169, (*sub nom. Gronnerud v. Gronnerud Estate*) 287 N.R. 1, 26 R.F.L. (5th) 331, (*sub nom. Gronnerud v. Gronnerud Estate*) 217 Sask. R. 161, (*sub nom. Gronnerud v. Gronnerud Estate*) 265 W.A.C. 161 (S.C.C.).

(Sask.) "A litigation guardian [or guardian *ad litem*] is now generally defined as a person appointed to protect the interests of the child and to present his or her conclusions about the child's best interests to the court. . . . A litigation guardian, in short, takes the position of the child in the court action. The litigation guardian then carries on the proceeding for the child, instructing counsel and making decisions on representation. The litigation guardian puts forward his or her own opinion as to what is best for the child." (Per Ryan-Froslie, J. at pp. 185-186 [W.W.R.].)

Re F. (T.L.), [2001] 10 W.W.R. 179, 2001 SKQB 271, 208 Sask. R. 98, 8 C.P.C. (5th) 175, 19 R.F.L. (5th) 265, 2001 CarswellSask 385 (Q.B.).

LITIGATION PENDING

(Man.) Section 10 of the Interpretation Act, 1957 (Man.) provides that the provisions of an enactment do not affect "litigation pending" at the time of the enactment, unless the contrary is expressly stated therein. "Litigation pending" means any legal proceeding, suit or action remaining undecided or awaiting decision or settlement.

Garnham v. Tessier and Winter (1959), 27 W.W.R. 682 (C.A.).

LITIGATION PRIVILEGE

See also ADMISSIBLE
ANTICIPATION OF LITIGATION
CASE-BY-CASE PRIVILEGE
CLASS PRIVILEGE
CONFIDENTIALITY
DOMINANT PURPOSE
DOMINANT PURPOSE TEST
INFORMER PRIVILEGE
LEGAL PROFESSIONAL PRIVILEGE
LITIGATION
PRIVILEGE
SOLICITOR-AND-CLIENT PRIVILEGE
SOLICITOR-CLIENT RELATIONSHIP
WAIVER OF PRIVILEGE
WORK PRODUCT/LAWYER'S BRIEF RULE
WORK PRODUCT PRIVILEGE

TAB 5

Board's powers, general

Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Board's powers, miscellaneous

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) Repealed: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1)

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

TAB 6

28. Interrogatories

28.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;

(b) simplify the issues;

(c) permit a full and satisfactory understanding of the matters to be considered; or

(d) expedite the proceeding.

28.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;

(b) be numbered consecutively, or as otherwise directed by the Board, in respect of each item of information requested, and should contain a specific reference to the evidence;

(c) be grouped together according to the issues to which they relate;

(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;

(e) be filed and served as directed by the Board; and

(f) set out the date on which they are filed and served.

29. Responses to Interrogatories

29.01 Subject to **Rule 29.02**, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;

(b) group the responses together according to the issue to which they relate;

(c) repeat the question at the beginning of its response;

(d) respond to each interrogatory on a separate page or pages;

(e) number each response to correspond with each item of information requested or with the relevant exhibit or evidence;

(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;

(g) file and serve the response as directed by the Board; and

(h) set out the date on which the response is filed and served.

29.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;

(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response; or

(c) otherwise explaining why such a response cannot be given.

A party may request that all or any part of a response to an interrogatory be held in confidence by the Board in accordance with **Rule 10**.

29.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

29.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

30. Identification of Issues

30.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

TAB 7

Disclosure

5.4(1)If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1)The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2)Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Evidence

What is admissible in evidence at a hearing

15.(1)Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2)Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3)Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4)Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5)Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6)A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. R.S.O. 1990, c. S.22, s. 15.

Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1. 1999, c. 12, Sched. B, s. 16 (8).

Rules

25.1 (1) A tribunal may make rules governing the practice and procedure before it. 1994, c. 27, s. 56 (38).