
Court of Appeal for Saskatchewan
Docket: CACV4358

Citation: *Boldt v Saskatchewan Telecommunications*, 2025 SKCA 54

Date: 2025-05-08

Between:

Ryan Boldt

*Appellant
(Plaintiff)*

And

Saskatchewan Telecommunications

*Respondent
(Non-party Respondent)*

And

Telus Communications Inc., Access Communications Co-operative Limited

Respondents (Non-party Respondents)

Before: Jackson, McCreary, and Kilback JJ.A.

Disposition: Appeal allowed (orally)

Written reasons by: The Court

On appeal from: QBG-RG-01125-2021, Regina (Sask KB)
Appeal heard: May 8, 2025

Counsel: Madlin Lucyk for the Appellant
Nancy Drew for the Respondent, Saskatchewan Telecommunications
No one appearing for Telus Communications Inc. or Access
Communications Co-operative Limited

The Court

I. INTRODUCTION

[1] Ryan Boldt appeals from an April 3, 2024 decision of a judge of the Court of King’s Bench, sitting in Chambers (*Boldt v Doe* (3 April 2024) Regina, QBG-RG-01125-2021 (Sask KB) [Chambers Decision]). The Chambers judge dismissed Mr. Boldt’s application made pursuant to Rule 5-15 of *The King’s Bench Rules* for an order requiring Saskatchewan Telecommunications [SaskTel], a non-party, to disclose documents associated with activity from certain internet protocol [IP] addresses [Identifying Documents].

[2] Among other things, Mr. Boldt alleges that the Chambers judge erred when he determined that any Identifying Documents that might be in the possession or control of SaskTel was protected from disclosure by solicitor-client privilege.

[3] The appeal was heard on May 8, 2025, and the appeal was allowed, with a promise of reasons to follow. These are our reasons.

II. BACKGROUND

A. Mr. Boldt’s claim

[4] On June 1, 2021, Mr. Boldt caused a claim to be issued against Jane Doe, Betty Doe, Sally Doe, as well as Facebook, Inc. and Facebook Canada, Ltd. A later amendment was made to re-name the two Facebook defendants as Meta Platforms, Inc.

[5] In his claim, Mr. Boldt alleges that the defendant, Betty Doe, created a false and defamatory story that she was sexually harassed by Mr. Boldt in the course of her employment. He further asserts that Betty Doe delivered the false and defamatory story to the defendants, Jane Doe and Sally Doe [Account Administrators] with the intention that it would be published on an Instagram account they administered called “victimsvoicesregina”. Mr. Boldt alleges that on July 25, 2020, the Account Administrators published the false and defamatory story on a publicly accessible Instagram page [Post], without taking any steps to verify the accuracy of the Post or the associated comments made by others on the page. Mr. Boldt claims that he suffered damages because of the

defamatory Post, which he quantifies at \$1,000,000. He also seeks punitive and aggravated damages.

[6] Mr. Boldt does not know the identity of Betty Doe, or the Account Administrators. He needs to ascertain their identities to serve his claim. For such purpose, he applied pursuant to Rule 5-15 of *The King's Bench Rules* for disclosure of Identifying Documents in the custody or control of Telus Communications Inc. [Telus], Access Communications Co-operative Limited [Access] and SaskTel respecting IP addresses associated with the Post or other postings on the “victimsvoicesregina” Instagram page. While an application for disclosure from a non-party is expressly permitted in the *Rules*, it is also available under the common law, often described as a *Norwich* application: see *Norwich Pharmacal Co. v Customs and Excise Commissioners*, [1974] AC 133 (HL).

[7] Specifically, Mr. Boldt sought an order directing Telus, Access and SaskTel to produce Identifying Documents relating to activity from certain IP addresses at specified dates and times that is in their custody or control containing the following information: account holder name(s); account holder address(es); account holder billing information; account holder email addresses; physical addresses related to IP addresses; and any other identifying information.

[8] While Telus and Access took no position respecting the application for disclosure, SaskTel opposed the motion on the basis that the documents sought were subject to solicitor-client privilege. It also argued that Mr. Boldt had not established that the Identifying Documents were relevant because he had failed to show the IP addresses and posting times for which the Identifying Documents were sought had any connection to his claim.

1. The evidence

[9] Mr. Boldt filed several affidavits in support of his application. For the purposes of this appeal, the most relevant is a November 14, 2023 affidavit of Kevin Ripa, a cyber security investigator retained by legal counsel for Mr. Boldt. In that affidavit, Mr. Ripa averred as follows:

6. I have reviewed the information disclosed by Facebook Inc. in accordance with this Honourable Court's Order on the proceeding in [A.H.] v Doe et al OBG [*sic*] 1408, 2020, (hereinafter the “identifying documents and information”). The information disclosed by Facebook Inc. included a list of time the victimsvoicesregina Instagram account was accessed by unknown individuals and the respective IP addresses associated

with each instance of access. Through further investigating of the IP addresses provided by Facebook Inc., I have determined that Jane Doe, Sally Doe and Betty Doe accessed the victimsvoicesregina Instagram account using the following Internet Service Providers:

- a. Telus Communications Inc.
- b. Saskatchewan Telecommunications
- c. Access Communications Co-operative Limited

7. I have collated a chart of the instances of access to the victimsvoicesregina Instagram account over the period of time the defamatory post in question was made, demonstrating the respective date and time of login-in, IP address and Internet Service provider and which is attached hereto as Exhibit “B”. I believe that the Respondents [SaskTel] (as Internet Service Providers) hold account information including account holder names, account holder addresses, physical addresses related to IP addressed [sic], account holder billing information and account holder email addresses.

[10] SaskTel filed two affidavits in response to the application. The first was from Linda Mackin, SaskTel’s security manager, in which Ms. Mackin stated that SaskTel did not have possession, control or custody of any of the Identifying Documents:

4. I reviewed the information contained in the herein Application and then checked our database system for records, and SaskTel is not in possession, custody or control of any Records or documents that include the information of the names of the persons using the IP addresses cited in the Application on the dates indicated.

[11] The second affidavit was from Lindsay Gatzke, an administrator in SaskTel’s legal department. In her affidavit, Ms. Gatzke addressed the issue of whether SaskTel possessed or controlled identifying documents and information in respect of another litigation file, which was referred to by Mr. Ripa in his affidavit, “[A.H.] v Doe, et al” QBG No 1408 of 2020 [A.H.], in which A.H. sought similar disclosure from SaskTel, again as a non-party. Ms. Gatzke stated:

4. I was asked by SaskTel legal counsel to locate and review the Legal Department file regarding an application for documents in relation to [A.H.]....

5. I was able to locate electronic records on our Legal Department file relating to the [A.H.] file. There is no other indication that the documents on the Legal Department file are copied or archived with any other Department of SaskTel.

2. The Chambers Decision

[12] At the hearing in Chambers, Mr. Boldt narrowed his application for disclosure by seeking to have SaskTel disclose the Identifying Documents relevant to the identities of the defendants, Jane Doe, Sally Doe, and Betty Doe, which might be held on SaskTel’s legal file respecting the A.H. litigation. Presumably, the narrowed scope of the application was because SaskTel had

averred that it did not possess, have custody of, or control of the Identifying Documents, other than those that might be on its legal file relating to A.H.

[13] SaskTel took the position that the Identifying Documents sought by Mr. Boldt were subject to solicitor-client privilege because, if they existed, they were located on files held in SaskTel's legal department. It also argued that Mr. Boldt had not established how those documents and SaskTel's response to a court order for disclosure from SaskTel as a non-party in the A.H. litigation were relevant to a matter at issue in *his* claim, nor that SaskTel might be required to produce those documents at trial, both of which are criteria pursuant to Rule 5-15(1).

[14] While SaskTel argued the issues of solicitor-client privilege *and* relevancy, the Chambers judge dismissed the application as against SaskTel on the grounds that the Identifying Documents need not be disclosed by SaskTel because, if they existed, the information in them was protected by solicitor-client privilege. The Chambers judge concluded as follows:

[28] The assumption here is that the relationship I am to consider is the legal relationship between the client (SaskTel) and the lawyer (in-house legal counsel employed by SaskTel). I do not believe the legal relationship here is between SaskTel's lawyers and the undisclosed IP addressees. However if it had been between SaskTel's lawyers who were representing the undisclosed IP addressees, then this would also be a confidential legal relationship.

[29] I can do no better than to quote from SaskTel's brief: "the request from the Applicant in this matter has moved from a request for traceable IP data records to a request for information obtained by the SaskTel lawyers in the course of providing legal services" (SaskTel's brief, para. 17).

[30] I am of the view that any information contained in any legal files held by a lawyer for SaskTel is cloaked in solicitor-client privilege and confidentiality and not subject to Rule 5-15(1) or a *Norwich* application. In my opinion, the interests of justice factor favours the legal confidentiality principle over the applicant's interests. The confidentiality principle clearly trumps the request for disclosure of these legal files in this application.

[15] In the result, the application against SaskTel was dismissed, but an order for disclosure was granted against Access and Telus.

III. ANALYSIS

A. Issues and standard of review

[16] Mr. Boldt alleges that the Chambers judge erred by: (1) failing to consider material evidence; (2) misapprehending what disclosure Mr. Boldt was seeking; (3) determining that the information contained in the documents applied for was subject to solicitor-client privilege; and (4) determining that information contained in documents protected by solicitor-client privilege was not subject to disclosure pursuant to Rule 5-15, or a *Norwich* application.

[17] Our analysis herein deals only with the grounds of appeal surrounding whether the Identifying Documents could be found to be subject to solicitor-client privilege or disclosure pursuant to Rule 5-15(1). Because we have determined that the appeal should be allowed on these footings, it is unnecessary for us to consider the other grounds of appeal.

[18] The Chambers judge's decision to dismiss the application for non-party disclosure was discretionary, and therefore is reviewable on the standard of review set out in *Kot v Kot*, 2021 SKCA 4, 63 ETR (4th) 161:

[20] In summary, these cases confirm that appellate intervention in a discretionary decision is appropriate where the judge made a palpable and overriding error in their assessment of the facts, including as a result of misapprehending or failing to consider material evidence. Appellate intervention is also appropriate where the judge failed to correctly identify the legal criteria which governed the exercise of their discretion or misapplied those criteria, thereby committing an error of law. Such errors may include a failure to give any or sufficient weight to a relevant consideration.

1. Record did not demonstrate that the Identifying Documents were protected by solicitor-client privilege

[19] Respectfully, it is our view that the Chambers judge erred in law when he determined that the Identifying Documents sought by Mr. Boldt were covered by solicitor-client privilege by virtue of the sole fact that they were held on a file in SaskTel's legal department or located in legal files held by a lawyer for SaskTel. He also erred when he determined that such documents cannot be disclosed under Rule 5-15 (or, alternatively, by way of a *Norwich* application).

[20] Rule 5-15 of *The King's Bench Rules* stipulates that a party seeking disclosure from a non-party must establish that the document sought is in the person's possession or control, is relevant to any matter at issue, and that it *might* be required to be produced at trial. The relevant part of the Rule states:

Obtaining documents from others

5-15(1) On application, and after notice of the application is personally served on the person affected by it, the Court may order the production of a document from a person who is not a party at a date, time and specified place if:

- (a) the document is in the possession, custody or control of that person;
- (b) there is reason to believe that the document is relevant to any matter in issue; and
- (c) the person who has possession, custody or control of the document might be required to produce it at trial.

[21] As a starting point, a party responding to a disclosure application is obligated to disclose the existence of a document over which privilege is claimed, although it is not required to produce the contents of a privileged document: see (Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at §9.13 [Dodek]).

[22] The burden of proof rests with the party asserting privilege to demonstrate that the documents sought are, in fact, privileged. A claim of privilege is not established merely by asserting it: Dodek at §9.14; and see, *General Accident Assurance Company v Chrusz* (1999), 180 DLR (4th) 241 at para 95 (Ont CA); *British Columbia (Securities Commission) v C.W.M.*, 2003 BCCA 244 at para 47, 226 DLR (4th) 393; and *Intact Insurance Co. v 1367229 Ontario Inc.*, 2012 ONSC 5256 at para 22.

[23] From our review, the Chambers judge did not perform an analysis of whether the Identifying Documents sought by Mr. Boldt were protected by solicitor-client privilege. He simply accepted SaskTel's assertion that they had such status and quoted from SaskTel's brief for that proposition. This led him into error.

[24] It is trite law that a document, or information contained in a document, is not solicitor-client, or otherwise, privileged just because it is kept on a lawyer's file, or kept in a file in a corporate legal department. "[M]erely placing a document that would otherwise be subject to discovery, or otherwise admissible, in a lawyer's file cannot immunize it from discovery": see

Halsbury's Laws of England, *Evidence* at HEV-184 "Elements of litigation privilege" (2022 Reissue); see also *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 64, [2006] 2 SCR 319. Rather, documents must meet the criteria for privilege, and that criteria must be proven with evidence.

[25] In *Maranda v Richer*, 2003 SCC 67, [2003] 3 SCR 193, Deschamps J. made clear that the existence of solicitor-client privilege depends upon the context:

[42] Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. It is the context in which the communication takes place that justifies characterizing it as privileged....

[26] Justice Deschamps further quoted Dickson J.A. (as he then was) in *Solosky v The Queen*, [1980] 1 SCR 821 at 837, who stated the three prerequisites for solicitor-client privilege to attach: (1) it must be a communication between a solicitor and a client; (2) which entails the seeking or giving of legal advice; and (3) which is intended to be confidential by the parties.

[27] In *Redhead Equipment Ltd. v Canada (Attorney General)*, 2016 SKCA 115 at para 33, 402 DLR (4th) 649, this Court demonstrated that there is a continuum of lawyer-client communication. In order to be shielded by solicitor-client privilege, a communication must involve legal advice, rather than merely provide factual information. The Court stated as follows:

[33] The nature or content of the communication must involve legal advice. A lawyer must be acting as a lawyer giving legal advice rather than in some other non-legal capacity (*Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10, [2008] 2 SCR 574). Purely business or policy advice, as opposed to legal advice, is not privileged (*R v Campbell*, [1999] 1 SCR 565 at para 50). Documents of an accounting or factual nature or those providing strategic business direction are not privileged (*Belgravia Investments Ltd. v Canada*, 2002 FCT 649 at paras 72 and 74-75, 220 FTR 246 [Belgravia]). Documents which simply come into the possession of a lawyer that are not related to the provision of legal advice are not privileged (*General Accident Assurance Company v Chrusz* (1999), 45 OR (3d) 321 (CA) [Chrusz]). A document that is clothed with no privilege does not acquire privilege simply because it goes into the hands of a lawyer. Where the timing, format and/or nature of the factual information provided would not allow the nature of the legal advice being sought to be discerned, the communication is not privileged (*Maranda v Richer*, 2003 SCC 67 at paras 30-32, [2003] 3 SCR 193).

[28] In this case, SaskTel, the party asserting solicitor-client privilege, tendered no evidence establishing that the Identifying Documents sought were privileged. SaskTel's only evidence was that it located "electronic records" on the "Legal Department file relating to the [A.H.] file" and that it opposed production of "account holder documents or information that may be included in documents on the Legal Department file". SaskTel did not provide any evidence that would allow a court to conclude that the electronic records, account holder documents, or information contained in documents it held in its legal files constituted a communication between a solicitor and a client that involved the seeking or giving of legal advice that was intended to be confidential.

[29] Given the absence of evidence pertaining to how the Identifying Documents held by SaskTel might be solicitor-client, or otherwise, privileged, the record before the Chambers judge could not support a finding that the Identifying Documents sought had that status. In other words, the evidentiary record rendered it impossible for SaskTel to meet its burden of demonstrating that the information contained in the documents sought was protected from disclosure by any type of privilege or confidentiality. Respectfully, the Chambers judge erred in finding otherwise.

[30] The Chambers judge also erred when he asserted that documents protected by solicitor-client privilege are not subject to disclosure pursuant to Rule 5-15, or through a *Norwich* application. On the contrary, a number of Canadian legal authorities support the proposition that a document that is protected by privilege can be subject to disclosure pursuant to an application for non-party disclosure, if certain conditions are met: see, for example, *Geffen v Goodman Estate*, [1991] 2 SCR 353 at 384–386 (in the context of estate litigation); *Figley v Figley*, 2018 SKQB 102 at para 15, 21 CPC (8th) 149 (also in the context of an estate litigation); and *1061307 Ontario Inc. v Wang*, 2022 ONSC 7288 at paras 40–41 (in which the Ontario court held that a *Norwich* order can be used to secure disclosure of information within a document otherwise protected by solicitor-client privilege when redactions can be made and requested information can be excised from the remainder of the document). Thus, depending on the circumstances, disclosure of privileged documents held by a non-party can be ordered.

2. Remedy

[31] Pursuant to ss. 12(1)(a) and (d) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, this Court has the authority to allow an appeal and make any decision that could have been made by the court or tribunal appealed from. The Court has decided that the appeal should be allowed. Using the power vested in it by s. 12(1)(d), it is appropriate for this Court to order disclosure of the Identifying Documents at issue pursuant to Rule 5-15(1).

[32] SaskTel admits that it possesses or controls at least some of the Identifying Documents that Mr. Boldt seeks. We have considered the record in its entirety, and we are satisfied that Mr. Ripa's evidence, along with the December 8, 2020 production order of McMurtry J. in the A.H. matter involving SaskTel, while not necessarily relevant to the impugned Post, is relevant to the identity of at least one of Jane Doe, Betty Doe or Sally Doe. Given the general relevancy to identity, we are also satisfied that the documents sought might be required to be produced at trial, such that the requirements of Rule 5-15(1) are met.

IV. CONCLUSION

[33] The appeal is allowed.

[34] SaskTel shall produce to Mr. Boldt the Identifying Documents containing the following information forthwith:

- (a) account holder name;
- (b) account holder address;
- (c) physical address related to the IP address;
- (d) account holder billing information; and
- (e) account holder email address(es)

associated with the IP addresses, dates, and times of internet access, with SaskTel as the internet service provider, that are common to both Mr. Boldt's application and the December 8, 2020 order of McMurtry J. issued in the A.H. matter on QBG No 1408 of 2020. Any Identifying Documents

received by Mr. Boldt pursuant to this order are subject to the implied undertaking rule and shall be held by him and his solicitors in the strictest confidence and shall be used by them only for this specific litigation in which they were obtained.

[35] As we directed at the oral hearing, the parties are invited to submit a draft order for this Court's consideration.

[36] Given the nature of this application and the fact that SaskTel is a non-party, there will be no order for costs in relation to this appeal, or the application for leave to appeal.

“Jackson J.A.”

Jackson J.A.

“McCreary J.A.”

McCreary J.A.

“Kilback J.A.”

Kilback J.A.