CITATION: BIE Health Products v. Attorney General (Canada), 2024 ONSC1240
COURT FILE NO.: CV-08-362242
DATE: February 28, 2024

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BIE Health Products o/b 2037839 Ontario Ltd. v. the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada, Jim Daskalopoulos, Healthwatcher.Net Inc. and Dr. Terry Polevoy;

BEFORE: **ASSOCIATE JUSTICE C. WIEBE**

COUNSEL: Paul H. Starkman for BIE Health Products o/b 2037839 Ontario Ltd. ("BIE"); Laura Tausky for the Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada and Jim Daskalopoulos (together the "AG");

PARTY: Dr. Terry Polevoy and his representative, Marvin Ross;

HEARD: January 22, 2024.

REASONS FOR DECISION

[1] At the case management conference on November 17, 2023, Mr. Starkman advised that the plaintiff ("BIE") wanted to bring a motion for production of documents concerning the reports of the two experts the AG had served, namely the reports of Dr. Barbara Menzies and Errol Soriano. Mr. Starkman described the motion as seeking the production of all communication between the AG and Health Canada and the two experts, and of all notes and draft reports of the two experts. Ms. Tausky indicated at that time that the AG also wanted a determination of whether a privileged document inadvertently disclosed by the AG to Dr. Menzies is in fact privileged. If it is privileged, the AG will have to consider in the future whether to disclose the document or withdraw Dr. Menzies or move to allow Dr. Menzies to testify without disclosure. I set a schedule for the motion.

[2] The motion in the end was slightly broader than this. It included a request for an order for the production of the instructions given to the experts, an updated AG List of Documents with an updated Schedule B, and the aforesaid document inadvertently produced by AG to Dr. Menzies.

Background

[3] In this action, there are two issues: BIE seeks damages for alleged defamation arising from a Public Health Warning issued by Health Canada concerning "GHR" or "GHR-15," a product marketed by BIE without regulatory approval; BIE seeks declarations that the governing statutes, namely the federal *Food and Drugs Act* ("*FDA*") and *Food and Drug Regulations* (the "*Regulations*"), as they pertain to BIE's product, are unconstitutional for being beyond the jurisdiction of the federal government or a violation of sections 2(b), 8 and 12 of the *Canadian Charter of Rights and Freedoms.*

The second issue includes an allegation that *FDA* section 3, the prohibition against advertising any food, drug, cosmetic or device that purports to be a treatment for conditions itemized in Schedule A.1 of the *FDA*, is unconstitutional.

[4] The AG defends both issues. It alleges that the plaintiff violated the *FDA* and the *Regulations,* that the defendants acted in good faith and properly in executing their regulatory duties, that their response to the plaintiff's noncompliance was reasonable, and that the subject statutory provisions are constitutional.

[5] Dr. Menzies' report, dated September 30, 2021, explores the justification for the prohibition against direct to consumer advertising in *FDA* section 3. Mr. Soriano' report, dated December 23, 202, responds to the report of the plaintiff's expert, VSP Valuation Partners Ltd., concerning the damages allegedly suffered by the plaintiff.

Instructions

[6] BIE asserts that the AG has not disclosed the instructions it gave to these experts. Rule 53.03(2.1) requires that the expert witness disclose in his or her report the instructions that were given.

[7] In her report, Dr. Menzies identifies nine topics that her report covered. She did not identify these topics as stemming from her instructions. This would have been helpful. However, the AG disclosed the Witness Contract it entered into with Dr. Menzies. "Annex A" to this document contains the description of the work to be done. Under "Expert Report" are the nine instructions given to Dr. Menzies. They are the same as the topics in Dr. Menzies' report.

[8] I find that the instructions given to Dr. Menzies were disclosed.

[9] The AG also disclosed the contract it had with Mr. Soriano. The Statement of Work attached to this contract shows that Mr. Soriano's instructions were simple: respond to the damages expert report served by the plaintiff, namely the expert report of VSP Valuation Support Partners dated August 31, 2017. That is what Mr. Soriano proceeded to do in his report.

[10] I find that the instructions given to Mr. Soriano were disclosed.

Communication

[11] BIE wants to have all communication between the Department of Justice and the AG's experts disclosed, including all communication, text messages and letters between the Department of Justice and Health Canada and the experts. All such communication is *prima facie* litigation privileged.

[12] Rule 31.06(3) specifies that, at discovery, a party may obtain the "findings, opinions and conclusions" of an expert engaged by the examined party to testify. Rule 53.03 requires that the party calling the expert serve a report of the expert prior to the pretrial conference, and in Rule 53.03(2.1) specifies what must be contained in that report. These requirements include a list of the documents relied upon by the expert.

[13] In the past the courts diverged significantly as to the disclosure of communications between a lawyer and an expert. Some courts refused disclosure maintaining the litigation privilege; see *Bell Canada v. Olympia & York Developments Ltd.* (HCJ), 1989 CanLII 4170. Other courts required full disclosure; see *Brown (Litigation Guardian of) v. Lavery,* 2002 CanLII 49411 (ONSC).

[14] In *Moore v. Getahun*, 2015 ONCA 55 (CA) at paragraph 70 the Court of Appeal held that litigation privilege continued to apply to communication between a lawyer and the expert. In paragraph 64, the Court held that this communication served the useful purpose of helping the expert clarify the report and make it understandable and appropriate. This privilege applies even when the party serves the report and calls the expert to testify. However, the Court stated in paragraphs 77 to 78 that if the party seeking disclosure can show "reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness' duties of independence and objectivity," the court may order disclosure of such communications.

[15] BIE alleges that it has established such "reasonable grounds." I disagree. First, BIE alleges that written instructions were not disclosed. As stated above, those instructions have been disclosed. They correlate directly to the subject expert reports and do not show undue interference by counsel.

[16] Second, BIE alleges in the case of Dr. Menzies that she assumed in her report that GHR-15 is a drug without conducting her own analysis. I do not agree. In her report, Dr. Menzies in fact explains at page 33 that the health related claims of GHR-15 on the BIE website were, in her opinion, consistent with the definition of a "drug" in the *FDA,* "(b) restoring, correcting or modifying organic functions in human beings or animals . . ." I am, therefore, satisfied that she reached her conclusion on her own and not through interference of counsel.

[17] Third, BIE alleges that the defendants produced "no foundational information" for the expert reports, thereby creating the inference that counsel unduly affected what the experts relied upon. I do not agree. In the course of 2023, the defendants disclosed over 150 documents that they provided to the experts. This disclosure satisfies me that there was no such undue interference by counsel.

[18] Fourth, BIE alleges that the use made by Mr. Soriano of allegedly "irrelevant" US sales data creates the inference that counsel interfered and caused him to do so. I do not agree. Mr. Soriano used this data as a part of the analysis he decided upon. He calculated BIE's financial loss by comparing the revenue generated in a US scenario with one generated in a Canadian scenario. This is a method decided upon by Mr. Soriano, not by counsel.

[19] Fifth, BIE alleges that the inadvertent disclosure to Dr. Menzies of the allegedly privileged document that is the subject matter of this motion creates the inference that counsel interfered unduly with the expert. I do not agree. There was no evidence that this disclosure was anything but inadvertent. While this raises the question of whether this document, if privileged, should be produced, that does not lead to the conclusion that counsel unduly interfered with the expert.

[20] Sixth, BIE alleges that the disclosure of an affidavit affirmed by one Ann Sztuke-Fournier in 2006 in another action, *CanWest Mediaworks Inc. v. Attorney General of Canada,* to Dr. Menzies creates the inference that counsel unduly interfered with her work. Again, I do not agree. This affidavit sets

out the history of the *FDA* as it pertains to direct to consumer advertising of prescription drugs, the regulatory regime relating to prescription drugs, and Health Canada's oversight of advertising activity. This information is clearly relevant to Dr. Menzies' report. There is no evidence that in producing this document to Dr. Menzies, counsel instructed her to use or be influenced by the affidavit in any way, or at all. The transmission of relevant information to an expert *per se* does not create the inference of impropriety; see *Bruell Contracting Limited v. J. & P. Leveque Bros. Haulage Limited,* 2015 ONSC 273 at paragraph 53.

[21] With BIE having failed to establish proof of reasonable grounds to suspect undue interference with the work of Dr. Menzies and Mr. Soriano, I am not prepared to order the requested disclosure of communication.

Expert notes and draft reports

[22] BIE wants the disclosure of all the experts' notes and draft reports. The analysis mandated by *Moore* applies here as well. This documentation is *prima facie* litigation privileged. I have already gone through BIE's argument as to the reasonable grounds to suspect that counsel interfered with the expert witnesses' duty of independence and objectivity. I reiterate, for the reasons stated above, that I do not accept this argument.

[23] In his factum, Mr. Starkman referred to the decision in *Westerhof v. Gee Estate,* 2015 ONCA 206. In this case, the court dealt with in part the disclosure obligations concerning participant experts, not opinion experts engaged by the parties to give opinion evidence, such as Dr. Menzies and Mr. Soriano. The court held that notes and drafts of such participant experts are discoverable as part of the usual discovery process. This only makes sense. Participant experts are like fact witnesses. Their notes and drafts were not prepared for the purpose of litigation and would not be subject to litigation privilege. This case is clearly distinguishable.

[24] I, therefore, will not order the requested disclosure of notes and draft reports.

Updated Schedule B

[25] BIE wants the AG to serve an updated List of Documents containing an updated Schedule B. The AG served its 7th Supplementary List of Documents on September 16, 2021. Rule 30.07 requires that after a party has served an affidavit of documents and then comes into possession, power and control of relevant documents that "are not privileged," it must "forthwith" serve a supplementary affidavit of documents updating the served affidavit of documents.

[26] I am not satisfied that an updated List of Documents is required in this case. The disclosure of the documents the AG gave to its expert witnesses is governed by Rule 53.03(2.1). I was given no authority for the proposition that these documents have to be separately listed as well in a supplementary affidavit of documents. As for the communications, notes and draft reports we have been discussing, in this case I have concluded that litigation continues to apply to these documents. Therefore, they do not have to be listed in a supplementary affidavit of documents. Finally, there was no evidence that the AG has come into the power, possession and control of other relevant documents.

[27] I, therefore, do not order the requested updated List of Documents.

Inadvertently disclosed document

[28] This document is entitled, "CECD-DCVIU File Sheet BIE/GHR." It is undisputed that the document was inadvertently disclosed in unredacted form to Dr. Menzies. BIE wants it disclosed in unredacted form to BIE as well.

[29] This portion of the motion is limited in scope. I must decide whether the document is indeed solicitor-client privileged, as the AG maintains. If it is, the AG must then decide whether to bring a subsequent motion to allow Dr. Menzies to be used as its expert witness without disclosing the document, on the basis that the document did not influence Dr. Menzies' opinion. If such a motion is unsuccessful, the AG must then decide whether to withdraw Dr. Menzies as an expert witnesses or disclose the entire document. On the other hand, if I find that the document is not solicitor-client privileged, the document in unredacted form must be disclosed forthwith.

[30] The AG disclosed a redacted version of the document to BIE. The AG filed the document with the court in unredacted form as an exhibit to an affidavit sworn by one Gabriela Plati Trotto on December 20, 2023. Solicitor-client privilege attaches to documents or parts of documents that identify the lawyer giving the legal advice and the legal advice itself; see *Guelph (City) v. Super Blue Box Recycling Corp.,* [2004] OTC 961, 134 ACWS (3d)787 at paragraphs 87,106 and 120.

[31] Having reviewed the unredacted document, I am satisfied that the redacted portions of the document are indeed subject to solicitor-client privilege. They identify the lawyer giving the legal advice and the legal advice itself. I cannot and will not say more on this topic. As a result, I will not order that the redacted portions be disclosed.

[32] There was discussion as to whether the redactions contained foundational information that must be disclosed. The requirement in Rule 31.06(3) to disclose the "findings, opinions and conclusions" of an expert witness called to testify has been interpreted as requiring the disclosure of facts contained in a privileged document given to that expert that may have affected the expert's opinion; see *Conceicao Farms Inc. v. Zeneca Corp.,* (2006), 83 O.R.(3d)792 (Ont. C.A.) at paragraphs 11-12. Having reviewed the information covered by the redactions in this document, I agree with Ms. Tausky that the redactions do not contain such foundational information. The foundational information is contained in the unredacted portions of the document. I will, therefore, make no further order concerning this document.

Costs

[33] Concerning the costs of the motion, the parties filed costs outlines. The AG costs outline shows $11,956.99 in partial indemnity costs and $14,946.90 in substantial indemnity costs. The BIE costs outline shows $15,448.23 in partial indemnity costs, $20,187.45 in substantial indemnity costs and $26,347.08 in actual costs.

[34] I believe I have enough to make a fair and reasonable costs award. The AG is clearly the successful party and should get costs. There was nothing in this motion that warrants the imposition of substantial indemnity costs. BIE's position, while unsuccessful throughout, was not without some

merit. I also conclude that the AG costs outline represents a fair reflection of what BIE could reasonably expect to pay in the event of a loss. The number of hours spent on the motion by each side was about the same. Ms. Tausky's claimed hourly rate is below what Mr. Starkman claimed for his student and clerk, much less than for himself. I, therefore, have decided to award the AG **$12,000** in partial indemnity costs, which must be paid by BIE in thirty (30) days from today.

[35] To be fair to the parties, particularly in the event relevant offers to settle were exchanged, I have decided to give the parties an opportunity to challenge this award. Should either party be dissatisfied with this award, they may serve, file and upload written submissions on costs of no more than two (2) pages on or before **March 5, 2024**. If that happens, my present costs award will be deemed to be set aside. The opposing party may then serve, file and upload written responding submissions on costs of no more than two (2) pages on or before **March 11, 2024**. Keep in mind that, in the event of a challenge, my final decision may go in any direction and will add the costs of the challenge to the award.

DATE: February 28, 2024

ASSOCIATE JUSTICE C. WIEBE