[Indexed as: **British Columbia Emergency Health Services and Ambulance Paramedics of British Columbia (CUPE, Local 873), Re**]

BRITISH COLUMBIA EMERGENCY HEALTH SERVICES (the "Employer") and AMBULANCE PARAMEDICS OF BRITISH COLUMBIA, CUPE LOCAL 873 (the "Union")

British Columbia Arbitration

Docket: None given.

Robert Pekeles Member

Judgment: March 10, 2017

Procedure —— Production of documents — Prior to hearing —— Grievance concerning employer's unilateral investigation of complaints and payments made to employees — Union seeking production of investigator's report — Solicitor-client privilege attached to report — Employer waived privilege over legal advice given with respect to employees — Employer required to produce majority of report.

Evidence —— Privilege — Solicitor-client privilege —— Investigator's report commissioned by employer into workplace harassment allegations — Investigator also acted as legal counsel to employer — Solicitor-client privilege attached to report — Employer expressly and voluntarily waived privilege over part of legal advice regarding employees — Fairness and consistency require conclusion that privilege waived over entirety of legal advice — Balance of report protected from disclosure.

Evidence —— Privilege — Confidentiality —— Investigator's report into complaints of workplace harassment — Solicitor-client privilege waived with respect to portion of report that contained legal advice — Necessary for majority of report to be disclosed in order to achieve just result and fair hearing — Order for disclosure subject to Ryan conditions — Remainder of report protected by solicitor-client privilege.

[See *Brown & Beatty*, 3:1420; 3:1422; 3:4346]

Cases considered by *Robert Pekeles Member*:

Biehl v. Strang (2011), 2011 BCSC 213, 2011 CarswellBC 304, 8 C.P.C. (7th) 31, [2011] B.C.J. No. 274 (B.C. S.C.) — considered

Blood Tribe Department of Health v. Canada (Privacy Commissioner) (2008), 2008 SCC 44, 2008 CarswellNat 2244, 2008 CarswellNat 2245, (sub nom. *Privacy Commissioner of Canada v. Blood Tribe Department of Health)* 2008 C.L.L.C. 210-030, [2008] S.C.J. No. 45, 67 C.P.R. (4th) 1, 376 N.R.

327, 74 Admin. L.R. (4th) 38, 294 D.L.R. (4th) 385, (sub nom. *Canada (Privacy Commissioner) v. Blood Tribe Department of Health)* [2008] 2 S.C.R. 574 (S.C.C.) — referred to

Camosun College v. Levelton Engineering Ltd. (2014), 2014 BCSC 1190, 2014 CarswellBC 1895, [2014] B.C.J. No. 1353, 66 B.C.L.R. (5th) 402, 38 C.L.R. (4th) 72 (B.C. S.C.) — referred to

Christensen and Ambulance Paramedics of British Columbia (CUPE, Local 873), Re (2015), 2015 CarswellBC 3637 (B.C. L.R.B.) — referred to

Cimolai v. Hall (2004), 2004 BCSC 153, 2004 CarswellBC 415, 25 B.C.L.R. (4th) 117, 22 C.C.L.T. (3d) 221, [2004] B.C.J. No. 187 (B.C. S.C.) — followed

College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner) (2002), 2002 BCCA 665, 2002 CarswellBC 2942, [2003] 2 W.W.R. 279, 9 B.C.L.R. (4th) 1, 23 C.P.R. (4th) 185, 176 B.C.A.C. 61, 290 W.A.C. 61, [2002] B.C.J. No. 2779 (B.C. C.A.) — considered

Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada (2004), 2004 BCCA 512, 2004 CarswellBC 2322, 245 D.L.R. (4th) 443, 3 C.P.C. (6th) 69, 204 B.C.A.C. 208, 333 W.A.C. 208, [2005] 2 W.W.R. 434, 36 B.C.L.R. (4th) 70, [2004] B.C.J. No. 2045 (B.C. C.A.) — considered

Gower v. Tolko Manitoba Inc. (2001), 2001 MBCA 11, 2001 CarswellMan 24, 7 C.C.E.L. (3d) 1, 196 D.L.R. (4th) 716, 153 Man. R. (2d) 20, 238 W.A.C. 20, [2001] 4 W.W.R. 622, 2 C.P.C. (5th) 197, [2001] M.J. No. 39 (Man. C.A.) — considered

Hacock v. Vallaincourt (1989), 40 B.C.L.R. (2d) 83, 63 D.L.R. (4th) 205, 1989 CarswellBC 181, [1989] B.C.J. No. 1860 (B.C. C.A.) — followed

M. (A.) v. Ryan (1997), 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, [1997] S.C.J. No. 13, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

Pacific Concessions Inc. v. Weir (2004), 2004 BCSC 1682, 2004 CarswellBC 3004, [2004] B.C.J. No. 2653 (B.C. S.C. [In Chambers]) — considered

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 32 B.C.L.R. (2d) 320, [1989] 2 W.W.R. 679, 1988 CarswellBC 411, [1988] B.C.J. No. 1960 (B.C. C.A.) — referred to

R. v. Fosty (1991), [1991] 6 W.W.R. 673, (sub nom. *R. v. Gruenke)* 67 C.C.C. (3d) 289, 130 N.R. 161, 8 C.R. (4th) 368, 75 Man. R. (2d) 112, 6 W.A.C. 112, (sub nom. *R. v. Gruenke)* [1991] 3 S.C.R. 263, 7 C.R.R. (2d) 108, 1991 CarswellMan 206, 1991 CarswellMan 285, [1991] S.C.J. No. 80, EYB 1991-67160 (S.C.C.) — referred to

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd. (1983), [1983] 4 W.W.R. 762, 35 C.P.C. 146, 45 B.C.L.R. 218, 1983 CarswellBC 147, [1983] B.C.J. No. 1499 (B.C. S.C.) — considered

Slavutych v. Baker (1975), [1976] 1 S.C.R. 254, (sub nom. *Slavutch v. Board of Governors of University of Alberta)* 3 N.R. 587, [1975] 4 W.W.R. 620, 38 C.R.N.S. 306, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224, 1975 CarswellAlta 145F, 1975 CarswellAlta 39, [1975] S.C.J. No. 29 (S.C.C.) — followed

Weir-Jones v. Taylor (2013), 2013 BCSC 1633, 2013 CarswellBC 2693, 51 C.P.C. (7th) 161, [2013] B.C.J. No. 1957 (B.C. S.C.) — considered

Statutes considered:

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165
Generally — referred to
s. 33.1(1)(t) [en. 2011, c. 17, s. 13(c)] — considered

Labour Relations Code, R.S.B.C. 1996, c. 244
Generally — referred to
s. 6(1) — considered
s. 12 — considered
s. 99(1) — considered

APPLICATION by union for production of documents and particulars in context of grievance.

Gabrielle Scorer, Julie Menten, Sarah Dickson, for Employer
Patrick Dickie, Michael Shapiro, for Union

***Robert Pekeles Member*:**

INTRODUCTION

1 The Union applies for the production of the following documents and particulars:

i. All documents concerning or touching upon the review conducted by Lisa Southern for the Employer in 2014 including, without limiting the generality of the foregoing, the following

(a) Any retainer agreement or retainer letter regarding the review;

(b) Any terms of reference for the review;

(c) Ms. Southern's report;

(d) Any correspondence or emails to or from Ms. Southern;

(e) Any notes of meetings or telephone conversations with Ms. Southern;

(f) Any internal correspondence, emails, notes of meetings, or notes of telephone conversations concerning or touching upon the review or any report or recommendations issued by Ms. Southern; and

(g) Any documents reviewed by Ms. Southern.

ii. Particulars of the names of any other employee that the Employer contacted in regard to any possible apology or settlement related to Ms. Southern's investigation or her report.

iii. Particulars of the negative consequences experienced by Ms. Christensen and Ms. Muller and the Employer's reasons for concluding same; and

iv. Particulars of the ways in which the internal investigations conducted by the Employer did not meet expected standards of procedural fairness and the Employer's reasons for concluding same.

2 The matter was presented by means of lengthy submissions, statutory declarations, and a day of oral argument.

BACKGROUND

3 The Union's policy grievance dated November 19, 2014 (the "Grievance") concerns the Employer's unilateral investigation conducted by Lisa Southern and the Employer's subsequent payment of $15,000 to each of bargaining unit members Tracy Christensen and Lorie Muller. The Union alleges, among other things, that the Employer's actions were contrary to the Collective Agreement's provisions concerning procedures for investigating and resolving disputes and contrary to the Union's exclusive bargaining agency pursuant to the Collective Agreement and the *Labour Relations Code* ("the *Code*") and contrary to the *Code*'s prohibition against interference with the administration of a trade union.

4 The Union asserts as follows:

1. In 2013, the Employer conducted an investigation pursuant to Article 31.03 into harassment complaints that bargaining unit employees Chad Swanson and Tracy Christensen had made about each other (the "First Investigation"). These complaints concerned conduct at the Employer's Station 257 in Maple Ridge.

2. On November 8, 2013, the Employer issued a report as a result of the First Investigation. The Employer also issued a written warning to Ms. Christensen (the "Christensen Discipline").

3. In late 2013 and early 2014, the Union filed four grievances regarding the First Investigation and the Christensen Discipline (collectively the "Christensen Grievances").

4. In May 2014, the Employer retained the Investigator to investigate a number of unspecified workplace complaints at Station 257 (the "Second Investigation").

5. On September 10, 2014, the Investigator delivered her findings and recommendations (the "Report") to the Employer.

5 The "Investigator" referred to by the Union was Southern. In this decision, I too will refer to her report dated September 10, 2014 as the "Report". I note that some 24 ½ of the Report's 32 pages dealt with the Christensen and Muller investigations.

6 On September 18, 2014, Jodi Jensen, the Chief Operating Officer of the Employer, with other representatives of the Employer had separate meetings with Christensen and Muller. Alan Boulier, a bargaining unit employee and steward, who was chosen by Christensen and Muller to be present, attended each meeting. The Union asserts that Boulier did not have authority to negotiate a resolve to the Christensen Grievances and that the Employer was aware of this. The Union further asserts that:

> 9. Mr. Boulier did not disclose his involvement in these negotiations or the findings and recommendations of the Report to the Union, contrary to his duties as a steward. Mr. Boulier also sought to structure the agreement between the Employer and Ms. Christensen so that information would not be disclosed to the Union, contrary to his duties as a steward. The Employer was aware of Mr. Boulier's conduct in this regard, but nonetheless continued to deal with him as if he was an authorized representative of the Union and agreed to structure the agreement between the Employer and Ms. Christensen so that information would not be disclosed to the Union.
>
> 10. On October 19, 2014, the Employer advised the Union that it wished to offer compensation to Ms. Muller and Ms. Christensen.

7 Jensen provided a statutory declaration which states in part as follows:

> 7. On September 18, 2014, representatives of BCEHS, including me, had separate meetings with Lorie Muller and Tracy Christensen. Mr. Al Boulier, the union representative chosen by Ms. Muller and Ms. Christensen to be present, attended each meeting.
>
> . . .

> 9. The purpose of the meetings was to acknowledge the personal hardship suffered by both employees which resulted from mistakes made by the Employer in how it had handled previous employment situations involving each of them. I offered an apology to each employee on behalf of the Employer.
>
> 10. I recall that in each meeting I was mindful of the fact that Ms. Southern's report was a privileged and confidential report and I was careful not to speak to any specific findings, conclusions or recommendations made by Ms. Southern in her report.
>
> . . .
>
> 15. Towards the end of each of the meetings on September 18, 2014, Kristy Child, who was Acting Director, Human Resources, BCEHS at that time, stated that the Employer recognized that each of the employees had experienced hardship and negative impact as a result of the Employer's prior actions involving them. Ms. Child said something to the effect that the Employer would like to discuss with each of them and Mr. Boulier what the Employer might be able to do to make each of them whole. She asked each employee to consider this and get back to her.

8 Bronwyn Barter, the President of the Union, was not in attendance at the meetings held with Christensen and Muller on September 18, 2014.

9 On October 30, 2014, the Union and the Employer met. John Strohmaier, a Union representative, provided a statutory declaration which states in part as follows:

> 2. On October 30, 2014, the Union and the Employer held a meeting to discuss various labour relations issues. Present for the Union were myself, Dave Deines, Provincial First Vice President of the Union, and Sherman Hillier, Provincial Second Vice President of the Union. Present for the Employer were Kristy Child, Director of Labour Relations, and Julie Wengi, Executive Director of Human Resources.
>
> 3. After discussing other issues, Ms. Child advised that the Employer would like the Union's agreement to pay money to Tracy Christensen and Lorie Muller to avoid a human rights complaint. Ms. Christensen and Ms. Muller are paramedics in the Union's bargaining unit who worked at the Employer's Ambulance Station 257 in Maple Ridge, BC. One of the Union representatives asked what it was about. Ms. Child advised that employees had bombarded the Employer with complaints. One of the Union representatives asked the Employer representatives to elaborate on the complaints but they refused to do so.

> 4. Ms. Wengi advised the Union that the Employer had hired a lawyer, Lisa Southern, to do an investigation following the complaints and that Ms. Southern had informed the Employer that a previous investigation it had done regarding complaints by Ms. Christensen was flawed, the Employer had a human rights liability, and the Employer should pay money to the two employees in return for a release.
>
> . . .
>
> 8. Ms. Child made it clear that the Employer was going to pursue the settlements with Ms. Christensen and Ms. Muller regardless of the Union's objections. The meeting ended with Mr. Deines advising the Employer representatives that the Union was not going to sign off on any settlement based on what they had been told thus far.

10 I pause to note that both Wengi and Child no longer work for the Employer.

11 On or about November 3, 2014 Linda Lupini, the Executive Vice President of the Provincial Health Services Authority (the "PHSA") and of the Employer, telephoned Barter. According to Barter's statutory declaration:

> 13. On or about November 3, 2014, Ms. Lupini telephoned me. Ms. Lupini advised me that Ms. Southern had done a re-investigation of complaints Ms. Christensen had previously made at Station 257 and had issued a report, as a result the Employer wished to make payments to Ms. Christensen and Ms. Muller, and that she needed me to agree to these payments. Ms. Lupini further advised me that there had been a lot of mistakes made in the original investigation of Ms. Christensen's complaints by past leadership of the Employer, and that a big issue in Ms. Southern's report was the Union's conduct in the original investigation of Ms. Christensen's complaints. I asked Ms. Lupini what she meant and she said that the Union had one person representing a number of different employees during the original investigation. I advised Ms. Lupini that this was the Union's long-standing practice in such investigations and that I could not agree to the payments to Ms. Christensen and Ms. Muller without seeing Ms. Southern's report. Ms. Lupini advised that she would get back to me.
>
> 14. On November 5, 2014, Ms. Lupini telephoned me again and advised that she was mistaken when she said Ms. Southern had done a re-investigation of Ms. Christensen's complaints and that instead Ms. Southern had reviewed the original investigation, that the Employer was not going to show me Ms. Southern's report, and that there were human rights issues, the Employer did not need the Union's agree-

> ment, and the Employer was going to make the payments to Ms. Christensen and Ms. Muller.

12 By contrast, Lupini's statutory declaration dated May 2, 2016 states in part as follows:

> 4. While I do not have a detailed recollection of these calls, my recollection is that I advised Ms. Barter that Ms. Southern had provided BCEHS with a report regarding her review of Station 257. I believe I would have reiterated the privileged nature of the report. I told her I could not discuss the content of the report with her.
>
> 5. During my conversations with Ms. Barter I was always keenly aware that the Employer had committed to those employees who shared information with Ms. Southern that it would keep their information confidential.
>
> 6. My conversations with Ms. Barter are typically high level and strategic. To my recollection we have never discussed the details of any particular grievance. All grievances are discussed formally at the Provincial Joint Labour Management Committee which I have never attended.

13 For the purpose of this decision, I need not resolve the differences between Barter's and Lupini's statutory declarations.

14 On November 19, 2014, the Union filed the Grievance. On November 26, 2014 the Employer made payments of $15,000 to each of Christensen and Muller.

15 Christensen pursued an unsuccessful Section 12 complaint against the Union under the *Code*. I note that in her complaint to the Labour Relations Board, Christensen referred to, among other things, the investigation conducted by Southern. Among other allegations, Christensen alleged that the PHSA had agreed to provide her with restitution and that Union officials did not assist her with restitution: see page 19 of her complaint. The Board ultimately dismissed Christensen's Section 12 complaint: see *Christensen and Ambulance Paramedics of British Columbia (CUPE, Local 873), Re* [2015 CarswellBC 3637 (B.C. L.R.B.)], BCLRB No. B233/2015.

16 In the course of Christensen's Section 12 proceeding, the Employer filed a written submission to the Board dated July 30, 2015. The Employer wrote in part as follows (the reference to the "Investigator" is a reference to Southern):

> Ms. Christensen's complaint against CUPE Local 873 (the "Union") under section 12 of the *Code* is a matter between the Union and Ms.

Christensen and BCEHS takes no position on the merits of the section 12 complaint.

That said, we are of the view that some factual background may be of assistance to the Board in making its decision.

. . . . .

External Investigation

15. On or about April 28, 2014, BCEHS engaged an external investigator (the "Investigator") to conduct an investigation, in part, into workplace concerns that gave rise to the June 22 Incident (the "External Investigation").

16. The External Investigation identified several flaws in the initial investigative process. These were identified as follows:

(a) assessment of credibility

(b) failure to interview other key witnesses and take into account similar events;

(c) bias or perception of bias; and

(d) application of the law.

17. With respect to bias or perception of bias, the Investigator noted that a number of individuals raised a concern throughout the investigation process about Mr. Towle's representation of all witnesses, including Mr. Swanson and Ms. Christensen. The Investigator characterized Mr. Towle's participation in that role as "unusual" and found that his participation in all meetings would have made his ability to fulfill his role in properly representing the members throughout the process "impossible". The Investigator further concluded that Mr. Towle put himself in a conflict of interest by advising individuals with diverging interests.

18. With respect to the application of the law, the Investigator found that, even accepting the findings of the initial investigation, Ms. Christensen's behaviour was not sufficiently egregious to meet the legal definition of harassment. In particular, there were insufficient facts to support a conclusion that Ms. Christensen had engaged in a pattern of conduct designed to belittle and humiliate Mr. Swanson. As a result, the resulting disciplinary outcomes from the initial investigation could not be sustained.

19. The Investigator's report (the "Report") included recommendations relating to Ms. Christensen and the initial investigation.

17 On November 25, 2015 the Union requested production of documents that are the subject of this application. On December 23, 2015 the Employer refused production on the basis of solicitor-client privilege.

18 On February 12, 2016 I issued a consent order for the production of a redacted Report, without prejudice to the Employer's position that the entire Report is covered by solicitor-client privilege. The Union was free to apply for production of the redacted portions of the Report and other documents concerning Southern's investigation and Report, but was not to rely on production of the redacted Report as waiver of solicitor-client privilege.

19 Lupini's statutory declaration dated April 11, 2016 states in part as follows:

> 4. At the material time I was employed as the Chief Human Resources Officer of PHSA and on April 10, 2014, I was appointed the Executive Vice President with PHSA and BCEHS. As part of my job duties, I provided management and oversight of the Human Resources Departments of BCEHS and PHSA.
>
> 5. At the material time, Julie Wengi was employed as the Executive Director of Human Resources, BCEHS. Ms. Wengi is no longer employed with the Employer.
>
> 6. In or around early 2014, Ms. Wengi approached me regarding a number of concerns among employees involving potentially sensitive labour and employment issues at Station 257.
>
> 7. In my experience some workplace concerns raised by employees are complicated and sensitive, in particular where they involve a number of employees in the same workplace.
>
> 8. It is my practice to seek legal advice when dealing with a workplace issue or concern that I conclude is of this nature.
>
> 9. After speaking with Ms. Wengi, I contacted Ms. Lisa Southern to inquire about her services as legal counsel. Lisa Southern is a lawyer with special expertise and experience in the field of labour relations, employment law and workplace issues.
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> 10. I attended a meeting on April 28, 2014 with Ms. Wengi and Ms. Southern. Ms. Wengi and myself, on behalf of the Employer, requested that Ms. Southern provide legal advice to the Employer with respect to the workplace issues and employee concerns at Station 257, and to assess the Employer's compliance with workplace laws and obligations and provide recommendations to ensure these obligations were met at Station 257.
>
> 11. Ms. Southern and the Employer agreed that she would investigate these concerns, acting as legal counsel for the Employer throughout the investigation.

12. Ms. Southern and the Employer agreed upon the terms under which she would investigate and signed an agreement titled Terms of Reference for an Investigation on April 28, 2014 (the "Terms"). The Terms are attached as Exhibit "A" to this statutory declaration.

13. It was my expectation and understanding that as legal counsel for the Employer, Ms. Southern at all times would conduct herself with the interests of the Employer in mind and provide legal advice to me with respect to the Employer's interests.

14. I did not have full knowledge of the facts concerning the workplace issues and employee concerns at Station 257. I knew that it would be necessary for Ms. Southern to gather information from employees, in order to be able to provide appropriate legal advice to the Employer in respect of its legal obligations regarding any workplace issues.

15. It is my belief and understanding that throughout the Investigation Ms. Southern and Ms. Wengi communicated about the investigation process and Ms. Southern provided her advice as legal counsel to the Employer about how the investigation should be conducted, in all respects.

16. The Employer relied on Ms. Southern for her legal advice regarding what steps were necessary for Ms. Southern to take in order to perform the investigation of the workplace issues, and in respect of other workplace issues of concern at Station 257.

17. At all times it was my expectation and understanding that all communications I had with Ms. Southern about the investigation and anything to do with the investigation of the workplace issues were subject to solicitor client privilege as she was the Employer's legal counsel providing legal advice about the workplace issues and investigation.

18. At all times it was my expectation and understanding that all materials prepared, obtained, relied on or created by Ms. Southern in her investigation would be subject to solicitor client privilege since she was acting as legal counsel to the Employer during the investigation of the workplace issues.

19. On completion of the investigation, Ms. Southern provided the Employer with a written report of her findings, opinions, recommendations and related legal advice, which report was clearly marked privileged and confidential (the "Report").

20. At all times it was my expectation and understanding that the Report was subject to solicitor client privilege as it reflected legal advice provided to the Employer by Ms. Southern.

20 Southern also provided a statutory declaration. In it she states that she is a labour and employment lawyer operating a legal practice. She further states that:

> 2. In my capacity as a labour and employment lawyer I am often retained by clients as legal counsel to conduct workplace investigations for the purpose of providing legal advice.
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> 3. Provincial Health Services Authority ("PHSA") is an existing client of mine, and I have an ongoing and continuing solicitor-client relationship with them.
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> 4. Through BC Emergency Health Services ("BCEHS"), PHSA oversees the BC Ambulance Service.
>
> 5. In early 2014 Linda Lupini, who was at that time the PHSA's Executive Vice President, contacted me to inquire about retaining my services as legal counsel.
>
> 6. I met with Ms. Lupini and Ms. Julie Wengi, then the Executive Director for Human Resources for BCEHS at that time, on April 28, 2014. Ms. Lupini and Ms. Wengi requested that I provide legal advice to PHSA and BCEHS (the "Client") with respect to concerns at a particular worksite. I was asked to conduct an "environmental scan" of the workplace; in other words, to gather information about employee concerns at the workplace, to consider whether the workplace was in compliance with applicable workplace laws and obligations, and to provide legal advice and recommendations regarding these matters.
>
> 7. The Client instructed me to conduct a fulsome confidential and privileged investigation to establish the factual foundation for the legal advice I would provide to the Client (the "Privileged Investigation").
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> 8. The purpose of the Privileged Investigation was specifically to provide legal advice to the Client.
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> 9. It was clearly, specifically and unequivocally understood between me and the Client that all communications between us, the Privileged Report, my work product including notes and documents created by me for the purpose of providing legal advice and all legal advice I provided to the Client during the Privileged Investigation would at all times and for all intents and purposes remain confidential and was protected by solicitor-client privilege.
>
> 10. On or around April 28, 2014, I prepared the Terms of Reference for the Privileged Investigation and delivered them to the Client for review, approval and execution (the "Terms"). Attached to this Statutory Declaration as Exhibit "A" is a copy of the Terms.

11. The Terms reflected my intention that the Privileged Investigation was protected by solicitor-client privilege and that the information collected by me during the course of the Investigation would be collected and treated as privileged and/or personal information supplied in confidence for the purposes of the *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] Chapter 165.

12. I acknowledge that the Terms do not explicitly state I was retained as legal counsel for the purpose of conducting the Privileged Investigation. At the time I drafted the Terms I did not have a practice of including the fact that I was retained as legal counsel in the terms of reference for an investigation. However, my intention and unequivocal understanding was that I was retained by the Client as legal counsel to conduct the Privileged Investigation, and that the purpose of the Privileged Investigation was to provide legal advice to the Client.

13. As the Client's legal counsel, I at all times had the client's legal interests in mind as I conducted the Privileged Investigation.

14. During the Privileged Investigation I interviewed some of the Client's employees to establish the factual foundation necessary to provide legal advice to the Client.

15. The employee interviews I conducted were purely voluntary on the part of the Client's employees; no employees were required to attend an interview with me.

16. The sole purpose of communicating with each employee I interviewed was to establish a factual foundation for the purpose of providing legal advice to the Client.

17. Prior to asking any questions I informed each employee I interviewed that I was legal counsel for the Client and had been retained to conduct a privileged and confidential investigation on behalf of the Client.

18. Prior to asking any questions, I informed each employee I interviewed that the information disclosed to me during the interview would be received in confidence, would be treated by me as strictly confidential, and would only be disclosed to the Client, or as required by law, or to ensure the fairness of the investigation.

19. I believe that due to the sensitive workplace issues being discussed, the employees I interviewed would not have been forthcoming with me had they not been assured that their identities and the information they disclosed would be received in confidence and would be treated by me as strictly confidential.

> 20. The questions I asked each employee I interviewed were fundamentally shaped by my knowledge of the applicable law and heavily informed by my role as legal counsel to the Client.
>
> 21. The notes I took of each interview were for the sole purpose of providing legal advice to the Client.
>
> 22. The Privileged Investigation involved my application of the civil standard of proof and my assessment of each interviewee's credibility against the appropriate legal test.
>
> 23. In the process of conducting the Privileged Investigation and throughout the process of the Investigation I provided legal advice to the Client, in the mutual expectation that all communications, written and oral, would always remain privileged and confidential.
>
> 24. On completion of the Privileged Investigation I provided a written report of my findings, and related legal advice, and recommendations to the Client, which report was clearly marked privileged and confidential (the 'Privileged Report").
>
> 25. All written notes and documents relating to the Privileged Report were made for the purpose of providing legal advice to the Client.

21 Before concluding these background facts, I note that I have set out these facts based upon the statutory declarations, as well as submissions, provided by the parties. None of the declarants were cross-examined on their declarations. The present application addresses the Union's preliminary application for the production of documents and particulars. In terms of the hearing of the merits, the parties are free to provide oral evidence with respect to any alleged facts. My point here is that the merits will be decided on facts that are established in oral testimony at the hearing (except to the extent that the parties agree about any of the facts).

RELEVANCE

22 The Union takes the position that the entire Report and all related documents are relevant to this proceeding. It sets out its position in the following terms in its submission:

> 7. We say that all of the requested documents are clearly relevant. These documents concern Ms. Southern's investigation and report. The Grievance concerns Ms. Southern's investigation, and whether that investigation is contrary to the collective agreement and the Labour Relations Code. The requested documents go directly to this central issue. (I will refer to this as the "first ground")
>
> 8. The Grievance also concerns the Employer's provision of compensation to Ms. Christensen and Ms. Muller, and whether that compen-

sation is contrary to the collective agreement and the Labour Relations Code. It is clear that the Employer provided this compensation as a result of Ms. Southern's investigation and report. The requested documents go directly to this central issue as well.

9. Finally, the Grievance concerns the Employer's negotiating the compensation with Mr. Boulier when the Employer knew that Mr. Boulier did not have the authority to do so and that he was seeking to conceal information from the Union. To whatever extent the requested documents may speak to Mr. Boulier's involvement, they go to this central issue as well. (I will refer to this as the "third ground")

23 The Employer's position is as follows:

204 The Union's allegations in this grievance focus on two issues: 1) whether the Employer breached the collective agreement by unilaterally retaining Ms. Southern to conduct the Investigation, and 2) whether the Employer breached the Union's exclusive bargaining agency with members of the bargaining unit.

205 In order to be relevant to this dispute, the Redacted Information must go towards proving or disproving a material fact relating to one of those two issues.

206 There are three types of information in the Report. These include:

(a) Information pertaining to Ms. Christensen, Ms. Muller, the Christensen Investigation, and the Muller Investigation that does not include identifying or personal information about other employees;

(b) Information pertaining to Ms. Christensen, Ms. Muller, the Christensen Investigation, and the Muller Investigation that does include identifying or personal information about other employees; and

(c) Information about workplace concerns not related to Ms. Christensen, Ms. Muller, the Christensen Investigation or the Muller Investigation.

207 The information in category (a) has already been disclosed to the Union.

208 It is the Employer's position that the information in category (b), while arguably relevant to the allegation that the Employer breached the collective agreement investigation/complaint processes, is protected by confidentiality privilege and FIPPA. The Employer submits this information is not relevant to the Union's allegation that the Emplyer breached the Union's exclusive bargaining agency.

> 209 The Employer submits that the information in category (c) is not relevant to the grievance and ought not to be disclosed.

24 The Union notes that the only difference between information in categories (a) and (b) is the presence of identifying or personal information about other employees. The Union argues that has no bearing on relevance. With regard to information in category (c), the Union notes that the Grievance concerns the Employer's unilateral investigation of complaints at Station 257. It expressly asserts that the Grievance is not limited to matters concerning Christensen and Muller. The Collective Agreement contains procedures for conducting workplace investigations. The Union alleges that the entire investigation was done contrary to the Collective Agreement. Consequently, the entire Report is relevant to this arbitration and should be produced to the Union, subject of course to any valid claim of privilege.

25 In order to require that it be disclosed, the redacted information must be such that it could be used to prove or disprove a material fact, subject of course to any valid claim of privilege.

26 One of the issues before me will be whether by making those payments to Christensen and Muller, without the agreement of the Union, did the Employer interfere with the administration of the Union contrary to Section 6(1) of the *Code* and/or did it breach the Collective Agreement. Section 6(1) of the *Code* provides as follows:

> Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

27 Relevant to that issue will be the reason the Employer made those payments. While I acknowledge the Employer's written submission that it does not intend to rely on the Report in responding to the Grievance, that is not determinative. There are two parties to the arbitration, the Union and the Employer. It is the Union's Grievance. Moreover, in oral argument before me, the Employer asserted that the payments to Christensen and Muller were good faith remedies for the two employees. The question for the Union remained: remedy for what? In the context of the present case it is entirely relevant for the Union to question the basis upon which the Employer made the payments to Christensen and Muller. The Report explains that in great detail. It is not sufficient for the Employer to provide the Union with Southern's conclusions. It must also fully disclose the bases for those conclusions.

28 Substantial portions of the Report have been redacted. The Employer's reasons for those redactions were to 1) protect the "Wigmore" confidentiality of the Employer-employee relationship, particularly by redacting those portions that dealt with employees other than Christensen and Muller and 2) exclude information about workplace concerns not related to Christensen, Muller, the Christensen investigation or the Muller investigation. I will address the issue of Wigmore confidentiality later in these reasons. Strictly in terms of relevance, however, I have no doubt that the redacted information with respect to Christensen and Muller is relevant to an issue in the arbitration before me. It all goes to explain the factual underpinning of Southern's conclusions regarding the Christensen and Muller investigations, which is what caused the Employer to provide a remedy to those two women. The portions of the Report regarding the Christensen investigation and the Muller investigation resulted in the Employer's decision to provide monies to Christensen and Muller: see para 113 of the Employer's May 2, 2016 submission referred to below in the Waiver section of this decision, as well as Strohmaier's statutory declaration, at para. 4.

29 Having carefully reviewed the brief remainder of the Report under the overall title "Other Issues and Recommendations", I conclude that the information under the heading "Application of Various Policies and Tools" is also relevant to the Christensen matter.

30 With respect to the remainder of the Report I am prepared to assume, without deciding, that it is relevant. However, my conclusions and reasons below regarding the extent of waiver must be read in order to understand why this approach does not matter in terms of my conclusions in the Union's present application.

SOLICITOR-CLIENT PRIVILEGE

31 Solicitor-client communications are excluded however, not because the evidence is not relevant, but rather because there are overriding policy reasons to exclude this relevant evidence: *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), at para. 26.

32 The Union acknowledges that the statutory declarations of Southern and Lupini provide some support for a claim of solicitor-client privilege: see Union's submission dated April 25, 2016, at para. 26. It submits, however, that a party's characterization of a relationship is not necessarily determinative. While I agree with that submission, I easily conclude that the relationship between Southern and the Employer was one of so-

licitor and client and that the Report was the giving of legal advice by Southern to the Employer. The statutory declarations of both Southern and Lupini lend substantial weight to that determination. At the Parties' invitation, I have reviewed the unredacted Report. Having done so, it is clear that Southern was not just fact finding, but was giving her client legal advice with respect to, among other things, both the Christensen and Muller investigations and what the Employer should do to remedy the flaws in those investigations.

33 The Union relies on *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 (Man. C.A.) at paragraph 18:

> Thus, the onus is on the person seeking to claim the privilege to establish three factors in connection with any particular document:
>
> 1. that the document was the giving or obtaining of legal advice;
> 2. the presence of a solicitor and the presence of a client; and
> 3. the existence of the solicitor-client relationship.

34 On the basis of Southern's and Lupini's statutory declarations and my review of the unredacted Report, I conclude that the Report was the giving of legal advice, that Southern, the lawyer, and the Employer, the client, were in a solicitor-client relationship. I conclude that Southern was acting as legal counsel to the Employer, and was not acting solely as a fact finding investigator. I note that Southern relied upon both court and arbitral authorities in providing her legal advice to the Employer in the Report.

35 As stated by the BC Court of Appeal in *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)*, [2002] B.C.J. No. 2779 (B.C. C.A.):

> 31...Because legal advice privilege protects the relationship of confidence between solicitor and client, the key question to consider is whether the communication is made for the purpose of seeking or providing legal advice, opinion or analysis...
>
> 32...Legal advice privilege arises only where a solicitor is acting as a lawyer, that is, when giving legal advice to the client. Where a lawyer acts only as an investigator, there is no privilege protecting communications to or from her. If, however, the lawyer is conducting an investigation for the purposes of giving legal advice to her client, legal advice privilege will attach to the communications between the lawyer and her client (see Gower at paras. 36-42)...

. . . . .

> 42. In my opinion, the Commissioner and the chambers judge erred in finding that the College's lawyer was not acting in her capacity as a lawyer when she investigated the Applicant's complaint. She was acting on her client's instructions to obtain the facts necessary to render legal advice to the SMRC concerning its legal obligations arising out of the complaint. As such, she was engaged in giving legal advice to her client.

36 As stated in *Gower*, at para. 19:

> With respect to the first factor, the communication must be connected to obtaining legal advice, but legal advice is not confined to merely telling the client the state of the law. It includes advice as to what should be done in the relevant legal context. It must, as a necessity, include ascertaining or investigating the facts upon which the advice will be rendered. Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. As the United States Supreme Court acknowledged:
>
> > The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.
> >
> > [*Upjohn Co. v. United States*, 449 U.S. 383(1981) (S.C.) at para. 23]

37 Based on both the case law, and the facts as set out in the Southern and Lupini statutory declarations, as well as my review of the unredacted Report, I have concluded that the relationship between Southern and the Employer was one of solicitor and client and that solicitor-client privilege attaches to the Report.

WAIVER

38 The next issue is whether or not the solicitor-client privilege has been waived. Both parties rely on a decision of Madame Justice McLachlin, then of the British Columbia Supreme Court, with respect to waiver of solicitor-client privilege in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C. S.C.) ("*S. & K. Processors*."):

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to

> waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189. (at para. 6)

39 I have concluded that the Employer waived solicitor-client privilege with respect to at least part of Southern's advice regarding Christensen and Muller when 1) it filed its submission to the Labour Relations Board dated July 30, 2015 in respect of Christensen's Section 12 complaint under the *Code*, in the passages that I have quoted above in the Background section of this decision, combined with 2) the information set out in Strohmaier's statutory declaration.

40 Lupini's statutory declaration makes clear that she, on behalf of the Employer, knew of the existence of the privilege. As stated therein, she and Wengi met Southern on April 28, 2014 and requested that Southern provide legal advice to the Employer with respect to the workplace issues and employee concerns at Stationn 257, to assess the Employer's compliance with workplace laws and obligations and to provide recommendations to ensure these obligations were met. Southern and the Employer agreed that she would investigate those concerns, acting as legal counsel for the Employer throughout the investigation. It was her expectation and understanding that the Report was subject to solicitor-client privilege as it reflected legal advice provided to the Employer by Southern: see paragraphs 10, 11 and 20 of Lupini's statutory declaration.

41 The Employer's submission to the Board was clearly voluntary. The Employer itself expressly noted that Christensen's Section 12 complaint was a matter between the Union and her. The Employer took no position on the merits of Christensen's complaint. Nevertheless, it was of the view "that some factual background may be of assistance to the Board in making its decision."

42 Christensen's Section 12 complaint referred to Southern's investigation and the Union's lack of assistance regarding the PHSA's offer of restitution to her. The present Grievance, of course, concerns Southern's Report and that same offer and payment of money to her, as well as to Muller. The Board proceeding and the Grievance are clearly related proceedings. Once a party waives solicitor-client privilege in one proceeding, that waiver applies to a second related proceeding in which the party who waived privilege is also a party: see *Camosun College v. Levelton Engineering Ltd.*, [2014] B.C.J. No. 1353 (B.C. S.C.), at para. 28. The

Employer, as well as the Union, was a party to Christensen's Section 12 complaint. The Employer, as well as the Union, is a party to the present arbitration.

43 The Employer voluntarily disclosed the Report's critical conclusions about the Christensen investigation in its submission to the Board, which submission it properly copied to counsel for the Union. In particular, it disclosed Southern's critical conclusions as follows:

> 16. The External Investigation identified several flaws in the initial investigative process. These were identified as follows:
>
> (a) assessment of credibility
>
> (b) failure to interview other key witnesses and take into account similar events;
>
> (c) bias or perception of bias; and
>
> (d) application of the law.
>
> . . .
>
> 18. With respect to the application of the law, the Investigator found that, even accepting the findings of the initial investigation, Ms. Christensen's behaviour was not sufficiently egregious to meet the legal definition of harassment. In particular, there were insufficient facts to support a conclusion that Ms. Christensen had engaged in a pattern of conduct designed to belittle and humiliate Mr. Swanson. As a result, the resulting disciplinary outcomes from the initial investigation could not be sustained.

44 I conclude that the Employer voluntarily evinced an intention to waive solicitor-client privilege with respect to at least part of Southern's advice about Christensen, and indeed a critical part of it.

45 The Strohmaier statutory declaration makes clear that the Employer's disclosure was not merely with respect to Southern's conclusions regarding Christensen, but also with respect to her conclusions regarding Muller. At the October 30, 2014 meeting between representatives of the Employer and the Union, the Employer advised that it would like the Union's agreement to pay money to Christensen and Muller to avoid a human rights complaint. It further advised that it had hired Southern to do an investigation and that Southern had informed the Employer that a previous investigation it had done regarding complaints by Christensen was flawed, the Employer had a human rights liability and the Employer should pay money to the two employees in return for a release: see Strohmaier's statutory declaration at paras. 3-4.

46 The advice that the Employer got from Southern's Report resulted in the Employer's provision of a remedy to them. As stated in the Employer's submission dated May 2, 2016:

> 113. The Redacted Report provides sufficient disclosure of information about the only issues which were allegedly disclosed, which, generally speaking, involve alleged mistakes made in the Original Investigation and the finding that Ms. Christensen's conduct did not meet the legal definition of harassment, providing the basis for the conclusion that the Employer possibly faced human rights liability and resulting in its decision to provide monies to Ms. Christensen and Ms. Muller. The Redacted Report, already provided to the Union by order of the Arbitrator, sets out sufficient information about these specific issues, and fairness does not require disclosure of any further content of the Investigation Report.
>
> (emphasis added)

47 As noted earlier, one of the issues before me will be whether by making those payments to Christensen and Muller, without the agreement of the Union, did the Employer interfere with the administration of the Union contrary to Section 6(1) of the *Code* and/or did it breach the Collective Agreement. One of the central issues in that determination will be why the Employer paid money to Christensen and Muller. That is very much a matter of substance, and indeed a vital issue, between the parties in this arbitration.

48 The advice that the Employer received from Southern in her Report, which resulted in the Employer's providing monies to Christensen and Muller, addresses one of the central issues in the arbitration before me namely, why did the Employer make the payments to Christensen and Muller. Moreover, Southern's recommendations resulting from her conclusions regarding Christensen and Muller also have an important bearing regarding the issue of the Union's exclusive bargaining authority. The Employer had already disclosed to the Union Southern's conclusions about the Christensen investigation in its submission to the Board regarding Christensen's section 12 complaint. The Strohmaier statutory declaration makes clear that the Employer's disclosure was not merely with respect to Southern's conclusions regarding Christensen, but also with respect to her conclusions regarding Muller. It did not, however, disclose the factual foundations of those conclusions or Southern's precise recommendations resulting from those conclusions which have an important bearing on the present arbitration. In short, the Employer has expressly waived privilege over part of Southern's advice regarding Christensen

and Muller. Fairness and consistency require a conclusion that privilege has been waived over the entirety of Southern's advice regarding them. Put another way, as a matter of fairness and consistency, the Employer should not be permitted to disclose only to the extent that it wished to with respect to Southern's advice regarding Christensen and Muller, and then cloak itself in solicitor-client privilege to withhold the remainder of the Report with respect to them.

49 The Employer relies upon the B.C. Court of Appeal's decision in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, [2004] B.C.J. No. 2045 (B.C. C.A.) ("*Doman Forest Products")*. Before quoting passages from *S. & K. Processors*, including the one quoted above, the Court of Appeal wrote:

> 12. Solicitor-client privilege, which protects the fundamental civil and legal right of citizens to communicate in confidence with their lawyers, will not be lightly abrogated: *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875. It will, however, be considered waived when a party makes its state of mind material to its claim or its defence in such a way that to enforce the privilege would be to confer an unfair litigation advantage on the party claiming it...

50 The Court of Appeal went on to state:

> 18. Thus, in *Rogers v. Bank of Montreal*, supra, the privilege was waived because the elements of waiver were present. By its pleading, the bank put in issue its knowledge of the law that was at the heart of the dispute. Since the information sought was vital to the receiver's defence against the bank's claim that it had relied on the receiver's advice, fairness and consistency required that the privilege be waived.
>
> 19. On the other hand, a mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege. This Court's decision in *Pax Management Ltd. v. C.I.B.C.* (1987), 14 B.C.L.R. (2d) 257, [1987] 5 W.W.R. 252 [cited to B.C.L.R.] makes that clear...
>
> 20. In the Pax Management, supra case, the material facts pleaded by the bank were that the alleged representations were not made or, if they were made, they were true. These were questions of fact to which any advice received by the bank, legal or otherwise, would have been irrelevant since it had not made its state of mind a material fact by its pleading. By way of contrast, in *Rogers v. Bank of Montreal*, supra the material fact pleaded was that the bank relied on the receiver's advice as to its legal position. That was a question of fact on which it was necessary to know whether the bank had received

> any legal advice from another source on the same subject for, if it had, it might not have relied on the receiver's advice.
>
> . . .
>
> 25. In my view, the chambers judge erred in her statement of the applicable principle in this passage of her reasons.
>
> . . .
>
> 27. Next, Doman did not make its state of mind material by pleading that the parties conducted themselves as if no Event of Default had occurred...
>
> (emphasis added)

51 The Employer argues that a mere reference to a "state of affairs" is not sufficient to warrant setting aside a legal right as important as solicitor-client privilege. It argues that its disclosures of Southern's advice would be in the nature of general statements made to convey a "state of affairs" and are not vital to the merits of the Grievance. I do not agree that the Employer's disclosures of Southern's advice are not vital to the merits of the Grievance. As indicated earlier, they are vital to the merits of the Union's Grievance and particularly to the alleged breach of section 6(1) of the Code.

52 Moreover, returning to *S. & K. Processors*, recall that Madame Justice McLachlin referred to two examples where waiver may occur in the absence of an intention to waive where fairness and consistency so require. First, waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Second, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. The Court of Appeal's decision in *Doman Forest Products*, and particularly its reference to "a mere allegation as to a state of affairs on which a party may have received legal advice" in the *Pax Management* case addressed the second example of implied waiver, and more particularly that implied waiver would not be found in those circumstances. That is not at all the basis upon which I have concluded that the Employer has waived privilege over Southern's advice regarding Christensen and Muller. The present case fits within the first example of implied waiver set out in *S. & K. Processors*. The basis of my conclusion is set out earlier namely, that having expressly waived privilege over part of Southern's advice regarding Christensen and Muller, fairness and consistency require a conclusion that privilege has been waived over the entirety of Southern's advice regarding them.

53 As indicated earlier though, even had I concluded that the reasoning in *Doman Forest Products* regarding "a mere allegation as to a state of affairs on which a party may have received legal advice" is applicable to the very different circumstances before me, the importance of the Employer's disclosures of Southern's advice regarding the alleged breach of section 6(1) of the Code would preclude me from concluding that it was a "mere allegation as to a state of affairs" on which the Employer received legal advice.

EXTENT OF WAIVER

54 The Employer argues that when privilege has been waived, the question that must be asked is: to what extent? It goes on to argue that where waiver has occurred, solicitor-client privilege should only be interfered with "to the extent absolutely necessary in order to achieve a just result." The Employer goes on to argue that waiver only occurs to the extent that fairness requires it.

55 As stated by the B.C. Supreme Court in *Weir-Jones v. Taylor*, [2013] B.C.J. No. 1957 (B.C. S.C.) regarding the extent of the waiver of privilege:

> 68. In *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875, the Court confirmed that solicitor-client privilege should only be interfered with to the extent absolutely necessary in order to achieve a just result. See also *Pacific Concessions, Inc*. at para. 13.

56 As further stated by the Court in *Biehl v. Strang*, [2011] B.C.J. No. 274 (B.C. S.C.):

> 47. Limiting the waiver of privilege to the matters put in issue is also consistent with the proposition in *Descoteaux* that the degree of interference with issues of privilege should be limited to what is necessary to ensure fairness.
>
> (emphasis added)

57 The Court in that case referred at length from *Pacific Concessions Inc. v. Weir*, 2004 BCSC 1682 (B.C. S.C. [In Chambers]). In that case, the Court considered the scope of the waiver to flow from the defendant attaching an email between himself and his solicitor to an affidavit. The Court in *Pacific Concessions* held that: "I am satisfied that when Mr. Weir appended the email between himself and Ms. Holman to his affidavit filed at the summary trial, *he waived solicitor-client privilege with respect to the matters contained in that email*." (para. 15; emphasis ad-

ded). The Court in *Biehl* went on to quote the following passages from *Pacific Concessions*, among others:

> 26. In *Chow v. Maddess*, [1999] B.C.J. no. 2236, the plaintiff swore an affidavit which included as an exhibit a copy of a handwritten statement that she had prepared for her solicitor regarding a conversation between herself and an employee of one of the defendants. The defendants argued that solicitor-client privilege had been waived and sought all the documents in the solicitor's possession relevant to the action.
>
> 27. Coultas J. allowed the motion for production. He concluded that when the plaintiff waived privilege over her handwritten statement by exhibiting it in her affidavit, she also waived privilege over the documents and notes produced by her solicitor with respect to that statement. Citing the relevant principles stated in Wigmore, he observed, at para. 7, that "[T]he plaintiff cannot choose what will be produced and withhold the remainder — it would be unfair to allow this, as the plaintiff could choose the evidence most favourable to her and withhold the rest". Nonetheless, the court limited production to those documents in the solicitor's file that dealt with the matters raised by the handwritten statement, namely the conversation between the plaintiff and the employee.
>
> 28. A similar result was reached in *Murao v. Blackcomb Skiing Enterprises Limited Partnership*, 2003 BCSC 558, which arose out of a claim for personal injuries resulting from a snowboarding accident. The solicitor for the plaintiff swore an affidavit in which he set out statements that the plaintiff made to him describing the accident. The description in the solicitor's affidavit was not consistent with the plaintiff's version of events. The defendants brought an application for disclosure of the solicitor's file.
>
> 29. Sinclair Prowse J. concluded that solicitor-client privilege had been impliedly waived and ordered that certain materials in the solicitor's file be disclosed. However, she confined her order for disclosure to those communications or parts thereof that were pertinent to the matters mentioned in the affidavit.
>
> (emphasis in *Biehl*)

58 As noted above, in its submission dated May 2, 2016, the Employer wrote:

> 113. The Redacted Report provides sufficient disclosure of information about the only issues which were allegedly disclosed, which, generally speaking, involve alleged mistakes made in the Original Investigation and the finding that Ms. Christensen's conduct did not

> meet the legal definition of harassment, providing the basis for the conclusion that the Employer possibly faced human rights liability and resulting in its decision to provide monies to Ms. Christensen and Ms. Muller. The Redacted Report, already provided to the Union by order of the Arbitrator, sets out sufficient information about these specific issues, and fairness does not require disclosure of any further content of the Investigation Report.
>
> (emphasis added)

59 The Union, by contrast, argues that the entire Report is relevant and that the Employer's reliance on the Report in this arbitration and in the related Board proceeding have put the entire Report at issue and that principles of fairness demand disclosure of the entire Report.

60 Having carefully reviewed the unredacted Report, and having compared it with the redacted Report, I have concluded that all of the Report relating to the Christensen and Muller investigations must be disclosed in full, subject to the exception set out below [and subject, as I explain later in this decision, to the type of conditions referred to by the Supreme Court of Canada in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), ("*Ryan*"). I will refer further to the *Ryan* case in the Wigmore Confidentiality section of this decision.]

61 Reading just the redacted Report it is not possible to fully understand the substantive basis underlying Southern's conclusions regarding the Christensen and Muller investigations, which in turn caused the Employer to provide a remedy to those two employees. A central issue before me will be whether by making those payments, without the agreement of the Union, did the Employer breach the *Code* and the Collective Agreement. Not just relevant to that issue, but critical to it, will be the reason the Employer made those payments. The Employer made those payments based on the advice that it received from Southern: see para. 113 quoted above from the Employer's May 2, 2016 submission, as well as Strohmaier's statutory declaration, at para. 4. Moreover, Southern's recommendations resulting from her conclusions regarding Christensen and Muller also have an important bearing regarding the issue of the Union's exclusive bargaining authority. In my view, it is simply not fair for the Employer to state that the Report's conclusions resulted in the Employer's providing monies to Christensen and Muller, and at the same time assert that the Union should not be permitted to fully see the factual bases for those conclusions and Southern's recommendations resulting from her conclusions regarding Christensen and Muller. Accordingly, I have concluded that it is absolutely necessary for those portions of the

Report to be disclosed to the Union in order to achieve not only a just result, but also a fair hearing. Similarly, the information under the heading "Application of Various Policies and Tools", which pertains to the Christensen matter must be disclosed.

62 In this connection, I note the obligation of an arbitration to provide a fair hearing as expressly set out in Section 99(1)(a) of the *Code* which provides as follows:

> On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that:
>
> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
>
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

63 The exception to my conclusion above is the last 3 sentences in the middle paragraph on page 23 of the Report and Tab 6 of the Report, which do not have anything to do with Christensen, Muller and their respective investigations. In my view it is not absolutely necessary to disclose them in order to achieve a just result, nor would there be any unfairness to the Union by not disclosing them. I must add that those 3 sentences are, at best, only marginally relevant to the issues raised by the Grievance.

64 I do not agree with the Union that principles of fairness demand disclosure of the entire Report. The Employer's waiver of solicitor-client privilege was exclusively with respect to Southern's advice regarding Christensen and Muller. The Employer has not waived privilege with respect to the remainder of the Report. Consistent with *Biehl v. Strang* and the caselaw cited in that decision, the remainder of the Report which is protected by solicitor-client privilege, and which has not been waived by the Employer, should not be disclosed.

65 I pause to address the statement in *S. & K. Processors Ltd.* quoted above that "waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication." That second statement flows from the first state-

ment. Hence, Madame Justice McLachlin's use of the word "Thus". Accordingly, where fairness and consistency so require, a party will not be permitted to waive privilege as to part of a communication, and yet seek to maintain privilege over the remainder of the communication. Where, however, fairness and consistency do not require the disclosure of the remainder of the privileged communication, it need not be disclosed: see, for example, *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1960 (B.C. C.A.).

66 Solicitor-client privilege is fundamental to the proper functioning of our legal system: see, for example, *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44 (S.C.C.), at para. 9. Given the fundamental importance of solicitor-client privilege, I do not see the remainder of the Report (including Tab 10, which is irrelevant to the arbitration), the privilege with respect to which has *not* been waived by the Employer, as being necessary to disclose. Nor will there be any unfairness to the Union, in the sense contemplated by *S. & K. Processors* regarding waiver of solicitor-client privilege, by not disclosing the remainder of the Report. Rather, it would be unjust and unfair for the Employer to have to reveal the remainder of the Report, which was protected by solicitor-client privilege and which was not waived by the Employer.

67 I should note that, although not the basis of my decision regarding the extent of waiver, all references to Boulier in the Report and attached Tabs (i.e. relating to the Union's third ground) are included in those portions of the Report and attached Tabs that, as I have already held, must be disclosed to the Union.

WIGMORE CONFIDENTIALITY

68 In the alternative, the Employer opposes the disclosure of the documents on the basis of the Wigmore test of confidentiality. This type of case by case privilege was adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 (S.C.C.). The B.C. Supreme Court outlined the requirements of this test in *Cimolai v. Hall*, [2004] B.C.J. No. 187 (B.C. S.C.) in the following terms:

> 44. The test for such a privilege against the disclosure of communications is derived from that propounded by Wigmore, *Evidence*, McNaughton revision, Vol. 8 (Toronto: Little Brown and Co., 1961) at 2285. Four conditions must be met:

1. The communications must originate in a confidence that they will not be disclosed
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
3. The relation must be one which, in the opinion of the community, ought to be sedulously fostered, and
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

69 All four conditions must be met. Whether or not the conditions are met depends on the circumstances of each case: see, for example, *Cimolai v. Hall*, at para. 48.

70 I agree that on the evidence before me, the first Wigmore condition is met. As set out in Southern's statutory declaration at para. 18, prior to asking any questions, Southern informed each employee that she interviewed that the information disclosed to her during the interview would be received in confidence, would be treated by her as strictly confidential, and would only be disclosed to the PHSA and the Employer, or as required by law, or to ensure the fairness of the investigation.

71 In terms of the second Wigmore condition, in the particular circumstances of the present case, I conclude that it too has been met. I note para. 15 of Southern's statutory declaration which indicates that the employee interviews which she conducted were purely voluntary on the part of the employees. In light of the sensitive workplace issues being discussed, I conclude that Southern's belief, as expressed in para. 19 of her statutory declaration, was well founded. In that paragraph she declared: "I believe that due to the sensitive workplace issues being discussed, the employees I interviewed would not have been forthcoming with me had they not been assured that their identities and the information they disclosed would be received in confidence and would be treated by me as strictly confidential." Southern, as counsel for the Employer, was acting on behalf of the Employer in the interviews that she conducted. Given the sensitive workplace issues, I conclude that the element of confidentiality was essential to the full and satisfactory maintenance of the relation between the Employer and employees - at least, and particularly, in the context of the Employer's investigation.

72 In terms of the third Wigmore condition I am prepared to assume, without deciding, that it too is met. I note that the Union relies on the

B.C. Court of Appeal's decision in *Hacock v. Vallaincourt*, [1989] B.C.J. No. 1860 (B.C. C.A.) for the proposition that the third Wigmore condition is not met in the present case. The Employer seeks to distinguish that case from the present one. In view of my conclusion on the fourth Wigmore condition, I need not resolve that issue.

73 I turn to the fourth Wigmore condition. I begin by carefully noting the following statements of the majority of the Supreme Court of Canada in *Ryan*:

> 31...For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.
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> 32. At this stage, the court considering an application for privilege must balance one alternative against the other. The exercise is essentially one of common sense and good judgment. This said, it is important to establish the outer limits of acceptability. I for one cannot accept the proposition that "occasional injustice" should be accepted as the price of the privilege. It is true that the traditional categories of privilege, cast as they are in absolute all-or-nothing terms, necessarily run the risk of occasional injustice. But that does not mean that courts, in invoking new privileges, should lightly condone its extension...
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> 33. It follows that if the court considering a claim for privilege determines that a particular document or class of documents must be produced to get at the truth and prevent an unjust verdict, it must permit production to the extent required to avoid that result. On the other hand, the need to get at the truth and avoid injustice does not automatically negate the possibility of protection from full disclosure. In some cases, the court may well decide that the truth permits of nothing less than full production. This said, I would venture to say that an order for partial privilege will more often be appropriate in civil cases where, as here, the privacy interest is compelling. Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.
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> . . .
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> 37. My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in appropriate circumstances. Once the first three requirements are met and a compelling prima

> facie case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the completing interests of disclosure and privacy in each case...

74 In terms of the injury to the relationship between the Employer and employees in question by the disclosure of the communications, I note that the redacted information is personal or identifying information that was provided to Southern on the understanding that it would remain confidential between the employee and the Employer. Some of this information is personal and sensitive, including information about relationships between employees. In my view, disclosure of the information would cause some injury to the relationship between the Employer and the employees in question, in that the employees will note that the information that they provided to Southern, and hence to the Employer, will have been disclosed. I do note, however, that Southern advised each employee, prior to asking any questions, that the information disclosed to her during the interview would be disclosed, among other things, "as required by law". I therefore reject the Employer's submission that there would be "irreparable damage" to the employees' trust in the Employer if the redacted information were disclosed. I also note that the investigation conducted by Southern was a one-off investigation at one worksite namely, Station 257 in Maple Ridge, as opposed to an ongoing human rights process such as the one considered in *Cimolai v. Hall*. In this respect, the disclosure of the documents will have less of an impact than it would if the investigation were part of a regular ongoing process, or if the investigation were province-wide.

75 I pause to note that the Employer relies on the *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] Chapter 165, but expressly acknowledges that an arbitrator is not bound by the disclosure rules under that Act and agrees that that Act does not bar an arbitrator from ordering disclosure of any particular document. Indeed, Section 33.1 (1) (t) of that Act expressly permits a public body to disclose personal information "*to comply with* a subpoena, a warrant or *an order issued or made by a* court, *person or body in Canada with jurisdiction to compel the production of information*." (emphasis added). I agree with the Union's submission that that Act does not prevent me from ordering

production of the Report, nor does it assist in determining whether or not the documents are privileged. The latter determination in the present context is to be made under the Wigmore conditions, and particularly under the fourth condition balancing the injury caused by the disclosure against the benefit that would be gained for the correct disposal of the litigation. That depends upon the particular factual circumstances of each case. I have already concluded that the disclosure of the information would cause some injury to the relationship between the Employer and the employees in question.

76 As against that injury to the relationship between the Employer and the employees in question, however, must be weighed the benefit that would be gained for the correct disposal of the Union's Grievance. As set out earlier in the Extent of Waiver section of this decision, I have concluded that it is necessary for the majority of Report, as set out in that section, to be disclosed to the Union in order to achieve a just result, as well as a fair hearing as required by the *Code*. As stated earlier, the factual foundations of Southern's conclusions regarding Christensen and Muller, as well as her recommendations resulting from those conclusions, are important in terms of the issues in this case including the alleged breach of section 6(1) of the Code and the Union's exclusive bargaining agency. I have concluded that in the particular circumstances here, the benefit to be gained for the correct disposal of the Union's Grievance outweighs the injury that would inure to the relation by the disclosure.

77 However, the remainder of the Report protected by solicitor client privilege (as set out in the Extent of Waiver section of this decision) need not be disclosed to the Union. Moreover, the imposition of *Ryan* conditions including who may see the Report and limits on copies of the Report, would be a useful additional way to balance the competing interests under the fourth Wigmore condition in the particular circumstances of the present case. I leave it to counsel to work out the *Ryan* conditions (as per their agreement in the oral hearing). Failing agreement, I reserve jurisdiction to hear from them and resolve whatever condition(s) they are unable to agree upon.

DOCUMENTS AND PARTICULARS TO BE DISCLOSED

78 With respect to the Terms of Reference for the investigation, I agree with the Employer that it has not waived privilege over them by virtue of its production of them in this preliminary hearing. As stated in the terms

of counsel for the Employer's letter dated February 12, 2016, which formed part of my consent order:

> The Employer shall produce to the Union a redacted version of Ms. Southern's report, without prejudice to the Employer's position that the entire report is covered by solicitor client privilege.

79 The Employer has relied on the Terms of Reference in this preliminary hearing as part of its onus to establish the factual foundation of its claim that the Report is covered by solicitor-client privilege. The disclosure was not voluntary, and does not meet the test for express waiver as set out in *S. & K. Processors*. The same is true for Southern's retainer letter. As I concluded earlier, the Report is covered by solicitor-client privilege. So, too, are the Terms of Reference and retainer letter.

80 However, in its submission to the Labour Relations Board, the Employer stated, among other things, that it had "engaged an external investigator (the "Investigator") to conduct an investigation, in part, into workplace concerns that gave rise to the June 22 Incident..." Strohmaier declares in his statutory declaration, among other things, that: "Ms. Wengi advised the Union that the Employer had hired a lawyer, Lisa Southern, to do an investigation following the complaints..." I earlier concluded that fairness and consistency require a conclusion that privilege has been waived over Southern's advice relating to the Christensen and Muller investigations. So, too, do I conclude that fairness and consistency require a conclusion that privilege has been waived over the Terms of Reference of Southern's hiring and Southern's retainer letter. However, in terms of the retainer letter, all that needs to be disclosed is the fact that it is between Southern and Wengi of the Employer and the first two sentences ending in the words "on the following terms". The remainder of the letter simply sets out the financial terms of her services, which are irrelevant to the issues before me.

81 In terms of the documents in (i) (d) through (g) sought by the Union, I have not seen them (apart from the Tabs attached to the Report). The Employer argues that they are subject to solicitor-client privilege. For the reasons set out above, along with the cases cited by the Employer, I agree that they are subject to solicitor-client privilege. However, for the reasons set out above, I have concluded that the Employer has waived solicitor-client privilege with respect to Southern's advice regarding Christensen and Muller and that the majority of the Report, as set out in the Extent of Waiver section of this decision, must be disclosed. The Employer is to produce those of the documents in (i) (d) through (g) which

are consistent with my conclusions in this decision. I retain jurisdiction to resolve any issue(s) regarding those documents that the parties are unable to resolve on their own. This order for disclosure will equally be subject to *Ryan* conditions as set out earlier.

82 With respect to the particulars sought by the Union, the Employer advised in oral argument that in terms of the negative consequences experienced by Christensen and Muller and the Employer's reasons for concluding same, the Employer adopts the information provided by Christensen at Exhibit D of Barter's statutory declaration and the information provided by Muller at Exhibit E of Barter's statutory declaration. The provision of those parts of the Report, and documents, that I have ordered to be disclosed will provide the particulars sought by the Union under items (ii) and (iv) of its request for particulars.

83 I retain jurisdiction to settle the *Ryan* conditions, if need be, as well as to resolve any other dispute between the parties that may arise out of this decision.

Application granted in part.