



Reference: *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2010 Comp. Trib. 16
File No.: CT-2008-004
Registry Document No.: 0701

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Order pursuant to section 75 of the *Competition Act*;

AND IN THE MATTER of an Application by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for an Interim Order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER of a Motion by Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited for a Show Cause Order;

AND IN THE MATTER of a Motion by the Respondent Groupe Westco Inc. for an Order or Direction regarding the Tribunal's Interim Supply Order;

B E T W E E N:

**Nadeau Ferme Avicole Limitée/
Nadeau Poultry Farm Limited**
(applicant)

and

Groupe Westco Inc.
(respondent)



Decided on the basis of the written record.

Before Judicial Member: Blanchard J.

Date of Reasons and Order: November 30, 2010

Reasons for Order and Order signed by: Justice Edmond P. Blanchard

**REASONS FOR ORDER AND ORDER REGARDING A CLAIM FOR SOLICITOR-
CLIENT PRIVILEGE IN RESPECT OF THE AMOUNT OF NADEAU'S LEGAL FEES**

I. BACKGROUND

[1] On September 24, 2010, the Tribunal issued a confidential version of its Sentencing Order (the “Order”) in which it imposed a fine of \$75,000 on the respondent Groupe Westco Inc. (“Westco”). The Tribunal also ordered it to pay to the applicant, Nadeau Poultry Farm Limited (“Nadeau”), costs fixed in the amount of \$250,000. Nadeau and Westco were asked to meet in order to reach agreement about the redactions to be made to the Order to enable the Tribunal to issue a public version.

[2] Nadeau and Westco have agreed on all redactions but those relating to the fees charged by Nadeau’s counsel.

II. THE ISSUE

[3] Nadeau has not asked for the redaction of the figure which relates to its total disbursements. It is found at paragraph 78 of the Order. Nadeau’s requests for redaction relate to four figures. Two show combined totals of fees and disbursements and two give totals for fees alone. However, given its agreement that the disbursements figure is to be disclosed to the public; it is clear that Nadeau’s claim of solicitor-client privilege in fact relates solely to the total amount it has been charged for legal fees. In the case of the combined totals of fees and disbursements, that amount can be discovered by deducting the total disbursements from the combined total. I note in passing that the fees at issue refer to the total amount charged by Fogler, Rubinoff LLP and Folkes Legal Professional Corporation. However, there is no way to distinguish the fees charged by each firm.

III. THE PARTIES’ POSITIONS

[4] Nadeau asserts in its written submissions that the fees it paid its counsel are covered by solicitor-client privilege. It refers to the Federal Court of Appeal decision in *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (C.A.), and to Mr. Justice Lebel’s ruling in *Maranda v. Richer*, [2003] 3 S.C.R. 193. It adds that while it was required to disclose the legal fees it was charged as part of its confidential submissions to the Tribunal about costs, this disclosure does not amount to public disclosure, nor does it imply consent to public disclosure.

[5] In the alternative, Nadeau submits that its legal fees are confidential under the terms of the Confidentiality Order issued by the Tribunal on June 26, 2008.

[6] Westco submits, on the other hand, that the fees charged are not privileged. It argues that Nadeau’s fees disclose no communications between lawyer and client and no information about legal advice. The total amount of the fees is therefore not privileged and Westco points to the test known as the “fact/communication analysis” and the “rebuttable presumption of privilege test”, applied by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 251 D.L.R. (4th) 65.

[7] Westco further submits that Nadeau has failed to establish that the fees it paid its counsel are confidential under the terms of the Tribunal’s Confidentiality Order. Westco argues that

Nadeau has failed to advance any allegation showing that the release of the total fees will cause it specific, direct harm. It also submits that counsel for Nadeau provided figures for total fees and total fees plus disbursements on the public record at the sentencing hearing and that Nadeau has therefore waived solicitor-client privilege.

IV. ANALYSIS

[8] Solicitor-client privilege is a civil and legal right which is fundamental to the justice system in Canada (see, for example, *R. v. McClure*, [2001] 1 S.C.R. 445 at 455).

[9] A typical account for legal services will be comprised of the following elements:

- a narrative description of the work done or advice given;
- the identity of the lawyer who did the work or gave the advice and his or her hourly rate;
- the time spent on each aspect of the work;
- a list of disbursements and related charges;
- a total of fees (time x hourly rate);
- a total for disbursements; and
- a grand total of the amount owing.

[10] In the case at bar there is no invoice or account at issue. The only question is whether the total amount of the fees, referred to in the Order, is subject to a claim of privilege.

[11] In *Maranda v. Richer*, [2003] 3 S.C.R. 193 (also cited below as *Maranda v. Leblanc*), the Supreme Court of Canada was asked to determine whether in the context of a police investigation, solicitor-client privilege protects the total amount of the fees charged by the suspect's counsel. In that case, the RCMP had obtained authorization to search a law office for any documents relating to fees and disbursements billed to a client whom the RCMP suspected of money laundering and drug trafficking and for any documents relating to the ownership of a car that the client had allegedly transferred to his lawyer to pay for his professional services.

[12] There was no issue in *Maranda* about the principle that lawyers' invoices are protected by privilege when they contain information about legal advice and about the terms of payment of the lawyer's fees.

[13] Speaking for the majority, Mr. Justice Lebel held, at para. 33, in connection with the total amount of fees:

In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege.

[14] While this decision was issued in a criminal law context in which the Crown was seeking information about a suspect's lawyer's fees, the Ontario Court of Appeal subsequently applied the *ratio decidendi* in a civil matter. In *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 251 D.L.R. (4th) 65, the Court of Appeal

accepted that the total amount paid in respect of lawyers' fees is presumptively protected by solicitor-client privilege. In that case, two journalists had sought the disclosure of information relating to the total amount of legal fees paid by the Ministry of the Attorney General to lawyers who had acted for two intervenors in a criminal proceeding. The Court referred to the Supreme Court of Canada decision in *Maranda* as follows, at pp. 69-70, where it said:

[9] [...] Assuming that *Maranda v. LeBlanc*, supra, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

[...]

[11] [...] we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

[15] With respect to the rebuttal of the presumption, the Ontario Court of Appeal held that "if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege", the presumption will be rebutted (at p. 70) (see also *Maranda*, at pp. 214-215). The Court further held as follows at p. 70:

[12] [...] In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC [Assistant Information and Privacy Commissioner] that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege.

[16] I have concluded that the approach taken by the Ontario Court of Appeal is appropriate in the context of this case and I therefore find that the total amount of Nadeau's legal fees is presumptively protected by solicitor-client privilege. In these circumstances, according to the principle set out by Mr. Justice Lebel, at para. 34 of *Maranda*, the obligation on Westco is to rebut the presumption that the disclosure of fees will reveal a communication between Nadeau and its counsel which is protected by solicitor-client privilege. In my view, how that rebuttal is accomplished will vary with the facts of the case. In some cases, the presumption may be

rebutted by logical arguments dependant on self-evident facts. Additional evidence may not be required.

[17] In some situations, a submission that no breach is reasonably possible will satisfy the Tribunal. Westco asserts at page 3 of its October 27, 2010 submissions that the disputed redactions, i.e. the bare totals of fees plus disbursements and fees alone, disclose no content of communications between lawyer and client, no information about legal advice, no litigation strategy, no information concerning terms of payment and no information concerning Nadeau's financial situation.

[18] In its written submissions, Nadeau does not address the possibility that the Tribunal may find that the presumption has been rebutted. It simply says that a rebuttal cannot be accomplished without evidence and because there is none, the presumption in favour of solicitor-client privilege for the total amount of legal fees must stand.

[19] In my view, this position is not reasonable. Once the presumption is rebutted, the onus shifts back to Nadeau. It is then incumbent upon Nadeau to positively assert its privilege claim and describe why it says that communications could be revealed by the disclosure of the total fees. Nadeau has not responded in a substantive manner to Westco's submission that the disclosure of the fees it paid is neutral. If it had reason to think that a solicitor-client communication could be disclosed if its legal fees were made public, it should have alerted the Tribunal to that possibility.

[20] To conclude, I agree with Westco that the presumption is rebutted. I have determined that an assiduous inquirer, aware of the background information available to the public, could glean nothing about communications protected by privilege if the total fees were made public. In my view, the total fee can be characterized as neutral and can be disclosed without impinging on the solicitor-client privilege. In view of this conclusion that there is no privilege in the figure for total fees in the circumstances of this case, it is not necessary to consider whether privilege was waived.

[21] However, in the alternative, I conclude that the privilege claimed in the total fees was waived when counsel for Nadeau provided a total figure for fees and disbursements on the public Tribunal record on July 7, 2010. The figure is found at page 157 of the transcript and, while it is not the amount for fees and disbursements sought to be redacted from the Order, it is very close – the difference being approximately \$20,000.

[22] Although Nadeau now asserts, and I accept, that the figure was provided to the Tribunal in confidential written submissions and was disclosed on the public record in error, it has not asked to have the transcript assigned confidential status. Accordingly, a figure which closely represents the total fees has been in the public domain for four months and remains there today. In these circumstances, I conclude that privilege has been waived.

[23] Nadeau also submits that the information is confidential under the terms of the Confidentiality Order. In its written submissions, it says :

Specifically, disclosure of the amount of the fees and disbursements charged by the Firm [Fogler, Rubinoff LLP] to its Client [Nadeau Poultry Farm Limited] is akin to forcing disclosure of a price paid by a supplier to Nadeau. In this case, the “supplier” is the Firm. During the course of this litigation, the parties have successfully maintained confidentiality over that type of information and there is no justification in these circumstances to depart from that practice.

It is respectfully submitted that the terms between the Firm and the Client merit no less consideration than the terms between Nadeau and its suppliers, or Westco and its suppliers. In fact, given the nature of the relationship (solicitor-client), it is submitted that it should be given higher consideration.

Further, the amount of fees and disbursements charged by the Firm to its Client is an item that would typically appear in a Financial Statement as an expense. If it appeared in that manner, in this proceeding, there is no question the item would remain redacted and would remain Confidential Level “A”.

[24] I disagree with the analogy drawn above and find that Nadeau is blurring two distinct issues: solicitor-client privilege and the protection of information under the Tribunal Confidentiality Order. With respect to the arguments referring to the solicitor-client relationship, I have already concluded above that the disputed redactions are not privileged.

[25] With respect to the argument that the information should be treated as confidential, it should be noted that Nadeau does not refer to the specific paragraph of the Confidentiality Order on which it relies in support of its position. The Confidentiality Order only protects documents which, if disclosed, could cause specific and direct harm, in accordance with Rule 67 of the *Competition Tribunal Rules*, SOR/2008-141.

[26] Nadeau, despite the analogy it has drawn between the disputed redactions and a supplier’s pricing information, has not set out the harm which would allegedly result from the disclosure of the information. I have looked at the disputed redactions to see if, on their face, it is evident that there would likely be a specific, direct harm if those amounts were made public (see *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 27 and *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2009 Comp. Trib. 11). I fail to see any risk of harm.

[27] In these circumstances, I find that the disputed redactions are not confidential under the Tribunal’s Confidentiality Order.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[28] The identical amounts set out in paragraphs 20 and 73 of the Order, representing total fees and disbursements, and the slightly different amounts in paragraphs 74 and 75 of the Order, representing total fees, shall be disclosed in the public version of the Order.

DATED at Toronto, this 30th day of November, 2010.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Edmond P. Blanchard

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