

**ONTARIO LABOUR RELATIONS BOARD**

**2831-09-M Gailene Durrant, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2869-09-M Patrick Cejudo, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2870-09-M Florence Brown, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2871-09-M Adon Adap, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2872-09-M Luisa Civra, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2873-09-M Andrew Jardine, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2874-09-M Sylvia Jackson, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**2875-09-M Heidi Malon, Applicant v. Service Employees International Union Local 1 and Valleyview Residence, Responding Parties.**

**BEFORE:** Tanja Wacyk, Vice-Chair.

**APPEARANCES:** Ronald Lachmansingh for Gailene Durrant et al., Denis Ellickson for Service Employees International Union, Local 1 Canada; Robert Budd for Valleyview Residence.

**DECISION OF THE BOARD:** June 5, 2012

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1. These are applications pursuant to section 52 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") for an exemption from membership in the Service Employees International Union, Local 1 Canada ("SEIU"), and being required to pay union dues in accordance with SEIU's Collective Agreement with Valleyview Residence ("Valleyview").
  2. The style of cause has been amended to reflect the change in Ms. Durrant Lennon's name to Guilene Durrant.
  3. The applicants maintain the basis of their applications is their membership in the Seventh-Day Adventist Church in Canada (the "Seventh-Day Adventist Church").
  4. Grace Mackintosh, the initial counsel for the applicants, is also General Counsel to the Seventh-Day Adventist Church.
  5. This decision deals with SEIU's request for the production of e-mail correspondence between Ms. Mackintosh, and Mike Savatovich, the Administrator of Valleyview and/or Valleyview.
  6. In my decision of May 28, 2012, I found the email correspondence to be arguably relevant.
  7. In this decision I determine whether Valleyview is entitled to claim the correspondence is protected by solicitor-client privilege.
- BACKGROUND:**
8. For ease of reference, I will again briefly set out the history of these applications below.
  9. One of the applicants, Ms. Durrant, filed a substantially similar section 52 application in late April 2009. That application was withdrawn as it was premature. (Board File No. 0198-09-M).
  10. The instant applications were filed in December 2009.
  11. Ms. Mackintosh filed the applications on behalf of the applicants in all of the above instances. By correspondence dated January 24, 2011, the applicants advised they had retained a new lawyer, Ronald Lachmansingh and law firm, Juriansz & Li.
  12. The emails between Ms. Mackintosh and Mr. Savatovich occurred in May 2009, and December 2009, continuing into 2010.
  13. Valleyview is now represented by Robert Budd.

**SOLICITOR-CLIENT PRIVILEGE:***Mr. Savatovich's Testimony*

14. Mr. Savatovich testified that he had no knowledge of Ms. Mackintosh prior to receiving a copy of Ms. Durrant's initial application, which contained Ms. Mackintosh's name on the fax cover sheet. Mr. Savatovich indicated he did not know if she was a lawyer, but assumed she was. He also indicated he has no knowledge of whether Ms. Mackintosh has labour relations or other specific legal expertise.

15. Mr. Savatovich maintained Ms. Mackintosh was retained by Valleyview when he initiated email communication with her on May 1, 2009. Mr. Savatovich acknowledged he was aware, at the time, that Ms. Mackintosh was counsel to the applicants, and General Counsel to the Seventh-Day Adventist Church, but she did not indicate she could not represent Valleyview as well.

16. Mr. Savatovich testified that Valleyview did not have a retainer with Ms. Mackintosh and she did not bill or receive payment for her services.

17. Mr. Savatovich indicated he retained Ms. Mackintosh for the purpose of obtaining legal advice regarding the applications. When questioned by counsel for SEIU whether the scope of the retainer was to help him file the response to the applications, Mr. Savatovich answered in the affirmative.

(Although Mr. Budd objected to this question on the basis it was not appropriate to enquire about the particulars of the communications claimed to be privileged, I allowed the question. As stated in *Minter v. Priest* [1929] 1 K.B. 655 (Eng. C.A.) at pp. 668-69 and referred to in *R. v. Shirose* (1999) 171 D.L.R. (4<sup>th</sup>) 193 at paragraph 50:

It not sufficient for the witnesses to say, "I went to a solicitor's office." ... Questions are admissible to reveal and determine for what purpose and under what circumstances the intended client went to the office.)

18. Mr. Savatovich conceded, however, that Ms. Mackintosh did not file Valleyview's response. Nor did the response identify her as Valleyview's counsel. Further, while Mr. Savatovich attended the first day of hearing in these applications, he did so on his own. While Ms. Mackintosh attended, she did so on behalf of the applicants, and Mr. Savatovich did not identify her as Valleyview's lawyer as well.

19. Mr. Savatovich conceded that Valleyview's response indicated that Valleyview supported the applications, although he pointed out this had been subsequently "corrected" and Valleyview now takes "no position".

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20. Mr. Savatovich could not recall if he and Ms. Mackintosh had had any communications in another format such as by telephone.

21. Mr. Savatovich indicated Ms. Mackintosh had been retained solely in relation to the instant applications and Valleyview's relationship with her ended with the last email communication between them on June 25, 2010. When asked why the relationship ended he replied that "the applications had been submitted".

22. Mr. Savatovich testified he expected his communications with Ms. Mackintosh to be privileged, private and confidential.

23. As administrator Mr. Savatovich is required to seek authorization for expenditures exceeding \$10,000.00. He conceded he did so when Mr. Budd was initially retained in 2007 to assist with Valleyview's negotiation of its first collective agreement with the SEIU. However, Mr. Savatovich did not seek a similar authorization when Ms. Mackintosh was retained. He indicated this was because her retainer was a "one off" situation, whereas Mr. Budd was retained to assist with Valleyview's industrial relations over the longer term. Mr. Savatovich conceded Mr. Budd was not retained via e-mail.

### *The Test*

24. Solicitor-client privilege has evolved into a "principal of fundamental justice" incorporated in section 7 of the *Charter of Rights and Freedoms*, and is of supreme importance in Canadian Law. ("Protecting solicitor-client privilege; Guidelines for Law Office Searches", *Law Society Gazette*, Winter 2012). The privilege, once established, is considerably broad and all-encompassing. (*Corporation of the City of Windsor* 2008 CanLII 419 (ON LRB at paragraph 8))

25. Solicitor-client privilege has been extended to include communications exchanged during other litigation, those made in contemplation of litigation, any consultation for legal advice, whether litigious or not, and can include instances where a retainer is not perfected or the communications are with a solicitor's agents. (*Solosky v. R.*, (1980) 105 D.L.R. (3d) 745 at paragraph 22; *Descôteaux c. Mierzewski*, [1982] 1 S.C.R. 860 at paragraphs 14 and 42).

26. Solicitor-client privilege may also extend to miscellaneous documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice. (*Blood Tribe v. Canada (Attorney General)*(2010) 317 D.L.R. (4<sup>th</sup>) 634 at paragraph 26). Further, communications with counsel who are in effect employees of the client i.e. in-house counsel, are also protected if they meet the usual requirements to establish privilege. (*R. v. Shirose, supra*)

27. The test for the modern principle of privilege for solicitor-client communications has been framed in *Wigmore on Evidence*, McNaughton revision (1961),

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vol. 8 paragraph 2292, p. 554, and referred to favourably in *Solosky, supra* at paragraph 23. It provides as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

28. Valleyview and the applicants maintain that based on the above principles, the communications between Mr. Savatovich and Ms. Mackintosh are protected by solicitor-client privilege, as they were for the purpose of seeking her legal advice regarding the applications.

29. Counsel for Valleyview pointed out that Mr. Savatovich's initial contact with Ms. Mackintosh occurred after Ms. Durrant's initial application. He maintained it was clear on the basis of the timing of the initial contact and Mr. Savatovich's testimony, that Mr. Savatovich contacted Ms. Mackintosh in her capacity as lawyer, for the purpose of getting legal advice.

30. Both Counsel for Valleyview and Counsel for the applicants submitted Mr. Savatovich's and Ms. Mackintosh's communications form a continuum of communications in the course of Mr. Savatovich seeking her legal advice, and were accompanied by the expectation they would be kept confidential. Accordingly, they were entitled to the protection of client-solicitor privilege. (*B.C.T.F. v British Columbia* [2010] B.C.W.L.D. 7805 at paragraphs 29 and 31).

31. Counsel for Valleyview also conceded that if Ms. Mackintosh was, in fact, representing both the applicants and Valleyview this placed her in a conflict position. However, he submitted that although Ms. Mackintosh may have failed in her obligation to tell Mr. Savatovich she could not provide legal advice to both Valleyview and the applicants because it placed her in a conflict position, this shortcoming cannot be visited upon Mr. Savatovich so as to abrogate the solicitor-client privilege he is entitled to claim. (*First Majestic Silver Corp. v. Davila*, 2010 CarswellBC 1011 at paragraph 15).

32. Counsel for Valleyview and Counsel for the applicants urged me to find Mr. Savatovich's and Ms. Mackintosh's communications were protected by solicitor-client privilege and deny the SEIU's request for production.

#### **DETERMINATION:**

33. A determination regarding whether solicitor-client privilege attaches in a situation depends on the nature of the relationship, the subject matter of the advice and the circumstances in which the advice is sought and rendered.

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34. The difficulty in this instance is establishing the threshold requirement of the existence of a solicitor-client relationship. As the Supreme Court stated in *Solosky* at paragraph at 24:

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted *in his professional capacity*.

[emphasis added]

35. Similarly, as stated in "*The Law of Evidence in Canada*" 3rd Edition, Sopinka, Lederman & Bryant (Butterworths) at paragraph 14.72, the communication must be made in order to elicit professional advice from the lawyer based upon his or *her expertise in the law*, rather than in a personal or business capacity in order for the privilege to attach.

36. This observation is followed by the following reference to Wigmore:

Such a conversation [in a business or personal capacity] is not privileged, because the reason of the privilege designs to secure only the freedom of resort to attorneys *where some appreciable interest of the client is to be protected and the advice is sought and given with a view to its protection*.

[emphasis added]

37. The discussion of the solicitor-client privilege in the jurisprudence is consistent in the requirement that the discussion between the person seeking the protection of the privilege and the lawyer must be in the context of seeking legal advice from the lawyer "*in his capacity as such*" [see also the earlier quote from Wigmore set out in paragraph 27 above].

38. In other words, lawyers can convey information of various sorts, but it is only when their legal expertise is sought for the purpose of protecting or furthering a client's legal interests that the communications will be protected by solicitor-client privilege.

39. In this instance, I am not persuaded Mr. Savatovich contacted Ms. Mackintosh in order to "retain" her in her capacity as a lawyer regarding Valleyview's interests. Indeed, he was not even certain she was a lawyer when he contacted her – but only "assumed" that was the case.

40. Further, there was no indication, at any of the opportunities prior to the production request at issue, that Valleyview had retained any counsel regarding these applications or that that counsel was Ms. Mackintosh. Ms. Mackintosh did not file Valleyview's response, nor did the response identify her as Valleyview's counsel. When Ms. Mackintosh attended at the first day of hearing she identified herself solely as counsel for the applicants. (As Counsel for the SEIU suggested in the context of why Ms Mackintosh did not advise Mr. Savatovich she could not represent Valleyview as well as the applicants, this may have been because she was not aware she was both

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Valleyview's and the applicants' counsel.) Further, Mr. Savatovich, although in attendance, also did not indicate Ms. Mackintosh was his counsel.

41. Further, given the continuum of communications between Mr. Savatovich and Ms. Mackintosh, it is also unusual that Valleyview was not billed nor paid for her services. While not determinative, in the context of the facts in this case, the lack of a formal retainer or any payments being billed or paid are simply two more missing indicators of a solicitor-client relationship. While the jurisprudence is clear that communications which do not culminate in a formal retainer can still attract the protection of solicitor-client privilege, in my view, this is primarily to protect individuals in the course of exploring whether, for example, they need legal representation, or whether a particular lawyer may be appropriate. However, the "continuum" of communication between Mr. Savatovich and Ms. Mackintosh, as characterized by counsel for Valleyview and the applicants, clearly exceeds these types of exploratory discussions or inquiries.

42. Further, while Counsel for Valleyview argued that in this electronic age it was not at all unusual for the entire solicitor-client relationship to exist via email, such a relationship is still a formal business one that could reasonably be expected to have some external indicia.

43. It is noteworthy, for example, that Mr. Budd's services were retained in a manner other than by e-mail, and only following the requisite authorizations. Further, he billed and received fees. This is to be contrasted against the informal manner in which Valleyview allegedly retained Ms. Mackintosh, and the provision of her legal services to Valleyview for free.

44. Indeed, the only evidence in support of Mr. Savatovich's position that he retained Ms. Mackintosh as Valleyview's legal counsel is his testimony. That testimony, as pointed out by Counsel for the SEIU, was given in a somewhat rote manner, mimicking the legal test i.e. that he contacted Ms. Mackintosh to obtain legal advice regarding the applications and he expected their communications to be confidential, private and privileged. His testimony contained no details regarding why he chose her to give legal advice in this instance, although Mr. Budd had been retained since 2007 to assist with Valleyview's labour relations issues, or why their communications continued after Valleyview's response was filed.

45. Accordingly, in the absence of any of the traditional indicia of a solicitor-client relationship, and what I find to be Mr. Savatovich's somewhat mechanical testimony, I am not persuaded he contacted Ms. Mackintosh to retain her services to provide legal advice to Valleyview.

46. Rather, I find Mr. Savatovich contacted Ms. Mackintosh in her capacity as the agent, (lawyer or otherwise), for the applicants. That is the capacity in which he became aware of her, and I find that is the context in which their communications occurred.

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47. Further, as submitted by Counsel for the SEIU, an unrepresented party having a conversation with the lawyer for a party with whom that unrepresented party sees himself (as did Mr. Savatovich at the time) aligned in interest, does not, on its own, create or constitute a solicitor-client relationship, with the accompanying protection of privilege. There is simply no authority which suggests, in the absence of any other indicia that would normally accompany a solicitor-client relationship, that to be appropriate. Given the broad and appropriately expansive protection accompanying solicitor-client privilege, such privilege should not be casually bestowed at the simple assertion of privilege, preventing the disclosure of arguably relevant documents.

48. Accordingly, I find the email communications which occurred between Mr. Savatovich and Ms. Mackintosh during the period of May 1, 2009 to June 25, 2010 are not protected by solicitor-client privilege and are to be produced to Counsel for the SEIU.

49. I would note that Counsel for the SEIU also suggested Mr. Savatovich had been deceitful in the context of this proceeding, and that by having done so had waived all right to privilege. There were also submissions regarding the circumstances in which it would be appropriate for me to examine the documents in order to make a determination regarding which, if any, may be subject to solicitor-client privilege. However, in light of my finding above, I need not address either issue.

**DIRECTION:**

50. Valleyview is directed to provide copies of the email communications which occurred between Mr. Savatovich and Ms. Mackintosh during the period of May 1, 2009 to June 25, 2010 to Counsel for the SEIU forthwith, and by no later than June 15, 2012.

51. These applications are referred to the Registrar to be relisted for hearing.

"Tanja Wacyk"  
for the Board