

CANADA / JUDGMENT

Yen v. Ghahramani

2024 BCSC 1405

COURT

Supreme Court of British Columbia

DECIDED

5 July 2024

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2024 BCSC 1405 Yen v. Ghahramani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yen v. Ghahramani,

2024 BCSC 1405

Date: 20240705

Docket: S220213

Registry: Vancouver

Between:

Vincent Yen and 0756383 BC Ltd.

Plaintiffs

And

Frederick Ghahramani, 0751846 B.C. Ltd.,

airG Employee Share Ownership Plan Ltd., and airG Inc.

Defendants

And:

Vincent Yen, Canfleet Logistics Ltd., Studypug Inc., Studypug Holding Inc.,

Studypug USA Inc., Studypug Holding (HK) Limited, Studypug (HK) Limited, Manitoulin Global Forwarding Inc., airG Services Inc.,

and Tai Management Ltd.

Defendants by Counterclaim

Before: The Honourable Justice Basran

Oral Ruling Re Application for Document Disclosure

In Chambers

Counsel for Vincent Yen, 0756383 BC Ltd., Studypug Holding (HK) Limited, Studypug Holding Inc., Studypug Inc., Studypug USA Inc., airG Services Inc., and Tai Management Ltd.:

B.J. Cabott

P. Burnham

Counsel for Frederick Ghahramani and 0751846 BC Ltd.:

J.D. Shields

Counsel for airG Inc.:

G.R. Cameron

K.F. Milinazzo

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

June 26-27, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2024

Overview

- [1] The plaintiffs are Mr. Yen and a numbered company he controls, 0756383 BC Ltd. ("Yen Co.") (together, the "Yen plaintiffs"). In May 2024, shortly before the anticipated start of the trial on June 10, 2024, the Yen plaintiffs applied for the broad disclosure of documents by the defendants, Mr. Ghahramani and a numbered company he controls, 0751846 B.C. Ltd. ("Ghahramani Co.") (together, the Ghahramani defendants"). The documents in issue are asserted to be subject to solicitor/client privilege.
- [2] The underlying dispute between these parties was initiated by the Yen plaintiffs by notice of civil claim filed January 14, 2022. The Ghahramani defendants filed a response to civil claim on February 7, 2022, and the defendants, airG Employee Share Ownership Plan Ltd. and airG Inc. ("airG"), did likewise on March 7, 2022. The proceeding against airG Employee Share Ownership Plan Ltd. was discontinued on March 8, 2022.

- [3] This litigation involves allegations of oppression and breach of contract. It is a dispute between the two major shareholders of airG, Mr. Yen and the companies he controls, and Mr. Ghahramani and the companies he controls. AirG is a mobile software company founded in 2000 by Mr. Yen, Mr. Ghahramani, and another party.
- [4] The Yen plaintiffs assert that the documents in issue ought to be disclosed because they believe that they were in a solicitor/client relationship along with the Ghahramani defendants and airG. Alternatively, the Yen plaintiffs suggest that the relevant documents are subject to common interest privilege. In the further alternative, they argue that the Ghahramani defendants waived privilege over the documents in issue so they must be disclosed.
- [5] The Ghahramani defendants and airG deny that the Yen plaintiffs were in a solicitor/client relationship with them. They assert that the law firms, Campney & Murphy ("C&M") and Fasken Martineau DuMoulin LLP ("Fasken"), and their counsel, were retained solely by airG and not by either the Yen plaintiffs or the Ghahramani defendants. The Ghahramani defendants and airG deny any common-interest privilege and also deny that airG waived privilege over any documents.
- [6] For the reasons that follow, I am dismissing the application for disclosure of most of the solicitor/client privileged documents sought by the Yen plaintiffs because the evidence does not support the existence of a solicitor/client relationship between the Yen plaintiffs, Ghahramani defendants, airG, and the subject law firms and their counsel. There was no joint retainer involving these entities.
- [7] There is a common interest in respect of airG's share buybacks that involve both the Yen plaintiffs and the Ghahramani defendants. Documents involving these transactions must be disclosed to the Yen plaintiffs. In respect of all other documents sought by the Yen plaintiffs, airG did not waive privilege over them, and they are therefore not subject to disclosure.

Relevant Findings of Fact

- [8] The underlying dispute involves allegations by the Yen plaintiffs that Mr. Ghahramani breached an agreement whereby the Yen plaintiffs and the Ghahramani defendants would maintain equal share ownership of airG. The Yen plaintiffs allege that the Ghahramani defendants breached this agreement by purchasing shares from other investors without involving the Yen plaintiffs in these purchases, obtaining proxies from other shareholders, and using them to remove Mr. Yen as a director of airG.

- [9] Bruce Tattrie is the long-time corporate counsel of airG and an investor in this company. He was previously at C&M and now is a lawyer at Fasken. The Yen plaintiffs subpoenaed him for trial and sought access to documents in respect of the work he did as airG's solicitor. On behalf of airG, Mr. Tattrie claimed privilege over the requested documents and communications. The Yen plaintiffs also intend to call Mr. Tattrie as a witness in his personal capacity as an investor in airG.
- [10] At this time, Yen Co. owns 44.37% and Ghahramani Co. owns 48.58% of the issued and outstanding common shares of airG.

Positions of the Parties

- [11] The Yen plaintiffs assert that, Mr. Tattrie and his firm, Fasken, which acted for Yen Co., Ghahramani Co., and airG, were on a joint retainer for each of the share buybacks. They submit that Fasken provided legal services to Yen Co., rendered invoices to Yen Co. for these services, and Mr. Yen, on behalf of Yen Co., paid half of the amount due on each of the invoices.
- [12] Alternatively, the Yen plaintiffs suggest that Yen Co., Ghahramani Co., and airG had a common interest in the relevant documents and, in the further alternative, they submit that the Ghahramani defendants waived privilege over these documents. Specifically, the Yen plaintiffs assert that the disclosure of some of the otherwise privileged documents by the Ghahramani defendants suggests that they are either subject to a joint retainer or privilege was waived on them and the Ghahramani defendants should not be able to pick and choose which privileged documents they may rely on at trial.
- [13] The Yen plaintiffs submit that the requested documents are relevant to the share buybacks in issue because they may establish a material fact regarding why these buybacks largely proceeded on a 50/50 basis and how they were implemented.

Legal Principles of Solicitor/Client Privilege

- [14] Solicitor/client privilege is a fundamental, constitutionally protected principle of our legal system that must be jealously guarded: *Descotezus et al v. Mierzwinski*, [1982] 1 S.C.R. 860 at 892-893.
- [15] Solicitor/client privilege belongs to the client, not the lawyer, and it attaches to all communications made within the framework of the solicitor/client relationship: *Smith v. Jones*, [1999] 1 S.C.R. 455, 1999 CanLII 674 (SCC) at para. 46.

- [16] Corporations enjoy the protection of solicitor/client privilege. A corporation cannot act except through individuals, and therefore it receives legal advice through certain individuals. However, this does not erode the solicitor/client relationship between the corporation and its lawyer, nor does it add the individual seeking the advice on behalf of the corporation into the solicitor/client relationship: Dodek, A.M., Solicitor-Client Privilege (LexisNexis Canada: May 31, 2024) at ch. 6.
- [17] A corporation and its directors have an interest in obtaining confidential legal advice to assist in the operation of the corporation. A shareholder has no general right of access to legal advice provided to the corporation: FCMI Financial Corporation and Fez Financial Corporation v. Curtis International Ltd., 2003 CanLII 23179 (ON SC), citing Discovery Enterprises Inc. v. Ebco Industries Ltd. (1998), 41 B.L.R. (2d) 207, 1998 CanLII 6453 (BCCA); McPherson v. Institute of Chartered Accountants of BC (1988), 32 B.C.L.R. (2d) 328, 1988 CanLII 3216 (CA).
- [18] The person asserting the solicitor/client privilege bears the onus of establishing that the privilege is met with respect to each document that is sought to be disclosed: Western Potash Corporation v. Amarillo Gold Corporation, 2020 BCSC 17 at para. 62.

Are the Yen Plaintiffs in a Joint Retainer with the Ghahramani Defendants and airG in relation to C&M, Fasken, and their counsel?

Relevant Legal Principles

- [19] There is no privilege regarding the communications between parties to a joint retainer, and in such circumstances, the clients to the retainer are treated as one: Capital Sports Management Inc. v. Trinity Development Group Inc., 2022 ONSC 2657 at paras. 28-29.
- [20] Parties to a joint retainer retain no confidence against one another: Sarvarian v. Sok, 2011 BCSC 585 at para. 76.
- [21] The question of whether a joint retainer exists depends on whether a solicitor/client relationship existed between Yen Co. and Fasken. This determination is a question of fact where the overarching issue is whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for Yen Co. When determining whether a solicitor/client relationship exists, the court will consider a number of factors, including:
- a) a contract or retainer;
 - b) a file opened by the lawyer;
 - c) meetings between the lawyer and the parties;
 - d) correspondence between the lawyer and the party;
 - e) a bill rendered by the lawyer to the party;

- f) a bill paid by the party;
- g) instructions given by the party to the lawyer;
- h) the lawyer acting on instructions given;
- i) statements made by the lawyer that the lawyer is acting for the party;
- j) a reasonable expectation by the party about a lawyer's role; and
- k) legal advice given.

See: Capital Sports Management Inc. at paras. 33-34.

[22] Not all of the above indicia must be present for the court to determine a solicitor/client relationship exists: Capital Sports Management Inc. at para. 35.

Discussion

[23] The notice of application seeks wide-ranging disclosure of documents regarding all communications that airG's directors, representatives, and employees had with C&M and Fasken and their partners and associates, respectively, over two decades from 2001 to 2021. The order sought goes well beyond documents sought in relation to the airG share buybacks. In his sworn affidavit, Mr. Yen deposed as follows:

On various occasions between October 2011 and February 2020, I on behalf of Yen Co., was in contact with and received legal services and advice from legal counsel at Fasken in relation to the share buybacks. Fasken delivered invoices to Yen Co. in respect of the services.

[24] This evidence is insufficient to support granting the orders sought. Mr. Yen's vague and ambiguous affidavit evidence does not describe what specific legal services or advice he received, when it was given, or by whom. At best, this evidence only addresses the orders sought regarding share buybacks.

[25] Almost none of the relevant factors that support the existence of a solicitor/client relationship exist between the Yen plaintiffs and Fasken. Specifically, there is no contract, retainer, or file opened by Fasken in respect of the Yen plaintiffs, and there is no evidence of meetings or non-billing correspondence between Fasken and the Yen plaintiffs. The Yen plaintiffs offered no detailed evidence that they provided instructions to Fasken or that Fasken acted on their instructions.

[26] Similarly, there is no evidence from Mr. Tattrie or any other partner or associate at either C&M or Fasken that suggests they were acting for the Yen plaintiffs or at any time provided legal advice to them.

[27] I do not accept that the Yen plaintiffs had a reasonable expectation that Fasken was acting as their counsel.

- [28] On the issue of the payment of Fasken invoices, Mr. Yen deposes that Yen Co., through inter-company transfers, paid 50% of the total amount owing on each of the Fasken invoices. Mr. Yen provided no documentary evidence to show these purported payments. This sparse evidence does not justify and support the existence of a solicitor/client relationship between Fasken and Yen Co.
- [29] The Fasken invoices included in Mr. Yen's affidavit were sometimes addressed to airG and sometimes to Yen Co. and Ghahramani Co. They were always sent to the attention of Mr. Ghahramani and do not refer to Mr. Yen at all.
- [30] It is common ground between the parties that airG had to approve all share buybacks, including of course those completed by Yen Co. and Ghahramani Co. I am satisfied that airG's solicitors at Fasken performed the legal services required to effect these transfers, and that Yen Co. and Ghahramani Co. were sent the invoices because they paid for some of these services.
- [31] Invoices were rendered to airG and sent to Yen Co. and Ghahramani Co. for payment, but this does not suggest that the Yen plaintiffs were clients of Fasken.
- [32] As previously discussed, the evidence of these purported payments for Mr. Yen is vague and unsupported by proof of payment or any other documentary evidence. Even if the Yen plaintiffs paid some of these bills, this could have been for a number of reasons, including administrative efficiency in processing share buybacks or for tax purposes.
- [33] The payment of fees to a lawyer does not in and of itself make the payor a client. The essence of the solicitor/client relationship is seeking and receiving legal services or advice, not paying for these services.
- [34] In my view, the administrative payment arrangement disclosed in the invoices and enclosed cover letters does not suggest or create a solicitor/client relationship involving the Yen plaintiffs.
- [35] Substantively, there is no convincing evidence that Yen Co. and Ghahramani Co. were clients of Fasken. The relationship to which solicitor/client privilege attaches existed solely between airG and Fasken.
- [36] I am not convinced that a joint retainer existed involving Yen Co. and Ghahramani Co. along with airG in relation to legal services and advice provided by Fasken, or formerly by C&M, or their counsel.

Do the Yen Plaintiffs Have a Common-Interest Privilege in the Requested Documents?

Relevant Legal Principles

- [37] Privilege over a communication cannot exist as between the parties where there is a joint interest in that communication at the time it comes into existence. In those circumstances, both parties enjoy solicitor/client privilege: *Nielsen v. Nielsen*, 2017 BCSC 269 at para. 56.
- [38] Documents and communications cannot be privileged as among parties that have a common interest. This will extend to documents and communications where the parties have a mutuality of interest at the time the document or communication is disclosed: *Western Potash Corporation* at para. 66.
- [39] In *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552 at para. 57, the Court, citing Hubbard, R., Magotiaux, S., and Duncan, S., *The Law of Privilege in Canada*, looseleaf (Aurora, ON: Canada Law Book, 2008), held:

For common interest to exist, the parties must share a common goal, seek a common outcome, or have a selfsame interest.

[40] The court in *Ziegler Estate* further held:

- [58] The common interest must already be established at the time at which the information is provided. The common interest can exist even if there is some issue outstanding between the parties. The legal advice sought to be protected by common interest must be relevant to the claim of the parties claiming the common interest, not just the one party.

Discussion

- [41] I am satisfied that the parties have a common interest in the documents and communications involving Fasken in respect of the share buybacks that involve both the Yen plaintiffs and the Ghahramani defendants. To the extent that Fasken provided legal services and advice in respect of transactions that involved the buyback of airG shares by both the Yen plaintiffs and Ghahramani defendants, they shared a common goal, sought a common outcome, and had the same interest that was established before Fasken undertook this work.
- [42] If Fasken has not disclosed documents to the Yen plaintiffs that involve the airG share buybacks by both the Yen plaintiffs and the Ghahramani defendants, the Yen plaintiffs are entitled to disclosure of these documents. To be clear, the Yen plaintiffs are not entitled to disclosure of the documents involving share buybacks that they were not involved in because these transactions presumably did not involve a common goal or outcome.

Did the Ghahramani Defendants Waive Privilege Over the Requested Documents by Listing Some of Them on Their List of Documents?

Relevant Leal Principles

- [43] Solicitor/client privilege does not permit a client to disclose some privileged information for their own benefit while protecting the full content of that information from discovery by the other side: *Biehl v. Strang*, 2011 BCSC 213 at para. 55.

Discussion

- [44] The Yen plaintiffs rely on the disclosure by airG of email correspondence between Mr. Ghahramani and Mr. Tattrie. These communications relate to Mr. Tattrie's participation in share buybacks as a shareholder. They do not contain any legal advice. These documents are therefore not subject to solicitor/client privilege and are not an example of documents over which solicitor/client privilege was waived.
- [45] As described earlier in this ruling, the Yen plaintiffs assert that the disclosure by the Ghahramani defendants of some of the otherwise privileged documents suggests that the privilege was waived on them, and the Ghahramani defendants should not be able to pick and choose which privileged documents they may rely on at trial. This submission ignores a third option, which is that the Ghahramani defendants mistakenly disclosed airG's documents. This disclosure by a third party does not constitute waiver by airG of the privilege it holds over these documents.
- [46] The solicitor/client privilege belongs to airG, not the Ghahramani defendants, because as I have found, airG is in a solicitor/client relationship first with C&M and later with Fasken. Neither the Yen plaintiffs nor the Ghahramani defendants are in a solicitor/client relationship with these firms, nor with its lawyers.
- [47] I reject the assertion that the Yen plaintiffs are entitled to sweeping disclosure of otherwise privileged documents based on a disclosure potentially errantly made by another party, the Ghahramani defendants.

Disposition

- [48] The Yen plaintiffs are entitled to the disclosure of otherwise privileged documents held by Fasken in respect of the airG share buybacks that involved both the Yen plaintiffs and the Ghahramani defendants. The Yen plaintiffs are not entitled to any of the other orders sought in their notice of application.
- [49] Before I move to the next ruling, are there any submissions on costs in respect of this ruling?
- [50] CNSL J. CABOTT: Can I ask a question? Do you mind --
- [51] THE COURT: You may.

- [52] CNSL J. CABOTT: Do you mind if I ask a question? On the application for a ruling on the withheld matters, has that been dismissed and decided for the purpose of trial, or will that carry over as something to be decided at trial? And perhaps I am not being clear.
- [53] There was an assertion of privilege over certain questions that were asked to Mr. Tattrie. Paragraph 1 of the notice of application we sought a ruling that those matters be that airG be prohibited from asserting that privilege. You have now dismissed that application, and my question is whether that dismissal is on the basis that my friend argued at the application, which was that's a matter for you know, those questions when they arise at trial ought to be dealt with in the context of questions that arise at trial, or is that application been dealt with?
- [54] THE COURT: I do not intend to deal with any particular questions that may be asked of Mr. Tattrie because he is potentially wearing at least two hats.
- [55] CNSL J. CABOTT: Yes.
- [56] THE COURT: So there may well be some questions that can be asked of him that are appropriate, but my determination regarding the existence of solicitor/client privilege as between him, Fasken, and airG is determined.
- [57] CNSL J. CABOTT: Right. I absolutely understand that, and I appreciate the clarification.
- [SUBMISSIONS ON COSTS]
- [58] THE COURT: Thank you. Costs will be in the cause in respect of this application.
- "Basran J."

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