Federal Court Cour fédérale

**Date: 20170717**

**Docket: T-608-17**

**Ottawa, Ontario, July 17, 2017**

**PRESENT: Case Management Judge Mireille Tabib**

**BETWEEN:**

**SEEDLINGS LIFE SCIENCE VENTURES, LLC**

**Plaintiff**

**and**

**PFIZER CANADA INC.**

**Defendant**

## ORDER

**UPON** the Defendant's motion for an order compelling the Plaintiff to produce an unredacted copy of the Litigation Funding Agreement entered into between the Plaintiff, Bentham IMF Capital Limited, Gowlings WLG and Arthur Z. Bookstein (the "LFA") and requiring Dr. Rubin and Ms. Sulan to re-attend to answer orally all relevant and proper questions arising from the unredacted LFA;

**CONSIDERING** the parties' respective motion records and having heard the oral submissions of counsel at a hearing held on July 12, 2017;

Production of the unredacted LFA was refused on the basis that it is covered by privilege. The Defendant argues that the Plaintiff has not led sufficient evidence to establish the existence of privilege, that no privilege attaches, at law, to third-party funding agreements such as the LFA and that, in any event, the Plaintiff has waived any privilege that might have attached by bringing the agreement to the Court for approval.

The evidence before me establishes that litigation privilege attached to the LFA. Litigation privilege, which is different from but may be coextensive with solicitor-client or legal advice privilege, attaches to material that was prepared for the sole or dominant purpose of litigation that has been commenced or is reasonably contemplated (*Blank v Canada*, 2006 SCC 39). On its face, for its very stated purpose and consistent with all the evidence before me, the LFA as a whole was prepared and created for the sole purpose of the present litigation, as contemplated and as in fact commenced. This determination is sufficient to dispose of this aspect of the motion before me, and I accordingly do not need, and specifically decline to determine, whether solicitor-client privilege also attached to the LFA or parts of it.

The Defendant's argument to the effect that, as a matter of law, privilege does not attach to the LFA rests entirely on the decision of Justice Perell of the Ontario Superior Court of Justice in *Fehr v Sun Life Assurance Co of Canada*, 2012 ONSC 2715.

I start by noting that decisions of the Ontario Superior Court have persuasive, but not binding effect on this Court.

I also note that the reasons in *Fehr* are expressly circumscribed to the context in which they were rendered: that of class proceedings (see para 8: "As I will explain, in the context of class proceedings, the terms of Class Counsel's retainer agreement and any associated third-party funding agreement are not privileged in law and ought not to be regarded as privileged as a matter of public policy".) Those reasons were not intended to be declaratory of the law generally applicable to such agreements outside of class proceedings. Indeed, as explained below, the analysis set out in the decision is not applicable to the particular facts and circumstances of the present case. Further, Justice Perell himself, in a subsequent decision (*Berg v Canadian Hockey League*, 2016 ONSC 4466) recognized that the application of the broad principles he had outlined in *Fehr* were problematic in respect of more complex funding agreements, especially where the precise terms of the financing and the temporal variables of indemnity provisions would provide the defendant with a tactical advantage as to how the litigation would be prosecuted or settled. Justice Perell acknowledged that some modifications to the principles identified in *Fehr* were necessary (see, in particular, paras 15, 21 and 22).

Very broadly speaking, the analysis in *Fehr* proceeds from the assumption that funding agreements ought to contain only information about who is funding the action and how much counsel is being paid, so as to answer the critical questions, in class proceedings, of the independence and motivation of the representative plaintiff, the ability of the representative plaintiff to see the action through to completion on behalf of the class and who is truly controlling the litigation. The reasons acknowledge that while there is a presumption that such communications might be protected by solicitor-client privilege, the presumption is rebutted when there is no reasonable possibility that disclosure of the amount of fees paid, by whom and who instructs counsel will not directly or indirectly reveal the content of legal opinion or the

litigation plan. The Court goes on to opine that, in a funding agreement, including information about counsel's legal opinion would be unnecessary for the purpose of approval and including information about the litigation plan would be improper, because it would mean that the third-party has already dictated and assumed control of the litigation. To the extent a funding agreement did include information as to conflicts of interest or who controls the litigation that might arguably be privileged, that privilege would, by necessity and fairness to the defendant, be waived because these matters must be considered in determining whether to approve the agreement and the class proceeding as a whole.

As mentioned, this analysis does not apply in the circumstances of the present case. This is not a class proceeding and the motivation and ability of the Plaintiff to pursue the litigation to its conclusion on behalf of a class is irrelevant. Further, the basis on which I find that privilege arises in respect of the redacted portions of the LFA is not that it discloses counsel's opinion as to the merits of the action or a pre-established litigation plan, but that it discloses the details of the third-party funding commitment and of the temporal variables of the indemnity provisions. That conclusion is plain from reading the unredacted copy of the LFA that was provided to me pursuant to a confidentiality order.

The privileged information here is the same type of information that Justice Perell considered would provide a defendant with a tactical advantage in how the litigation would be prosecuted or settled, and the very essence of what the litigation privilege is designed to protect.

The Defendant has not presented a cogent explanation as to why these details are relevant to the issues that the Court may need to consider and determine on the merits of the Plaintiff's

motion to declare that the LFA is not an abuse of process and/or to approve the LFA or the funding arrangements. There is accordingly no rationale for holding that, as a matter of principle or public policy, privilege should not attach to these portions of the LFA.

I note that the British Colombia Supreme Court, in *Stanway v Wyeth Canada Inc.*, 2013 BCSC 1585 at para 43, recognized that portions of an LFA dealing with litigation budget, strategy and trial stamina are entitled, even in class proceedings, to be kept confidential. A similar result was reached in *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 278 and in *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, the only reported case brought to my attention where an LFA was considered in a private litigation.

I am accordingly satisfied that privilege can and does attach to the redacted portions of the LFA. Privilege having been established, the burden shifts to the Defendant to show that it has been waived, by necessity or implication.

Again, the Defendant has failed to put forward a cogent argument that in the circumstances of this case, disclosure of these details is necessary to fairly allow it to make effective argument and to protect whatever interest it may have at the hearing of the Plaintiff's motion. I am not satisfied that the privilege has been waived by the Plaintiff, by implication or necessity.

The Defendant's motion to compel production of the unredacted LFA is accordingly dismissed. As a result, there is no object to the Defendant's request that Dr. Rubin and Ms. Sulan be compelled to re-attend to answer questions arising from that production.

**THIS COURT ORDERS THAT:**

1. The Defendant's motion is dismissed, with costs.

"Mireille Tabib"
Case Management Judge