SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v Canada (Attorney General)*, 2016 YKSC 51

Date: 20160930
S.C. No. 06-A0092
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL

PLAINTIFF

AND

THE ATTORNEY GENERAL OF CANADA on behalf of and as the representative for Her Majesty the Queen in right of Canada

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:
Stephen L. Walsh — Counsel for the plaintiff
Suzanne M. Duncan — Counsel for the defendant
Eden Alexander

RULING
(Admissibility of Documents v Settlement Privilege)

INTRODUCTION

[1] This is an application by the Ross River Dena Council ("RRDC") to admit to documents as evidence in the eventual trial of this action. The first is a letter dated December 17, 2015, from RRDC's counsel to counsel for the Attorney General of Canada ("Canada") referring to a settlement offer in a Federal Court action involving the same parties as this action. The second is an email chain between the same counsel, between May 13 and 26, 2016, referring to the settlement offer and Canada's pending response. Canada objects to the admission of the documents on the basis that they are subject to settlement privilege. RRDC's counsel argues that settlement privilege does

not apply because: (1) the documents pertain to a separate court action; and (2) the privilege has been waived.

DECISION

[2] I rule the documents to be inadmissible.

REASONS

1. The documents pertain to a separate court action

[3] The purpose of settlement privilege is to wrap a "protective veil" around the communications made by the parties to settle their disputes by ensuring that those communications are inadmissible in the event a settlement is not reached.[1] This encourages frank and candid discussions, even implicit admissions of liability, for the purpose of achieving settlement. Such discussions would likely not occur if the parties feared that they would later come to light in subsequent litigation. Thus, the privilege is based upon the public policy goal of encouraging settlement, and has been referred to as "an overriding public interest",[2] "sound judicial policy [that] contributes to the effective administration of justice",[3] and a "social value of superordinate importance".[4]

[4] The three criteria for establishing settlement privilege are:

1) a litigious dispute must be in existence or within contemplation;
2) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event the negotiations fail; and

[1] *Sable Offshore Energy Inc.* v. *Ameron International Corp*., 2013 SCC 37, at para. 2.
[2] Ibid, para. 11.
[3] Ibid, para.11.
[4] *Hollinger Inc. (Re)*, 2011 ONCA 579.

3) the purpose of the communication must be to attempt to effect a settlement.[5]

[5] The Supreme Court of Canada in *Sable*, cited above, determined that settlement privilege is a "class privilege" (para. 12). Accordingly, it applies at large and not on a case-by-case basis. The important distinction between a class privilege and a case-by-case privilege is the difference in onus. With a class privilege, there is a *prima facie* presumption of inadmissibility and the onus lies upon the party seeking to admit the communications to establish that they fall within one of the recognized exceptions to the privilege. With a case-by-case privilege, admissibility is presumed, and the onus lies on the party claiming the privilege to establish that the communications should not be disclosed on the basis of the four Wigmore criteria.[6]

[6] The generally recognized exceptions to settlement privilege include:[7]

1) a dispute as to the existence or scope of a settlement agreement;

2) a risk of overcompensation by double recovery;

3) unlawful communications;

4) costs; and

5) fraud or misrepresentation.

[7] The communications at issue *prima facie* fall within the category of communications protected by settlement privilege, as they were made: (1) in the context of ongoing or contemplated litigation; (2) with the implied intention that they would not

[5] *The Law of Evidence in Canada*, fourth edition, LEXIS-NEXIS Canada Inc. 2014, at 14.325.
[6] Ibid, at 14.16.
[7] *Bellatrix Exploration Ltd*. v. *Penn West Petroleum Ltd*., 2013 ABCA 10, at para. 29.

be disclosed to the court in the event the negotiations fail; and (3) for the purpose of attempting to reach a settlement.[8]

[8] Because settlement privilege is a class privilege, the onus shifts to RRDC to establish that the communications fall within one of the exceptions. RRDC has not met its onus here. The fact that the communications were made in the context of a separate court action is not one of the generally recognized exceptions to settlement privilege. Further, RRDC has not established that the circumstances of this case give rise to "compelling policy reasons" to invoke an exception to the general rule that communications protected by settlement privilege will not be admissible in subsequent court proceedings on the same matter[9].

[9] Indeed, even before *Sable* definitively recognized settlement privilege as a class privilege, the Ontario Court of Appeal in *I.Waxman & Sons Ltd.* v. *Texaco Canada Ltd.*, [1968] 2 O.R. 452, upheld the decision of the judge below (on appeal from a Master) which prevented settlement communications in one action from being used in a subsequent separate action. In the first action, there were three letters between A and C, which were clearly subject to settlement privilege, as they were marked without prejudice and were exchanged in the course of *bona fide* negotiations for settlement. In a subsequent action brought by B against A involving the same or closely related subject-matter, B sought the production of the letters. The Court of Appeal agreed with the judge below that the letters were protected from production in the second action by the application of the doctrine of settlement privilege.

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[8] *The Law of Evidence in Canada*, cited above, at 14.325.
[9] *Heritage Duty Free Shop Inc*. v. *Canada (Attorney General),* 2005 BCCA 188, at para. 31.

[10] The *Waxman* decision was referred to with approval by Locke J in his concurring reasons in *Middlekamp* v. *Fraser Valley Real Estate Board*, [1992] B.C.J. No. 1947, at paras. 74 and 75. This was an appeal from a decision in a civil matter ordering the production of documents allegedly exchanged on a without prejudice basis in previous criminal proceedings. At issue was a litigant's obligation to produce documents prior to the civil trial when the documents were generated in negotiations resolving the potential criminal charges against the party. The British Columbia Court of Appeal, sitting as a panel of five, held that settlement privilege protected the documents from disclosure. Interestingly, Locke J. made the following comment in his final summary of the case at para. 88:

> (c) As to the future, and always apart from fraud, any production to a third party, be they either a true third party or a stranger, ought not to be ordered if the court is persuaded in the particular circumstances of that future case that the disclosure could fairly be said to inhibit the parties from settling that action **or any other actions**. (my underlining and bolding)

[11] Accordingly, I conclude that the communications at issue remain protected by settlement privilege notwithstanding that they were made in the context of a separate court action.

2. The privilege has been waived

[12] RRDC's counsel informs this Court that the Federal Court action seeks to restore a tax moratorium in relation to RRDC territory, which was put in place by Canada during

the negotiations for the Umbrella Final Agreement. The parties are the same as in the present action.[10]

[13] RRDC's counsel also relies upon an order made by this Court in 2008, on consent, referring to this action (06-A0092, the "06 action") and a related companion action between the same parties (05-A0043, the "05 action"), which holds that the evidence in one action shall be evidence in the other action, and *vice-versa*.

[14] Pursuant to that Order, on the present application RRDC's counsel has referred to an exhibit in the 05 action,[11] which is a letter from Gavin Fitch to the Minister of Indian Affairs and Northern Development, Chuck Strahl, dated March 26, 2008. Mr. Fitch had been retained by the previous Minister, Jim Prentice, in 2006, for the purpose of undertaking exploratory discussions with the Kaska Nation (of which RRDC is a part) with a view to finding common ground for advancing and concluding a final land claim agreement and self-government agreement. That letter contains the following statement:

> … RRDC has offered to discontinue one of its lawsuits if Canada agrees to convert its Land Set Aside [LSA] to a reserve… The lawsuit in question essentially seeks to have the court restore the tax moratorium put in place by Canada during the UFA negotiations. The settlement offer is predicated on the notion that once RRDC's LSA are converted to a reserve, the section 87 tax exemption will apply….

[15] RRDC's counsel submits that this is the same settlement offer referred to in his letter of December 17, 2015, which is one of the two documents at issue. I simply pause

[10] With the exception that Canada is referred to in the Federal Court action as "Her Majesty the Queen", whereas in the present action Canada is referred to as "The Attorney General of Canada on behalf of all and as the representative for Her Majesty the Queen in right of Canada".
[11] Tab 162, in the Common Book of Documents.

here to observe that there is no evidence on this point. Although the two offers appear to be similar, I believe I can take judicial notice of the fact that in land claim negotiations, as in negotiations generally, offers can be put forward, withdrawn and offered again with amendments. In any event, the main point made by RRDC's counsel is that Mr. Fitch was acting as an agent for Canada when he wrote his letter, which has now become part of the public domain. Further, because he referred to the settlement offer to convert lands set aside to reserve lands, he effectively waived the settlement privilege over the negotiations generally on Canada's behalf. Accordingly, the continuation of those negotiations as evidenced by the documents at issue should be admissible.

[16] The argument of RRDC's counsel here is that partial waiver of the communication will be held to be waiver of the entire communication. This notion arises from a case that I referred to in an earlier ruling in this action cited as *Ross River Dena Council* v. *Canada (Attorney General)*, 2009 YKSC 04, at para. 47. The case was *Fraser* v. *Houston*, 2002 BCSC 1378, a decision of Master Scarth setting out a number of principles relating to waiver of solicitor-client privilege. One of those principles was expressed by the Master as follows:

> … Waiver of solicitor-client privilege may occur in the absence of an intention to waive, where fairness and consistency so require. 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: *S&K Processors Ltd.* v. *Campbell Ave. Herring Producers Ltd*., [1983] B.C.J. No. 1499. (my emphasis)

[17] As one can see, no particular authority was specifically cited for the proposition that waiver of part of communication will amount to waiver of all of it. Further, *S&K Processors* does not, in my view stand for such a broad proposition.

[18] *S&K* was a complex civil action in which an accountant's report particularising a claim for expenses was raised in the defendant's statement of defence, and was delivered to the plaintiff's pursuant to the *Evidence Act.* The plaintiffs sought production from the defendants of the correspondence, notes, drafts and other working papers (the supporting documents) relating to the accountant's report. The defendants claimed solicitor and client privilege. The plaintiff's said that the privilege had been waived by the disclosure of the accountant's report. McLachlin J., as she then was, ruled that the disclosure of the report required by the *Evidence Act* was not voluntary and therefore did not constitute waiver. Further, even if it did constitute waiver, it could not be said to be "unfair or inconsistent" in those circumstances that the defendants retain the solicitor-client privilege with respect to the supporting documents (although she did require disclosure of all the facts upon which the accountant's opinion was based). At para. 6 of the decision, McLachlin J. commented upon the effect of partial waiver of a privileged communication:

> 6 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, <u>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</u>. 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. (my emphasis)

[19] The importance of fairness and consistency in determining whether unintentional partial waiver should lead to full waiver was picked up in *Hallman Estate (Re)*, [2009] O.J. No. 3890, where Brown J. referred to the following quote from Wigmore, at para. 16:

> … in *Bentley v. Stone* (1998), 42 O.R. (3d) 149 (Gen. Div.), Hockin J. referred to the broad description of waiver coined by Wigmore:
>
> 8 ... Privilege may be waived expressly or by implication. It is useful to understand these words from Wigmore as set out in The Law of Evidence, Butterworth's, Sopinka, Lederman and Bryant, at p. 666:
>
> It has also been said that clear intention is not in all cases an important factor. In some circumstances, waiver may occur even in the absence of any intention to waive the privilege. There may also be waiver by implication only.
>
> As to what constitutes waiver by implication, Wigmore said:
>
> > Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could also control the situation. *There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.*

> Whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege. (emphasis already added)

[20] Partial waiver may also lead to full waiver where the former might be the result of cherry picking and therefore be misleading. This point was made clear by Scott C.J.M. in *Bone* v. *Person*, [2000] M.J. No. 107, in the context of solicitor-client privilege, at para 10:

> 10 The first issue relates to the nature and extent of the waiver of solicitor/client privilege. Was it limited and, if so, to what extent? The law is clear that a party to legal proceedings may voluntarily waive solicitor/client privilege on a limited basis, that is to say with respect to a particular defined subject matter. See, for example, Power Consol. (China) Pulp Inc. v. B.C. Resources Invt. Corp., [1989] 2 W.W.R. 679 at 682 (B.C.C.A.). However, a reasonable balance must be struck so that the court and the other parties are not misled. The party making the disclosure cannot pick and choose between the favourable and the unfavourable. In Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1995), 46 C.P.C. (3d) 110 (Ont.C.J.,G.D.) Sharpe J., as he then was, put the matter this way, at paras. 41-42:
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> > <u>It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading ....</u>
> >
> > <u>The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure</u>. (my emphasis)

[21] I conclude from these cases that waiver of part may lead to waiver of all of a communication where it would be unfair, inconsistent or misleading for a party to rely upon the partial disclosure. For example, where a party has cherry picked selective

information for strategic disclosure. In that circumstance, fairness may require disclosure of the complete body of information in order to avoid misleading the court. However, that is not the situation in the case at bar.

[22] Indeed, in *Sable*, the Supreme Court impliedly endorsed that partial waiver is permitted, by finding that, notwithstanding the disclosure of the settlement agreements at issue there, the settlement amounts remained subject to settlement privilege[12].

[23] Accordingly, to the extent that the Fitch letter can be taken as a partial waiver of the settlement offer regarding lands set aside being converted to reserve lands, I conclude that it does not lift the veil of settlement privilege from the two documents at issue.

COSTS

[24] Costs were not spoken to. The parties may make written submissions in that regard within 30 days of this ruling, failing which Canada will have its costs in the cause for this application.

GOWER J.

[12] *Sable*, cited above, at para. 30.