SUPREME COURT OF NOVA SCOTIA

Citation: Green v. T&T Inspections & Engineering Ltd., 2012 NSSC 397

Date: 20121127
Docket: Hfx No. 181886
Registry: Halifax

Between:

Donald Campbell Green

Plaintiff

v.

T & T Inspections & Engineering Ltd., a body corporate
and **Alco Industrial Inc**., a body corporate

Defendants
(Plaintiffs by Crossclaim)

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: October 30th, 2012 in Halifax, Nova Scotia

Oral Decision: November 27th, 2012

Written Decision: November 29th, 2012

Counsel: Jamie MacGillivray for the Plaintiff

Jean McKenna for T&T Inspections & Engineering Ltd.

Ann E. Smith for Alco Industrial Inc.

By the Court:

[1] This is a motion by the Defendant, Alco Industrial Inc. (hereinafter referred to as "Alco") for an Order requiring the Plaintiff to disclose to the Defendants the complete file of Dr. Karol S. Dusil relating to his 2012 examination and testing of a rod hook assembly.

BACKGROUND

[2] The Plaintiff alleges that in June of 2000, he was seriously injured while working as a Rig Manager in Saskatchewan. In the course of the Plaintiff's employment, a rod hook, which was apparently pulling a significant amount of force, fractured and penetrated the Plaintiff's skull causing severe injuries.

[3] In June of 2002, the Plaintiff commenced this action. The first Defendant (hereinafter referred to as "T&T") had allegedly been retained to conduct non-destructive testing of the rod hook prior to the date of the accident. Alco was allegedly contracted to repair the rod hook prior to the incident in question. T&T and Alco have both denied liability for the incident and have crossclaimed against each other.

[4] The Plaintiff and Alco have both retained experts to provide opinions on the cause of the rod hook failure. In May of 2009, the Plaintiff's solicitor disclosed to the Defendants a report prepared by Dr. Karol S. Dusil dated May, 2009. In February of 2011, Alco disclosed to all other parties a report of Dr. Iain Le May dated February

of 2011. Dr. Dusil's May, 2009 report had been provided to Dr. Le May prior to the preparation of Dr. Le May's report.

[5] Dr. Dusil then prepared a second report for the Plaintiff dated March of 2011. This second report was also disclosed to the Defendants. In this second report Dr. Dusil commented, *inter alia,* on Dr. Le May's February, 2011 report and proposed that a series of hardness tests be conducted on the rod hook in question.

[6] On February 20th, 2012, the Court granted an Order allowing for the transport of the rod hook assembly from the offices of Dr. Le May to a testing facility in Ontario for the purpose of Dr. Dusil observing and conducting non-destructive testing of the rod hook in question. It appears that the testing took place shortly thereafter. Dr. Dusil subsequently prepared a third report dated March of 2012. Plaintiff's counsel claims privilege over this third report which has not been disclosed to the other parties.

[7] On May 14th, 2012, the Plaintiff's solicitor wrote to the Defendants' solicitors advising that the Plaintiff did not intend to produce any further reports from Dr. Dusil and also indicating that the Plaintiff was content with the reports from this expert that had already been produced.

[8] By letter dated May 23rd, 2012, the Plaintiff's solicitor provided the Defendants' solicitors with a report dated May 9th, 2012 prepared by a new expert, Dr. Dennis R. Turriff. This report also deals with the cause of the rod hook failure. According to Dr. Turriff's report, he was provided with copies of Dr. Dusil's first two

reports (dated May of 2009 and March of 2011) prior to preparing his opinion. At page 1 of Dr. Turriff's report he writes "I was instructed to review the materials in Appendix B and technically assess the potential causes of failure for a lifting hook (i.e., a 'rod hook') shown in Figure 1." Dr. Dusil's first two reports are listed in Appendix B of Dr. Turriff's report.

[9] On September 4th, 2012, the Plaintiff's solicitor advised opposing counsel that the Plaintiff does not intend to call Dr. Dusil as a witness at the time of trial.

[10] It is against this background that the Defendant, Alco, has applied for production of Dr. Dusil's March, 2012 report and file.

LAW AND ANALYSIS

[11] Alco brings this motion pursuant to Civil Procedure Rules 14.12(1) and 14.05(4). Civil Procedure Rule 14.12(1) provides:

> **Order for production**
>
> **14.12**(1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

[12] Counsel for all parties agree that the documentation in question is relevant to the matters in issue in this proceeding.

[13] Civil Procedure Rule 14.05 provides:

> **Privilege**
>
> **14.05** (1) Nothing in Part 5 requires a person to waive privilege or disclose privileged information.
>
> (2) A provision in a Rule in Part 5 for disclosure of a relevant document, electronic information, or other thing means disclosure of a relevant document, electronic information, or other thing that is not privileged.
>
> (3) A provision in a Rule in Part 5 that requires an answer to a question calling for relevant evidence, or information that reasonably could lead to relevant evidence, means relevant evidence that is not privileged, or information, not itself privileged, that could lead to relevant evidence that is not privileged.
>
> (4) A judge may determine a claim for privilege, except the information and confidences referred to in sections 37 to 39 of the *Canada Evidence Act* are determined under that Act.
>
> (5) A judge who is required to determine a claim for privilege may direct a person to deliver the thing claimed to be privileged to the judge in order that it may be dealt with under Rule 85.06, of Rule 85 – Access to Court Records.

[14] The Plaintiff's solicitor has provided the Defendants with a copy of Dr. Dusil's file but he takes the position that Dr. Dusil's 2012 report is protected from production on the basis of litigation privilege. Alco has asked the Court to rule on this claim for privilege pursuant to Civil Procedure Rule 14.05(4).

[15] When determining whether a document is protected from disclosure on the basis of litigation privilege the Court considers the dominant purpose for which the

document was prepared. In ***Leslie v. S&B Apartment Holdings Ltd.***, 2009 NSSC 57, Wright J. explained at ¶ 14-16:

> The dominant purpose test emanates from the decision of the House of Lords in **Waugh v. British Railways Board** , [1979] 2 All E.R. 1169 where it was set out as follows (at page 1183):
>
> > A document which was produced or brought into existence either with the *dominant* purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It should also be observed that the dominant purpose test was adopted and applied by the Nova Scotia Court of Appeal in several decisions along the way, the earliest of which was **Davies v. Harrington** [1980] N.S.J. No. 411 and the most recent of which appears to be **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.** [2000] N.S.J. No. 258.
>
> The dominant purpose test is discussed at length in the well-known text *Solicitor-client Privilege in Canadian Law* written by Manes & Silver in 1993. At page 93, the authors identify the following three elements of the test, each one of which must be met:
>
> (1) The document must have been *produced* with contemplated litigation in mind;
>
> (2) The document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation (i.e., for the dominant purpose of contemplated litigation);
>
> (3) The prospect of litigation must be *reasonable*, meaning that there is a reasonable contemplation of litigation.
>
> [Emphasis in the original]

[16] The Supreme Court of Canada approved the dominant purpose test in ***Blank v. Canada (Minister of Justice)***, 2006 SCC 39.

[17] The burden is on the party claiming privilege to prove that the document in question satisfies the dominant purpose test. Surprisingly, the Plaintiff has not filed any evidence in response to this motion. In other words, I have no evidence about the dominant purpose for which the 2012 report was prepared. At the time of the hearing of the motion, counsel for the Defendants quite reasonably conceded that the dominant purpose test is not in issue in relation to Dr. Dusil's 2012 report. The issue is whether any litigation privilege that attached to this report has been waived.

[18] Alco submits that since the Plaintiff has waived privilege over Dr. Dusil's 2009 and 2011 reports, he has also waived privilege over Dr. Dusil's 2012 report. Alco submits that once a party waives privilege by producing the report of an expert, the party waives privilege over any subsequent report prepared by that expert which deals with the same subject matter as the previous report. In support of this position Alco refers to ***Hardy v. Prince George Hotel Ltd.***, 2004 NSSC 165; ***Nickerson (H.B.) Ltd. v. Sommerville Belkin Industries Ltd.*** (1985), 72 N.S.R. (2d) 289 (N.S.S.C. T.D.); ***Huntley v. Larkin***, 2007 NSSC 297 and ***Walsh v. Smith*** (1999), 180 N.S.R. (2d) 173 (N.S.S.C.).

[19] Alco also submits that the Plaintiff has waived privilege over Dr. Dusil's 2012 report by disclosing his 2009 and 2011 reports to Dr. Turriff. Alco refers to ***Monahan v. Foote et al.*** (1999), 180 N.S.R. (2d) 306 (N.S.S.C.), where, prior to trial, a psychologist's report was found to be privileged and not subject to production. Subsequently, it was learned that the report in question had been sent to another expert retained by the Plaintiff for that expert's consideration. Saunders J. (as he then

was) found that once the psychologist's report was disseminated to another of the Plaintiff's experts, it was no longer shielded by a cloak of privilege. His Lordship stated at ¶ 12:

> . . . It is trite law to say that a cross-examiner is entitled to know the facts upon which an expert put forward by the other side has based his or her opinion. By presenting the expert, privilege over the opinion of the expert is waived. So too any claim for privilege for other reports prepared by other experts furnished to the witness for his consideration. Counsel cross-examining must be able to tell for themselves whether such reports from others formed a factual basis for the views expressed by the witness .....
>
> [Emphasis added]

[20] In ***Monahan v. Foote et al.***, *supra*, Saunders J. quoted from a decision of Hart J.A. writing for the Nova Scotia Court of Appeal in ***Greenwood Shopping Plaza Ltd. et al. v. Neil J. Buchanan Ltd. et al.*** **(No. 1)** (1979), 31 N.S.R. (2d) 135 (N.S.S.C A.D.), where Justice Hart started at p. 167:

> ..... When a party elects to waive a privilege to withhold specific evidence he must also intend to waive the privilege to withhold the facts and circumstances surrounding that evidence. In deciding to take advantage of the evidence for his own purposes he must be prepared to accept the side effects of that decision, and if, as in the case at bar, some declarations against his interest may be revealed he must take that chance. No one is forcing him to waive his privilege which may be maintained by reserving the expert's evidence for the personal use of his solicitor in conducting the litigation.

[21] Finally, Alco has referred to Civil Procedure Rule 14.08(1) which provides:

> **Presumption for full disclosure**
>
> **14.08** (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[22] T&T supports Alco's position. It suggests that the February 20th, 2012 Order that allowed for the transport of the rod hook to a testing facility in Ontario was agreed to on the understanding that Dr. Dusil would generate a supplementary report to his previous reports of May, 2009 and March, 2011. T&T points out that in a Case Management Conference held on June 9th, 2011 counsel for the Plaintiff indicated that Dr. Dusil's third report would be filed with the Court and served on all other parties by November 30th, 2011 (a date which subsequently changed as the Order allowing the transport of the rod hook was not issued until February of 2012.) T&T takes the position that this constitutes an express waiver of any privilege that may have existed over this third report.

[23] Further, T&T takes the position that while Dr. Dusil has generated three reports, he is, in fact, offering a single opinion on the cause of the failure of the rod hook in question. The argument is made that since the first two reports have been disclosed, privilege over his third report has also been waived. T&T states that if the Defendants do not have all of Dr. Dusil's reports, the potential exists of the Court being misled by partial production of this expert's opinion.

[24] T&T has referred to the obligations of an expert under Civil Procedure Rule 55 to report everything the expert regards as relevant to his/her opinion (C.P.R. 55.04(1)(c)) and to notify each party in writing of any change in his/her opinion or of any material fact that was not considered when a report was prepared that could reasonably affect the expert's opinion (C.P.R. 55.04(1)(e)). T & T submits that these

Rules place an obligation on Dr. Dusil to release his most recent findings and opinions.

[25] The Plaintiff submits that he is entitled to claim litigation privilege over Dr. Dusil's 2012 report despite the fact that privilege was waived over this expert's two previous reports. The Plaintiff notes that Dr. Dusil's third report did not exist at the time the first two reports were disclosed and says that he could not waive privilege over a report that did not yet exist.

[26] The Plaintiff has undertaken not to call Dr. Dusil as a witness at the time of trial if Dr. Dusil's 2012 report is found to be privileged. The Plaintiff submits that since he will not be relying on or calling Dr. Dusil as a witness there is no risk of the Court being misled as a result of not having all of Dr. Dusil's reports.

[27] The Plaintiff acknowledges that Dr. Dusil's 2012 report essentially addresses the same subject matter as his 2009 and 2011 reports (the issue of what caused the rod hook in question to fail). At the hearing, Plaintiff's counsel also acknowledged that if he was going to call Dr. Dusil as a witness at the time of trial, he would be obliged to produce this expert's 2012 report. He submits, however, that the fact that he is not relying on Dr. Dusil's opinions or calling him as a witness at the time of trial permits him to claim privilege over Dr. Dusil's third report.

[28] The Plaintiff's solicitor notes that the Defendants are free to ask Dr. Dusil about his most recent findings and opinions. He says that the Court will not be misled by only having a portion of Dr. Dusil's opinions as the Defendants are free to

ask Dr. Dusil about any of his opinions and bring these opinions before the Court. It is the 2012 report itself that the Plaintiff does not want disclosed to the other parties or to the Court – not the opinion of Dr. Dusil.

[29] The Plaintiff acknowledges that disclosing an expert's report to another expert waives privilege over the report that was disclosed. He notes, however, that Dr. Dusil's 2012 report has not been provided to Dr. Turriff.

[30] The Plaintiff refers to the policy reasons behind litigation privilege and says that he should be able to explore issues with his own expert and, if he chooses not to rely on the expert, claim privilege over a report that has not yet been disclosed to the other parties. The Plaintiff has referred to the Supreme Court of Canada decision in ***Blank v. Canada (Minister of Justice)***, *supra*, where the Court discussed the need to facilitate investigation and preparation of a case for trial as well as the need for a "zone of privacy" in relation to pending or apprehended litigation.

[31] The Plaintiff has also referred the Court to the case of ***Morrissey v. Morrissey***, 2000 NFCA 67, where the Court stated at ¶ 37 - 38:

> The underlying rationale of the litigation privilege is to enable the parties to properly prepare their cases, and to permit investigation of the facts and development of strategy without fear that either might be revealed to the opposing party. It is believed that inefficiency and unfairness would result if the litigation privilege were not available. For example, a party might fail to investigate in order to take advantage of the other party's work or for fear of what might be revealed about the weakness of his case. This type of behaviour would not promote settlement.
>
> The litigation privilege recognizes that relevant information will be withheld from the other party. This is a price which is paid to ensure that the system works

> and that counsel for litigants can and do conduct the case with the best knowledge available .....

[32] The Plaintiff has also referred to the decision in ***R. v. 1278481 Ontario Ltd.***, 2007 NLTD 151, where the Court was considering whether an expert's draft report had to be produced to opposing counsel. Hoegg J. stated at ¶ 13:

> In my view, experts ought to be free to explore theories and develop options with a litigant in investigating and preparing a case for trial. This is so whether done in conjunction with counsel or not, although the involvement of counsel could well strengthen a claim of litigation privilege. Expert opinions, advice and recommendations are necessarily altered and refined as the expert's investigation and assessment of the issues evolves. This learning process should progress unfettered by the fear of having to disclose thoughts and ideas to an adversary just because they have been committed to paper. It must be remembered that there is nothing to prevent counsel from asking questions designed to cast doubt on an expert report, including asking an expert whether his opinion changed during the course of advising a client and why.

[33] Further, the Plaintiff has referred to ***Harris v. Doucette and Harris*** (1988), 99 N.S.R. (2d) 241 (N.S.S.C. T.D.), where Tidman, J. stated at ¶ 16:

> .....In my opinion it is important that parties in preparing a case for litigation enjoy the freedom of doing so without fear of unearthing information detrimental to one's own case.

[34] The Plaintiff submits that litigation privilege allows him to obtain this new report from Dr. Dusil without the need to disclose it to the other parties as he is no longer relying on Dr. Dusil at the time of trial.

[35] The Plaintiff has indicated that the Defendants are free to call Dr. Dusil as a witness at trial should they wish to do so and they are also free to discover him.

During the course of the hearing of this motion, counsel for the Plaintiff stated that he has no difficulty with the Defendants asking Dr. Dusil questions about the testing that he performed on the rod hook in question or the results of this testing. He went on to confirm that he has no objection to the Defendants asking Dr. Dusil what his opinion is as a result of the testing that he did. As indicated previously, it is the report itself that the Plaintiff does not want disclosed. In other words, the Plaintiff objects to the Defendants asking Dr. Dusil what his 2012 report says, but has no difficulty with the Defendants asking for Dr. Dusil's full opinion on the failure of the rod hook. Counsel for the Plaintiff went on to explain that apparently there are some gratuitous comments and questions asked by Dr. Dusil in his 2012 report which the Plaintiff does not want disclosed – hence, the desire not to disclose the report itself, but the willingness to allow Dr. Dusil to be asked about his findings and his opinions.

[36] In ***S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.***, [1983] B.C.J. No. 1499 (B.C.S.C.), McLachlin, J. (as she then was) reviewed waiver of privilege and stated at ¶ 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, 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.....

[37] Counsel for the Defendants submit that in the case at bar the Plaintiff has expressly waived privilege in relation to Dr. Dusil's third report and, further, that fairness requires disclosure of this document.

[38] I do not accept the Plaintiff's submission that he could not waive privilege over a report that did not yet exist. It is not at all unusual for counsel to agree to testing or examination by an expert on the condition that the expert's report will be disclosed to all parties (see for example: C.P.R. 21.02(6)(d).) While it may not be wise to waive privilege over a report that has not yet been prepared, there is nothing preventing it from occuring.

[39] Further, I do not accept the submission of T&T that the Plaintiff's solicitor expressed a "complete intention" to waive privilege over Dr. Dusil's third report when he agreed to the deadline for the filing of this report. This file is being case managed. As is common with case management, various deadlines have been set throughout the proceeding. In my view, agreeing to a deadline for the filing of a report is not sufficient to expressly waive privilege in relation to that report.

[40] Nor do I accept T&T's submission that Dr. Dusil's third report must be disclosed because the February 20th, 2012 Order allowing for the transport of the rod hook to Ontario for testing by Dr. Dusil was consented to on the understanding that Dr. Dusil would generate a third report. If it was a condition of this consent that Dr. Dusil's third report be disclosed, it should have been reflected in the Order or in correspondence between counsel.

[41] I am not satisfied, in the circumstances of this case, that the Plaintiff's solicitor expressly waived privilege in relation to Dr. Dusil's third report. However, as indicated in ***S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.***,

supra, waiver may also occur in the absence of an intention to waive where fairness and consistency so require.

[42] As indicated previously, Alco submits that once a party waives privilege to an expert's report they waive privilege over any subsequent report prepared by that expert which deals with the same subject matter. They refer, *inter alia*, to ***Hardy v. Prince George Hotel Ltd.***, *supra*, where Murphy, J. stated at ¶ 8:

> .....Once the Plaintiff waived the privilege to Dr. Franks' and Dr. MacDonald's initial reports, he waived the privilege to subsequent reports dealing with the same subject matter – the medical condition and opinions relating to the Plaintiff (see **H.B. Nickerson Ltd. v. Sommerville**, [1985] N.S.J. No. 451 (S.C.) and **MacEachern v. Co-Operative Fire & Casualty Company**, [1986] N.S.J. No. 241 (S.C.)).

[43] In my view, the issue of whether privilege is waived does not turn solely on the question of whether the document in question deals with the same subject matter. If it did, the medical report being sought in ***Harris v. Doucette and Harris***, *supra,* would have been ordered to be produced. The issue is determined based on an analysis of whether partial production will be misleading or unfair to the other parties or the court. As part of that analysis, the court will consider whether the document in issue deals with the same subject matter.

[44] In the case at bar, the Plaintiff submits that he is not relying on Dr. Dusil at the time of trial and, accordingly, there is no danger of the court or of the other parties being misled by only having two of Dr. Dusil's three reports. The difficulty with this position is that the Plaintiff has provided his new expert with copies of Dr. Dusil's first two reports and this new expert has reviewed these reports in arriving at his

conclusions. While the Plaintiff may not be calling Dr. Dusil as a witness at the time of the trial, he has relied on Dr. Dusil by giving his first two reports to Dr. Turriff. In these circumstances there is, in my view, a real risk of the parties and the Court being misled by only having two of Dr. Dusil's three reports. For this reason, Dr. Dusil's third report must be disclosed to the Defendants.

[45] In my view, it is not sufficient for the Plaintiff to offer Dr. Dusil up for discovery with the caveat that he not be asked what his 2012 report says. The Defendants are entitled to see Dr. Dusil's third report and should not have to rely on a discovery examination to obtain information that they are entitled to have disclosed.

[46] Once the Court is satisfied that a document was prepared for the dominant purpose of use in real or anticipated litigation the burden shifts to the Defendants to establish waiver (see ***Harris v. Doucette and Harris***, *supra,* at ¶ 8.) In this case, the Defendants have satisfied that burden.

[47] There are two additional matters that I should deal with. First, counsel for the Plaintiff has advised the Court that there are drafts of Dr. Dusil's March, 2012 report which have not been disclosed. This decision does not deal with the issue of whether drafts of this report are producible. Counsel have reserved the right to return and argue the producibility of these drafts if they are unable to reach agreement on the matter following the release of this decision.

[48] Finally, the Plaintiff's solicitor has referred the Court to the case of ***Skinner v. Dalrymple***, 2011 NSSC 461, and has suggested that an expert's advice on "strategy

and tactics" need not be disclosed to opposing counsel. Mr. MacGillivray has confirmed that it is only Dr. Dusil's draft reports that may contain "strategy and tactics" and therefore, I have not dealt with that issue in this decision. I reserve the right to deal with the issue of strategy and tactics if the issue of Dr. Dusil's draft reports comes back before me.

Deborah K. Smith
Associate Chief Justice