SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Securities Commission) v. Potter, 2011 NSSC 240

Date: 20110616
Docket: Hfx. No. 334479
Registry: Halifax

Between:

STAFF of the Nova Scotia Securities Commission

Applicant

v.

Daniel F. Potter, Knowledge House Inc., Raymond G. Courtney, Calvin W. Wadden and Kenneth G. MacLeod

Respondents

Restriction on publication: SEALED by Court Order - *In camera* hearing held

Editorial Notice

Court of Appeal order dated Feb 11/13- "The sealed decision of the Honourable Peter P. Rosinski in Hfx. No. 334479 dated June 16, 2011 is unsealed."

Judge: The Honourable Justice Peter P. Rosinski.

Heard: May 18, 2011, in Halifax, Nova Scotia

Counsel: Heidi Schedler, for the Applicants
W. Dale Dunlop, for the Respondents Wadden and MacLeod
Daniel Potter, Respondent, Self-Represented

By the Court:

[1] These are my reasons for concluding that the Staff investigators would not be violating Nova Scotia Securities laws if they answered the question in issue herein, at discoveries.

[2] Scott Peacock testified, *in camera*, supplementing the evidence in his July 9, 2010 affidavit filed in the Application in Chambers. In summary, I am satisfied from his testimony and the other information available to me that:

(i) As lead investigator, only he and Staff counsel have seen the confidential Settlement Agreements herein and therefore have detailed information regarding the basis for the Staff's claimed statutory prohibition objection to the question in issue being answered;

(ii) During the investigation by him, of the activities of Knowledge House Inc. and persons (natural and corporate), he became aware of sufficient evidence being available to charge National Bank Financial Ltd. (NBFL) and Eric Hicks (Hicks) with violations under the *Securities Act* R.S.N.S. 1989 c. 418 as amended;

(iii) As a result of negotiations, both NBFL and Hicks reached Settlement Agreements with Staff of the Nova Scotia Securities Commission;

(iv) These Settlement Agreements contain provisions to allow only the charged parties to request the Commission to approve or ratify the Agreements;

(v) To date, neither party has requested the Agreements be approved by the Commission.

[3] "Settlement Agreement" is defined in s. 1.1 of the Rules. Until the Commission approves such Agreements, they are not capable of becoming public information - see Rule 10.6 of the *General Rules of Practice and Procedure* made pursuant to s. 150A of the *Securities Act*. Such Rules have the force of law, but are not "regulations" and not subject to the *Regulations Act* - s. 150A(5) *Securities Act*.

[4] Whether there is a prohibition on revealing **the existence** of, the **contents** of, **and negotiations that led to**, settlement agreements, requires separate consideration of each of these three aspects.

Is there a prohibition on revealing even the existence of non-public Settlement Agreements?

[5] Rule 8.12 reads:

> Exclusion from Disclosure
>
> 8.12 Notwithstanding anything contained in the Rules, no disclosure is required to be made:
>
> a. which would contravene subsection 148(2) of the Act;
>
> b. of information which is protected from disclosure by privilege;
>
> c. of a fact or matter which is inadmissible by virtue of Nova Scotia securities laws; or
>
> d. of information which would not otherwise be disclosable by law.

[6] This Rule underlines the seriousness with which the legislation views the maintenance of confidentiality. The Rules may make even the public admission of the existence of a confidential Settlement Agreement a prohibited act. I will now examine whether they do impose such a prohibition.

[7] Staff did not identify which subsection of Rule 8.12 (Part 8 - Disclosure) would be violated if the question in issue were answered by investigators (i.e. "... no disclosure is required to be made"):

> Rule 8.12(a) - [is not applicable in this case.]
>
> Rule 8.12(b) - "of information which is protected from disclosure by privilege."
>
> Rule 8.12(c) - "of a fact or matter which is inadmissible by virtue of Nova Scotia Securities laws."
>
> Rule 8.12(d) - "of information which would not otherwise be disclosable by law."

[8] Rule 8.12(b) appears to support the notion of "settlement privilege", insofar as it relates to the circumstances in the case at Bar. Informer privilege has not been articulated as the basis for prohibition on disclosure in this case. Moreover, that privilege, also rooted in the common law, attracts greater deference - in criminal and civil proceedings alike it is subject to only one exception, imposed by the need to demonstrate the innocence of an accused person. Waiver requires that both the Crown and informant consent to the release of information - *Named Person v. Vancouver Sun* [2007] 3 SCR 253. There is no evidence before me that there is an informer privilege in this case. Moreover, if Hicks and the NBFL had agreed to testify as part of their Settlement Agreements their identity would then become known and any rationale for suppressing their identities, even temporarily at this stage, would be unjustifiable.

[9] Rule 8.12(d) is also arguably applicable in this case. Staff appeared to suggest that the existence of the Settlement Agreements "would not otherwise be disclosable by law" because:

(i) Only a Settlement Panel, upon approving a Settlement Agreement, can make such Agreements public documents and until such time they are statutorily deemed to be non-public documents.

(ii) In this case the Settlement Agreements herein both contain agreed to procedures for seeking the approval of a Settlement Panel which are in the joint control of the parties (Hicks or NBFL and Staff), and no approvals have been sought.

[10] Rule 8.12 has the heading: "Exclusions from Disclosure". I will now examine Rule 8.12(b) and (d) respectively in greater detail, as I find consideration of Rule 8.12(c) to be unnecessary given: Rule 8.12(b) and my comments on the "relevancy" basis for objection in the public Decision; and because Rule 8.12(c) speaks in terms of inadmissibility "by virtue of Nova Scotia Securities laws" not by virtue of the law of evidence. "Nova Scotia Securities laws" is defined in s. 2(aab) of the *Securities Act* as:

> Means this Act, the regulations, any decisions made by the Commission or the Director and any extra-provincial securities laws adopted or incorporated by reference under section 149D.

[11] The Rules are included by virtue of s. 150A of the Act, and the procedure for objections at discovery adopted by the Commission are also part of Nova Scotia Securities laws in my view.

Rule 8.12(d)

[12] Rule 8.12 reads:

> Notwithstanding anything contained in the Rules, no disclosure is required to be made:
>
> ...
>
> (d) of information which would not otherwise be disclosable by law.

[13] Are the existence of the Settlement Agreements (and their contents) "information" that is "not otherwise disclosable by law"?

[14] This requires me to examine what is "disclosable by law"?

[15] Clearly this is a reference to Part 8 - Disclosure of the General Rules of Practice and Procedure. More specifically it is a reference to "pre-hearing disclosure" - see Rule 8.1 which contains a general statement of the disclosure obligation on Staff and an express reference to Rule 8.12. Notably, Rule 8.1 limits disclosure to "all documents and things which are in the possession or control of Staff that are relevant to the Hearing...". I will presume that the Settlement Agreements are arguably relevant to the Hearing involving the Respondents herein.

[16] Rule 8.2(d) requires that, "as soon as reasonably practicable after service of the Notice of Hearing, and in any case at least 15 days before" a hearing is set to commence, Staff must deliver to the Respondent(s) "copies of all documents that Staff intends to produce or enter as evidence at the Hearing **and a list of documents protected by s. 8.12**."

[17] Rule 8.4 states:

> A party may, subject to section 8.12, seek an order of disclosure in advance of a hearing by bringing a motion before the Commission."

[18] Thus, while generally “no disclosure” of the contents of items falling within Rule 8.12 may be required, if they are in documentary form, Rule 8.2(d) requires that their existence be disclosed: i.e. a list of those relevant documents must be made available to Respondents no later than 15 days before a Hearing.

[19] A “Settlement Agreement” is a document. Whether a “Settlement Agreement” is intended to be produced or entered as evidence by Staff at a Hearing or not, if relevant, its existence must be disclosed as required by Rule 8.2(d). However, disclosure of its contents before the Hearing may not be sought by Respondents according to Rule 8.4.

[20] I note that Rule 8.2(d) reads: “must deliver... all documents that Staff intends to produce or enter as evidence at the Hearing **and** a list of documents protected by s. 8.12"; it does not read: “... at the Hearing **including** a list of documents protected by s. 8.12...” . In my opinion, any relevant documents, including documents such as the Settlement Agreements in this case, are capable of being caught by this Rule.

[21] To reiterate, the Rules leave the decision about any potential disclosure of the **contents** of Rule 8.12 protected information, such as the Settlement Agreements herein, in the hands of the Commission at the Hearing of the allegations.

[22] Therefore Staff are prohibited from disclosing the existence of the Settlement Agreements until Rule 8.2(d) requires, if that disclosure is **otherwise** disclosable by law. I am presuming the Agreements are "relevant" or capable of being "relevant" in the sense conveyed by the Supreme Court of Canada in its analysis of disclosure obligations upon the Crown in criminal cases.

[23] Whether the existence of, and possibly the contents of, the Settlement Agreements is otherwise disclosable by law will depend on whether their (time delayed) disclosure under Rule 8.1 and Rule 8.2(d) is over-ridden by an outright prohibition on the disclosure of their existence and/or contents at any time under Rule 8.12(b).

[24] In summary then, Rule 8.12(d) might provide a temporary basis for Staff denying the existence of the Settlement Agreements in the case at Bar, **until** Rule

8.2(d) requires their disclosure. Much as in the criminal context, the Crown (Staff under the *Securities Act*) has some discretion in the timing of the provision of the required disclosure to the responding party. This discretion should generally be exercised when "the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest" per Charron, J. for the Court in *R v. McNeil* [2009] 1 SCR 66 at para. 18.

Rule 8.12(b)

[25] Rule 8.12 reads:

> Notwithstanding anything contained in the Rules, no disclosure is required to be made:
>
> ...
>
> (b) of information which is protected from disclosure by privilege.

[26] As noted earlier, informer privilege has not been claimed nor is there evidence of such a privilege in this case. "Settlement privilege" is what, in my view, Staff are relying upon in this case, as embodied in Rule 8.12(b).

[27] Staff argues that the Settlement Agreements herein are not public, and therefore pursuant to (by necessary implication) Rule 10, Staff are prohibited from revealing their existence and content.

[28] I disagree. I will review the statutory provisions claimed to create a statutory prohibition on disclosure, and then the common law notion of "settlement privilege" as it arises through statutory provisions, but may be argued to be independent thereof - see for example the comments of Binnie, J. for the Court in a case involving contractual undertakings by sponsors of immigrants to Canada under the Federal *Immigration Refugee Protection Act* - *Canada (A.G.) v. Mavi* 2011 SCC 30. The Court concluded in that context that the sponsor's undertakings were valid contracts, but were also structured, controlled and supplemented by legislation, therefore those undertaken obligations were not only contractual but statutory, and as such their enforcement is not exclusively governed by the private law of contract.

(i) The statutory provisions as a basis for prohibition on disclosure / so-called "privilege"

[29] Firstly, as a matter of the statutory interpretation of The Rules, seeking to read the provisions of the Rules as a harmonious whole [*R v. JA* 2011 SCC 28 at para. 32, per McLachlin, C.J.] I conclude that the intention of the Rules clearly contemplates an approval **process** in relation to Settlement Agreements.

[30] Even the definition of "Settlement Agreement" in s. 1.1 of the Rules states:

> "Settlement Agreement" means an agreement... and that contains:
>
> ...
>
> (c) the term of Settlement agreed to by the Parties, including the provisions of any Order requested of the Settlement Panel...
>
> (d) a procedure for approval of the agreement;
>
> (e) a provision on whether the Agreement is confidential pending approval of the Settlement by the Settlement Panel...
>
> (i) a provision that the Agreement will become a public document upon its approval by the Settlement Panel; ...

[31] These provisions do **not**, in my view, permit what has happened in this case. They do not permit Staff and an accused party to agree, in the terms of a Settlement Agreement, to prevent the Settlement Agreement from reaching a Settlement Panel without their consent. The Parties' reason for so agreeing is unknown to me, but the effect is that the Agreements would never become public if I accept Staff's position herein.

[32] Secondly, it must be recognized that these Settlement Agreements are **not** purely private matters. The public interest is implicated and is paramount.

[33] The purpose of the *Securities Act* is stated in section 1A:

> The purpose of this Act is to provide investors with protection from practices and activities that tend to undermine investor confidence in the fairness and efficiency of capital markets and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation.

[34] Thirdly, the interests of Hicks and NBFL here would still typically be protected, given their presumed admissions of culpability in the Agreements, by not disclosing the "settlement negotiations", but only the results thereof, if the

Settlement Panel is satisfied, that the Agreement is "appropriate and in the public interest" - Rule 10.5.

[35] While I am skeptical that the existence or content of such Settlement Agreements, as opposed to the negotiations leading up to them, could be prohibited from disclosure by "settlement privilege", I will nevertheless also examine that basis of the Staff argument as I understand it. The argument would seem to be that "settlement privilege" exists at common law and as an independent basis for prohibiting Staff from disclosing the existence and contents of the Agreements.

(ii) "Settlement privilege" as a basis for prohibition on disclosure

[36] "Settlement privilege" is a class of privilege in contrast to a privilege determined on a case-by-case basis. Therefore, it has common pre conditions that define its existence or not.

[37] Once those pre conditions are met there is a *prima facie* presumption of privilege attaching to the relevant communications (and possibly the outcome of such communications).

[38] In *The Law of Evidence*, revised 5th ed. 2008, Irwin Law Inc. Paciocco and Stuesser summarize "settlement negotiation privilege" at p. 244:

> There exists a "class" privilege to protect settlement discussions. The discussions must be made during the course of settlement negotiations, for the purpose of settlement, and are not intended to be disclosed or used against the parties should the negotiations fail. The fundamental purpose underlying the privilege is to encourage settlement. The privilege applies to both civil settlement discussions and criminal resolution discussions. The privilege applies not only to the parties involved in the negotiations, but also protects communications from being disclosed to third parties.
>
> **The privilege is subject to exceptions.** The starting point is that settlement discussions are privileged. Where the existence of an agreement, or the terms of a settlement are at issue, or the negotiation discussions give rise to a cause of action, the privilege may be overridden. **The privilege may also be overridden where there exists a compelling public interest to do so.**
>
> [my emphasis added]

[39] Paciocco and Stuesser listed the pre-conditions at p. 250:

> 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 that negotiations failed.

3) The purpose of the communication must be to attempt to effect a settlement.

[40] While the law is consistent in applying the privilege strictly as between the private parties to settlement negotiations, the privilege may also be extended to protect their communications from being revealed to third parties - p. 251 Paciocco.

[41] This is so generally because the privilege is designed to protect the admissions made by the parties which could prejudice their positions in future as between themselves, and *vis-a vis* third parties.

[42] While the privilege is grounded in public policy, its exceptions find their roots in overriding public policy concerns.

[43] The onus to override such a privilege lies on the party seeking the disclosure. Furthermore, it requires demonstration of a compelling basis to override the privilege.

[44] Even in relation to “settlement negotiation privilege”, it may be sufficent for a party seeking disclosure to demonstrate that the information sought is not only relevant, but the use to which it will be put will not materially prejudice the party having the privilege nor will it be used against the maker of the communication - p. 252 Paciocco.

[45] If the party seeking disclosure can also demonstrate a compelling public interest, then it will be much more difficult for a privilege holder to rely on the privilege.

[46] In the case at Bar, the dispute is not about the negotiations that led to the Settlement Agreements, but rather about the existence of those Agreements, and possibly their contents.

[47] Thus, while much of the above noted discussion is not directly applicable to the case at Bar, as it dealt with settlement negotiations, it does set the context.

[48] There is disagreement in the case law over the scope of "settlement negotiation privilege", and in particular about when the outcome of settlement negotiations should be considered properly disclosable to third parties.

[49] Although she did not need to decide the issue on a summary judgment motion in *Barthe v. National Bank Financial Ltd.* 2009 NSSC 305, Hood, J. concluded at para. 54:

> There is conflicting law with respect to the use the courts can make of such agreements in subsequent proceedings.

[50] See also:

1. *Dos Santos v. Sun Life Assurance Co. of Canada* 2005 BCCA 4

2. *British Columbia Children's Hospital v. Air Products Canada Ltd. 2003 BCCA 177*

3. Moyes v. Fortune Financial Corp. [2002] OJ No. 1660 (Ont. S.C.)

4. *Hill v. Gordon-Daly Grenadier Securities* [2001] OJ No. 4181 (Div. Ct.)

5. *Sabre Inc. v. IATA* (2009) 76 C.P.C. (6th) 146 (Ont S.C.)

6. *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1998) 23 C.P.C. (4th) 268 (Man. CA)

7. *Clarke v. Yorkton Securities Inc.* (2003) C.P.C. (5th) 294 (Ont. S.C.)

8. *Western Canadian Place Ltd. v. Con Force Products Ltd.* (1998) 26 C.P.C. (4th) 189 (Alta, QB)

[51] With particular reference to *Hill* supra, I note that in Ontario the parties who enter into settlement agreements with the Ontario Securities Commission do so with a full awareness that what is contained therein **will** be made public.

[52] Thus in Ontario, the parties know that their negotiations remain privileged, but the results thereof do not.

[53] The question in the case at Bar is whether on an analysis of competing public policy grounds, Hicks and NBFL should remain entitled to the apparent protection of the Nova Scotia Securities laws in a situation where:

1. Staff and NBFL and Hicks have agreed to keep the existence and content of these Agreements non-public, unless and until they agree otherwise;

2. That form of agreement is not supported by a proper interpretation of the Rules;

3. The existence of, and contents of the Settlement Agreements is of unknown relevance to the Respondents until they become aware of the contents of those Agreements.

4. I infer that Hicks and NBFL may have entered these Agreements with the expectation that only they could decide when, if at all, to seek the approval of a Settlement Panel, which if it approved them, was under a legal duty to make them public [I therefore alerted Staff counsel on June 9, 2011 that she should advise counsel for Hicks and NBFL that I would consider any submissions that they wish to present regarding

> the disclosure of the existence and contents of these Agreements. By confidential letter dated and received June 15, 2011, counsel for Hicks and NBFL reiterated Staff's position that the Settlement Agreement(s) must remain confidential because, "to disclose the Settlement... is contrary to the basis upon which my clients entered into the Settlement and, it is respectfully submitted, would be unjust"] - see also Binnie, J.'s comments at paras. 68 - 72 in *Mavi* supra, regarding the "doctrine of legitimate expectations" when government officials make representations within the scope of their authority. This doctrine would however appear to be restricted to representations as to which "administrative process... the government will follow", and provided the representations that are "clear, unambiguous and unqualified", relate to procedural matters, and do not conflict with the decision makers' statutory duty. In this case, while there was agreement on the procedure for approval of the Settlement Agreements, I have concluded that the deferral of seeking such approval, to a point beyond a short period after execution of the Agreements, is not in keeping with the intent or spirt of Nova Scotia Securities laws.

[54] The "relevant period" in the Statement of Allegations against the Respondents spans December 1999 to August 2001 - Exhibit 2 of the Affidavit of Scott Peacock, sworn July 9, 2010.

[55] Even without knowing the contents of the Settlement Agreements in detail, one can conclude that the allegations against NBFL and Hicks must have preceded August 31, 2001 in time.

[56] Section 136(2) of the *Securities Act*, contains a 6 year limitation period for any "proceedings under this Act... before the Commission..." after "the date of the occurrence of the last event upon which the proceeding is based".

[57] Therefore, NBFL and Hicks could only have been proceeded against before the Commission by the filing and serving of a Statement of Allegation up until September 1, 2007. I wonder whether The Commission would even have the jurisdiction to now approve such Settlement Agreements if the parties requested that it do so? Neither Party has asked for such approval in any event, but could do so at some point in the future. To the extent that the Parties wish to not seek approval until all related proceedings have run their course, such a point in time may be many years away. There exist at present, numerous civil suits, the *Securities Act* prosecution, and of late, a criminal prosecution.

[58] Both the NBFL and Hicks Settlement Agreements may therefore be said to be “cast in stone”. There cannot, and will not, likely be any public information about their contents forth-coming within the foreseeable future, unless the Commission or a Court exceptionally rule that, in spite of the confidentiality asserted, a compelling public interest argument to disclose them carries the day.

Conclusion

[59] Rule 8.2(d) of the General Rules of Practice and Procedure requires Staff to disclose the existence of the Settlement Agreements prior to any hearing they would conduct against the Respondents.

[60] Whether as a matter of statutory interpretation, or within an examination of the protection afforded by “settlement negotiation privilege”, in neither context are the existence and contents of those Settlement Agreements protected from disclosure. The public interest basis for the preservation of that protection is presently insignificant, and the public interest basis for the disclosure of the existence and content of those Agreements is significant.

[61] I conclude that the Settlement Agreements entered into between Staff and Hicks and NBFL, are not protected from disclosure, and therefore there is no basis for the investigators refusing to answer the question in issue at the discovery process scheduled for June 20 - 24, 2011.

Relief Requested

[62] Staff sought a declaration from this Court to sustain its objection to the investigators at discoveries being asked the question in issue. Staff requested in its March 23, 2011 brief that if I do not agree that the answer(s) to the question in issue are inadmissible and / or prohibited by Nova Scotia Securities laws, then pursuant to CPR 85.06(4), I should "maintain confidence over the argument... so it can determine how to proceed". I do not find that is an appropriate basis for maintaining the confidence requested, however, I conclude that it is within my authority to do so based on the right of Courts to control their own process and to act in the interests of justice.

[63] To allow Staff to assess its position, and to afford the Respondents access to my Decision herein, I will order that:

As a condition of taking receipt of a copy of this Decision by any person, [i.e. limited to the Parties - Staff (counsel Ms. Schedler), MacLeod, Wadden and Potter; and counsel for Hicks and NBFL] that person will be required to undertake, unless with express permission of this Court otherwise:

(i) themselves, to not divulge any information to anyone (other than counsel retained to provide legal advice in relation thereto) which would reveal the existence or content of the Settlement Agreements in issue, nor to allow any other person to do so;

(ii) to not allow any copies to be made (in part or in full), or distribution (in any form) of my Decision to take place;

(iii) to take all necessary precautions to ensure the above noted conditions are complied with; and

(iv) if there is no appeal filed within the time periods contained in the *Civil Procedure Rules (2009)*, then these conditions will be deemed to have lapsed and this Decision will become public.

J.