SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2019 NSSC 175

Date: 20190604
Docket: Hfx No. 469869
Registry: Halifax

Between:

Nova Scotia Teachers Union

Plaintiff

v.

Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant

DECISION

Motion Regarding Admissibility of Portions of Affidavits

Judge: The Honourable Justice Jamie Campbell

Heard: May 15 and 16, 2019, in Halifax, Nova Scotia

Counsel: Gail Gatchalian and Balraj Dosanjh, for the Plaintiff
Andrew Taillon, for the Defendant

By the Court:

[1] This motion has been brought by the Attorney General of Nova Scotia to exclude portions of several affidavits filed on behalf of the Nova Scotia Teachers' Union.

[2] The NSTU and the Province are engaged in a dispute about the constitutionality of the *Teachers' Professional Agreement and Classroom Improvements (2017) Act*[1], referred to as Bill 75. That bill imposed a collective agreement. The NSTU claims that the bill violates its members' rights to free association and freedom of expression. The union says that the Province substantially interfered with collective bargaining in a way that did not respect the process of meaningful and good faith consultation.

[3] The portions of the affidavits that the Province wants to exclude deal with the union's assertion that the Province intended to introduce legislation if the NSTU did not accept an agreement by a certain date. The NSTU says that its bargaining committee was motivated to accept a tentative agreement because of the concern that if it did not, the Province would legislate less favourable terms.

[4] There are several portions of affidavits filed on behalf of the NSTU that the Province seeks to exclude but they all relate to two discussions. The first is alleged to have involved George McLellan, then Deputy Minister of Finance, and Ron Pink Q.C., chief negotiator for the NSTU. On October 28, 2015 Mr. McLellan is alleged to have said to Mr. Pink that the Province had prepared legislation that would impose the Province's fiscal plan and that it intended to introduce legislation when the legislature opened on November 12, 2015 unless the parties could reach an agreement before then.

[5] The second discussion is at a November 12, 2015 meeting of the NSTU bargaining committee in which Mr. Pink is alleged to have said that the Province was drafting legislation to impose a wage package on teachers that would be less favourable than that in the first tentative agreement.

[6] The Province argues that privilege applies to the discussions between Mr. McLellan and Mr. Pink. That may be either settlement privilege, as a class

[1] S.N.S. 2017 c. 1

privilege or the application of case-by-case privilege. The NSTU says that no privilege applies to these communications.

Summary

[7] The Province claims that the communications are subject to settlement privilege. The purpose of settlement privilege is to protect negotiations intended to settle a dispute from being used against a party in the adjudication of that dispute by a third party. The communications sought to be excluded here are not being used in the adjudication of any dispute that they were intended to settle.

[8] If settlement privilege does not apply the Province says that the categories of privilege are not closed. Labour negotiations are not privileged. The Province argues that communications between negotiators intended to be private and confidential should attract privilege.

[9] The relationship between management and union labour negotiators is not of the kind that would give rise to privileged communications in the context of the negotiation of a collective agreement. The purpose of a trial is to seek the truth and the extension of privilege is an impediment to that. Sometimes, when the price of that truth comes at too high a cost to a relationship, the confidences of which ought to be assiduously protected. The relationship between management and union labour negotiators is not of that kind.

Background

[10] Governments do have the right to legislate the members of striking public sector unions back to work. They can only do that after they have conducted good faith negotiations. The Province cannot enter those negotiations with a take it in negotiation or face it in legislation mandate. That is essentially what the NSTU claims happened here.

[11] The negotiation history between the parties will ultimately be an important part of the decision on whether *Charter* rights have been breached. The context in which the discussion or discussions between Mr. McLellan and Mr. Pink took place is significant to the issues of their relevance and to any privilege that might apply to them.

[12] The NSTU is the exclusive bargaining agent for teachers employed by school boards in Nova Scotia. The Minister of Education and Early Childhood

Development is the employer in respect of the terms and conditions of work set out in the *Teachers Collective Bargaining Act*[2]. The NSTU and the Province had negotiated a collective agreement that applied from August 1, 2012 to July 31, 2015. On June 18, 2015 the NSTU gave the Minister of Education notice to bargain a new collective agreement. It was agreed that bargaining proposals would be exchanged on September 29, 2015.

[13] The parties met and exchanged proposals on that date. The Province proposed changes to the collective agreement, driven in part by the Public Services Sustainability Mandate, which it says was based on the amount of money available in the Provincial budget as determined by the Department of Finance and Treasury Board. That mandate had been explained the previous months in a meeting with labour leaders from across the Province.

[14] There was a meeting held on November 5, 2015 with public sector union leaders, including the NSTU, to discuss the mandate. The Provincial and NSTU representatives agreed to meet on November 12, 2015 for in person bargaining.

[15] This motion is about what happened between September and November 2015. There was a discussion, or there were discussions, of some kind between Ron Pink and George McLellan, the Deputy Minister of Finance. There are no affidavits filed from either of them. Neither of the participants have given evidence to indicate what was said or understood about the extent to which those discussions could be disclosed. Those discussions led to exchanges between members of the bargaining teams and the eventual creation of a proposal on November 12, 2015.

[16] In the affidavit of Angela Kidney, Director of School Board Labour Relations for the Department of Education and Early Childhood Development, affirmed on August 9, 2018, the discussions are referenced at para. 21. That affidavit was filed by the Province. Ms. Kidney says that on or before November 6, 2015, she was advised by Roland King, Senior Executive Director of the Public Service Commission that there had been "without prejudice discussions" between NSTU and Provincial representatives "to develop a framework for a deal on a new collective agreement". She says that he received a document that appeared to have been drafted by someone at Mr. Pink's firm, titled "Employer Proposal". She understood that the document represented that framework. Her job, as she understood it, was to work the NSTU representatives toward ironing out any

[2] R.S.N.S. 9089, c. 460

potential problems with the details and then "to present it to the Union as the proposal of the Employer at a bargaining session that had been scheduled for Thursday, November 12, 2015".

[17] Ms. Kidney does not elaborate on what Mr. King told her that Mr. McLellan told him, was the meaning of "without prejudice discussions" in the context of negotiations on the terms of a collective agreement with no reference to litigation of any kind.

[18] Throughout November 10 and 11 a small group of people from the Province and NSTU kept working on the document and made several revisions. They met on November 12, 2015 at the NSTU offices and agreed to a tentative agreement based on the document that had been worked on over the previous few days. At the NSTU provincial executive meeting on November 12, 2015 the executive voted to recommend the tentative agreement to the membership.

[19] Roland King is now the Associate Deputy Minister, Labour Relations, with the Public Service Commission. He provided an affidavit sworn April 29, 2019. He says that he was informed by George McLellan, that he was approached in October 2015 by Ron Pink and asked if he could discuss the matter of the teachers' collective bargaining with him. Mr. King says that Mr. McLellan told him that he sought instructions from "the Executive Branch of Government" and was told that he could enter into such negotiations "on a confidential and 'without prejudice' basis". The goal of the negotiations was to determine the parameters for a collective agreement that would be "on the record" and then put to the membership of the NSTU for ratification.

[20] Mr. King says that the purpose of these confidential and "without prejudice" negotiations away from the respective bargaining committees was to allow for private, full and frank discussion that would lead to the settling of a collective agreement. "If the conversations were not "without prejudice" and confidential then there would have been no point in having them and the regular process could have been followed." It is not clear whether that is the opinion offered by Mr. King or the opinion of Mr. McLellan as offered to Mr. King. It is also not clear from that whether Mr. McLellan or Mr. King meant that the discussions should be private, full and frank and also not admissible in the event that some litigation should arise if the Province were to legislate a resolution and the NSTU were to challenge that legislation. Mr. King also says that he was informed by Mr. McLellan that there was no written record of those discussions.

[21] Those discussions appear to have resulted in a number of documents being prepared. Written proposals went back and forth by email on November 9, 10 and 11, 2015. There is no claim of privilege made with respect to the documents that set out the nature of those negotiations. They are included in the affidavit of Angela Kidney.

[22] What is in issue is what was said on or about October 28, 2015, specifically, what Mr. McLellan said to Mr. Pink. Neither Ms. Kidney nor Mr. King were present for the discussions between Mr. Pink and Mr. McLellan. And there is no evidence from either Mr. Pink or Mr. McLellan. The judge hearing the Application in Court will determine how much weight should be given to the reports of those discussions. It is the Province that is now seeking to claim privilege over them and bears the burden of offering evidence as to the intent of the people involved in those discussions.

[23] Jack MacLeod is an Executive Staff Officer with the NSTU. His affidavit was sworn on May 30, 2018. He says at para. 71 that Ron Pink informed him on or about October 28, 2015 that George McLellan had "told him that the Province of Nova Scotia had prepared legislation that would impose the Employer's fiscal plan and that Nova Scotia intended to introduce the legislation in the Nova Scotia House of Assembly when the legislature opened on November 12, 2015 unless the parties could reach an agreement before then". That is one of the statements that the Province seeks to have excluded.

[24] Wally Fiander is also an Executive Staff Officer with the NSTU. In his affidavit he says that there was a meeting of the NSTU Negotiating Committee on November 12 to discuss the proposed settlement. He says that at that meeting Ron Pink informed the members of the negotiating committee that the Province was drafting legislation to impose a wage package on teachers. He goes on to say in that affidavit that at a meeting on November 18, 2015 of the NSTU Yarmouth and Digby locals an Executive Staff Officer explained the tentative agreement and "the potential for legislation to be introduced should teachers vote against the tentative agreement". The Province objects to portions of Mr. Fiander's affidavit.

[25] Tammy Landry is a teacher with the Strait Regional Centre for Education. In her affidavit she says that at the November 23, 2015 meeting of the NSTU Local Presidents the NSTU legal counsel and chief negotiator "informed us that the Province of Nova Scotia was drafting legislation to impose a wage package on teachers that would be less favourable than that in Tentative Agreement 1". She

voted for the tentative agreement in part because she understood that if it were rejected the Province would impose a worse package by legislation. The Province objects to the admissibility of those portions of Ms. Landry's affidavit.

[26] Tami Jardine is a teacher at the Annapolis Valley Regional Centre for Education at Falmouth District School. She is also First Vice-President of the NSTU. She confirms in that affidavit what Tammy Landry said about the November 23, 2015 meeting of local presidents. She says that Mr. Pink informed the meeting that the Province was "crafting legislation to impose a wage package" that was less favourable than the tentative agreement. The Province objects to portions of her affidavit as well.

[27] The NSTU Provincial Executive was recommending that the membership accept the tentative agreement. The NSTU President in a regularly published newsletter entitled "A Brief Word" communicated to the members. In the November 18, 2015 version the president of the NSTU stated;

> Our lead negotiator was made aware the Government had prepared legislation that would impose the already highly publicized public sector age settlement on teachers with a five-year deal – 0%, 0%, 0%, 1% and 1%.... The threat of legislation to settle our agreement was real, and we have seen this government use its legislative power to resolve other disputes over the last two years… In the face of impending draconian legislation it was decided to recommend acceptance of this offer. Your provincial executive believes that while the process to reach this negotiated tentative agreement was not optimal, it is necessary under the current circumstances, and we urge you to vote in favour of this agreement.

[28] Ron Pink Q.C. as chief negotiator wrote to the members of the NSTU on November 24, 2015. He outlined the terms of the tentative agreement and noted that "the end of bargaining came early because there were two willing parties". He says that there was nothing "abnormal or unusual" about the deal and that if it had been proposed after 6 months of bargaining it would have been acceptable to the union. In the event that members voted against ratification Mr. Pink noted 4 possibilities. Continued bargaining was "doubtful". Conciliation would be unlikely to change anything given that the negotiating committees had agreed on an earlier deal. As for a strike vote, members would have to decide on that themselves. On legislation, the fourth possibility, Mr. Pink said;

> Our sources advised us that legislation was always an option for the government and if they were willing to legislate, they may will impose by legislation their

> unilateral plan to change the Teachers' Provincial Agreement to fall in line with the Action Plan. This would be a serious setback for teachers.

[29] That letter was sent to members of the NSTU after the "Brief Word" document.

[30] The ratification vote for the tentative agreement was held on December 1, 2015. The tentative agreement was rejected by the membership of the NSTU.

[31] On December 2, 2015 a Globe and Mail article reported the Premier of Nova Scotia had said that legislation was being drawn up after the teachers' rejection of the contract offer. On December 14, 2015, the Province introduced *The Public Services Sustainability (2015) Act*, known as Bill 148. That bill received third reading and Royal Assent on December 18, 2015. It was not proclaimed in force.

[32] The parties held negotiations in January 2016. There were further sessions in April and May 2016. A conciliator was appointed in June 2016. Conciliation took place on August 2 and 4 and between August 3 and 9, 2016 the negotiating teams reached an agreement for the framework of a second tentative agreement. The NSTU provincial executive voted to recommend acceptance of the agreement. It was put to the membership on October 4, 2014 and was rejected. On October 25 the membership of the NSTU voted in favour of a strike mandate. The parties continued with conciliation. On December 3, 2016 the NSTU was in a legal strike position and indicated that it would begin job action on December 5, 2016. Schools were closed that day by the Minister of Education, citing safety concerns. Schools re-opened on December 6, 2016. The legislature had been recalled in the event that legislation was required. Legislation was not passed that day and the parties agreed to continue negotiations.

[33] The negotiations continued. On January 20, 2017 a third tentative agreement was reached between the parties. That was rejected by the NSTU membership on February 9, 2017. On February 11, 2017 the government announced that legislature would sit once again.

[34] On February 14, 2017 the government introduced Bill 75, *An Act Respecting a Teachers' Professional Agreement and Classroom Improvements*. That bill received Royal Assent on February 21, 2017. It imposed terms of a collective agreement on the NSTU.

Relevance

[35] For any evidence to be admitted, it must be relevant, in the sense that it is probative of a material fact in issue. It will be for the judge hearing the Application in Court to determine the weight to be given to the evidence. At this point it must only be established and that the statement alleged to have been made by Mr. McLellan to Mr. Pink would be relevant in the Application in Court. That determination can only be based on the information contained in the pleadings and affidavits filed until now.

[36] The NSTU's Application in Court is with respect to the constitutionality of Bill 75 in 2017. The Grounds for the Order, attached as Appendix A to the Application in Court, states that Bill 75 was passed without a meaningful process of collective bargaining and good faith consultation. The Province, in its Notice of Contest, says that the parties engaged in negotiations between May 2015 and February 2017 and specifically that the parties reached three tentative agreements. The Province asserts that the tentative agreements act as evidence of good faith bargaining. The NSTU says that the threat of legislation being filed on November 12, 2015 explains why that tentative agreement was made and recommended to the membership.

[37] The relevance of the communications between Mr. Pink and Mr. McLellan may not be limited to that. But the alleged conversation is relevant to a material fact put in issue in the pleadings themselves.

Settlement Privilege

[38] The Province says that the discussions between Mr. Pink and McLellan fall under class privilege as information shared between parties in the context of settling a dispute. Settlement privilege is intended to encourage the settlement of litigation. There is an interest in facilitating the ability of parties to litigation to reach a settlement. Settlement privilege allows for frank discussions in the course of those negotiations.

[39] The standard test for settlement privilege has three requirements. Litigation must have been commenced or must have been in contemplation. The communication must have been made with the express or implied intention that it would not be disclosed if settlement negotiations failed. And the purpose of the communication must have been to bring about a settlement. The party asserting the privilege must show those things.

[40] The requirement for litigation or contemplated litigation suggests that the privilege does not apply in circumstances where for example parties are negotiating a standard commercial transaction, with no thought to litigation. The concept has been broadened however beyond formal litigation commenced or to be commenced in court. Litigation as such is not required and the privilege can apply in the context of settling other disputes. Examples might include matters being heard or potentially heard by a labour relations board, a human rights tribunal, a professional regulatory tribunal, or any number of other administrative tribunals in which parties appear for the purpose of resolving disputes. Parties in the labour relations context often seek to achieve the settlement of labour board or collective agreement arbitration matters through without prejudice negotiations. Settlement privilege would apply, even though they are not litigious matters, in the sense of being before a court.

[41] In *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*[3], the Alberta Court of Appeal provided the following rationale for settlement privilege.

> Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because admission of liability is often implicit as a part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.[4]

[42] That summary of the rationale is instructive on the issue of whether the privilege should extend to collective agreement negotiations or to parts of collective agreement negotiations. Litigation is not the result of failed collective agreement negotiations. Liability is of course not an issue in those negotiations. The parties in the labour relations context have no choice but to negotiate and the form and content of those negotiations is legally regulated in the sense that both parties are legally required to bargain in good faith.

[43] The negotiation of a collective agreement is not analogous to a litigious matter or a dispute.

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[3] [2013] ABCA 10
[4] *Bellatrix Exploration*, at para. 21

[44] In *FortisBC Inc. v. IBEW, Local 213*[5], Arbitrator Larson drew the distinction between disputes arising out of contract formation and those that arise out of contractual rights, which might give rise to the claim of settlement privilege. The issue was raised as to whether interest arbitration upon failure of collective bargaining may be the kind of dispute to which settlement privilege might apply. "Negotiations for a new collective agreement do not involve proposals to compromise existing contractual rights as in the case in normal litigation but rather constitute proposals to create those rights."

[45] There was no dispute between the NSTU and Province in the fall of 2015. There is no evidence that a dispute was even contemplated. Counsel for the Attorney General argued that whenever legislation is contemplated *Charter* litigation should be in contemplation as well. But no one was planning to take anyone to court about anything at that point.

[46] The second feature of settlement privilege is that the communication must have been made with the express or implied intention that it would not be disclosed in court if the negotiations failed. That is not limited to a formal court process. It would include disclosure to any adjudicative body or third-party decision maker. But the purpose of the privilege is to prevent the negotiations from being put before the ultimate decision maker or the body adjudicating the dispute. The negotiations that the privilege protects relate to the settlement of the dispute to be resolved by the body from which those negotiations are privileged. If negotiations failed to reach a collective agreement there was then no court or other adjudicative body from which those negotiations were intended to be kept, as privileged. Here, the Province is seeking to protect the negotiation of one matter, the collect agreement, from an adjudicator, the court, that is resolving an entirely different matter, the *Charter* litigation.

[47] The aspect of the discussion that is most relevant to the NSTU claim is that Mr. McLellan told Mr. Pink that if negotiations failed, there would be a legislated resolution. For settlement privilege to apply it must have been understood that Mr. Pink could not use that statement either in court or in another adjudicative forum. But there was no adjudicative forum to which the dispute that they we endeavoring to settle could have been sent. Failed collective agreement negotiations result in strikes or lock outs, not litigation.

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[5] [2014] B.C.C.A.A.A. No. 133

[48] The third feature is that the communications must have been made in the effort to settle the dispute. Once again, the communications appear to have been made in the effort to reach a collective agreement, not to settle a *Charter* litigation claim with respect to legislation that had not yet been introduced, much less passed.

[49] Settlement privilege does not apply generally to all things that people choose to call settlements or to all negotiations. It applies to the settlement of litigious disputes. Disputes have become more broadly interpreted to include those that do not involve the formal court process. Disputes in this context, are generally resolved in an adjudicative forum of some kind, in the absence of a settlement. The purpose is to protect the ability of the parties to make compromises without risking that those compromises will ultimately compromise their positions before the adjudicative authority.

[50] The negotiation of a collective agreement is not the negotiation of the resolution to a dispute. It does not relate to the purpose of the privilege which is to encourage the settlement of disputes that are otherwise to be resolved by third parties.

Labour Relations Privilege

[51] The Province argues that even if the discussions do not attract settlement privilege, they should be subject to a case-by-case privilege. The party seeking to benefit from a new case-by-case privilege has the burden of showing that privilege should attach to the communications. Privilege keeps otherwise relevant evidence from the court or other body making an adjudication. It impedes the truth-seeking function. It must be shown that the relationship of confidence in which the communications were made is so valued that the truth-seeking function should give way to it.

[52] The party seeking recognition of a case-by-case privilege must satisfy the court of four things. The communications must have originated in a confidence that they would not be disclosed. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties. The relationship must be one that in the opinion of the community ought to be fostered. And the injury to that relationship by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

[53] Case-by-case privilege assesses each relationship within its context to determine if privilege should apply. It is not settlement privilege but serves another purpose. That purpose is the fostering of certain relationships in which trust is important and ought to be fostered. The relationship between union and management negotiators in a labour relations context is so unlike those relationships to which privilege applies that the application of the four-part test seems stilted and artificial. These are adversaries. They may cooperate and a level of trust is always beneficial. But each person owes his or her allegiance first and foremost to his principal.

[54] Settlement privilege might apply in some circumstances. But it is hardly relationship of trust and confidence in which information is given in confidence that it will never be disclosed. Privilege based on a confidential relationship is usually not sought to be applied by one party to that relationship in a dispute with the other.

[55] The discussion or discussions between Mr. McLellan and Mr. Pink were outside of the room in which negotiations were taking place. There is no evidence directly from either of them that the information was provided by Mr. McLellan in the confidence that it would not be repeated to Mr. Pink's client or received by Mr. Pink with the understanding that it should go no further and not to be conveyed to anyone else. It can be reasonably inferred from the circumstances that if the statement was made to Mr. Pink that legislation was to be put forward on November 12, 2015, the legislation was in some way to be relevant to the negotiations and that the information should be shared with Mr. Pink's client, as apparently it eventually was. Mr. McLellan is said to have sought approval of the "Executive Branch" before telling Mr. Pink about the potential for legislation. It can be inferred that the information was not intended to be for Mr. Pink's personal interest or edification. It would some serve a purpose only if it were conveyed. Otherwise, Mr. Pink would be encumbered with information that he would be required to keep from his client.

[56] It is evident that Mr. Pink did not believe that the content of conversation was intended to be kept in confidence. He told the NSTU representatives with whom he was dealing what he had been told. The NSTU communicated that information broadly to its membership. Neither Mr. Pink nor the NSTU attributed the comments to Mr. McLellan. His identity as the source was kept confidential. The information he conveyed, as an anonymous source was not. That is quite a different matter from the conversation being held under a veil of secrecy that

would prevent it from being disclosed to anyone else or from being used if the parties were at some point to find themselves in litigation.

[57] The importance of confidentiality in the relationship presumes a relationship in which information is being conveyed in confidence. Union and employer negotiators do routinely have discussions in which proposals are discussed with the view that the discussions will be confidential. The negotiators may informally "float" compromises that go beyond their negotiating mandates and may convey information that is intended to facilitate a settlement on the basis that they will not be attributed as the source. Confidentiality between negotiators in that sense is important. They should to be able to rely on each other to do that in the course of negotiations.

[58] That however does not establish that the element of confidentiality is essential to the relationship in a way that would justify the extension of privilege. In the context of collective agreement negotiations there are rules that apply to how negotiations can take place and the strategies that can be used. Bargaining in bad faith can arise as a complaint to the tribunal governing labour relations or may be part of an application dealing with *Charter* rights. In either case, how the negotiations have been undertaken can be relevant to the determination that has to be made. If the meaningful part of collective agreement negotiations can be undertaken under a cloak of privilege, enforcement of obligations to negotiate in good faith could become difficult. Confidentiality, in this context, is not essential to the relationship.

[59] The relationship between the parties is of course one that should be fostered but confidentiality in the negotiation of the collective agreement is not vital to it.

[60] The fourth factor is whether the interests served by protecting the communications from disclosure outweigh the interests in disposing correctly with the litigation. The information has lost any confidential nature that it may ever have been able to lay claim to. The Province has filed materials that refer to the discussions between the NSTU negotiator and government sources about the prospect of legislation. Whether the information came from Mr. McLellan or someone else, and whether it made reference to legislation being prepared or contemplated, it was a report of the discussions between Mr. Pink and Mr. McLellan. That piece of information is important to the case being put forward by the NSTU. The conduct of the government could help to establish whether the Province acted in bad faith. The importance of the confidentiality of information

that is hardly, if at all confidential, is considerably less significant than the importance of that information to the search for truth in this case.

[61] The discussions between Mr. McLellan and Mr. Pink are not subject to a case-by-case privilege.

[62] The Province's motion seeking to strike portions of the affidavits filed by the NSTU is dismissed.

[63] An award of costs will be made in favour of the NSTU in the amount of $1,500, inclusive of disbursements.

Campbell, J.