SUPREME COURT OF NOVA SCOTIA

Citation: *Lowndes v. Halifax City Soccer Club* , 2021 NSSC 193

Date: 20210118
Docket: *Bridgewater*, No. 479118
Registry: Halifax

Between:

Steve Lowndes

Applicant

v.

Halifax City Soccer Club

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	December 21, 2020, in Halifax, Nova Scotia
Counsel:	Richard A. Bureau and Ryan Christen, for the Applicant Colin D. Bryson, Q.C., for the Respondent

By the Court- orally:

[1] Mr. Lowndes is advancing a claim seeking damages for constructive dismissal and unjust dismissal; Halifax City Soccer Club ("Halifax City Soccer") denies the claim. The plaintiff and defendant had agreed to file a Joint Book of Exhibits prior to the trial.

[2] This is a motion by the plaintiff, Mr. Lowndes, seeking that the Court consider whether a number of documents are properly admissible for trial. The documents allude to a mediation, among other matters, and predate Mr. Lowndes leaving the employment of Halifax City Soccer.

ISSUE

[3] The main issue between the parties is whether the documents are subject to privilege, and should be excluded from the Joint Book of Exhibits.

REASONS FOR DECISION

[4] Mr. Lowndes submits that the documents should be excluded on three different grounds:

1. Settlement privilege precludes their admission into evidence; or
2. The documents are subject to litigation privilege; or

3. Fairness: Mr. Lowndes argues that, if a finding is made that the documents are not privileged and subject to disclosure at trial, the applicant will be required to retain alternate counsel just prior to trial, thereby causing him a hardship.

[5] Halifax City Soccer disagrees with Mr. Lowndes on each of these items.

[6] I will canvass each of these grounds, with a disposition accordingly.

A. Settlement Privilege Precludes Admission into Evidence

[7] The documents are contained as attachments to Mr. Bureau's affidavit of counsel, dated October 28, 2020. They include emails between Mr. Bureau, acting as Mr. Lowndes' counsel, and Halifax City Soccer executives, as well as emails and correspondence exchanged with Halifax City Soccer's counsel Mr. Bryson.

[8] Counsel for Mr. Lowndes indicated at the hearing that some emails are not covered by the assertion of settlement privilege:

(a) June 13, 2018
(b) June 18, 2018
(c) June 20, 2018

Specifically, those emails addressing access to the office by Mr. Lowndes.

[9] The question for me to consider is whether the remainder of the emails and letters included in the affidavits submitted by counsel for the parties are subject to the assertion by Mr. Lowndes of settlement privilege.

[10] As was noted in *The Law of Objections in Canada: A Handbook*, Claude Marseille and Joe McArthur, LexisNexis Toronto (2019) at p 50:

> Settlement Privilege is a class privilege. Thus it applies once the party invoking it establishes that certain conditions...have been met. Conversely, a party resisting the application of settlement privilege must show that an exception to the privilege applies, or else that the matter falls outside the scope of the privilege.

[11] Both counsel have directed me to the leading cases in Nova Scotia concerning privileged communications, specifically *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, and *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2013 NSSC 131, in which these principles are considered at length.

[12] Justice Bryson in *Brown v. Cape Breton (Regional Municipality)*, at paragraph 30, refers to the three part analysis a Court undertakes when determining a claim of settlement privilege:

> (30) It is generally accepted that there are three conditions that must be met to attract settlement privilege:
>
> 1. A litigious dispute must be in existence or in 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 communication must be to attempt to effect a settlement.

With this in mind, I have reviewed the documents and considered the submissions of the applicant and the respondent.

1. Litigious Dispute

[13] In applying the first branch of the test, I would note that these correspondences span the time before Mr. Lowndes filed his action.

[14] Halifax City Soccer submits that the communications were intended to harmonize the working relationship between Mr. Lowndes and Halifax City Soccer Manager, Ms. Meggie Spicer.

[15] Ms. Spicer made an allegation to Halifax City Soccer executive of a serious incident between them, occurring in the context of their employment. Halifax City Soccer's position is that its response was intended to lessen tensions between the employees to ensure that both continued at Halifax City Soccer, and to seek a mediation between Ms. Spicer and Mr. Lowndes, with these communications made not to settle a litigious dispute, whether in existence or contemplated by the parties.

[16] Mr. Lowndes' retention of Mr. Bureau, immediately after the alleged incident, and the content of the communications sent by Mr. Bureau to Halifax City Soccer, seems to leave little doubt that an action concerning his employment contract was being contemplated by Mr. Lowndes. The content of Mr. Bureau's statements seeking specific remedies for a potential breach of employment contract (which would include damages, an apology, and renegotiation of the employment

contract) demonstrate an intention to seek a remedy from a court, in the event that the requests were not fulfilled by Halifax City Soccer in the course of their communications.

[17] May 9, 2018, was the date of the alleged incident. Mr. Bryson confirmed in his submissions that he was retained by Halifax City Soccer on May 10th, 2018. Halifax City Soccer perceived the need for legal advice to address the situation, generally, and specifically in regard to either of their employees.

[18] I am satisfied that the first branch of the test was met, as a litigious dispute between the Halifax City Soccer and Mr. Lowndes was in contemplation by the parties.

2. Documents Subject to Litigation Privilege

[19] Moving on to the second branch, I note that this branch of the test requires a determination of whether the communications were made with an intention that they not be disclosed if negotiations concerning the dispute failed.

[20] Mr. Bureau's correspondences to Halifax City Soccer, are headed "Without Prejudice" or contain the phrase "without prejudice" in the body of the email or correspondences. This is not in and of itself determinative of whether the document is subject to settlement privilege, as the document must be considered in context.

[21] The affidavit evidence of Justice John Bodurtha, and that filed by both counsel, demonstrates Halifax City Soccer's communications were neither expressly made on a "Without Prejudice" basis as communications made to further a settlement, nor do I find that there was an implicit intent that they would not be disclosed at a later time in the course of litigation.

[22] I accept Justice Bodurtha's evidence concerning Halifax City Soccer's intent in its communications with Mr. Lowndes' counsel.

[23] Mr. Bureau's correspondences are in keeping with what is expected of an advocate advancing a position on behalf of his client, with the potential for litigation. However the responses sent by Halifax City Soccer, whether made by counsel or by its executive, do not explicitly or implicitly indicate that their intention is to effect a settlement of any potential action by Mr. Lowndes, or that they would not be disclosed at some future time.

[24] The communications are rather in keeping with the larger picture, as referenced in Justice Bodurtha's affidavit at para 10:

> … that the Halifax City Soccer's two key employees were at odds and the Halifax City Soccer needed to find a way for them to successfully work together.

There is no indication that Halifax City Soccer intended that the communications would not be disclosed.

[25] Mr. Lowndes submits that portions of the documents that speak to access to Halifax City Soccer's offices are admissible and intended to be made "With Prejudice", and although this is embedded in their communications, this would not come within the settlement privilege being asserted. Mr. Lowndes' position, presumably, is that those portions were not part of a settlement negotiation as they are attempts by Mr. Lowndes to meet the terms of the contract of employment. If accepted, this severing would only serve to support Mr. Lowndes' position as he maintains his actions in leaving the Halifax City Soccer were not to frustrate the contract, but leaves the defendant with no response.

[26] Halifax City Soccer's position is that this is contradictory. It is maintained in Mr. Bryson's correspondence on Halifax City Soccer's behalf, and stated in Justice Bodurtha's affidavit, that the intention of the communication, taken as a whole, was that Mr. Lowndes would have continued employment and communications were not intended to settle an action for constructive dismissal. Halifax City Soccer maintains that their portion of the discussion was made on a "with prejudice" basis throughout.

[27] While I note that Halifax City Soccer did not expressly state the "with prejudice" aspect of their communications with Mr. Lowndes' counsel in the emails exchanged or letters between counsel until 2019, I find that on review of the

documents that Halifax City Soccer's communications were made in anticipation of disclosure in the event of litigation.

[28] In my view, the second branch of the test has not been met.

3. Fairness

[29] The third arm requires a consideration of whether the purpose of the communication is an attempt to effect a settlement of a contemplated action.

[30] The difference of opinion between the parties in regard to the intention of the communication is the essence of the motion.

[31] I note that Justice Bodurtha's affidavit, upon which he was not cross-examined, states at paras 9-13:

> (9) One of the short-term steps taken by the Club was to direct Mr. Lowndes not to attend at the Club office while Ms. Spicer was there, with arrangements subsequently made for Mr. Lowndes to have access to the Club Office at scheduled times when Ms. Spicer would not be there. The purpose of this was to separate the two temporarily, as Ms. Spicer was not prepared to work in the same work space as Mr. Lowndes. Mr. Lowndes was not pleased with this.
>
> (10) The larger picture was that the Club's two key employees were at odds and the Halifax City Soccer needed to find a way for them to successfully work together.
>
> (11) One of the Club's solutions was to engage a workplace mediator to help Ms. Spicer and Mr. Lowndes work with each other. Ms. Spicer met with the mediator. Mr. Lowndes did not.
>
> (12) The Club retained Colin D. Bryson, Q.C. to advise the Club in this matter. Mr. Lowndes retained Mr. Bureau.

> (13) It was in this context that the email exchanges between Mr. Bryson and Mr. Bureau in June/early July occurred. The Club's goal throughout these exchanges was to find a way for Mr. Lowndes and Ms. Spicer to successfully co-exist in their employment at the Club.

[32] Halifax City Soccer spoke only of a return to work as set out in the prior portion of this decision. This was no negotiation with a shared intent to effect a settlement. The intent by the employer, clearly expressed in the emails, is to set out a schedule for both employees to work in a shared space and arrange for a mediation with the intent of addressing a complaint of working conditions raised by the other employee, not Mr. Lowndes. Halifax City Soccer stated that elements raised by counsel for Mr. Lowndes, which included renegotiation of the contract or damages, were not part of the discussion for Halifax City Soccer, as mediation to address the working relationship was actively sought.

[33] I find that the third branch of the test is not met.

[34] I specifically determined that the documents at Tab "E" of Mr. Bureau's October 28th affidavit do not meet the test for settlement privilege, as it does not pass either the second or third branch of the test. Read together, they document an exchange concerning roles and responsibilities in the workplace and are absent of any indication of a potential negotiation or settlement discussion that would give rise to further considerations.

[35] While I do not find that settlement privilege has been established in applying the three part test to the communications between Mr. Lowndes' counsel and Halifax City Soccer, I will also address whether either waiver or an exception is applicable, if settlement privilege had been established.

A. Waiver and Exception

[36] In regards to the issue of waiver, I agree with the submissions made by Mr. Bureau that the *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd*., 2013 ABCA 10, decision, and others cited in the supplemental briefs filed on the issue of a unilateral waiver, do not support the argument advanced by Halifax City Soccer that settlement privilege may be unilaterally waived.

[37] However, as was noted in *The Law of Objections in Canada: A Handbook*, as referenced earlier, the authors note at p. 52 that "Where a party places the conduct of the settlement discussions in issue in litigation…(as is the case in the pleadings here) …it will be taken to have waived its ability to claim that the discussions are cloaked in settlement privilege." The citation in that text is to *Cowichan Tribes v. Canada (Attorney General)*, 2007 BCSC 1855. I have reviewed that decision, and also note that this concept more neatly overlaps with

the exception set out in *R. v. Clarke,* 2015 NSSC 26, at para. 20 where it was written:

> Settlement privilege is based on a compelling public policy. Exceptions must be based on a more compelling public policy such as one's ability to make full answer in defence and the right to a fair trial.

[38] I note at paragraphs 19-20 of the Plaintiff's Statement of Claim that Mr. Lowndes pleads:

> (19) As a result of the Defendant's position and failure to provide the Plaintiff with necessary feedback and support to allow him to do his job the Plaintiff had no choice bu[t] to resign from his position to the Defendant.
>
> (20) The Plaintiff further notes that despite his continued denial of committing any act of harassment, the Defendant has directly/indirectly caused damage to the Plaintiff's reputation by refusing to properly investigate what happened and allowing misinformation to be leaked to the soccer community.

[39] These claims do put into issue Halifax City Soccer's conduct in the course of the discussions contained in the documents. Halifax City Soccer would not be able to respond fully in its own defence in the absence of these documents.

[40] In *Brown v. Cape Breton Municipality, supra*, the Court's consideration of privilege led it to cite Chief Justice Wells' decision in *Meyers v. Dunphy*, 2007 NLCA 1, at para. 27:

> (5) Where exclusion of the communication would facilitate an abuse of the privilege or another compelling or overriding interest of justice requires it, without prejudice communications are admissible.

[41] In *Brown, supra*, the Court remarked in regard to point (5):

> "…that disclosure should be both relevant and necessary to give effect to the compelling and overriding interests of justice."

[42] And again citing *Meyers v. Dunphy*, *supra*, the Court referenced the inclusion of categories of exception set out by Chief Justice Wells, including:

> (6) whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him….

[43] Halifax City Soccer has directed me to employment law decisions to demonstrate that the scope of admissible evidence of communications in an employment law dispute can be cast wide. The full circumstances of accommodations or mitigations offered by the employer may be required to be led for the employer to engage fully in its own defence.

[44] If settlement privilege had been found, an exception to the privilege would be appropriate on a consideration of the content of the documents and the pleadings advanced by Mr. Lowndes, as the defendant, would require disclosure to put forward its defence.

B. Litigation Privilege

[45] In the alternative, Mr. Lowndes claims litigation privilege. As was noted in Mr. Bureau's submission, with reference to *Sable Offshore Energy Inc. v. Ameron*

International Corp., *supra*, at para 47, Justice Suzanne Hood adopted the view that:

> The elements required in order to claim work product or litigation privilege over documents or communications are as follows:
>
> - the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
> - the preparation, gathering or annotating must be done in anticipation of litigation;
> - the documents or communications must meet the dominant purpose test;
> - the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and
> - the document or facts have not been disclosed to the opposing party or to the court.

I do not find that Mr. Bureau met the burden of establishing that the emails which document communication between Mr. Bureau and the staff and executive of Halifax City Soccer concerning Mr. Lowndes' employment come within the contemplation of "counsel's work product" as it is commonly understood to be subject to "litigation privilege".

[46] These emails were not created as part of counsel's "work product." They are exchanges of communication between the parties specific to the employment

relationship and are relevant as evidence, rather than documents created to meet the dominant purpose of preparation by counsel for litigation, or not disclosed or required to be disclosed to the opposing party or court.

C. Fairness

[47] It is unfortunate if counsel for Mr. Lowndes feels that an unfavourable result will require alternate counsel at this stage of the litigation. That is a professional decision for Mr. Bureau to make in consultation with, and on the instruction of, his client.

[48] That concludes my reasons for decision in regards to this matter.

Costs

[49] After hearing counsels' oral submissions on costs, this matter did require a certain amount of consideration. It was not unreasonably brought forward for a determination and certainly required some thought on the application of the law, particularly in regard to some of the commentary regarding waiver and exception.

[50] I will exercise my discretion and costs will not be awarded on the motion.

Rowe, J.