

NOVA SCOTIA COURT OF APPEAL
[Cite as: Duchêne v. Merrill Lynch & Co. Canada Ltd., 2000 NSCA 54]

Glube, C.J.N.S.: Roscoe and Cromwell, JJ.A.

BETWEEN:

DAVID DUCHÊNE

Appellant

- and -

MERRILL LYNCH & CO., CANADA LIMITED, a
body corporate, MERRILL LYNCH CANADA INC.,
a body corporate, and WILLIAM MORRISON

Respondents

REASONS FOR JUDGMENT

Counsel: Lindsay McCann for the appellant
John E. MacDonell for the respondents

Appeal Heard: April 19, 2000

Judgment Delivered: April 19, 2000

THE COURT: Leave to appeal is granted and the appeal is allowed per oral reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.

CROMWELL, J.A.: (Orally)

[1] The appellant seeks leave to appeal and, if granted, appeals an interlocutory decision made by Davison, J. ruling that a document was not subject to production. The only issue, apart from costs, is whether he erred in law in finding that the document in question was privileged because it was prepared in contemplation of litigation for the dominant purpose of submitting it to a legal advisor for advice and use in litigation. Although privilege for direct solicitor - client communications was also argued before the Chambers judge, he did not rule on it and that aspect of privilege was not relied on by the respondents in this Court.

[2] The Chambers judge found , first, that at the time the document in question was prepared, litigation in the form of an investigation by the Securities Commission was reasonably anticipated and second that the document's purpose was to rebut any allegations that might be made to the Commission.

[3] In our view, it is not necessary to consider the appellant's arguments challenging the first of these holdings. As regards the second holding, that relating to dominant purpose, we are respectfully of the view that the Chamber's judge erred. While the record may support an inference that litigation was one of the purposes for which the disputed document was prepared, there is no evidence in the record supporting the finding that the dominant purpose of the document in question was submission to a legal advisor for advice and use in litigation. The burden was on the respondents to adduce such evidence and having failed to do so, the claim of privilege

should not have been upheld.

[4] The appellant also challenges the decision of the Chambers judge not to award costs. That decision was in his discretion and we are not persuaded that he erred in the manner in which it was exercised.

[5] Leave to appeal is granted, the appeal allowed and the Memo authored by Mr. Morrison dated October 23, 1998 is ordered to be produced. We will not disturb the Chambers judge's disposition of the costs before him. Taking into account the unnecessary appearance in Court of Appeal Chambers, the costs of the appeal shall be costs to the plaintiff in the cause fixed at the reduced amount of \$750 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.