SUPREME COURT OF NOVA SCOTIA
Citation: *Daniels v. Wolfville (Town)*, 2023 NSSC 126

Date: 20230417
Docket: *Kentville*, No. 511058
Registry: Kentville

Between:

David A. Daniels

Appellant

v.

Town of Wolfville

Respondent

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	October 4, 2022, in Kentville, Nova Scotia
Final Written Submissions:	Appellant, February 16, 2023 Respondent, February 17, 2023
Counsel:	David A. Daniels, Self-Represented Adam L. Harris, for the Respondent

By the Court:

Introduction

[1] The Appellant, David A. Daniels, filed an access to information request with the Respondent, the Town of Wolfville, under Part XX of the *Municipal Government Act*, S.N.S. 1998, c.18. Mr. Daniels wanted a copy of a settlement agreement. The agreement settled litigation brought by Micro Boutique Living Wolfville Incorporated against the Town and Mitchelmore Engineering Company Ltd. A&R Savoie & Sons Enterprises Limited was added as a third party. The litigation concerned a building development at 336 Main Street in Wolfville.

[2] The Town was willing to provide Mr. Daniels with a partially redacted copy of the settlement agreement. One of the parties to the agreement objected, and requested a review under the *Act*. In a decision dated July 8, 2021, the Review Officer (Information and Privacy Commissioner Tricia Ralph) recommended disclosure of the settlement agreement without redactions, except for signatures. Mr. Daniels does not take issue with the redaction of signatures.

[3] The Town did not follow the recommendation of the Review Officer. The Town gave Mr. Daniels a copy of the settlement agreement, but redacted the following information:

- the monetary amounts to be paid to Micro Boutique Living by "the Respondents," defined in the settlement agreement as the Town, Mitchelmore and A&R Savoie;
- a description of future actions or steps required to be taken by the Respondents; and
- dollar value estimates prepared by third parties to assist with the settlement discussions.

[4] Mr. Daniels appeals the decision of the Town to this Court under s.494(1) of the *Act*. On an appeal, the Court may determine the matter *de novo*: s.495(1)(a) of the *Act*. The burden is on the Town to prove that Mr. Daniels has no right of access to the redacted information: s.498(1) of the *Act*.

[5] The main argument of the Town is that common law settlement privilege justifies its decision to withhold the redacted information. The central question raised by this appeal is whether the purpose of Part XX of the *Act*, which is to

ensure that public bodies are fully accountable to the public, outweighs the public interest in encouraging settlement. As I will explain, I have concluded that the public interest served by Part XX of the *Act* does, in fact, outweigh the public interest in encouraging settlement, and therefore that the provisions of Part XX operate as an exception to common law settlement privilege.

[6] After the hearing, I asked the parties to provide further written submissions addressing whether common law settlement privilege is even available in the context of a statutory access to information regime, given that settlement privilege has been described as a rule of evidence that only operates in the evidentiary context of a court proceeding: see *Alberta v. University of Calgary*, 2016 SCC 53 at para.44. However, it is not necessary for me to address this issue, in light my conclusion that Part XX of the *Act* operates as an exception to settlement privilege.

Position of the Parties

[7] The Town justifies its decision to redact the settlement agreement on the following bases:

- The redacted information is protected by common law settlement privilege.

- Under s.476 of the *Act*, the Town may refuse to disclose information that is protected by solicitor-client privilege, and settlement privilege is a component of solicitor-client privilege.

- Under s.481(1) of the *Act*, the Town must refuse to disclose information that would reveal commercial or financial information of a third party that is supplied in confidence, the disclosure of which could reasonably be expected to cause one or more of the harms listed in that section.

[8] The position of Mr. Daniels is that:

- The *Act* abrogates common law settlement privilege.

- In the alternative, a competing public interest outweighs the public interest in encouraging settlement.

- Settlement privilege is not part of solicitor-client privilege under s.476 of the *Act*.

- The redacted information is not information that is *of* a third party, within the meaning of s.481(1) of the *Act*.

Issues

[9] In order to decide this appeal, I will consider the following questions:

1. Is there an exception to common law settlement privilege that applies in this case?

   If so, it is not necessary for me to determine whether the *Act* meets the requirements for the amendment or abrogation of fundamental common law rules: see *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para.57.

2. Is settlement privilege a component of solicitor-client privilege under s.476 of the *Act*?

3. Would the redacted information reveal commercial or financial information *of* a third party that was supplied in confidence and the disclosure of which could reasonably be expected to cause one of the harms listed in s.481(1) of the *Act*?

Is There an Applicable Exception to Settlement Privilege?

[10] To come within an exception to settlement privilege, Mr. Daniels must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para.19. The recognized exceptions to settlement privilege include

allegations of misrepresentation, fraud or undue influence, and preventing a plaintiff from being overcompensated: *Sable Offshore, supra* at para.19.

The Purpose of Settlement Privilege

[11] The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible: *Sable Offshore, supra* at para.1.

[12] The privilege not only renders the protected communications inadmissible. It also protects them from compelled disclosure in the litigation context: see *Brown v. Cape Breton Regional Municipality*, 2011 NSCA 32.

[13] Settlement privilege extends to concluded settlement agreements as well as to the financial terms of such agreements: *Sable Offshore*, *supra* at paras.17 and 18; and *Brown, supra* at para.41.

[14] Settlement privilege also protects the communications from being discoverable to third parties or strangers to the litigation, at least in the context of court proceedings: see *Middelkamp v. Fraser Valley Real Estate Board*, 1992

B.C.J. No. 1947 (BCCA) at para.19, cited with approval in *Sable Offshore, supra* at para.16 and *Brown, supra* at para.37.

[15] As a class privilege, settlement privilege entails a presumption of immunity from disclosure once the conditions for its application have been met: *Sable Offshore, supra* at para.12; *Lizotte, supra* at para.34.

[16] 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.

Brown, supra at para.30.

[17] There is an overriding public interest in favour of settlement because it promotes the interests of litigants by saving them the expense of trial and reduces the strain on an already overburdened court system: see *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235 at para.48, quoting from *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at p.230; and see *Sable Offshore, supra* at paras.1 and 11.

[18] Settlement privilege is therefore vital to improving access to justice, thus contributing to the effective administration of justice: *Sable Offshore, supra* at para.11 and *Union Carbide v. Bombardier*, 2014 SCC 35 at para.1.

Competing Public Interest

[19] The purpose of Part XX of the *Municipal Government Act* is set out explicitly in s.462 of the *Act*, and it is, in part, to ensure that municipalities are "fully accountable" to the public: s.462(a). The *Act* achieves this purpose by, amongst other things, giving the public a right of access to records and by "specifying limited exceptions to the rights of access": ss.462(a)(i) and (iii). Another purpose of the *Act* is to provide for the disclosure of all municipal information "with necessary exemptions, that are limited and specific," in order to facilitate informed public participation in policy formulation, ensure fairness in government decision-making, and permit the airing and reconciliation of divergent views: s.462(b).

[20] Section 465(1) of the *Act* provides that a person has a right of access to "any record" in the custody, or under the control, of a municipality upon making a request as provided in Part XX. However, s.465(2) states that the right of access to

a record does not extend to information exempted from disclosure "pursuant to this Part."

[21] Under s.467(2)(a)(ii), if the Town refuses disclosure, it must inform the applicant of the statutory provision upon which the refusal is based.

[22] Part XX explicitly provides for certain exceptions to disclosure. For example, s.476 provides that a municipality "may" refuse to disclose to an applicant information that is subject to "solicitor-client privilege." Part XX does not explicitly refer to any other common law privilege.

[23] Our Court of Appeal has said that, in the case of virtually identical language in the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5, the legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exceptions, to disclose all government information so that public participation in the workings of government will be informed, that government decision-making will be fair, and that divergent views will be heard: *O'Connor v. Nova Scotia*, 2001 NSCA 132 at para.40. The *Freedom of Information and Protection of Privacy Act* was, at least at the time of *O'Connor, supra*, the only legislation in Canada declaring as its purpose and obligation both to ensure that public bodies are fully accountable and to provide for

the disclosure of all government information subject only to necessary exemptions that are limited and specific: *ibid.*, para.56. Thus, the Nova Scotia legislation was deliberately more generous to its citizens and is intended to give the public greater access to information that might otherwise be contemplated in other provinces and territories: *ibid.*, para.57. Courts must therefore interpret the *Freedom of Information and Protection of Privacy Act*, and Part XX of the *Municipal Government Act*, liberally to give clear expression to the legislature's intention: see *ibid.*, para.41.

[24] I am satisfied that the public interest in the full accountability of public bodies and in the disclosure of all government information, subject only to necessary exemptions that are limited and specific, outweighs the public interest in settlement in the context of the access to information regime contained in Part XX of the *Municipal Government Act* because of:

> (a) the explicit and broad language used by the legislature to describe the purpose of the access to information regime contained in Part XX of the *Act*;
>
> (b) the restrictive language used by the legislature to describe exceptions to full disclosure (e.g. "limited" and "specific");

(c) the explicit inclusion in the *Act* of common law solicitor-client privilege as an exception to full disclosure and the omission of settlement privilege as an exception; and

(d) the requirement to interpret the provisions of Part XX of the *Act* liberally to give clear expression to the legislature's intention.

[25] The Town relied on the Ontario Divisional Court decision in *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 97 O.R. (3d) 665, where the court held that common law settlement privilege exempted the disputed records from disclosure under Ontario's *Freedom of Information and Privacy Act*. The decision was upheld on other grounds based on the specific statutory language at issue: 2010 ONCA 68 at para.48. I decline to follow the decision of the Ontario Divisional Court. It is not binding on me, and is based on a different, less generous statutory regime, as pointed out by our Court of Appeal in *O'Connor, supra*.

Does the *Act* Abrogate Common Law Settlement Privilege?

[26] Given my conclusion that there is an exception to common law settlement privilege in this matter, it is not necessary for me to decide whether the *Act* meets the strict requirements for the amendment or abrogation of fundamental common law rules.

Does Solicitor-Client Privilege Include Settlement Privilege?

[27] Section 476 of the *Act* provides that the Town "may refuse to disclose to an applicant information that is subject to solicitor-client privilege."

[28] Similar language in other access to information statutes has been found to include litigation privilege: see *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para.4.

[29] The Town did not provide the Court with any authority for the proposition that the reference to solicitor-client privilege in s.476 also includes settlement privilege.

[30] The Town is incorrect when it asserts that "[s]ettlement privilege arises and follows from the provision of legal advice privilege and litigation privilege." Settlement privilege applies when the three-part test for settlement privilege is met, whether a party is represented by a lawyer or not.

[31] Solicitor-client privilege and settlement privilege are distinct concepts. Section 476 of the *Act* does not include settlement privilege.

Commercial or Financial Information Supplied in Confidence by Third Party?

[32] The Town states that it was entitled to refuse disclosure of the redacted information in the settlement agreement under s.481(1) of the *Act*, because the information:

> (a) would reveal commercial or financial information of a third party;
>
> (b) was supplied, implicitly or explicitly, in confidence; and
>
> (c) the disclosure of which could reasonably be expected to:
>
> i. harm significantly the competitive position or interfere significantly with the negotiating position, of the third party,
>
> ii. result in similar information no longer being supplied to the municipality when it is in the public interest that similar information continue to be supplied;
>
> iii. result in undue financial loss or gain to any person or organization.

[33] Looking at the words s.481(1) in their entirety and in the context of the whole section, in light of the *Act*'s purposes, it is my view that, in order for the Town to come within s.481(1)(a) of the *Act*, it must establish, in part, that the redacted information is commercial or financial information *of* a third party that

was *supplied* to the Town. The Town has failed to discharge this onus. The redacted information is not information belonging to one or more of the third parties that was supplied to the Town. Rather, the redacted information is the product of settlement discussions amongst the Town and the other parties to the litigation. See *Atlantic Highways Corp. v. Nova Scotia*, 1997 CanLII 11497 (NSSC).

Conclusion

[34] The appeal is allowed. The Town is not authorized to refuse to give access to the redacted information at issue. The Town is ordered to provide Mr. Daniels, within two weeks of the date of this decision, with a copy of the settlement agreement that does not redact the following information:

- the monetary amounts to be paid to Micro Boutique Living by "the Respondents," defined in the settlement agreement as the Town, Mitchelmore and A&R Savoie;

- future actions or steps required to be taken by the Respondents; and

- dollar value estimates prepared by third parties to assist with the settlement discussions.

[35] Should the parties be unable to agree on the issue of costs, I will receive written submissions from Mr. Daniels within two weeks of this decision, and from the Town within four weeks of this decision.

Gatchalian, J.