Court of King's Bench of Alberta

Citation: McDiarmaid Estate v Alberta (Infrastructure), 2023 ABKB 14

Date: 20230109
Docket: 0103 21107
Registry: Edmonton

2023 ABKB 14 (CanLII)

Between:

The Canada Trust Company and Christopher Head, Executors of the Estate of Helen Jean McDiarmaid

Plaintiffs/Applicants

- and -

His Majesty the King In Right of the Province of Alberta As Represented by the Minister of Infrastructure, Formerly the Minister of Public Works, Supply and Services, and the Minister of the Environment

Defendants/Respondents

Case Management Memorandum
of the
Honourable Madam Justice A. Loparco

Introduction

[1] The Applicants seek a declaration that the Triple 5 Settlement Agreement is not subject to privilege or confidentiality and an order directing the Respondents to produce the Agreement and Supporting Documents (Triple 5 Documents). They also seek an order directing Ron Link, on behalf of the Respondent His Majesty the King (HMK), to reattend questioning to answer questions previously refused during questioning.

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[2] The background of this litigation is extensive and set out in my previous decisions, the last one being reported at 2021 ABQB 873.

[3] In a Case Management Endorsement dated September 8, 2020, I concluded that the files relating to the sale of the Leeds Lands and the Triple 5 Lands were relevant and material in respect of the allegations pleaded, save for the Settlement Agreements, the production of which was left to be determined later.

[4] HMK produced the Leeds and Triple 5 Settlement Agreements and Supporting Documents to me privately for review without waiving any privilege over them.

[5] In my Case Management Endorsement dated February 10, 2021, and subsequent reconsideration decision reported at 2021 ABQB 873, I ruled that the Settlement Agreements and Supporting Documents in relation to the Leeds and Triple 5 Lands were not relevant and material as they would not help resolve an issue in dispute. As a result, I made no determination as to the related confidentiality or privilege issues raised.

[6] On appeal, the Court agreed that the Leeds Settlement Agreement and Supporting Documents were not relevant and material because they reveal "…no information that can reasonably be expected to significantly help determine an issue raised in the pleadings or aid in a legitimate line of inquiry to ascertain evidence to do so." (2022 ABCA 247 at para 33) However, the majority held that the Triple 5 Settlement Agreement and Supporting Documents (Triple 5 Documents) are relevant and material to the action since the claim was limited to the market value of the Lands. It further held that the Triple 5 Documents, "on [their] own may not allow for an inference of market value to be drawn, but when considered against the backdrop of the Triple 5 dispute, this information can reasonably be expected to help ascertain evidence that could significantly help to do so." (at para 37)

[7] The Court of Appeal therefore redirected the issues of privilege and confidentiality in relation to the Triple 5 Documents alone back to me for determination.

Brief Conclusion

[8] As the Court of Appeal has now determined that the Triple 5 Settlement Documents are relevant and material, and after having assessed the question of privilege and confidentiality, I order that the Triple 5 Settlement Agreement and Supporting Documents be produced in the within action.

[9] It is premature for me to rule on the issue of the questions objected to.

Issue 1: Are the Triple 5 Documents producible?

[10] The Respondents bear the burden of establishing whether any privilege attaches to the Triple 5 Documents. The three-part test is established in ***Phoa v Ley***, 2020 ABCA 195 at para 15 as follows:

> To be protected from disclosure by reason of settlement privilege, each part of a three-part test must be satisfied by the party asserting that privilege**: first, that at the time of the communication a litigious dispute existed or was in contemplation; second, the communication must be made with the express or implied intention that it would not be disclosed, that is the communication**

> **would not be disclosed in the event negotiations failed; and third, the purpose of the communication must be to attempt settlement**. [Emphasis added]

[11] The Applicants raised a preliminary point, namely that since HMK did not file an affidavit establishing their privilege, they have not met their onus and that further, an adverse inference should be drawn.

[12] A party can provide evidence supporting the existence of a privilege: ***Imperial Oil Limited v Alberta (Information and Privacy Commissioner)****,* 2014 ABCA 231 at para 47. However, HMK does not appear to be relying on specific facts; rather, it is relying on the general law of settlement privilege as it applies to all settlements that meet the three-part test. The existence of settlement privilege is clear from the documents themselves and I find that no further affidavit evidence is required.

[13] I appreciate that the Applicants are in their words 'flying blind', not having seen the Settlement Documents. However, I find that the Triple 5 Documents indisputably meet the three-part test for settlement privilege.

[14] Second, the Applicants argue that even where a claim of litigation or settlement privilege is established, such a privilege expires at the end of the litigation in which the privilege arose, contrasted with solicitor-client privilege which, once established, never expires: ***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at para 37.

[15] They further note that the litigation giving rise to the Triple 5 Documents resolved decades ago, and that *any* associated privilege would have long expired.

[16] There are three distinct types of privilege discussed in the materials submitted that should first be briefly distinguished: litigation privilege; settlement privilege; and solicitor-client privilege.

[17] Litigation privilege is intended to cover statements and documents created for the dominant purpose of investigating the facts and determining how best to prepare for litigation (i.e., information for the 'lawyer's brief'): ***Canadian Natural Resources Limited v ShawCor Ltd*****,** 2014 ABCA 289 at paras 81 and 82, citing ***Moseley v Spray Lakes Sawmills (1980) Ltd*****,** 1996 ABCA 141 at paras 21 and 24. The Triple 5 Documents do not fall into this category of privilege.

[18] At common law, settlement privilege is an evidentiary rule that prevents communications during settlement negotiations from being disclosed. It exists independent of any confidentiality clauses that may be agreed to between the parties: ***Union Carbide Canada Inc v Bombardier Inc***, 2014 SCC 35 at para 1. Settlement privilege is the central issue in this application as it directly relates to the Triple 5 Documents.

[19] Solicitor-client privilege is tangentially related to settlement privilege in this case since questions asked of HMK's representative on the Triple 5 Settlement Agreement may lead to an objection on the basis that the communications between the company and its solicitors in relation to settlement discussions are privileged.

[20] In resisting the application for production of the Triple 5 Documents, the Respondents are only asserting the existence of settlement privilege and are not relying on any confidentiality clauses.

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[21] Settlement privilege is based on the public policy objective of encouraging open settlement negotiations and improving access to justice: ***Union Carbide*** at para 1.

[22] While litigation privilege ends with the end of the litigation and any collateral litigation, settlement privilege survives unless it is set aside in accordance with a recognized public policy exception: ***Union Carbide*** at paras 34-35 and ***Buck v Canada (Attorney General***), 2022 CanLII 19523 (FC) at paras 28-29.

[23] There are compelling public policy reasons that form the basis of settlement privilege: to encourage parties to settle disputes without prolonging the personal and public expense of litigation: ***Sable Offshore Energy Inc v Ameron International Corp***, 2013 SCC 37 at para 11; ***Bellatrix Exploration Ltd v Penn West Petroleum Ltd***, 2013 ABCA 10 at para 21. The rule ensures that parties can freely discuss their risks in the litigation and seek a mutually agreeable compromise. Without knowing that such privilege exists to shield communications during settlement discussions from future disclosure, parties would be more reluctant to settle disputes out of court.

[24] Settlement privilege applies equally to private disputes and those that have a public interest component: ***Imperial Oil*** at para 63. In that regard, I agree with the Respondents that it is a class privilege, i.e., it applies to all parties who engage in settlement communications that meet the three-part test noted above.

[25] In ***Sable***, the issue was whether the settlement amounts between some of the parties – negotiated pursuant to a Pierringer Agreement whereby the settling defendant limits its exposure – had to be fully disclosed to the non-settling parties prior to trial. The Supreme Court of Canada held that the settlement amount was *prima facie* presumptively inadmissible, but subject to certain exceptions "when the justice of the case requires it." (at para 12)

[26] In determining whether to permit disclosure, the Court must determine whether the competing public interest outweighs the interest in encouraging settlements. The Court in ***Sable*** stated at para 19:

> …These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v Procter & Gamble Co*, [2001] 1 All ER 783 (CA Civ Div), *Underwood v Cox* (1912), 1912 CanLII 582 (ON SCDC), 26 OLR 303 (Div Ct)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

[27] I note that there are other possible exceptions, which are not relevant in this case: see ***Phoa*** at para 19.

[28] The Applicants also argue that the Court should order disclosure of the documents to ensure the trial process' purpose of finding truth in relation to whether there was preferential treatment. They cite Associate Chief Justice Nielsen in ***Royal Bank of Canada v Independent Electric and Controls Ltd***, 2019 ABQB 217 at para 28:

> While there is, clearly, an interest in litigants having full information regarding the case which they face, *this interest is always in conflict with settlement privilege*. As stated by our Court of Appeal, "as settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court's truth-seeking function": *Bellatrix* at para 26.

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[29] The Applicants further submit that as they have pleaded misrepresentation, fraud, discrimination, and abuse of public office, the privilege may be set aside. However, HMK argues in response that the exception must be in relation to the parties themselves, as in the question of double recovery in relation to a Pierringer Agreement in ***Sable***. In this case, they state that the Applicants are strangers to the very Settlement Agreement they seek to have produced and can therefore not simply rely on a pleading of fraud to permit privilege in relation to a third-party agreement to fall away: ***Phoa*** at para 20.

[30] However, as noted in ***Sabre Inc v International Air Transport Association***, 2009 CanLII 9452 at para 20 (ONSC), "…the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action…" (citing from Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974) at 201).

[31] Further, the Court in ***Sabre***, citing from *Mueller Canada Inc v State Contractors Inc*, 1989 CanLII 4117 (ONSC) noted at para 20 "**[w]here documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations** […], **the privilege does not bar production,**" [Emphasis added**]**

[32] In ***Sable*** the actual settlement amount was irrelevant to the non-settling defendants as it had nothing to do with their liability or the determination of the appropriate quantum of damages in the case. In contrast, the amount paid by Triple 5 is relevant; as I previously held, it relates to to the sale of comparable lands. The value of the land is an essential component of liability against the Crown as regards the alleged preferential treatment.

[33] Although the issue was in relation to public interest immunity, the general principle noted by ACJ Miller (as he then was) in ***Leeds v Alberta (Minister of the Environment)***, 1990 CanLII 5933 at para 27 (ABKB) still holds true:

> I agree that the R.D.A. policy here at issue may well concern a greater number of the public than the particular tourist policy at issue in *Carey*. However, the development of transportation and utilities corridors around Edmonton and Calgary is "hardly world-shaking", to use Mr. Justice La Forest's phrase. The nature of the R.D.A. policy may be classified as economic or financial, but it fails to contain those elements of delicate negotiation or emergency which would constitute a public danger if revealed, regardless of the number of landowners who may ultimately be affected by the policy.

[34] Moreover, I find there is limited prejudice to HMK in producing the Triple 5 Documents for the following reasons:

- While the Crown has the same class settlement privilege as any private party, it also had a public interest role in expropriating lands;
- The Crown had set policies and procedures to be followed in dealing with the Restricted Development Areas (RDAs) expropriation;
- Issues related to the settlement may still be protected by solicitor-client privilege, which is a matter that can only be resolved after questioning on the documents;

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- HMK is not arguing that confidentiality provisions in the Triple 5 Documents prevent disclosure;
- The Settlement concluded in 1994;
- Triple 5 is no longer in existence, and I have no evidence that any implied confidentiality term that may exist would negatively affect the parties; and,
- Honourable Minister Kowalski, as he then was, is reported in the Alberta Hansard as having stated that all the information in relation to dealings with landowners in the RDAs in Edmonton and Calgary would ultimately be made public "at a time in which it will not have an impact on negotiations that are currently underway at the given time".

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[35] The Respondents deny that the Applicants are stymied in their ability to deal with the claim in the absence of the Triple 5 Documents since the crux of the issue is the value attributed to the land. They assert that the Applicants can rely on the LCB decision with respect to the Crown's position on value of land and that they have a copy of the appraisal.

[36] I respectfully disagree. The Applicants plead that HMK treated others such as Triple 5 and Leeds preferentially in their settlements, thereby disadvantaging Ms. McDiarmaid. The Crown's position and appraisal on the fair market value of the land does not allow the Plaintiffs to ascertain evidence that would assist it in making out this claim. It is not a question of land value alone.

[37] Therefore, the Applicants' claims are intrinsically related to the HMK policies and procedures and how these were applied in the dealings with third parties in comparative land deals. In other words, they need to be able to prove that Ms. McDiarmaid was treated differently and unfairly in comparison to others. They cannot do that unless they are permitted to question an officer of HMK on the Triple 5 Documents.

[38] As held by the Court of Appeal, the Triple 5 Documents are relevant as they contain information that can "reasonably be expected to significantly help determine an issue raised in the pleadings or aid in a legitimate line of inquiry to ascertain evidence to do so." My role is therefore confined to determining whether settlement privilege should be set aside to permit that legitimate line of inquiry to proceed.

[39] This task at hand requires the balancing of rights between the parties involved. Given the limited prejudice noted above, I find that the balancing of rights favours the Applicants.

[40] In my February 10, 2021 Case Management Endorsement I stated:

> This Court has concluded that settlement agreements *may* be produced if they are relevant and material: *Cheyne v Alberta***,** 2003 ABQB 244 at para 49 and *Western Canadian Place Ltd v Con– Force Products Ltd*, 1998 ABQB 1051 at paras 19 and 20. However, the threshold question must be answered first.

[41] As the Court of Appeal has now determined that the Triple 5 Settlement Documents are relevant and material, and after having assessed the question of privilege and confidentiality, I order that the Triple 5 Settlement Agreement and Supporting Documents be produced in the within action.

Issue 2: Should Ron Link reattend questioning to answer questions refused?

[42] The questions refused were on the bases that: the settlement privilege issue had not been determined; the Court of Appeal ruled that the Leeds Documents were not relevant and material; and/or, the questions were subject to solicitor-client privilege.

[43] As I have now ordered the disclosure of the Triple 5 Documents, any questions previously refused that relate to this Settlement Agreement may now be asked (including those previously objected to).

[44] It is premature for me to rule on the question of whether solicitor-client privilege applies to any information sought. As noted by Wakeling JA in his dissenting decision (2022 ABCA 247 at para 50), even if questioning were permitted, the answers may be protected by lawyer-client privilege.

[45] I note that the questions refused or objected to relate to both the Leeds and Triple 5 Settlements. However, as some of the questions were intermingled and applied to settlement strategy and process generally, it would be inefficient to deal with questions refused on the Leeds Settlement alone at this time.

[46] An issue was raised as to whether the Court of Appeal decision prohibits *any* line of inquiry on the Leeds Settlement, or whether it was intended to apply only to the Leeds Settlement Documents. However, the narrow issue before me on this application was to determine whether to set aside settlement privilege as it applies to the Triple 5 Documents. It does not broadly set aside all settlement privilege as it relates to Leeds or any other landowner.

[47] Once questioning is complete, if there remains a dispute on the questions objected to or refused, then the parties may seek further guidance in case management.

Heard on the 9th day of December, 2022.
Dated at the City of Edmonton, Alberta this 9th day of January, 2023.

A. Loparco
J.C.K.B.A.

Appearances:

Joseph V. Miller, K.C., Weir Bowen LLP
for the Plaintiffs

Vivian Stevenson, K.C., Field Law LLP
for the Defendants

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