# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bonneau v. British Columbia ,*
2023 BCSC 2450

Date: 20231221
Docket: S222492
Registry: Vancouver

Between:

**Reynold John Bonneau and Mildred Rose Bonneau**

Plaintiffs

And

**His Majesty the King in Right of the Province of British Columbia**

Defendant

Before: The Honourable Madam Justice Ker

## Oral Ruling on Voir Dire
## re Claim of Settlement Privilege

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| Counsel for the Plaintiffs: | K.N. Ramji |
| Counsel for the Defendant: | J. Regehr<br>D.M.L. Black |
| Place and Dates of Hearing: | Vancouver, B.C.<br>December 20–21, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>December 21, 2023 |

[1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.

## INTRODUCTION

[2] This ruling addresses an objection made by counsel for the defendant, His Majesty the King in Right of the Province of British Columbia (the “Province”), to plaintiffs' counsel tendering a without prejudice letter between counsel.

[3] The Province contends the letter is covered by settlement privilege. Counsel for the plaintiffs argues the letter is not covered by settlement privilege, as it contains no terms of settlement and it terminates the negotiations between the parties. In the alternative, plaintiffs' counsel contends that the letter falls within an exception to the privilege, as addressed by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 19 [*Sable*].

## BACKGROUND FACTS

[4] I have already made three rulings in the course of this trial, addressing various admissibility issues that have arisen. In those rulings, I have outlined the general background to this case. I incorporate my previous explications on the background found in those rulings into this ruling without the need to repeat them.

[5] In the course of cross-examining Ms. Dawn Drummond, a witness for the Province, counsel for the plaintiffs wanted to put a without prejudice letter to her that had been written by Geraldine Hutchings on October 27, 2021 (the “Hutchings Letter”). Ms. Hutchings was counsel retained by the Province to engage in settlement negotiations with the plaintiffs and their counsel. The Province objected to the Hutchings Letter being tendered and used in the trial, claiming it was captured by settlement privilege.

[6] Ms. Drummond is the Director of Indigenous Relations for the BC Ministry of Transportation and Infrastructure ("MOTI"), and had been the lead in the negotiations with the plaintiffs in an effort to resolve the Province's trespass on the plaintiffs' lands.

[7] The trespass was created by the Province's realignment of a provincial highway, Westside Road, done in 1964 such that it bisected the plaintiffs' property. Prior to the realignment in 1964, Westside Road abutted the property.

[8] The negotiations involving Ms. Drummond started in or around 2017. The negotiations were complex in light of the following issues: the federal legislation, being the *Indian Act,* R.S.C., 1985, c. I-5, in particular the issues around ss. 20, 24, and 35; the Okanagan Indian Band's ("OKIB") position on various issues; and the seeming confusion created by the years of historical records and previous negotiations between 1988 and 2001 that went nowhere, save seemingly in circles, and then paused.

[9] The negotiations appear to have been reinstituted sometime in 2017, with Ms. Drummond's involvement. Offers were exchanged back and forth and potential creative solutions were advanced by Ms. Drummond to endeavour to resolve the obstacles created by the *Indian Act,* and the impasse over the issue of s. 35 takings.

[10] At some point prior to October 27, 2021, the Province learned that the federal Indian Lands Registry System ("ILRS") operated by Indigenous Services Canada ("ISC"), formerly known as the Department of Indian Affairs, defined the plaintiffs' possessory interest in the land through a certificate of possession ("CP") with an attached survey from 1983. This survey is known as the "Shortt survey". This survey showed that the plaintiffs' parcel of land, initially known as Lot 9 and renamed as Lot 39 with sub-parcels within the overall lot, to have been divided into two subsections with the Westside Road running through the overall Lot 39. The Shortt survey suggested that the land that the road was located on was not part of the plaintiffs' lands, but rather the OKIB's lands.

[11] Both the OKIB and the plaintiffs have always disagreed with this characterization of the plaintiffs' possessory interest. The Shortt survey has since been determined to be in error and has now been replaced by the Johnson survey completed by ISC in November 2023, and registered with the ILRS and tied to the plaintiffs' CP as of December 2023.

[12] At the time the Hutchings Letter was sent, the Shortt survey attached to the plaintiffs' CP was the federal government information the Province had about the plaintiffs' possessory interest in what I have referred to in other rulings as the Parker Property. Prior to the Hutchings Letter, through the course of the 2017 to 2021 negotiations, the Province accepted both the plaintiffs' and the OKIB's representations that the plaintiffs possessed all of Lot 39 and that the Province's Westside Road trespassed on the Parker Property.

[13] The Province's reliance on ILRS records about the plaintiffs' possessory interest in the land as described by the Shortt survey was erroneous. The error was not discovered until the fall of 2023, when individuals in the ISC Lands Operation office conducted further research of the documents affiliated to the plaintiffs' Parker Property.

[14] The Hutchings Letter, in general terms, explains why the settlement negotiations were being suspended, indeed discontinued. However, the Hutchings Letter, which is only the end of a series of communications back and forth between the parties endeavouring to resolve the matter without resort to litigation, also contains an offer to continue further negotiations directed at resolution and compensation, provided the plaintiffs were able to provide further information to the Province that established they had possession of the disputed section of the land.

[15] It is the position of the Province that the Hutchings Letter contains three instances of offering to review their position further if the plaintiffs have other information to the contrary. These three offers, argues the Province, constitute terms of settlement. To put it bluntly, the Province contends the Hutchings Letter offers to reconsider the Province's position and re-engage if the plaintiffs provide further information to establish they had possession of the lands in issue. If the plaintiffs satisfied this term, the Province would re-initiate the negotiations.

[16] So, if the plaintiffs were able to provide more information establishing possession of the disputed lands, then the discussions around compensation and settlement could resume.

## GOVERNING LEGAL PRINCIPLES

[17] The principles and governing legal framework on whether an item, here correspondence between counsel, is covered by settlement privilege is not in dispute. The real issue is whether the October 27, 2021 without prejudice letter sent by Geraldine Hutchings to plaintiffs' counsel is a document captured by settlement privilege. Although the principles are not in dispute, it is prudent to set out the applicable principles that inform the calculus as to whether the Hutchings Letter is privileged.

[18] Settlement privilege is a class privilege, and therefore anything that falls under this privilege is presumptively inadmissible: *Sable* at paras. 12, 16.

[19] As Justice Abella, writing for the Court, notes in *Sable*:

> [11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc*. (1988), 66 O.R. (2d) 225 (H.C.J.):
>
> > ... the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]
>
> This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".
>
> ...
>
> [13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:
>
> > ... parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the

> course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.
>
> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[20] Whether the term "without prejudice" is used in the communication is not necessarily determinative. The “words are not required to invoke the privilege”: *Sable* at para. 14.

[21] Similarly, the simple labelling of correspondence as "without prejudice" does not clothe the communication with the privilege. Something more than a label is required. There must be:

a) a dispute or negotiation between two or more parties; and

b) terms of settlement offered.

See *Jiang v. Piccolo*, 2020 BCSC 1584 at para. 21; *Coombs v. LeBlond Estate*, 2013 BCSC 518 at paras. 16–17, 23; *Arbutus Environmental v. Peace River Reg. Dist. et al,* 2002 BCSC 130 at para. 2.

[22] The “subjective intention of the author of [the] communication is not determinative... It is the objective interpretation that must be considered”: *Coombs* at para. 18.

[23] One final point to address on the principles of settlement privilege is this: as with any privilege, class or case by case, there are exceptions. Justice Abella notes as much in *Sable*:

> [19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, “a competing public interest outweighs the public interest in encouraging settlement” (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ.

> Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

## ANALYSIS

[24] With the governing legal framework in mind, I turn to its application to the Hutchings Letter. There is no issue with the first condition as to settlement privilege. The parties agree that there is a dispute and that there was a negotiation between them. The privilege issue in this case turns on whether terms of settlement were offered by MOTI through the Hutchings Letter.

[25] Clearly no monetary amounts of settlement were offered in this correspondence. However, in my view, that does not end the analysis. The Hutchings Letter came at the end of a protracted period of trying to settle this matter that Ms. Drummond had re-initiated in 2017 with her efforts to overcome the impasse that had developed as between the Province, wanting a s. 35 taking under the *Indian Act*, that the plaintiffs seemed prepared to urge the OKIB to make, but which the OKIB refused to do.

[26] Ms. Drummond had suggested an alternative approach that left the s. 35 taking issue as between the Province and the OKIB over the entirety of Westside Road. Instead, it was proposed that the plaintiffs do a s. 24 *Indian Act* transfer of their possessory interest in the portion of their CP lands that the Westside Road trespasses upon to the OKIB. In return for that transfer, the Province would compensate the plaintiffs, and then separately the Province would deal with the OKIB on a s. 35 taking. That was the intent of the April 18, 2018 letter (Exhibit # 36 in the trial) sent to Chief Louis by Ms. Drummond. Unfortunately, that letter went unanswered, largely because the OKIB rejects providing a s. 35 taking to the Province.

[27] The Province and the plaintiffs continued to negotiate to try and settle this matter, until it came to the Province's attention that the lands in issue in the plaintiffs' allotment where the Westside Road trespasses were not, according to the 1983

Shortt survey attached to the plaintiffs' CP and registered with ISC in the ILRS, part of the plaintiffs' allotment. This is when the negotiations ground to a halt.

[28] The Hutchings Letter establishes that it is the review of the documents on the ISC's ILRS, which attach the Shortt survey to the CP, that caused the Province to believe that the plaintiffs were not in possession of the lands that the Westside Road traverses, and instead believe that the OKIB possessed them. We now know that the Province was mistaken on this point.

[29] In examining the Hutchings Letter with the benefit of the evidence adduced in this trial informing the context of this letter, it is clear to me that the letter is covered by settlement privilege. The Hutchings Letter contains three references or invitations to provide further information to the Province to re-establish the negotiations that the Province was suspending with the Hutchings Letter.

[30] Settlement privilege is not limited in scope to exchanges of proposed settlement terms. Indeed, as Justice Tucker notes in *Woodward v. Weinstein*, 2020 BCSC 1667 at para. 41, citing *Sable* at paras. 12–17, settlement privilege "applies broadly to include a course of dialogue directed at persuading the other party that a compromise resolution is preferable to litigation in the circumstances".

[31] Justice Tucker goes on to provide examples, stating in *Woodward*:

> [41] I ruled that paragraphs 41–45 and Exhibits M–P of Russell's affidavit #2, sworn September 12, 2019, were inadmissible. Settlement privilege is not limited in scope to exchanges of proposed settlement terms. To the contrary, it applies broadly to include a course of dialogue directed at persuading the other party that a compromise resolution is preferable to litigation in the circumstances: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras. 12–17. Thus the privilege covers, for example, correspondence in which one party provides its assessment of the weaknesses in the other's position or itemizes the downsides of continued litigation for the purpose of persuading the other side that settlement is a preferable means of resolution, regardless of whether specific terms of settlement are proposed.

[32] The Hutchings Letter does not contain an itemization of the downsides of litigation, but it holds open the prospect of reinstituting negotiations if there is further legal information that the plaintiffs have to establish possession of the disputed land.

[33] There are two further points that militate in favour of finding the Hutchings Letter to be clothed with settlement privilege. The first is that this is not the only document that was part of the ongoing and protracted negotiations. It comes at the end of a chain of correspondence in which the parties were going back and forth, exchanging offers and endeavouring to settle, and so that context informs its character as a document covered by settlement privilege.

[34] The second point that reinforces the nature of this document being covered by settlement privilege is the fact that in the plaintiffs' September 15, 2022 list of documents, the Hutchings Letter was listed in Part 4, a document over which the plaintiffs claimed privilege.

[35] When the amended list of documents was exchanged with the Province on or about December 4, 2023, the Hutchings Letter had been moved to Part 1 of the updated list of documents and was no longer listed as a privileged document. In my view, this provides further context to support the conclusion that the Hutchings Letter is covered by settlement privilege.

[36] The plaintiffs argued in reply that if the Court found that the Hutchings Letter was *prima facie* covered by settlement privilege, then the public policy exception to the privilege, as discussed in *Sable* at para. 19, ought to be applied.

[37] Here, the plaintiffs contend that the principles of equitable fraud, as outlined in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, apply. In that decision, Justice Dickson, as he then was, writes at 390:

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other", is sufficient.…

[38] However, equitable fraud has not been pled in this case, nor has fraudulent concealment. At best, the plaintiffs contend the Hutchings Letter, on behalf of the Province, establishes bad faith and/or unconscionable conduct by the Province. In my view, such a characterization, viewed in light of the totality of the evidence adduced thus far in this case, is unsupportable.

[39] Weighing the competing interests engaged—that is, the public interest in encouraging settlement with the countervailing interest of preventing a party to settlement discussions benefiting from misrepresentation, fraud, or undue influence—I am not satisfied the plaintiffs have demonstrated that the latter has been established.

[40] I conclude that the Hutchings Letter is covered by settlement privilege and that it does not fall within the exceptions to the privileges envisioned by *Sable* at para. 19.

[41] The Hutchings Letter is inadmissible in the trial. That concludes my ruling.

"Ker J."