

SUPREME COURT OF NOVA SCOTIA

Citation: *Molhant Proost v. Bunford*, 2017 NSSC 37

Date: 20170210

Docket: Hfx. No. 451785

Registry: Halifax

Between:

Michaela Amalie Elizabeth Zoe Mauricia Molhant Proost

Applicant

and

Dominic Anthony Max Dolph Claude Gregory Edward Bunford

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Pierre L. Muise

Heard: September 14, 2016, in Halifax, Nova Scotia

Summary: In taxation proceedings, counsel for Ms. Molhant Proost sent counsel for Mr. Bunford a PDF document containing invoices with information subject to solicitor-client privilege electronically redacted. It was forwarded to Mr. Bunford. When he printed it, the redacted text became legible. He refused to return / destroy the document, and to provide an undertaking he would not use the information. He did use the information in deciding to lay a complaint with the Prosecutor in Nanterre, France, naming his former French lawyers, Ms. Molhant Proost and the law firm representing her

in Nova Scotia. The complaint alleged breach of his solicitor-client privilege and trust. He also had outstanding proceedings against Ms. Molhant Proost in Belgium, France and Monaco in which, if not restrained, he would almost certainly use the privileged information against her.

Issues:

1. Has Mr. Bunford breached the implied undertaking rule?
2. What, if any, injunction should be granted?

Result:

Mr. Bunford had breached the implied undertaking rule. The disclosure was inadvertent and did not waive Ms. Molhant Proost's privilege. A permanent injunction was appropriate and granted: restraining Mr. Bunford from using, sharing, acting on or relying upon the privileged information; requiring its destruction; and, requiring Mr. Bunford to provide a list of those persons with which the information has been shared.

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Counsel: John A. Keith, Q.C., for the Applicant

Basile Chiasson, c.r./Q.C., for the Respondent

INTRODUCTION

[1] In proceedings before Justice Moir, the Applicant, Ms. Molhant Proost was declared the owner of certain company shares and awarded solicitor-client costs to be paid by the Respondent, Mr. Bunford.

[2] In the taxation proceedings relating to those costs, she submitted legal expense invoices. In the copies sent to Mr. Bunford's lawyer, Maître Chiasson, information subject to solicitor-client privilege was redacted electronically. Only paper copies of the first and second versions were sent to Maître Chiasson. The third version was sent to him electronically as a PDF document. He emailed it to Mr. Bunford.

[3] When viewed on a computer monitor, the redacted portions of the invoices showed up as coloured blocks. The redactions in red were items unrelated to the litigation for which no reimbursement was sought. The redactions in yellow were items related to the litigation for which reimbursement was sought. Notes identified the reasons for redaction. Previously redacted portions were highlighted in yellow to show they had been un-redacted.

[4] It was later discovered that when Mr. Bunford, or someone on his behalf, printed the invoices on a particular Canon printer, all of the redacted information

became visible. Ms. Mulhant Proost's lawyers had no idea that could happen. They had redacted the information in response to her direction that her solicitor-client privilege was to be protected. The unexpected uncovering of the redacted information in the print copy resulted in inadvertent disclosure to Mr. Bunford of the privileged information.

[5] Ms. Mulhant Proost's main lawyer in the matter, Mr. Keith, as soon as he was made aware of the issue, requested destruction or return of all copies and records of the privileged information. Mr. Chiasson took the position that: the information had not been disclosed to him, but rather to his client, who was not bound by the code of ethics requiring such immediate return or destruction; and, he would await instructions from his client regarding whether they should seek to use the information in the taxation.

[6] In the alternative, Mr. Keith requested that Mr. Bunford at least undertake to not make use of the information and secure it beyond his own access and control until an interim injunction application could be heard to determine what should be done with the information. Mr. Bunford was only prepared to undertake to act honourably.

[7] This was communicated to Mr. Keith by Mr. Chiasson by email dated May 24, 2016 at 2:29 p.m.

[8] Mr. Keith brought an emergency application for an interim injunction before Justice Moir on May 26, 2016, it was granted and restrained any actions related to the privileged information.

[9] It was later discovered that, on May 24, 2016, a complaint had been filed, on behalf of Mr. Bunford, with the Offices of the Prosecutor in Nanterre, France, alleging that two of Mr. Bunford's Paris lawyers had contravened the French penal code by violating solicitor-client privilege and committing breach of trust. The complaint appeared to be based in part on confirmatory information obtained in the taxation procedure.

[10] In addition, Ms. Mulhant Proost is concerned that Mr. Bunford will use the privileged information against her in one of the numerous proceedings he has commenced involving her in France, Belgium and Monaco.

[11] She, therefore, seeks a permanent injunction: continuing the restraint against actions relating to the privileged information; requiring its destruction; and, requiring Mr. Bunford to provide a list of those persons with which the information has been shared.

[12] Mr. Bunford concedes that: the disclosure was inadvertent; the information disclosed was subject to solicitor-client privilege; and, there was no waiver of

solicitor-client privilege. In the circumstances, in my view, it could not be said that Ms. Molhant Proost's law firm was reckless, which might justify overriding the privilege. Therefore, Ms. Mulhant Proost's right to assert that privilege continues to exist.

[13] However, Mr. Bunford submits there has been no breach of the rule that there is an implied undertaking to not use information disclosed in a proceeding for any purpose outside of that proceeding. He says the penal code complaint was filed based on information he had prior to viewing the privileged information in question.

[14] The laws of Belgium, France, and Monaco have not been included in the pleadings as being in issue and none have been proven. Therefore, in accordance with Civil Procedure Rule 54.04, I am to presume that the applicable law of those countries and of that principality is the same as the applicable law of Nova Scotia.

ISSUES

[15] Therefore, the issues to be determined in this application are the following:

1. Has Mr. Bunford breached the implied undertaking rule?
2. What, if any, injunction should be granted?

LAW AND ANALYSIS

ISSUE 1: Has Mr. Bunford breached the implied undertaking rule?

[16] The importance of the implied undertaking rule was recognized in **Nassar v. Capital Health Authority**, 2011 NSSC 464, where the Court, at paragraph 13, stated:

“The implied undertaking rule has always been recognized as being critical to the litigation process. Its application in Nova Scotia is specifically recognized in Civil Procedure Rule 14.03 which reads as follows:

14.03(1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of the judge.”

[17] In his affidavit sworn June 9, 2016, Mr. Bunford deposes to having information regarding alleged breach of solicitor-client privilege and trust by his French lawyers prior to the inadvertent disclosure of the privileged information contained in the legal expense invoices.

[18] He stated the following.

[19] He had been a client of CMS Bureau Francis Lefebvre since 2004. His regular contacts there were Maître Mathieu Daudé and Maître Pierre-Jean Douvier. In 2013, he discovered that his lawyers at CMS had performed legal work for his sister, Ms. Molhant Proost and his mother, Ms. Marie-Claude Bunford, which was

contrary to his own interests. In 2007, they had assisted his mother in establishing a trust called the MCB Trust. The assets in the trust were her one-third share in a company called Ferncroft Equities Limited, which, through another company, Coloony Limited, owned a real property in Valbonne, France called Domaine de Beaumont. [Both of those companies are Nova Scotia companies.] In January 2013, his mother revoked the trust and, through a notary in Brussels, Belgium, prepared a deed donating the shares to Ms. Molhant Proost. In June 2013, Ms. Molhant Proost commenced legal proceedings in Nova Scotia to effect the transfer of those shares to her. It was during a conversation with Maître Daudé in early 2013, and, then, during the summer, while reading the legal documents filed in Nova Scotia, that he discovered the involvement of his lawyers at CMS and that Maître Daudé had been involved since the end of 2012.

[20] During the proceedings before the Nova Scotia Supreme Court, Ms. Molhant Proost's lawyer, John Keith, Q.C., in January 2014, indicated that Maître Daudé and Maître Douvier may be witnesses. He also requested disclosure of documents from CMS. Mr. Bunford became aware of the disclosure of documents by CMS in February, 2014. He is of the view that the documents disclosed contain communications between CMS and himself. He wrote them in March 2014

advising them that they should not disclose such confidential information as it was subject to solicitor-client privilege.

[21] Then, in April 2014, Ms. Molhant Proost filed an affidavit in this Court which included 82 documents obtained from CMS.

[22] If Mr. Bunford was already aware, as early as 2013, of breach of solicitor-client privilege and trust by his lawyers at CMS, it begs the question of why he waited until immediately following the inadvertent disclosure of the privileged information in question to arrange for one of his new French lawyers, Maître Xavier Autain, to file a complaint in his name against his former French lawyers.

[23] Mr. Bunford had the opportunity, in this application, to explain why he waited. He did not do so.

[24] In my view, absent such an explanation, the most reasonable inference, is that, even though he may have had prior suspicions of breaches of solicitor-client privilege and trust, he did not have any solid information regarding any such purported breaches until he viewed the privileged information inadvertently disclosed in the legal invoices.

[25] In addition, the comments at paragraph 24 of his affidavit, in my view, provide direct evidence supporting that conclusion. He deposed:

“During the taxation procedure concerning the invoices of Mrs. Molhant Proost’s lawyers, Cox & Palmer, I became thoroughly convinced that certain lawyers with CMS Bureau Francis Lefebvre had violated professional secrecy rules. I also became convinced that Mrs. Molhant Proost had maliciously benefited from such information.”

[26] Further support for this conclusion can be found in a more in-depth examination of the exact timing of the complaint being laid and the circumstances surrounding it. I will discuss that first.

[27] I will then address the questions of whether it appears that Ms. Molhant Proost “maliciously benefited from such information”, and whether there was improper use of privileged information obtained from CMS during the proceedings in this Court. Those points are relevant to whether she brings the within application with clean hands. Since injunctive relief is an equitable remedy, that is a relevant factor.

[28] The circumstances surrounding the inadvertent disclosure and laying of the complaint are as follows.

[29] By April 2014, Mr. Bunford had received the affidavit of Ms. Molhant Proost attaching documents obtained from CMS. However, he did not, at that point, file any complaint against CMS. Instead, he withdrew his notice of contest and

indicated that there were no controversies precluding the relief sought by Ms. Molhant Proost.

[30] It is only two years later, immediately after receiving the unsuccessfully redacted documents on April 22, 2016, that he proceeded to arrange for the filing of such a complaint.

[31] Ms. Molhant Proost wished to ensure the confidentiality of the privileged information in her legal invoices and feared that, among other things, Mr. Bunford would attempt to use it in litigation that he had ongoing in Europe. Some of that litigation had been commenced by Mr. Bunford in Belgium after he commenced litigation in Nova Scotia. It pertained to matters which he had originally identified as needing to be determined by Nova Scotia courts, but which he discontinued. Also, even after Justice Moir's decision regarding share ownership, Mr. Bunford started litigation in France. This new litigation in Belgium and France seeks to undermine the order of Justice Moir. The cases in Belgium seek to annul the gift of Ferncroft Equities Ltd. shares to Ms. Molhant Proost from her mother, and declare ineffective the deed making the gift. The case in France seeks to declare the Nova Scotia companies, Ferncroft and Coloony Ltd. a nullity due to fraud of French law. As previously noted, Justice Moir's decision recognized Ms. Molhant Proost's ownership of certain shares in Ferncroft, which owns Coloony. This backdrop

provides context to the circumstances surrounding the inadvertent disclosure and the laying of the complaint. It highlights the extra importance of protecting Ms. Molhant Proost's solicitor-client privilege.

[32] A letter dated January 22, 2016, from Justin Morrison, a lawyer with Mr. Keith's firm, to Maître Basile Chiasson, enclosed a paper copy of Ms. Molhant Proost's legal invoices, with redactions. The letter also stated:

“[A]lthough a time entry may not be redacted, we will not be providing access to privileged information in any associated document. We will not disclose any document which relates to the European proceedings to protect solicitor and client privilege in that ongoing litigation. Will not disclose any documents which could intentionally or accidentally be used against our client in ongoing litigation.”

[33] The letter also noted that an un-redacted copy had been provided to Adjudicator Slone, who was presiding over the taxation proceedings. Maître Chiasson objected to that approach on the basis that he would be prejudiced in challenging the amounts claimed unless he could also view the un-redacted version. The issue was brought before Adjudicator Slone. He refused to direct Mr. Keith to provide Maître Chiasson with particulars of the redactions. However, he also warned Mr. Keith that the redacted entries “may not survive the process”, such that Ms. Molhant Proost would risk not recovering those expenses even if they might otherwise have properly formed part of an award of solicitor-client costs.

Adjudicator Slone also indicated that he must “not allow the taxation to be used by Mr. Bunford for any collateral purpose, such as by assisting him in his pursuit of the European litigation”.

[34] In response, Mr. Keith removed some additional redactions. His firm enclosed the revised redacted accounts with a letter dated April 22, 2016, from Justin Morrison to Maître Chiasson. Unfortunately, unlike the prior correspondence which had been sent in paper form, this correspondence was sent electronically, including a PDF copy of the redacted accounts. It is those electronic documents which Maître Chiasson sent to Mr. Bunford, and which, when printed, revealed redacted privileged information, even though, when the PDF document was viewed on a screen, the redactions remained, and even though neither Maître Chiasson, nor the law firm of Mr. Keith, have been able to reproduce that same result.

[35] It is noteworthy that the April 22 letter of Mr. Morrison included the following comments:

“[W]e ... have disclosed the identity of French and European Counsel. ...

The disclosure of the identity of Foreign Counsel is in no way meant to imply that privilege is waived over the content of the communication with Foreign Counsel.

Any issues of privilege will be dealt with on a case-by-case basis as per the direction of Adjudicator Slone.

We maintain that we will not be providing access to privileged information in any document associated with any time entry without first assessing whether the document contains information which is protected by solicitor and client privilege. We will not disclose any document which relates to the European proceedings or any document which could intentionally or inadvertently be used against our client in on-going litigation in Europe.

We understand and expect that information obtained in this proceeding will not be used or exploited in European proceedings and that the taxation will not be used by Mr. Bunford for any collateral purpose." [Emphasis by underlining added.]

[36] Maître Chiasson, in an email to Mr. Morrison dated April 22, 2016, responded that he was seeking an adjournment of the taxation to allow him time to review the revised redactions. He also stated that his only concern regarding use of the information was in the taxation and that whatever was done with it otherwise was irrelevant to his task, and that the understanding stated in Mr. Morrison's letter of April 22 was that of Mr. Morrison alone.

[37] By email dated April 25, 2016, adjudicator Sloan granted the adjournment request. The matter was set to May 18 and 19, 2016. Those dates were later adjourned to May 30 and 31 due to health difficulties suffered by Maître Chiasson.

[38] Meanwhile, as this process was unfolding in Atlantic Canada, over in France, Mr. Bunford had been dealing with the redacted accounts submitted in the taxation as follows.

[39] At some point in 2016, on or before April 22, 2016, Mr. Bunford retained Maître Xavier Autain regarding the actions of CMS. That was after the July 2015 order of Justice Moir awarding solicitor-client costs and referring the matter to taxation.

[40] Maître Autain wrote Mr. Bunford an opinion letter dated April 22, 2016. In it, he referred to the CMS documents that had been disclosed to Ms. Molhant Proost in the course of the Nova Scotia proceedings. He also referred to the ongoing taxation proceedings in Canada, suggesting that light be shed on CMS's alleged breach of solicitor-client privilege and conflict of interest.

[41] The reference to the taxation proceedings is significant because, in those proceedings, Mr. Bunford's lawyer was pressing for disclosure of all redacted entries, and, Mr. Bunford himself indicated that it is during those proceedings that he became convinced of the breach of solicitor-client privilege.

[42] Mr. Bunford instructed Maître Autain to file a complaint in his name before the Prosecutor of the Republic of Nanterre, in France. Maître Autain met with the

Joint Prosecutor on May 2, 2016. That was very shortly after Mr. Bunford received the inadvertent disclosure on April 22. Then, on May 10, 2016, Laurence Brossard, a judicial officer or court bailiff in France, prepared, for Mr. Bunford, a certified report. It outlined how the PDF copy of the redacted invoices, when viewed on a computer screen, showed the redactions as they were meant to be, i.e. all that could be seen were red and yellow bars. However, when printed on the printer provided by Mr. Bunford, being a Canon , i-sensys MF 3010, the words beneath those redaction markings became visible. She also indicated that he required her to re-transcribe the fragments of text. Maître Autain ultimately filed the complaint on May 24, 2016.

[43] In these circumstances, in my view, the most likely inference is that the privileged information inadvertently disclosed in the PDF document at least formed part of the factors upon which it was decided to lay the complaint. Further, Mr. Bunford was aware of the extra importance of protecting Ms. Molhant Proost's solicitor-client privilege.

[44] The Supreme Court of Canada in **Juman v. Doucette**, 2008 SCC 8, held that the implied undertaking rule extends to prevent use of documents or information compelled in civil proceedings for associated criminal proceedings. In that case, a child care worker was compelled to undergo discovery examination in a civil

proceeding brought against her because a child in her care had suffered a seizure and brain injury. Prior to being discovered, she obtained a court order to prevent the police from accessing her discovery information without further court order, based on the implied undertaking between the parties that the information would only be used for the purposes of the civil proceedings. The police sought to gain access to the discovery transcripts. The Supreme Court agreed with the chambers judge's refusal of their request.

[45] It ruled that statutorily compelled disclosure in civil proceedings cannot be passed to police for use in criminal proceedings without a court order authorizing its use as an exception to the implied undertaking rule. It noted some exceptions to that general approach, including: statutory exceptions such as the need to report a child in need of protection; public safety concerns involving "immediate and serious danger"; impeachment using inconsistent testimony; and, disclosure of criminal conduct where "immediate harm is likely to result". None of those exceptions obtain in the case at hand.

[46] The implied undertaking rule was specifically applied in the context of a taxation in the English Court of Appeal decision in **Bourns Inc v. Raychem Corp (No. 3)**, [1999] C.L.C. 1029 (1999). The Court in that case noted that, in taxation proceedings, privileged documents must generally be considered and, a party

wishing to maintain its claim for costs, in effect, will be compelled to disclose such privileged information. The taxation process must carefully balance client confidentiality and provision of all relevant information to the taxing master. I agree with this approach.

[47] In addition, the Nova Scotia *Small Claims Court Taxation of Costs Regulations* require filing of a copy of each bill incurred in the proceedings, and service of same upon the responding party. Further, the taxation process was mandated by the costs order of Justice Moir.

[48] Therefore, in my view, the invoices disclosed in the case at hand constitute the type of statutorily compelled disclosure envisioned in **Juman v. Doucette**.

[49] In the case at hand, Mr. Bunford made no attempt to seek the Court's permission to use the inadvertently disclosed confidential information provided to him as part of the disclosure process in the taxation proceedings. Instead, the formal complaint was laid after Mr. Keith, on behalf of Ms. Molhant Proost, had discovered the inadvertent disclosure of privileged information and sought reassurance that it would be returned or destroyed, and not be used for a collateral purpose.

[50] On Friday, May 20, 2016, at 8:44 p.m., Maître Chiasson sent an email to Mr. Keith and Adjudicator Slone advising them, for the first time, of the fact that the text under the redacted portions of the PDF document had all become legible to Mr. Bunford when he printed the document. He also referred to having received the certified report of Ms. Brossard confirming that. He acknowledged his own ethical obligations to destroy or return, and not use, any inadvertently obtained information. He noted that there was no inadvertent disclosure made to himself. However, he added:

“[T]he information is now with my client. He will give me instructions for the upcoming hearing on the face of information which he-and not me-has obtained. I cannot imagine refusing to follow his instructions and not make out the case for refusal of the claim for privilege for each item which was meant to be redacted.”

[51] Mr. Keith responded that same night at 9:41 PM expressing his concern and disagreement with the suggestion that the information could be used by Mr. Bunford, and emphasizing that the privilege was neither waived nor extinguished. He stated his view that any attempt to use the information would be “a deliberate and illegal use of confidential information”. He asked for details of how the redactions were removed and confirmation that any documents showing the redacted information would be returned or destroyed. He noted that, absent such

confirmation, he would seek to bring an emergency application for injunctive relief.

[52] Saturday, May 21, 2016, at 8:52 AM, Mr. Keith sent a follow-up email reiterating his position and concerns, and indicating that he required the confirmation by noon that day.

[53] The same day, at 10:01 AM, Maître Chiasson responded that: the problem was caused by the manner in which Cox & Palmer sought to effect the redactions; he was not suggesting that Mr. Mr. Bunford could use the information as he saw fit, though he could not unknow what he had come to know; Mr. Bunford could not be blamed for reading what was revealed on the printed copy; and, as a layperson, Mr. Bunford was not bound by the code of ethics applicable to lawyers.

[54] At 10:20 AM, Mr. Keith responded, acknowledging the inadvertent mistake by Cox & Palmer, but reiterating the importance of protecting the sanctity of solicitor-client privilege.

[55] There were further exchanges during the day. They discussed whether there had been a need for an intermediate step which resulted in the redactions being legible and, continued to discuss the need for the confirmations requested. Mr. Keith provided a list of undertakings/commitments he would require before noon

on Tuesday, May 24, failing which he would proceed to an emergency application on the afternoon of May 24, the first day the Court would be open after the long weekend.

[56] Maître Chiasson related to Mr. Keith that, in his view, Mr. Bunford had acted, and would continue to act, in a proper and honourable fashion. Meanwhile, in France, Mr. Bunford was dealing with the inadvertently disclosed information as previously described.

[57] Maître Chiasson followed up with an email to Mr. Keith on May 24, 2016, at 2:29 PM. By then, he had spoken with Mr. Bunford regarding the undertaking requested by Mr. Keith. He informed Mr. Keith that Mr. Bunford refused to bind himself to any such undertaking and would only undertake to “act honourably”. That is the same day that Maître Autain filed the complaint in France on Mr. Bunford’s instructions. Mr. Bunford did not halt the process to await the outcome of the emergency injunction application Mr. Keith indicated he would be making if the requested undertakings were not provided.

[58] Mr. Bunford went ahead with the use of the information for a collateral purpose before Mr. Keith had a chance to apply for an interim injunction, and, without the court order he required authorizing him to do so.

[59] On May 26, Justice Moir granted an interim injunction. Its terms were included in an order issued May 31, 2016. They included an interim injunction restraining Mr. Bunford, and others on his behalf, from dealing in any manner with the documents and electronic data containing information over which Ms. Molhant Proost had claimed privilege, including the PDF invoices in question, any hard or electronic copies of them, and any analysis or materials prepared of them.

[60] At that time, Ms. Molhant Proost was unaware of how Mr. Bunford had been using the information in France. The interim injunction was granted solely to protect her solicitor-client privilege. It was not known that there was an issue regarding breach of the implied undertaking rule. At that point, the envisioned use of the information being discussed was use in the taxation proceeding itself.

[61] There is no evidence of further collateral use of the information since the interim injunction, other than continued collateral use in the complaint laid with the French Prosecutor. However, in my view, Mr. Bunford clearly breached the implied undertaking rule prior to the interim injunction. If no permanent injunction is granted, he will almost surely make further collateral use of the information, including in the multiple proceedings he has started against Ms. Molhant Proost in Europe.

[62] The Court in **Colby Physioclinic Ltd. v. Ruiz**, 2005 NSSC 287, imposed an award of solicitor-client costs in the amount of \$5290, plus HST, plus disbursements, as a penalty for contempt by breaching the implied undertaking rule. In that case, the guilty party had used information obtained in a civil action to file a complaint against the other party with the Nova Scotia College of Physiotherapists, after the action had settled. However, upon receiving notice of the contempt application, the guilty party had withdrawn the complaint.

[63] Mr. Keith, in one of the prehearing briefs filed on behalf of Ms. Molhant Proost, argued that a similar damage award may be warranted in the case at hand. However, at the hearing, he confirmed that Ms. Molhant Proost is not seeking damages. She is only seeking an injunction.

[64] In my view, that approach reflects the inability to assign a value to a loss of solicitor-client privilege, and is an appropriate concession on her part.

[65] The circumstances relating to Ms. Molhant Proost obtaining and using documents from CMS in the earlier proceedings in this Court are as follows.

[66] Mr. Bunford and Ms. Molhant Proost commenced cross-applications in this Court regarding the 1/3 shares in Ferncroft originating from Ms. Marie-Claude Bunford and associated oppression claims by Mr. Bunford.

[67] In the context of those proceedings, by letter dated October 23, 2013, Mr. Keith requested, from Andrew Fraser, the lawyer for Mr. Bunford, information related to the companies Ferncroft and Coloony, and the MCB Trust. He also indicated that: he was seeking “any information in the possession or control of Cabinet Lefebvre in Paris, France”; and, would be writing the law firm directly and sending a copy to him. In a subsequent letter dated October 25, 2013, to Douglas Tupper, Mr. Keith again requested further disclosure which included communications with Cabinet Lefebvre. Mr. Keith then, by letter dated November 6, 2013, to Maître Douvier and Maître Daudé, noted that they were seeking nonprivileged information and requested: information relating to communications with the directors of Ferncroft or Coloony; communications with Mr. Bunford; information relating to tax returns for the companies, valuations of Domaine de Beaumont, ownership structure and changes; information relevant to capacity and undue influence issues in relation to Ms. Marie-Claude Bunford; information relating to the creation and revocation of the MCB Trust; and, information relating to Ms. Marie-Claude Bunford’s decision to gift her shares to Ms. Molhant Proost. The letter expressly states: “To the extent there is any Information relating to a personal retainer directly with Dominic Bunford, Marie-Claude Bunford or Amalie Molhant Proost, please advise so that we can discuss in advance of disclosure and

avoid any inadvertent waiver of privilege.” That correspondence was copied to Mr. Fraser and other counsel involved.

[68] Mr. Keith, in an email dated February 4, 2014, advised Mr. Fraser and other counsel involved, other than Mr. Tupper who was only on a watching brief and had not responded that he wanted a copy, that he had received documents from Maître Daudé and would be scanning and providing them. With correspondence dated February 11, 2014, he forwarded, to counsel, a disk containing the documents he had received from CMS.

[69] By letter dated April 22, 2014, Mr. Keith communicated to Mr. Fraser and the other lawyers involved that: no one had expressed any concern or complaint in relation to the CMS documents; his client took the position that no privilege attached to the documents; no party could assert privilege over them as against the other party; and, if there was any disagreement, counsel ought to have brought them forward earlier to avoid interfering with the filing deadlines set by the Court. The letter noted that his client would object to any such assertion of privilege but, if necessary, would seek extension of the deadline to file affidavits so that the issue could be determined.

[70] Mr. Tupper responded the same day indicating that he had no instructions to waive privilege on behalf of the companies, and requested copies of the specific

documents Mr. Keith wished to put before the Court. That same day, Mr. Keats wrote Mr. Tupper, enclosing a copy of the disk with the CMS documents and indicating that he had not previously sent it because Mr. Tupper had not responded to his earlier query regarding whether the parties not actively involved in the proceeding wanted a copy. Mr. Tupper asked to be pointed to specific documents. Mr. Keith responded that, in his view, the company was unable to assert privilege. That view was based upon the principle that shareholders, in a shareholder dispute, cannot assert privilege against each other over solicitor-client communications engaged in for the company.

[71] By letter dated April 24, 2014, Mr. Fraser advised Mr. Keith that his client had not waived any privilege and had not provided any instructions for that to be done on his behalf. He added that the question of privilege was likely governed by the laws of France. He suggested that Mr. Keith serve the affidavits of Ms. Molhant Proost and Ms. Bunford, but not file them until they have had a chance to discuss privileged content. Mr. Keith responded to Mr. Fraser the same day indicating that if Mr. Bunford believes he has a claim for privilege he should forthwith bring a motion to protect it, prior to the affidavits on behalf of Ms. Molhant Proost having to be provided.

[72] By letter dated April 28, 2014, to Mr. Fraser and other counsel, Mr. Keith identified continuing gaps in disclosure. He noted during the hearing that this was only two days before his client's affidavits were due.

[73] In a letter dated April 30, 2014, to Mr. Keith and all of the other counsel, Mr. Fraser, who was still representing Mr. Bunford, objected to the disclosure request and asked that Maître Alain Ranger, Mr. Bunford's lawyer in Montréal, and Maître Daudé, liaise with them in relation to potential disclosure of privileged documents. He took no steps to address the question of privilege over the CMS documents already disclosed. Mr. Keith immediately responded in a letter dated the same day to Mr. Frazer and the other lawyers: enclosing a copy of the affidavit of Ms. Molhant Proost the with some CMS documents exhibited; outlining the history of the production of the CMS documents and the communications regarding whether there was any claim of privilege; and, highlighting that no steps had been taken to protect any alleged privilege.

[74] Then, by email dated May 1, 2014, to all counsel involved, Mr. Keith presented his views that: Mr. Bunford had no authority to control anything, including the delivery of information, in relation to the MCB Trust; and, co-shareholders, though they may share a claim of the joint privilege in relation to matters related to the companies they own, they cannot use that privilege to

withhold, from each other, information related to the company or its assets and dealings. It urged counsel to put an end to interference with his client obtaining information to which she was entitled and avoid him having to seek a court order.

[75] It is after that that Mr. Bunford withdrew his notice of contest and advised the Court that there were no controversies precluding the relief sought by Ms. Molhant Proost.

[76] In my view, counsel for Ms. Molhant Proost only sought information relevant to the corporate issues and took all reasonable steps to avoid inadvertent waiver of privilege and gave ample opportunity for any interested party to raise issues of privilege and bring them before the court. He acted properly and no unclean hands can be attributed to Ms. Molhant Proost in the within application.

ISSUE 2: What, if any, injunction should be granted?

[77] In **Northumberland Fisherman's Assn. v. Patriquin**, 2015 NSSC 30, the Court outlined and applied the following two prong test for permanent injunctions:

1. Has a legal right been established?
2. Is a permanent injunction appropriate in the circumstances?
 - a. If an effective alternative remedy is available a permanent injunction will not be appropriate.

b. If there is no effective alternative remedy, given that an injunction is an extraordinary remedy, it must be proportionate to the activity being enjoined, considering “the degree of harm suffered by the applicant and the effects of the prohibition on each of the parties”.

1. Has a legal right been established?

[78] It is conceded that the disclosure of information subject to solicitor-client privilege was inadvertent, and that there has been no waiver of that privilege. It is well-established that, absent recklessness or other special circumstances, which do not obtain in the case at hand, such inadvertent disclosure does not waive privilege. Ms. Molhant Proost has asserted her right to solicitor-client privilege throughout, and continues to do so. In my view, she has a right to continue to protect the confidentiality of the information in the inadvertently disclosed redactions.

[79] Mr. Bunford has not advanced any basis upon which to override that privilege.

[80] In my view, a party who receives inadvertently disclosed privileged information should: not use that information; promptly return it; and, promptly inform the privilege holder of the nature and extent of any review conducted in

relation to the information in question. The Supreme Court of Canada, in **Celanese Canada Inc. v. Murray Demolition Corp.**, 2006 SCC 36, at paragraph 62, noted that as being the responsibility of counsel.

[81] In my view, it also extends to a party, when counsel, as in the case at hand, has forwarded the disclosure in question to his client. Otherwise, lawyers could always easily circumvent the requirements for their clients by automatically forwarding copies to their clients prior to reviewing the materials themselves.

[82] The fact that the inadvertent disclosure was discovered by the client, as opposed to the lawyer, may explain, though not justify, some delay. However, it does not justify a refusal to take those steps once those obligations have been communicated.

[83] There may be situations where there is some dispute regarding whether solicitor-client privilege attaches to the information in question. In such a situation, it may be appropriate to delay return of the information, pending a court determination of whether privilege attaches. There is no indication that that is the situation in the case at hand.

[84] In my view, Mr. Bunford, by acting as he did, breached Ms. Molhant Proost's legal right to protect her solicitor-client privilege.

[85] In addition, for the reasons noted above, she has established that Mr. Bunford breached the implied undertaking to refrain from making collateral use of information obtained in the taxation proceedings, which information was subject to solicitor-client privilege, making the breach more serious.

2. Is a Permanent injunction appropriate in the circumstances?

a. Is an effective alternative remedy available?

[86] In my view, there is no effective alternative remedy available.

[87] As stated at paragraph 17 of **R. v. McClure**, 2001 SCC 14: “Solicitor-client privilege is part of and fundamental to the Canadian legal system.”

[88] In my view, the loss of such privilege is not quantifiable and cannot properly be compensated in damages.

b. Is a permanent injunction proportionate to the activity being enjoined, considering “the degree of harm suffered by the applicant and the effects of the prohibition on each of the parties”?

[89] Where there has been inadvertent disclosure of information subject to solicitor-client privilege, the onus is on the party receiving that disclosure to rebut the presumption of prejudice to the party owning the privilege: **Celanese**, paras. 49

to 51. In my view, in the case at hand, Mr. Bunford has not rebutted that presumption.

[90] If an injunction is not granted, Ms. Molhant Proost will have lost all protection of her privileged information, at least vis-à-vis Mr. Bunford. That loss is not quantifiable in damages. If Mr. Bunford is not enjoined from using and further disseminating it, it will result in further disclosure that cannot be undone. In my view, these ramifications constitute irreparable harm to Ms. Molhant Proost's right to maintain her solicitor-client privilege.

[91] If Mr. Bunford is enjoined from using the inadvertently disclosed information he will simply be in the same position that he would have been in if it had not been inadvertently disclosed to him. It is information that he was not entitled to receive in the first place. He had an obligation to return it and not even use it in the taxation proceeding, let alone for a collateral purpose in breach of the implied undertaking rule.

[92] Granting the requested injunction would simply prevent him from wrongfully exploiting information which he has not shown he is entitled to. He will simply be required to respect the process instead of taking wrongful opportunistic action following inadvertent disclosure.

[93] Mr. Bunford argues that Ms. Molhant Proost would not suffer any prejudice from the information being used as part of the complaint laid with the Prosecutor in France as it does not involve her. That argument ignores that such use of information would override her solicitor-client privilege. Further, Maître Autain deposed that the complaint he filed was directed against unnamed persons; but, the facts highlighted the respective roles of Maître Daudé, Maître Douvier, Ms. Molhant Proost and Cox & Palmer. As such, she and her law firm are potentially subjects of the complaint, perhaps as parties, and definitely potential witnesses. In my view, even the possibility of being a witness, constitutes a prejudice that would not otherwise exist.

[94] Further, if not enjoined, Mr. Bunford is almost certain to use the confidential information to assist him, at least in making tactical decisions, in the numerous proceedings he has launched in Europe with Ms. Molhant Proost as an opposing party, including the ones I have already referred to in which he is seeking relief undermining the decision of Justice Moir.

[95] It would be unfair and undermine the integrity of the justice system if Mr. Bunford were permitted to use the inadvertently disclosed privileged information in those proceedings. In that regard, the following comments of Justice Binnie, at paragraph 34 of **Celanesse**, are instructive:

“Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands. Even granting that solicitor-client privilege is an umbrella that covers confidences of differing centrality and importance, such possession by the opposing party affects the integrity of the administration of justice. Parties should be free to litigate their disputes without fear that their opponent has obtained an unfair insight into secrets disclosed in confidence to their legal advisors. The defendant's witnesses ought not to have to worry in the course of being cross-examined that the cross-examiner's questions are prompted by information that had earlier been passed in confidence to the defendant's solicitors. Such a possibility destroys the level playing field and creates a serious risk to the integrity of the administration of justice. To prevent such a danger from arising, the courts must act "swiftly and decisively" as the Divisional Court emphasized.”

[96] Mr. Bunford argues that: he only obtained the inadvertently disclosed information because of the actions of Ms. Molhant Proost’s lawyers; since he is not a lawyer himself, it is too onerous to ask him to compromise himself by returning the information and ignoring it; and, it is impossible for him to separate the new information from what he already knew, starting as early as 2013, regarding the confidentiality breach by CMS.

[97] Ms. Molhant Proost’s lawyers had no reason to suspect that the redacted information would become legible when printed on the type of printer in question. They have been unable to reproduce the same result. Therefore, absent some manipulation of the PDF document by Mr. Bunford to produce that result, it appears to have been an aberration. Given the steps taken by Mr. Bunford to have

the unintended result officially documented, he clearly understood that he was viewing information he was not meant to see. The “honourable” and honest thing to have done would have been to immediately destroy the printed document and ensure that Ms. Molhant Proost’s lawyers were made aware of what had happened. That is particularly so given that the PDF copy containing the relaxed redactions was only provided after insistence by Mr. Bunford’s lawyer that it was required to properly represent him in the taxation proceeding. Instead he exploited the opportunity to use the information to pursue a complaint naming his former lawyers, Ms. Molhant Proost and the Nova Scotia law firm representing her. In my view, irrespective of whether he, himself, is a lawyer, it would not be unfair to Mr. Bunford to restrict his improper use of the information. The fair thing would have been for him to ensure that no improper use occurred in the first place.

[98] In addition, I fail to see why it is impossible for Mr. Bunford to separate what he already knew from what the information that he obtained in the printed copy of the invoices. That is also relevant to his argument that he would be unable to show what he knew, separate and apart from the redacted invoices, leaving him susceptible to allegations of breaching an injunction while simply using pre-existing information to protect his legal rights in Europe. In my view, to make such use of information, its source would have to be clearly indicated and, any relevant

documentation exhibited. Consequently, as a matter of course, he would be expected to differentiate his sources of information.

[99] If he already had information from a proper source, the proposed injunction would not prohibit him from using that information from that other source. It would only prohibit him from using, and referring to, information over which Ms. Molhant Proost claims privilege, including the redacted invoices in question.

[100] Another argument advanced by Mr. Bunford against the granting of an injunction is that, since he is in Europe, and his activities are taking place there, it would be difficult for a Canadian court to monitor compliance with, and enforce, the injunction. In my view, that is not a factor which is prejudicial to him. It merely, unfortunately, somewhat weakens the protection that an injunction would afford Ms. Molhant Proost.

[101] Mr. Bunford acknowledged that this Court has jurisdiction over him because he attorned to this jurisdiction for the purposes of the main legal proceedings and the taxation proceedings. As such, an injunction order against him would have force. It could be enforced against him here. He is still the owner of shares of a Nova Scotia Corporation. He could easily be involved in further litigation here. In addition, questions of reciprocal enforcement and mutual legal assistance between

countries can be addressed as the need arises, even with non-treaty countries, and Belgium and France do have mutual legal assistance treaties with Canada.

[102] Considering these points and circumstances, in my view, the permanent injunction requested is proportionate and appropriate.

[103] This decision has focussed on the inadvertent disclosure resulting from the printing of the third version of the redacted invoices. However, even prior to that, during the taxation process, there was inadvertent disclosure of information subject to solicitor-client privilege, including the name of French counsel contacted by Mr. Keith. The same reasoning applies to that privileged information, and the same injunctive relief is appropriate.

CONCLUSION

[104] For these reasons, I conclude that the following order is appropriate in the circumstances and hereby grant it.

[105] There shall be a permanent injunction restraining Mr. Bunford, his agents and any person acting under his instruction, or that of his agents, from doing any of the following acts or things: using, sharing, acting on, or relying upon, in any manner whatsoever, any and all documents and electronic data containing information over which privilege is claimed by Ms. Molhant Proost, including, but

not limited to, the .pdf format file of Cox & Palmer invoices delivered to Mr. Bunford or his counsel on April 22, 2016, any copies of the same either in hard copy or electronic copy format, and any analysis or memos or similar materials prepared of the same, in any format whatsoever.

[106] Mr. Bunford, his agents and any person acting under his instruction, or that of his agents, shall forthwith destroy any and all copies of the information in their possession over which privilege is claimed by Ms. Molhant Proost, in any form whatsoever, including but not limited to the .pdf format file of Cox & Palmer invoices delivered to Mr. Bunford or his counsel on April 22, 2016, any copies of the same either in hard copy or electronic copy format, and any analysis or memos or similar materials prepared of the same, in any format, such that they will cease having any access whatsoever to the information.

[107] To further give effect to the right of Ms. Molhant Proost to take whatever steps she can to protect her solicitor-client privilege, Mr. Bunford shall, no later than 30 days following the date this order is issued, provide, to John A. Keith, Q.C., a list of individuals and entities with whom he shared: the .pdf format file of Cox & Palmer invoices delivered to him or his counsel on April 22, 2016; or any copies of the same either in hard copy or electronic copy format; or any analysis or

memos or similar materials prepared of the same, in any format whatsoever; or, information contained in any of those items.

COSTS

[108] The Order of Justice Moir granting the interim injunction herein fixed the costs of the motion for interim injunction at \$2000 to be “payable as determined by the Court when the application for permanent injunction is determined”.

[109] I have determined that a permanent injunction is to be imposed. Since the result on this final application is the same as that in the interim motion, in my view, is appropriate that costs in both be payable by the same party, to the same other party.

[110] Mr. Bunford argues that this application and the interim motion were only required because of the error of the lawyers for Ms. Molhant Proost, which resulted in the inadvertent disclosure. I respectfully disagree. Mr. Keith clearly and repeatedly communicated that he would not bring the request for injunctive relief before the Court if the inadvertently disclosed information was destroyed or returned and appropriate undertakings respecting the use of the information were provided. Mr. Bunford refused to do so. In my view, that is what necessitated the proceedings before this Court for injunctive relief.

[111] In these circumstances, in my view, it would not do justice between the parties to award costs to the unsuccessful party. The usual approach of awarding costs to the successful party is appropriate.

[112] Mr. Keith suggests that an additional \$3000 in costs ought to be awarded for the hearing of the application, which was a full day.

[113] Civil Procedure Rule 77.06(1) states:

“Party and party costs of an application in court must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.”

[114] The lowest scale in Tariff A provides for costs of \$3,000, plus \$2,000 for each day of trial. Applying that tariff, without adjustment, would result in a costs award of \$5000. Tariff C, which applies to chambers applications, provides for costs of \$2,000 per day, with the possibility of applying multipliers to account for the complexity of the matter, its importance to the parties, and the effort required. Applying that tariff, without adjustment, would result in a costs award of \$2000, \$4000, \$6000, or \$8000, depending upon what, if any, multiplier was applied.

[115] The matter was of significant importance to the parties, particularly Ms. Molhant Proost. It was not overly complex. A significant amount of material was

filed in support. However, much of that had already been used in the proceedings leading to the solicitor and client costs award. Therefore, counsel for Ms. Molhant Proost was already very familiar with it, diminishing the amount of effort required. Considering that it was a full day application, in my view, only an average amount of effort was required.

[116] In these circumstances, applying a multiplier of two to the Tariff C amount for a full day, resulting in a costs award of \$4000, may not be unreasonable. However, I am of the view that the \$3000 amount suggested by Mr. Keith is appropriate and would best do justice between the parties.

[117] Therefore, I order that Mr. Bunford forthwith pay to Ms. Molhant Proost \$2000 in costs for the interim motion, and a further \$3000 in costs for the within application.

ORDER

I ask Counsel for Ms. Molhant Proost to prepare the order.

PIERRE L. MUISE, J.