

SJC-533-2013

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

Date : 2016 04 11

BETWEEN:

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

REC'D
REC'D
APR 19 2016
FILED
DEPOSE

COUR DU BANC DE LA REINE
GREFFIERE SAINT-JEAN

ROBERT HAYES

Plaintiff

- and -

**THE CITY OF SAINT JOHN,
THE SAINT JOHN POLICE COMMISSION AND
THE SAINT JOHN POLICE DEPARTMENT**

Defendants

BEFORE: Justice William T. Grant

HEARING HELD: Saint John

DATE OF HEARING: April 11, 2016

DATE OF DECISION: April 11, 2016

Ruling # 3

COUNSEL:

John A. McKiggan Q.C., for the Plaintiff

Donald Keenan for the Defendants

DECISION

GRANT, J,

[1] The Plaintiff, Robert Hayes, has made a motion for approval of a third party funding agreement (“the agreement”) to protect him against, *inter alia*, exposure for costs in this litigation.

[2] The motion was initially filed on an *ex parte* basis but the Court ordered that it proceed with notice to the defendants albeit without providing them with copies of the Record or brief until hearing argument on the preliminary issue of whether or not the agreement should be sealed.

[3] There is no question that the defendants are at a disadvantage in arguing this issue as they do not have access to the agreement. They submit that the third party funding agreement is not subject to privilege and rely on the case of *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715. They also submit that if there are any portions of the agreement which deal with solicitor-client communications, those can be redacted by the Court.

[4] On the issue of privilege it is not asserted by the plaintiff that the agreement is subject to solicitor-client privilege but rather litigation privilege which was discussed in *Blank v. Canada (Minister of Justice)* [2006] 2 SCR 319, 2006 SCC 39 (CanLII) by Fish J. at paragraph 27 as follows:

Litigation privilege ... is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to

litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[5] The agreement in this case is a communication between the plaintiff and the third party with the input and advice of the plaintiff's solicitor. It is an integral part of the plaintiff's case and, in my view, is protected by litigation privilege, the object of which is to protect the adversarial process, not the solicitor-client relationship.

[6] I find that disclosure of it in this case would impair the process by giving an unfair advantage to the defendants. I base that conclusion, not only on a reading of the agreement itself but also on the finding that the third party funding agreement is necessary to provide access to justice in this case.

[7] The defendants submit that the agreement can be redacted but in my view where there is a finding of privilege redaction can be risky. The defendants could be advantaged by disclosure of seemingly innocuous portions of the agreement that take on significance as the case evolves, significance that was not apparent at the time of the redactions.

DISPOSITION

[8] For these reasons I order that the third party funding agreement remain sealed.



**William T. Grant
Judge of the Court of Queen's Bench
of New Brunswick**