IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Kairos Community Development Ltd. v. Nova Scotia (Community Services) 2007 NSSC 330

Date: 20071114
Docket: SH 265555
Registry: Halifax

Between:

Kairos Community Development Ltd.

Plaintiff

v.

The Attorney General of Nova Scotia Representing Her Majesty the Queen in Right of the Province of Nova Scotia (Department of Community Services)

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	August 14, 2007 in Special Chambers, Halifax, Nova Scotia
Written Decision:	November 14, 2007
Counsel:	**Lisa M. Gallivan**, for the plaintiff **Catherine J. Lunn**, for the defendant

By the Court:

INTRODUCTION

[1] The applicant seeks production from the province. The province says the information sought is not relevant and too burdensome to produce.

FACTS

[2] Kairos is a community based service provider for persons with mental illness and disability. It has been providing services since August 1992. Among other things, Kairos provides supervised apartments and is paid by the Department of Community Services for the services it provides. In its statement of claim, Kairos states:

> 4. Prior to 1998, community services, including Kairos' services, were the responsibility of the municipalities. The municipalities implemented unlicensed service agreements, which bound the municipality, Kairos, and the individual receiving Kairos' services.
>
> 5. In 1998 the Province of Nova Scotia assumed responsibility for social service administration under the Department of Community Services (the 'Department') through the *Employment Support and Income Assistance Act*, S.N.S. 2000, c. 27.

[3] In para. 11 of its statement of claim, Kairos alleges:

> During all of this process the Department has repeatedly assured Kairos that it was being treated the same as other service providers with respect to the service fees being paid and the parameters of service rates with respect to proposals submitted.

[4] Kairos alleges in para. 13 of the statement of claim that it has discovered that the Department:

> .... has not in fact been treating Kairos the same as other service providers. The Department has in fact been paying other service providers higher service fees and rates than it has been paying Kairos, including, but not limited to, higher service fees and rates than it has been paying Kairos, including, but not limited to, higher administrative fees and mileage rates.

[5] Kairos claims damages for negligent misrepresentation, breach of contract, failure to deal with Kairos fairly and in good faith and also punitive and aggravated damages.

[6] In its defence, the defendant denies the facts alleged in Kairos' statement of claim. It also says in para. 5 of its defence:

> 5. The Plaintiff is one of several service providers across the province that the Department funds or pays to such service provider for certain residential services for a disabled person. The funding by the Department to such service providers is based on proposals submitted by the service provider which include a plan of service for the client and a projection of the estimated costs in delivering the service.

[7] In this application, the plaintiff seeks production from the defendant "of all documentation related to the service fees and rates (including but not limited to administrative fees and mileage rates) that the Defendant has paid to other service providers who provide supervised apartments and group homes for persons with mental health and disabilities in Nova Scotia, for the period of 1998 to present."

[8] The defendant says this documentation is not relevant and is too costly to provide.

ISSUES

1. Relevance;
2. Is the burden of production unjust?
3. If production is ordered, should the plaintiff pay the cost of production?

ANALYSIS

[9] *Civil Procedure Rule* 1.03 provides as follows:

> **Object of Rules**
>
> **1.03**. The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[10] *Civil Procedure Rule* 20 is entitled "Discovery and Inspection of Documents." *Rule* 20.01(1) provides:

> **List of documents: Exchange**
>
> **20.1.**
>
> (1) Unless the court otherwise orders, a party to a proceeding shall, within sixty (60) days after the close of the pleadings between an opposing party and himself, or within seven (7) days after the service of the originating notice where there are no pleadings, serve on the opposing party a list in Form 20.01A of the documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding and file with the prothonotary the list without a copy of any document being attached thereto.

[11] *Rule* 20.06 provides for a court order for production of documents. It provides as follows:

> **20.06.**
>
> (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.
>
> (3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

[12] *Rule* 20.01(1) uses the phrase "relating to every matter in question in the proceeding." That wording is repeated in *Rule* 20.06(1). The court may order such documents to be produced in such "manner as it thinks just." The court must conclude that the order is needed to fairly deal with the action or to save costs. It also must not be harmful to the public interest.

[13] A broad and liberal interpretation has been placed upon the *Civil Procedure Rules*. In *Central Mortgage and Housing v. Foundation Company of Canada Limited* (1982), 54 N.S.R. (2d) 43 (C.A.), Jones J.A. said in para. 11:

> **11** The practice in this Province has been to interpret the Rules liberally.

[14] In *Upham v. You* (1986), 73 N.S.R. (2d) 73, Matthews, J.A. repeated the above quote of Jones, J.A. He said (p. 6 QL version):

> The Supreme Court of this Province has consistently held that the Rules relating to discovery of persons and the production of documents should be interpreted liberally to give effect to full disclosure.

[15] One limit on full disclosure is relevance.

Relevance

[16] The onus is on the party seeking production to establish that it is relevant. Matthews, J.A. said in *Upham v. You, supra*, (p. 3):

> The respondent must demonstrate that it is relevant.

[17] As the court said in *Crosby v. Fisher* [2002] N.S.J. No. 121, (S.C.) in para. 4:

> 4 ... The onus of establishing relevance is on the party seeking production. That is the first onus.

[18] To determine relevance, the court must assess the issues. As Hallett, J. said in *ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc. et al* (1989), 90 N.S.R. (2d) 148 (S.C.) at p. 153:

> In determining the question of relevancy of any particular evidence, one has to start with an assessment of the issues in the case.

[19] In *Upham v. You*, *supra*, Matthews, J.A. said (p. 7, QL version):

> It is pertinent to examine the defence filed in order to question whether the appellant there placed the requested information in issue, and thus is relevant.

[20] The plaintiff says that this documentation is necessary in order for it to establish its loss and says therefore that it is clearly relevant. The test for relevance is a broad one. As Davison, J. said in *Eastern Canadian Coal Gas Venture Ltd. v. Cape Breton Development Corp.* (1994), 137 N.S.R. (2d) 123 (S.C.), the documents must have a "semblance of relevance." (para 20)

[21] Davison, J. referred to *Civil Procedure Rule* 20.06(1). He said in para. 17:

> Civil Procedure Rule 20.06(1) provides for production of any document "relating to any matter in question in a proceeding". These words are broad. A chambers judge is at a disadvantage in attempting to ascertain relevance on a preliminary basis.

[22] Davison, J. went on to refer to the decision of Justice Griffiths in *Toronto Board of Education Staff Credit Union Ltd. v. Skinner et al*(1984), 46 C.P.C. 292 (Ont. H.C.). Davison, J. said Justice Griffiths "applied a very wide and broad test for relevance ...". He then quoted from his decision at p. 296:

> The Court cannot at this stage lay down precise rules as to what is or is not relevant to the issues pleaded. If, however, the documents have a semblance of relevancy, they should be declared producible, leaving it to the trial Judge or the

> Judge hearing the final application to make the determination of relevancy at that time.

[23] The defendant says that Kairos is on a "fishing expedition" and that the documentation it seeks has no relevance or the relevance is too remote. I disagree. The essence of Kairos' claim is that it has not been paid the same as other providers who deliver the same services. The only way for it to be determined if that is the case is for the documentation to be produced. In Choate on Discovery (2d) at p. 3 - 70.2(1), the authors states:

> The broad relevance test applicable to the production of documents is that a party is entitled to discovery of a document or record if it directly or indirectly enables it to advance its own case ... .

In my view, Kairos cannot advance its case at all without production of information from the defendant. It is at the heart of Kairos' claim. Without it, Kairos' claim cannot proceed at all. It is information necessary to fairly dispose of this action. To deny it to Kairos would not be consistent with the spirit of the *Civil Procedure Rules*.

[24] However, Kairos is a Halifax based company and, although its statement of claim says it has provided services to people in "the Halifax Regional Municipality and beyond", there is no evidence before me of what services are provided to persons from outside Halifax County. Exhibit "B" to the Affidavit of Mark D. Tector is entitled "Kairos Community Housing" and lists a number of clients, the level of care of each and "monthly staff supports." The email attaching that list refers to "CSA Central Region Clients supported by Kairos." The "Central Region" is not further explained in any of the material submitted or in the affidavits filed on behalf of the defendant explaining the structure of the Department of Community Services and its governing structure. The Affidavit of Maria Lasheras states in para. 2:

> 2. THAT the Department of Community Services has a de-centralized governance structure with Head Office in Halifax and four (4) Regional Offices in Halifax, Sydney, New Glasgow and Kentville which in turn have district offices ands sub-offices to ensure that services are close to the clients that need them.

She continues in para. 3 to explain record storage in eleven district offices and two sub-offices.

[25] Based upon the information before me, I conclude that the documentation with a semblance of relevance does not include documentation outside the so-called Central Region. The breadth of the production requested by Kairos goes beyond documentation with a semblance of relevance. Documentation with a semblance of relevance would include documentation with respect to those who provide similar services in the Central Region to those provided by Kairos.

[26] The affidavit of Peter Lerette sets out in para. 3 that some residential sites receive block funding. In my view, documentation from these regional rehabilitation centres (RRC) does not have a semblance of relevance to the claim in this case. Nor do services provided to all of the approximately 4,800 individuals referred to in para. 8 of the affidavit of Mildred Colbourne. In her affidavit, Ms. Colbourne says that is the total number of persons with disabilities who are provided services and support . It includes those outside the Central Region as well as those in regional rehabilitation centres.

Burden of Production

[27] The defendant's second submission to the court is that, even if there is a semblance of relevance to some of the documentation (which they deny), it is too costly and time consuming to provide that documentation.

[28] At Tab M to the Tector affidavit is a letter from counsel for the defendant in which she said on May 8, 2007 (at p. 2) that they "are willing to provide information in regard to fees and rates paid to for-profit operators within central region." In a subsequent letter dated June 8, 2007 (Tab O, Tector Affidavit), counsel for the defendant advised of difficulties in gathering the information referred to in her previous letter. Counsel for Kairos wrote to defendant's counsel on July 31, 2007 (Tab Q). He says in that letter:

> .. Initially you *(sic)* client took the position that only the information in relation to for-profit providers in the 'Central Region' was relevant. Subsequently, your client has refused to produce even this limited information.

[29] In the affidavit of Maria Lasheras, referred to above, Ms. Lasheras deposes in para. 10:

> 10. THAT the information requested by the Plaintiff would have to be created and compiled by staff from the Department's Records Management Section and the Finance and Administration Division.

She continues in that paragraph to refer to "locating hundreds of files from for approximately 120 service providers contained in approximately 500+ accounts payable boxes in storage." She then refers to retrieving boxes stored at Iron Mountain at a cost of $25.00 per box for 62 boxes. She then deposes in para. 11:

> 11. THAT we do not have sufficient staff or manpower 'in house' to pull away from their regular duties to dedicate to such a voluminous task ... . Therefore it would be necessary to hire outside staff from a staffing agency ... .

[30] In her affidavit, Ms. Lasheras also raises issues of confidentiality and deposes in para. 14.

> 14. ... the Department would have to review, sever and copy all severed documents to ensure privacy and confidentiality.

[31] In the affidavit of Mildred Colbourne, referred to above, she refers [in paras. 13 through 17 of her affidavit] to cost of production of the requested materials. She says in para. 14:

> 14. THAT the information requested does not exist in an electronic data base nor does it exist in any readily available prepared, summarized or audited financial statements compiled into a financial document that would give the breakdown figures for each and every such service provider in the Program over the time period requested. ...

[32] She then sets out in para. 17 of her affidavit information she has received from Gregory Hodgson, a Financial Analyst with the Services for Persons with Disabilities Program (SPD). She deposes, based upon information she has received from Mr. Hodgson, that it would cost "approximately $105,000.00, exclusive of administrative costs", to provide information from approximately 56 service providers and that it would take "several months to over a year" to complete the task.

[33] In para. 8 of the affidavit of Peter Lerette, referred to above, he deposes:

> 8. THAT throughout the year payment of these invoices is not tallied nor tracked into a data base on site. Instead, short term on site payment records of every single paid invoice for all service providers are filed according to service provider and fiscal year according to our records retention procedures pending removal to long term off-site storage.

[34] Based upon the information contained in these affidavits, the defendant says that it is too costly and time consuming to provide the documentation requested. The defendant relies upon several reported decisions in support of its submission that it should therefore not have to produce the documentation.

[35] In *Air Canada v. West Jet Airlines Ltd.*, [2006] O.J. No. 1797 (Superior Court), Nordheimer, J. said in para. 21 that he was dealing with the issue of "... what is the necessary or reasonable scope of the production of documents in this case." He continued:

> I accept now, as I did on the earlier motion, that it would be unreasonably burdensome on Air Canada to have to produce documentation on each and every aspect of its operations just because of the broad allegations that WestJet makes in its statement of defence. There is, however, a wide gulf between that possible result and the current situation where Air Canada, in this admittedly complex proceeding, has produced in total only slightly more than one thousand documents.

Nordheimer, J. continued in para. 22:

> 22 In my view, it is an overstatement for Air Canada to assert that WestJet is seeking to 'examine in minute detail every aspect of Air Canada's operations.' WestJet's experts have made requests for very specific categories of documents. In addition, WestJet's experts have limited their requests to two years only ...

Nonetheless, he did conclude in para. 23:

> 23 Having said that, I accept that some of the documents that WestJet's experts seek may involve some degree of overreaching.

[36] He expressed the opinion in para. 26:

> I would have thought that the top two or three such markets would be sufficient to address that narrow point. This issue may need to be the subject of further submissions unless counsel can work out an acceptable arrangement.

He then continued in para. 28 to suggest "... there is a further option available to Air Canada by which it can reduce the amount of documentation that it will have to produce under this order." He then gave a suggestion about how the amount of documentation might be reduced, a suggestion which was specific to the nature of that case.

[37] In *Imperial Oil Ltd. v. Nova Scotia Light & Power Co. Ltd.* (1974), 10 N.S.R. (2d) 693 (NSSC, TD), Coffin, J.A. referred to limits on discovery. He said:

> **63** Although Chief Justice Cowan was dealing with another rule his remarks were appropriate to the problem raised in this appeal and I also repeat a brief extract from his decision:
>
> > My disposition is to give a liberal or wide construction to a Rule of this type. On the other hand, unless there are some limits placed upon its application, it can be used in a way which is burdensome, and it is for that reason that Civil Procedure Rule 18.01(2) provides that the Court may limit the number of persons to be examined where it is unnecessary, improper or vexatious. The overriding principle is whether or not a person proposed to be examined has any information with regard to any matter, not privileged, that is relevant to the subject-matter of the proceeding.

[38] The issue in *Imperial Oil* was document production. Coffin, J.A. considered Chief Justice Cowan's remarks with respect to a limitation on discovery to be applicable as well to document production requests.

[39] *Traverse v. Turnbull*, [1996] N.S.J. No. 212 dealt with the issue of who should pay for the cost of production of medical records where they were the records of the plaintiff and she was suing a surgeon as well as a drug company.

The plaintiff had no objection to providing the documentation but did object to the order of the Chambers Judge that she was to pay for the cost of producing the documents requested. A related issue was whether the plaintiff in fact had control of the medical records. Hallett, J.A. said in para. 44:

> 44 In my opinion the primary purpose of Rule 20.01 is to provide the opposite party with the documentary evidence upon which the party filing the list of documents will be relying to prove its claim or defence so as not to take the opposing party by surprise at trial. The ancillary purpose is to facilitate a settlement which is accomplished as each party will know what documentary evidence exists if all documents relating to every matter in question in the proceedings are disclosed.

[40] He also referred to the *Imperial Oil* decision quoted above, saying in para. 45:

> ... Coffin, J.A., in considering the scope of the obligations of a party under Rule 20.01, endorsed the opinion of Chief Justice Cowan that there must be limits on the requirement to produce documents as the Rule, given a broad interpretation, could be used in a way which is burdensome.

[41] In para. 50, Hallett, J.A. summarized the law with respect to production of documents.

> **50** From a review of the cases in other jurisdictions, I have concluded that the rule requires that the party who has possession, custody or control of documents related to every question in issue is to produce those documents at that party's expense; it is the cost of being involved in a law suit. Depending on the outcome of the trial, those disbursements may be recovered as part of an award for costs. However, the case law evidences exceptions to the rule. For example: (i) if a party demands compliance with the rule in a manner that is unjust or burdensome to the party in possession or control of the documents the court may relieve the party of the cost burden of reproduction of the documents (Imperial Oil v. N.S. Light & Power (supra)); (ii) if the cost of obtaining information sought from third parties, that would be of little relevance, the burden may be shifted to the party seeking the information (see statement previously quoted of Kroft J. in Royal Bank of Canada v. Waller); and (iii) if the documents sought are primarily to support the other party's claim or defence a court may decide that the party seeking the documents should pay for the cost of reproduction (Saunders v. Nelson (supra); Beeching Estate v. Beeching (1994, 29 C.P.C. (3d) 242 (Sask. C.A.)).

[42] In determining what is too burdensome for a party to produce, I must have regard to Chief Justice Cowan's caution about limiting document production so that it does not become burdensome because of the broad interpretation of *Rule* 20.01. However, I have concluded above that there is a semblance of relevance to certain documentation and, without any of that documentation, the plaintiff cannot begin to assert its case.

[43] Although Cowan, C.J. cautioned about the burden of document production, the first issue is always the relevance of the documents in question. As Coffin,

J.A. said in *Imperial Oil* in the passage quoted above (para. 63) with respect to discovery:

> The overriding principle is whether or not a person proposed to be examined has any information with regard to any matter, not privileged, that is relevant to the subject-matter of the proceeding.

That overriding principle also applies to the issue of document production. As Hallett, J.A. said in the passage from *Traverse* quoted above, unless there is an exception, the rule is that a party must produce documents relating to every question in issue at its own expense.

[44] It is perfectly clear that these documents, although stored in a disorganized fashion, are within the control of the defendant. I conclude that it is not unduly burdensome in all the circumstances of this case for the defendant to produce the documentation which I have concluded to be relevant. The plaintiff has no other way to obtain documentation which is critical to its case and should not be left without the opportunity to proceed with its lawsuit because of the fashion in which the defendant keeps its records. Nor do I conclude that this is one of those exceptional cases where the party requesting the documentation should pay for its

production. If the records were kept in a different fashion, it would not be difficult to produce them. It is not the fault of the plaintiff that this is not the case.

[45] *Civil Procedure Rule* 1.03, it must be recalled, refers not only to speedy and inexpensive determination of proceedings but also to just determination of proceedings. As Matthews, J.A. said in *Gould Estate v. Edmonds Landscape and Construction Services Ltd.*, [1994] N.S.J. No. 15 in para. 17:

> A patent injustice would result if the information requested is not provided.

[46] In the context of discovery, Matthews, J.A. said in *Coughlan v. Westminer Canada Holdings Ltd.* at pp. 9-10 (QL version):

> A court should not readily stifle that adversarial process, which is one of the fundamental tenets of our judicial system, by restraining the scope of questions at discovery. We must permit issues to be fully explored, argued and presented by the parties. The liberal interpretation of our rules respecting discovery and inspection of documents is based upon such a principle.

He also referred in that passage to documents production. To accede to the defendant's request to dismiss this application would stifle the adversarial process and, in my view, unnecessarily so, in this case.

[47] Some material has already been located as is evident from the affidavit of Mildred Colbourne in para. 15. She deposes that she was advised by Gregory Hodgson that staff were able to complete spreadsheets organized by client/month/year for three organizations in the Central Region, two of which were done for a four year period: April 2003 to March 2007 and one for a three year period: January 2004 to March 2007. That information appears to be readily available and can be produced with little further cost or time involved.

[48] In *Traverse v. Turnbull et al*, *supra*, the party who put the matter in issue had to provide the information and at its own cost. In that case, it was the plaintiff who put her medical history in issue and was required to produce the documentation at her own expense. In this case, the statement of claim raised the issue but the defendant, in its defence in para. 5, referred to the plaintiff as one of several service providers providing services for disabled persons. Therefore, not

only were other service providers referred to in the statement of claim but the services provided by others was put in issue by the defendant in its own defence.

[49] As in *Air Canada, supra*, there may be another option for the defendant to obtain the information required by this decision. The defendant may be able to obtain it more easily from some of the service providers who may have kept their records, which would be smaller in number, in a more accessible fashion than those of the defendant. The possibility that this could occur does not affect the order which will flow from my decision, but it is an option that the defendant may wish to explore.

COSTS

[50] This was a half day application in special time chambers. The successful applicant is entitled to its costs. I conclude that costs are payable forthwith in the amount of $850.00.

Hood, J.