SUPREME COURT OF NOVA SCOTIA

Citation: Canadian Federation of Independent Business v. Morrison, 2008 NSSC 414

Date: 20081216
Docket: Hfx No. 289959
Registry: Halifax

Between:

Canadian Federation of Independent Business

Plaintiff

v.

Bryan Morrison

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	July 30, 2008, in Halifax, Nova Scotia
Oral Decision:	December 16, 2008
Written Decision:	February 16, 2009
Counsel:	Jeff Aucoin, for the plaintiff Bruce W. Evans, for the defendant

By the Court:

[1] This is an application for production of documents under **Rule 20**. The defendant is a former employee of the plaintiff. The action involves a claim by the plaintiff that the defendant, who has moved to a new employer. The plaintiff alleges that the defendant has breached terms of his former employment contract respecting trade secrets and confidential information by disclosing such information to his new employer. The plaintiff maintains that the defendant, in his duties with his new employer, is in competition with it. The parties have exchanged lists of documents but the plaintiff seeks additional documents which they claim has a semblance of relevancy.

[2] **Rule 20.06** of the former **Civil Procedure Rules** 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.
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
>
> (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.

[3] The standard for determining whether a document should be produced is a "semblance of relevance" to a matter in the proceeding: see, e.g., *Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.* (2002), 205 N.S.R. (2d) 97 (S.C.), at para. 5.

[4] The defendant maintains that production of the documents requested would give the plaintiff a competitive advantage in the marketplace. Furthermore, the defendant maintains that the application is in effect a restraint of trade and should not be condoned by the court. The defendant also says there is no basis to say that the defendant is competing with the plaintiff, and that he is in a different type of employment than he was when he was employed by the plaintiff.

[5] The third party (the defendant's employer) is involved because many of the documents are in its control. Although initially the third party did not take issue with producing the documents, after the hearing, counsel for the third party claimed that they should not have to produce documents already in the public domain and secondly, that the plaintiff did not precisely know the nature of the

documents in question, or whether they actually existed. As I have said, initially, the third party agreed to produce these documents, with the exception of item number 19, which were clearly documents in its control.

[6] As noted above, **Rule 20** provides that the court may order the production by any party of any document relating to any matter in issue in the proceeding at such time, place and manner as the court directs. If these documents are in the hands of a third party, that is in the control of individuals or organizations who are not parties to the litigation, the court can still order their production. The **Rule** permits the court to deny an application for production of documents if the court believes that their production is not necessary for the proper disposition of the proceeding or because such an order would be injurious to the public interest.

[7] In *Upham v. You* (1986), 73 N.S.R. (2d) 73; 1986 CarswellNS 84 (S.C.A.D.), Matthews J. said, at para. 27:

> Jones, J.A. said in *C.M.H.C. v. Foundation Co. of Can.* (1982), 54 N.S.R. (2d) 43 at 49 ... :
>
> > Coupled with the requirements under the Rules for complete disclosure and inspection of documents, interrogatories, admissions, notice of experts' reports, and pre-trial conferences, it is apparent that our Rules are designed to ensure the fullest possible disclosure of the facts and issues before trial and thereby avoid the element of surprise. Whereas the former Rules prevented pre-trial disclosure of evidence I think one can now say

> the opposite is true. The object is to avoid surprise, simplify the issues and, hopefully, discourage the need for continued litigation. ...

And at p. 53:

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

[8] The defendant takes the position that this action is in the nature of restraint of trade and is unlikely to succeed at trial. On that basis, the defendant submits that I should not order production of the documents. The argument is not that they do not meet the standard of semblance of relevancy, but rather that the action is fatally flawed. It is not for me to judge the chambers application before me on the basis of what success, if any, of the plaintiff will enjoy at trial. This is not the correct basis upon which to consider this application. Many actions have not succeeded at trial, but this is not a basis upon which to deny an application for production of documents if it is established that these documents have a semblance of relevancy.

[9] The defendant also maintains that in reality, his employment is not similar to his former employment with the plaintiff – that, inf act, the jobs are absolutely different – and that there is no basis to say that the defendant is in any conflict with the plaintiff's business.

[10] I must consider the issues as they are disclosed in the pleadings, including the statement of claim, the defence, answers to interrogatories, if any, and answers to demands for particulars, if any, as well as any discovery evidence. I am not the trial judge. I am making a decision based on a semblance of relevancy and nothing else. It may well be that the defendant will be successful at trial in arguing that the documents are not relevant to the proceedings and therefore may not be admissible.

[11] As to the argument that disclosure of the documents in question will give the plaintiff a competitive advantage, and therefore would be injurious to the public interest, I refer to the decision of Fichaud, J. in *Business Depot Ltd. (c.o.b. Staples) v. 2502731 Nova Scotia Ltd. (c.o.b. Mailboxes Etc.)*, [2004] N.S.J. No. 384 (C.A.) (*Plazacorp*), where he ordered a third party to produce confidential financial information. I see no difference between the documents here and those that Fichaud, J. ordered released. In fact, I would consider the documents in *Plazacorp* more private than the documents in question in this application.

[12] Therefore I order production of the documents requested by the plaintiff in its application, either by the defendant or the third party, as the case may be, based on which has custody and control of the documents. However, documents of a personal or private nature relating to the defendant do not have to be disclosed to the plaintiff, nor any documents that may fall within the solicitor/client privilege. Any documents that are intertwined between clearly personal or private content and material properly subject to production may be redacted. If, upon receipt of such documents, the plaintiff seeks to have the redacted portion reviewed, it may make an application to the court to review them to determine whether they fall inside or outside the scope of **Rule 20**.

[13] The plaintiff/applicant shall have its costs in the amount of $1,000.00, to be paid in the cause.

J.