SUPREME COURT OF NOVA SCOTIA

Citation: MacNeil v. Nova Scotia (Attorney General), 2010 NSSC 138

Date: 20100406
Docket: Hfx. No. 267469
Registry: Halifax

Between:

Wilfred MacNeil

Plaintiff/Applicant

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, the Nova Scotia Teachers Union and the Strait Regional School Board

Defendants/Respondents

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	April 6, 2010 in Halifax, Nova Scotia
Written Decision:	April 16, 2010 *(Written release of oral decision of April 6, 2010)*
Counsel:	**Donald G. Peverill** for the Plaintiff **Dana McKenzie** for the Defendant, Attorney General of Nova Scotia **Peter McLellan**, Q.C. for the Defendant, Strait Regional School Board **Gail Gatchalian** for the Defendant, Nova Scotia Teachers Union

By the Court:

[1] The plaintiff makes a motion asking for three things. The first thing is, of course, now agreed upon by the parties and that is to produce the affiants for cross-examination on the summary judgment motion. The second matter is really the critical one and that is for the production of documents before the summary judgment motion is heard and, if that is successful, to adjourn the summary judgment motion while those documents are being produced.

[2] There is a nice summary of what documents the plaintiff is seeking in the brief of the School Board. I do not think that Mr. Peverill disagreed with its accuracy. The plaintiff is looking for in-camera employment relations sessions of the Strait Regional School Board ("SRSB"), e-mails and correspondence concerning the general authority of the government and its authority over the Strait Board, correspondence between the Minister of Education, the Strait Board and the Nova Scotia Teachers Union ("NSTU"), Mr. MacNeil's personnel file, records of other personnel changes by the SRSB and evidence about the reorganization that resulted in Mr. MacNeil's position being eliminated.

[3] Mr. Peverill is seeking those documents in advance of the summary judgment motions which are scheduled to be heard next week, summary judgment motions which were made by all three defendants. In response, the SRSB says it is not necessary for the plaintiff to have those documents to deal with the summary judgment motion because the greatest part is the jurisdictional issue. If the court has no jurisdiction, it would be contrary to the spirit of the *Rules* which is to provide a just, speedy and inexpensive determination of a proceeding if they had to provide those documents before the summary judgment motion was heard.

[4] The Board also says that the *Rule* contemplates making a motion without all documents having been provided. The Board goes on to say that the plaintiff can respond without the need of having those documents because relevant materials are provided including the *Act*, the collective agreements and the contract with SENCEN and, of course, by looking at the pleadings. Mr. McLellan also went on to say that, if it is necessary, the Board has rebutted the presumption which exists under *Rule 14.08(1).*

[5] The defendant Attorney General of Nova Scotia says that this is a collective agreement matter and *Weber v. Ontario Hydro,* [1995] S.C.J. No. 95 and decisions

following from it apply. Therefore, the summary judgment motion can be resolved by looking at, among other things, the statutory scheme and the collective agreements. The summary judgment motion is available, according to the present *Rule*, after the close of pleadings (*Rule 13.04(6*). If not granted, the court is to consider such things as dates for disclosure and production of documents (*Rule 13.07(1)(c))*. The alternate argument of the Attorney General is that it is unnecessary to provide those documents in any event to deal with the summary judgment motion because it would not be proportionate in relation to the cost and delay involved if they had to be produced, again because they are not relevant to the issues.

[6] The NSTU says that its position on the summary judgment motion is really threefold and it has been set out in paragraphs a, b and c on page 4 of its brief as follows:

> The Union's position in the summary judgment motion is straightforward:
>
> > (a) The Plaintiff claims against the Union for failing to enforce an employment contract he entered into with the third party. The Union is not a party to the employment contract and had no obligation or authority to enforce it.

> (b) The Plaintiff claims against the Union for failing to pursue remedies under the collective agreement in order to enforce the employment contract. The collective agreement did not apply to the Plaintiff's employment under the employment contract.
>
> (c) The Plaintiff claims against the Union for failing to enforce a particular provision of the collective agreement ('the secondment article') to his return to work with the school board when his employment with the third party ended. The secondment article did not apply to the Plaintiff.

The NSTU says this matter can be resolved by the documents which are now provided in the affidavits which are before the court on the summary judgment motion and those which Mr. Peverill seeks on behalf of the plaintiff are not relevant to those issues.

[7] I conclude that the intent of *Rule 13* is that it is not necessary to exchange lists of documents or affidavits of documents before a summary judgment motion is made. It is, of course, necessary that there be sufficient material before the motions judge to make a determination about whether summary judgment should be granted, that is, on a summary judgment motion on evidence. Each case, of course, will require different material. In my view, *Rule 14.08* does not mean that all disclosure must be made before a summary judgment motion can be made. That, in my view, would be inconsistent with the intent and the words of *Rule*

13.04 and, of course, the words of *Rule 13.07* which provide that, if a summary judgment motion is unsuccessful, the court is to discuss, among other things, production and disclosure issues.

[8] Even if the presumption under *Rule 14.08* must be rebutted, I conclude that, in this case, it has been rebutted. The documents sought are not relevant and the cost, burden and time delay of producing them would be inconsistent with the just, speedy and inexpensive determination of the matter. In my view, these documents do not relate to the issues to be determined on the summary judgment motion and the issues on the summary judgment motion raised by the defendants can be resolved, in my view, with the materials provided in the affidavits to which I have already referred. If that motion is unsuccessful or only partially successful, some or all of the documents that the plaintiff seeks may, in fact, be necessary.

[9] I do take note of the fact that one of the issues was resolved favourably only after the motion was brought, i.e. the issue with respect to the cross-examination on the affidavits. For that reason, although I do agree that the defendants who were successful on this motion should have their costs, I will go with the lower end of

the range to offset the fact that there was, in one sense, some success on the part of the applicants. I award each party costs of $300.00 payable forthwith.

Hood, J.