

SUPREME COURT OF NOVA SCOTIA

**Citation: *Annapolis Group Inc. v. Halifax Regional Municipality*, 2019 NSSC
264**

Date: 20190729

Docket: Hfx No. 460474

Registry: Halifax

Between:

Annapolis Group Inc.

Plaintiff/Respondent

v.

Halifax Regional Municipality

Defendant/Applicant

D E C I S I O N

Judge: The Honourable Justice James L. Chipman

Heard: July 29, 2019, in Halifax, Nova Scotia

Oral Decision: July 29, 2019

Written Decision: September 5, 2019

Counsel: Rebecca Jones and Amy Sherrard, for the
Plaintiff/Respondent

Counsel: Martin C. Ward, Q.C. and Michelle Kelly, for the
Defendant/Applicant

By the Court (orally):

OVERVIEW

[1] In this lawsuit, Annapolis Group Inc. (Annapolis) seeks damages against the Halifax Regional Municipality (HRM) for alleged *de facto* expropriation, abuse of public office and unjust enrichment.

[2] The Court file discloses previous production motions brought by HRM before Justice Edwards and by Annapolis before me. As I am the case management judge I am well acquainted with the file. In addition to hearing the earlier motion, I have presided over two case management meetings.

[3] The parties have agreed to a discovery plan and discoveries are scheduled to begin in the fall of this year.

BACKGROUND CONCERNING THIS MOTION

[4] By Notice of Motion filed July 12, 2019 the Defendant/Applicant, HRM, seeks an Order that the Plaintiff/Respondent, Annapolis, produce further relevant documents which they say are within an Annapolis' possession, custody and control. HRM relies on Rules 1.01, 14, 15 and 16. In terms of the evidence they rely on the affidavit of HRM legal services lawyer, Edward J. Murphy, deposed July 11, 2019. HRM also filed a brief, proposed order and book of these authorities: *Baird v. Barkhouse*, 2013 NSSC 425; *Maple Trade Finance Inc. v. Euler Hermes American Credit Indemnity Co.*, 2015 NSSC 37; *Velsoft Training Materials Inc. v. Global Courseware Inc.*, 2012 NSSC 295; *Down Chemical Canada Inc. v. Nova Chemicals Corp*, 2014 ABCA 244; and, *Creaser v. Warren* (1987), 77 NSR (2d) 429.

[5] On July 24, 2019, HRM filed a rebuttal brief and a revised draft order, "reflecting the progress that has been made since the filing of this motion and the remaining outstanding issues". Whereas the original draft order set out 19 items for Annapolis to produce, the revised draft order contemplates production as follows:

1. Annapolis shall confirm in writing by July 31, 2019, that it has searched for and produced all Annapolis records (electronic or physical) held by affiliated entities and relevant to this matter;
2. Annapolis shall provide HRM with a revised Schedule "B" outlining the documents over which it claims privilege by July 31, 2019;

3. Annapolis shall produce all relevant electronic records from the Hamshaw and Glenbourne developments by July 31, 2019;
4. Annapolis shall canvass David Hennigar and Jason Weston for relevant documents by August 15, 2019, and produce all relevant documents (electronic and physical_ by August 31, 2019;
5. Annapolis shall interview former employees Nicholas Betts, Chris Lowe, David Nantes and Richard Landzaat (the “Former Employees”) to determine whether they have possession of physical documents or electronic material relevant to this matter by August 15, 2019;
6. Annapolis shall produce all further relevant documents (including email, texts, paper files, audio files, electronic files) in its possession, custody, and control including all documents held by the Former Employees by August 31, 2019, and provide written confirmation;
7. Annapolis shall provide copies of all relevant records (including email, texts, paper files, audio files, electronic files) possessed by members of its Board of Directors, including correspondence between and from Board Members by August 31, 2019; and
8. Annapolis shall provide a complete Schedule D that describes the records once, but no longer in Annapolis’s control by August 31, 2019.

[6] In oral argument today, HRM confirmed that Annapolis has agreed to furnish items 2, 3, 4, and 7 such that there are four items left for my ruling.

[7] On July 22, Annapolis filed their brief and the affidavits of one of their lawyers, Chloe Boubalos of Lenzer Slaght; President, Archie Hattie, and Vice-President-Chairman, C. Robert Gillis. Annapolis also provided these authorities: *Laushway v. Messervey*, 2014 NSCA 7; and, *Nova Scotia (Attorney General) v. Royal & SunAlliance Insurance Co of Canada*, 2005 NSCA 34. Annapolis also provided copies of *Civil Procedure Rules* 14, 15 and 16.

[8] Late last week it was confirmed through email initiated by my office that the parties would not require cross-examination of the affiants. Today I heard oral argument augmenting the written submissions.

POSITIONS OF THE PARTIES

HRM

[9] At the heart of their motion, HRM says the requested documentary disclosure amounts to *quid pro quo* in respect of what they were ordered to produce a few months ago. HRM has highlighted Rule 16.03(1)(a) and (c) in

asserting that Annapolis has not described any efforts it undertook in compliance with Rule 16.03(1). In HRM's reply brief they state at p. 2:

Annapolis has not described any efforts it undertook pursuant to *Rule* 16.03(1) in the document setting out its search strategy or in any of the subsequent letters with additional information regarding its search efforts. Further, at paragraph 45 of its motion submissions, Annapolis states that "[it] has no obligation under the *Rules* to track down former employees to interview them for the purposes of discovering sources of documents or electronic information". Rather, Annapolis's efforts were confined to conducting custodian interviews of some current employees. As a self-described small closely-held company, it would be reasonably expected that its business (particularly a project of \$120 million dollars) would involve more than Annapolis's four current employees.

[10] HRM goes on to assert that Annapolis has not made sufficient or any efforts to canvass former relevant employees for records. They go on to say that Christopher Lowe, Nicholas Betts, David Nantes and Richard Landzaat must be canvassed for relevant records as follows:

1. Inquire with respect to sources of documents or electronic information, both in Annapolis's possession and in the custodian's possession; and
2. Inquire with respect to records that may be lost or destroyed, and list such records if any in Schedule D.

[11] HRM concludes by stating that a Schedule D must be produced by Annapolis in the event that any of the former employees or other individual holds Annapolis' records but refuses to provide them to Annapolis. They seek costs of \$5,000.00.

Annapolis

[12] By way of response, Annapolis says that much of the relief sought on this motion was already agreed to by Annapolis. They add that much of what they have provided in response to HRM's requests "are more properly matters for discovery". Annapolis notes that with respect to the requested Schedule D, their Affidavit Disclosing Documents of January 15, 2019 confirms that they do not have any documents to list in Schedule D. In the result they ask that the motion be dismissed with costs of \$2,000.00.

LAW

[13] The parties agree that *Rules* 1.01, 14, 15 and 16 govern this motion. Further, HRM and Annapolis have relied on the aforementioned cases, which are applicable to this production motion.

[14] When a party brings a motion such as this the Court should be guided by, among other cases, the direction of our Court of Appeal in *Laushway v. Messervey* and, in particular the 3-step analysis as set out at para. 74 by Justice Saunders:

74 To assist judges in future cases, the 3-step analysis that ought to be conducted when disposing of motions such as this are:

1. Has the moving party satisfied the court that the sought-after information is “electronic information” and therefore subject to a production order under the *Rules*?
2. If so, has the moving party established that the sought-after information, now properly characterized as electronic information is relevant?
3. If so, the moving party is then entitled to the presumption established by Rule 14.08 such that the responding party must then rebut the presumption in order to defeat the request for a production order. When considering whether or not the presumption has been rebutted several Rules offer illustrations of the kinds of criteria which might be considered by the judge – see for example, Rule 14.08(3), (6); 14.12(3), (4); and Rule 16.

ANALYSIS AND DISPOSITION

[15] The critical question to be addressed in today’s motion is whether HRM’s current requests – i.e., the remaining items contemplated in their revised draft order – are within Annapolis’ production obligations pursuant to the aforementioned *Rules* as interpreted by the caselaw and our Court of Appeal.

[16] In answering this question I have carefully reviewed the uncontested evidence on this motion; namely, the four affidavits, inclusive of their voluminous exhibits. I have done so with the added benefit of being the case management judge. As case management judge, I have previous involvement which has given me helpful context to assess the current motion. It is through this lens that I have evaluated the competing positions on this motion and come to the overriding conclusion that Annapolis has fulfilled its production obligations and is in compliance with the *Civil Procedure Rules*.

[17] In particular, I have determined that Annapolis' counsel's very detailed letters of March 25, May 10, June 17 and July 9 addressed to HRM's counsel provide for an extensive, thorough and complete discovery search process. Through these letters, Annapolis specifically confirmed as follows:

- (a) custodian interviews were performed with Archie Hattie, Rob Gillis, Mike Laycock, and Soori Sooriyakumuran (the "Primary Custodians"). The Primary Custodians were the key individuals involved in the matters at issue in this litigation that remained with Annapolis in early 2017 when production efforts commenced;
- (b) searches were conducted, and all relevant non-privileged documents in Annapolis's possession or control were produced. Specifically, Annapolis's entire data from EnviroSystems on the EV Hard Drive was searched using keywords and relevant documents were produced, including documents created by those former Annapolis employees and third party consultants identified by HRM in the present motion.
- (c) Annapolis collected additional data from EnviroSystems (in addition to the EV Hard Drive data) which included user folders, exchange e-mail accounts and groupwise e-mail accounts. The data recovered was from the following individuals, all of which was searched with keywords and relevant non-privileged documents were produced:
 - (i) Archie Hattie;
 - (ii) Mike Laycock;
 - (iii) Soori Sorriyamukaran;
 - (iv) Chris Lowe;
 - (v) Doug Morton; and
 - (vi) Rob Gillis.
- (d) all potential sources of Annapolis data had been canvassed for relevant records and those records had been produced;
- (e) Annapolis is not aware of any specific relevant document that would fall under a Schedule D and has already delivered a Schedule D confirming same.

[18] In the result, I am not satisfied that HRM's remaining requests (as set out in their latest draft order) are reasonable or necessary. Indeed, they do not fall within the scope of Annapolis' production obligations.

[19] With respect to the requested documents said to perhaps be in the possession of former Annapolis employees, I am satisfied that they have been produced. For example, Mr. Gillis says this at para. 13 of his affidavit:

13. To the best of my knowledge, all relevant, non-privileged documents involving the former employees and consultants listed above that are within Annapolis's possession or control have been produced.

[20] Given the aforementioned four letters, I am satisfied that this is not a hollow statement. I note Mr. Gillis (like the rest of the affiants) was not cross-examined.

[21] As for the documents that may be in the possession of affiliated companies, based on the evidence, I am satisfied there are no documents from affiliated companies which Annapolis controls. In this regard, I am mindful of the comments of the Alberta Court of Appeal in *Plas-Tex Canada Ltd et al v Dow Chemical of Canada Limited*, 2004 ABCA 309, and what constitutes control. It is clear that Annapolis has not placed the management or operations of its business in the hands of any related company or entity. I say this having had the benefit of reading Mr. Gillis' detailed affidavit describing Annapolis' corporate structure at paras. 17 – 33.

[22] I will not step through each of the remaining production requests in a line by line fashion. Rather, I will repeat that having reviewed the totality of the evidence on this application that I am of the emphatic view that Annapolis has fulfilled their end of the discovery plan and are within compliance of Rules 14, 15 and 16. In my view, the four letters offer a very detailed effort to explain the steps that Annapolis' counsel have gone through in producing the documents within their client's control. The production process will always leave lingering questions and I dare say suspicions. At some point it behooves counsel to stop with the endless requests and move forward with the discovery of relevant individuals. I know from the case management calls that there will be voluminous discoveries of more than a designated manager from each side. To the extent that there are any problems with production – on both sides – this can be further explored.

[23] Having considered Rule 1.01 and proportionality (as articulated by the Supreme Court of Canada in *Hrynich v. Mauldin*, [2014] 1 SCR 87), I regard this second production motion by HRM to have been unnecessary. For the reasons outlined I hereby dismiss the motion with costs of \$2,000.00 to Annapolis.

Chipman, J.