SUPREME COURT OF NOVA SCOTIA
Citation: *Henderson v. Quinn*, 2020 NSSC 299

Date: 20201023
Docket: AMH 460159
Registry: Amherst

Between:

Patrick Henderson, Mark W. Scales. Nicola J. Scales, Richard King, Sheila King, Timothy King, Cherie Marshall, Vicki Hallett, Jo Ann Hatfield, Edith Leadbetter, Allan Mills, Donald Quinn, Kelly Quinn, Shelley Dow, Deborah Woods Richard Porter, Nikole McCormick, James Wissman, Lynn Wissman, Carol Brown, James Yorke, Joan Andrusaitis, David Redfield, Carol Redfield, Stephen Schrempf, Mary Schrempf, John Campbell, Karen Campbell, Kevin McCormick, M. Gail McCormick, Dephine Davies, Gardiner Patterson, James Best, Donna Best, Danny Best, Heather Best, Jimmy-Lee Best, Natasha Kyte, Owen Wood, Michael Henderson, Gwendolyn Henderson, Kevin Yorke and Eric Yorke

Plaintiffs

v.

Jacqueline Quinn, William Quinn,
Bruce W. Graham, and G. Malcolm Graham

Defendants

Judge: The Honourable Justice D. Timothy Gabriel

Heard: October 8, 2020, in Truro, Nova Scotia

Counsel: Douglas B. Shatford Q.C., for the Plaintiffs
Paul G. Wadden, for the Defendants

By the Court:

[1] This motion is brought by the Defendants for disclosure pursuant to *Civil Procedure Rule* 18. What is sought is set forth in the Notice of Motion to the following effect:

> Motion
>
> Jacqueline Quinn and William Quinn, the Defendants in this proceeding move for an order:
>
> • Directing compliance with Rule 18.16(6) compelling the Plaintiffs to provide to the defendants outstanding and inappropriately refused discovery undertakings, namely:
>
> • For the Plaintiff Richard King:
>
> • To provide a list of names of the people, other than the Plaintiffs, who attended the group meetings;
>
> • To provide a copy of the email distribution list, as well as all related emails pertaining to the group meetings;
>
> • For the Plaintiff Gail McCormick:
>
> • To provide a list of the individuals, beyond the named parties involved in the present litigation, who were included in the email distribution list for the purpose of organizing initial meetings;
>
> • For the Plaintiff Cherie Marshall:
>
> • To provide the names of the individuals that are included in the email distribution list;
>
> • For the Plaintiff Kevin McCormick:
>
> • To provide the names of the individuals who were included in the group email distribution list, related to organizing the initial meetings;
>
> • For the Plaintiff Edith Leadbetter:
>
> • To provide a copy of email correspondence between the witness and any individuals involved in organizing group meetings;
>
> • For the Plaintiff Shelley Dowe:
>
> • To search for and provide a copy of any and all existing emails that the witness may have, that relate to planning the initial meeting;
>
> • To confirm the date that construction on the witness's current home was completed
>
> • For the Plaintiff James Yorke:

> • To provide a copy of any and all emails that were sent to the witness from Gail McCormick that relate to the group meetings, and to additionally provide a list of all the email recipients;
>
> • To provide a copy of any and all emails that the witness received prior to retaining counsel, and to additionally provide a list of the email recipients;
>
> • For the Plaintiff Joan Andrusaitis:
>
> • To search for and provide a copy of any and all existing emails that the witness received, prior to retaining counsel, that relate to organizing plaintiff meetings. To additionally provide a list of the email recipients;
>
> • To provide a copy of any and all emails that the witness has received from Gail McCormick, excluding those covered by solicitor-client privilege;
>
> • To identify on the property survey map, the path that the witness is claiming as a prescriptive right of way;
>
> • To identify on the property survey map, the area that the witness is claiming as a public road;
>
> • For the Plaintiff Timothy King:
>
> • To identify on the property survey map, the location of the Durant Road and provide a copy to his counsel;
>
> • For costs of this motion.

[2] Other than the information sought from the latter three Plaintiffs, which each has subsequently either already provided, or they have now agreed to provide, the motion is dismissed.

Background

[3] The parties to this action are landowners in Greenhill, Nova Scotia. The Defendants purchased their property in 2015, and blocked the use of that portion of the Old Farm Road which passes over their property, as a means of access to the Clarke Head beach. As a consequence, the Plaintiffs commenced these proceedings in February 2017. They have claimed the right to use the old Farm Road as a means of access to the beach.

[4] In *Henderson et al v. Quinn et al*, 2019 NSSC 190, Justice Arnold granted the Plaintiffs' motion for interlocutory injunctive relief, and restrained the Defendants from interfering with the Plaintiffs' use of the Old Farm Road to access the beach.

The Defendants were also directed to remove obstructions at their expense, pending the final disposition of these proceedings.

[5] Discovery of many of the parties has now taken place. Reference has been made (by almost all) to some preliminary meetings organized by one or more of the Plaintiffs (approximately four years ago) prior to the retention of counsel in this matter. At these meetings, the possibility of the necessity of litigation to resolve the impasse with the Defendants was discussed.

[6] One of the Plaintiffs (Mr. Richard King) had convened the initial meeting. The Defendants know the subject matter which was addressed at it because they have been provided with Mr. King's (handwritten) opening remarks to those that attended. These remarks (transcribed) follow:

> Good evening neighbors, friends, and interested people. Welcome to our cottage here at 22 Delbert Road.
>
> We are here to find a amical solution with last resort a legal action. We are here this evening to considerations that we may or may not have for access to the Beach at the Point on Clarks Head.
>
> A gathering like we have here tonight can pose problems and negative or positive, personal and legal implications, those we must conduct the meeting in a proper controlled manner.
>
> In order to have a good productive meeting my wife and I are going to lay down some house rules witch [sic] we hope will protect us and you our friends from any malicious or legal actions.
>
> 1. We are her to only discuss facts, not hearsay such as, he said, she said or I think they …
> 2. We are not here in any way to attack personally the character or personalities of the present or past land owners, families, or friends. We do not want you to use their names in any way but we will refer to them if necessary as the land owners of the access traveled way in question.
> 3. We do not nor will we ever support any wilful verbal or malicious actions taken by individuals, or groups of individuals, against the land owners.
> 4. When the chairman of this meeting calls the meeting to order we ask that there be absolutely no side conversations go on, please address the chair if you wish to speak and not other individuals.
> 5. When the chairman gives opportunity to speak please keep it as short as possible and on the subject so all that wish to speak will have the opportunity.

> 6. If anyone is deemed to be out of order they will be asked to refrain from their speech or action and if necessary asked to leave the meeting and premise.
> 7. For any that feel that they must have a smoke we request you to do so outside and away from open doors and windows.
> 8. We ask everyone to sign the attendance sheets. Please print your name, sign and fill in address and phone number.
>
> My wife and I are very grateful to those who have dropped in to share their heartfelt loving advice with us leading up to this meeting.
>
> (*Paul Wadden Affidavit, September 23, 2020, Tab "M")*

[7] Many of the attendees at this meeting, and those meetings that followed (prior to the retention of counsel) became Plaintiffs in this Action. Not all of them did, though. Some people were given an invitation to one or more of these meetings, never attended any or some of them, and never became Plaintiffs either.

[8] An issue has arisen between the parties because of the Plaintiffs' refusal to provide the names and contact information with respect to those people who did attend some or all of the meetings, but for whatever reason declined to participate as Plaintiffs in these proceedings. Similarly, a request for production of the list of those people (non-Plaintiffs) to whom notice(s) of the meeting(s) was/were provided, who never attended any of them, and their contact information, has also been refused by the Plaintiffs.

[9] The information sought by the Defendants defines the issues to be considered. First however, I will discuss briefly the applicable *Rule* and the effect of the authorities which have interpreted them.

***Civil Procedure Rules* 18.13 and 18.18**

[10] *Civil Procedure Rule* 18.13 reads as follows:

> 18.13(1) A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.
>
> (2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.
>
> (3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.

> (4) A party who withholds privileged information but decides to waive the privilege must disclose the information to each party and submit to discovery if required by another party.
>
> (5) An expert retained by a party is not subject to discovery, except as permitted under Rule 55 - Expert Opinion.

[11] This is augmented by *Rule* 18.16(6):

> 18.16(6) A party who undertakes to do anything in the course of a discovery must perform the undertaking no more than sixty days after the day the undertaking is made, unless the parties agree or a judge directs otherwise.

[12] Finally, *Civil Procedure Rule* 18.18 provides:

> 18.18(1) A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other thing referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:
>
> (a) the document, information, or thing is not in the control of the witness;
>
> (b) it is not relevant and is not likely to lead to relevant evidence;
>
> (c) it is privileged.
>
> (2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.
>
> (3) A party who requires production or access before the party completes examination of a witness at discovery may adjourn the discovery.
>
> (4) A judge may relieve a party or a non-party witness from a requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 - Disclosure and Discovery in General.

[13] Use of the words "relevant" and "relevancy" is important. Both refer to trial relevance. This is made explicit by *Civil Procedure Rule* 14:

> 14.01(1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or

> hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[14] Cumulatively, those portions of *Civil Procedure Rules* 14 and 18 referenced above displace the "semblance of relevancy" test which was employed in the authorities that had interpreted the predecessor to the current *Civil Procedure Rule* 18. The implications of this were discussed in *Brown v. Cape Breton (Municipality)*, 2011 NSCA 32, in which Bryson, JA observed:

> 12. The *Rule* requires the Chambers judge to decide relevancy as if he or she were entertaining a request for evidence at trial. In *Murphy v. Lawton's Drug Stores Ltd*., 2010 NSSC 289, Justice LeBlanc discusses at some length the meaning of "relevant evidence". In *Murphy* and *Saturley*, Justices LeBlanc and Moir conclude that the "semblance of relevancy" test has been displaced. I agree. However, the consequence is that judges have to determine relevancy long before trial, without the forensic advantages of the trial judge. This is thought to be the price of reducing litigation cost. As Justice Moir observes in *Saturley*, we have to ask a Chambers judge to assume the vantage point of the trial judge, "imperfectly constructed though it may be" (*Saturley*, para. 45). It remains to be seen whether this effort to save resources will be frustrated by the time and expense of extensive evidence on such motions in order to reproduce "the vantage point of the trial judge." And of course any such ruling is not binding on the trial or application judge: *Rule* 14.01(2). In any event, I agree with Justice Moir's comments at para. 46 of *Saturley* that:
>
> > [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
> >
> > > *The semblance of relevancy test for disclosure and discovery has been abolished.
> > >
> > > *<u>The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed</u>.
> > >
> > > *The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made

> according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
>
> *Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [Emphasis added]

[15] In *Laushway v. Messervy*, 2014 NSCA 7, Saunders, JA expanded upon this:

> 49. The observations of Wood, J. in a subsequent decision in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 are also instructive. In particular, I agree with Justice Wood's comments at para.9-10 where he said::
>
> > [9] In my view, the Court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than it might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
> >
> > [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.
> >
> > [Emphasis added]

[16] He continued:

> 86. If it would assist trial judges in the exercise of their discretion when considering whether or not to grant production orders in cases like this one, let me suggest that their inquiry might focus on the following questions. They would supplement the guidance already contained in the *Rules*. The list I have prepared is by no means static and is not intended to be exhaustive. No doubt the points I have included will be refined and improved over time, and adjusted to suit the circumstances of any given case:
>
> 1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
> 2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled

> disclosure; whereas a distant connection would weigh against its forced production;
>
> 3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
> 4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
> 5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
> 6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
> 7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
> 8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
> 9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?
> 10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the *Rules* which is to ensure the just, speedy and inexpensive determination of every proceeding?
>
> 87. It goes without saying that some of these same points may arise at trial when the judge may again be faced with challenges related to the relevance and reliability of the evidence. It is hoped that these suggested points for inquiry will enable trial judges to take a flexible approach when fashioning production orders containing terms and conditions which will best suit the circumstances of any given case.
>
> [Emphasis added]

[17] Justice Gogan's comments in *Hatfield v. Intact Insurance Co.*, 2014 NSSC 232, must also be kept in mind:

> 37. Confidentiality, sensitivity, privacy or lack of consent are not sufficient grounds, in and of themselves, to rebut the presumption of full disclosure. The general rule is that all relevant documents must be disclosed in a civil proceeding so long as they are not covered by privilege.

[Emphasis added]

[18] With the above principles in mind, I now return to the specific information with which the Court is being asked to deal.

Analysis

Other than the Plaintiffs, the names of attendees, and the list of those to whom notice was provided, of the meetings.

[19] The above heading subsumes a number of related requests made of Mr. Thomas King and others at discovery. For example, Mr. King was asked to provide copies of any sign-up sheets relating to the meetings of the Plaintiffs that he is able to locate, to provide a copy of any minutes of the meetings that are available ("subject to review relating to instructions to counsel and privilege") and to provide a copy of the distribution list for emails that were sent to organize meetings ("subject to review relating to instructions to counsel and privilege") and to provide a list of people, other than the Plaintiffs, who attended the group meetings. (*Affidavit, Paul Wadden, September 23, 2020, Tab "A", pp. 6-7*)

[20] Counsel was present, and in each case it is fair to say that Mr. King agreed to use his best efforts to obtain and provide the information requested. Those instances above where the qualifier was added (to the effect that provision of the information requested would be "subject to review" with counsel) have been noted.

A. Did Thomas King undertake (unconditionally) at discovery to provide all or some of this information?

[21] He did not. While it is true that he did not repeat (or his counsel did not repeat) the phrase after every request was made of him, the clear tenor of his answers was to the effect that all of the information related to this line of inquiry was subject to review with his counsel post-discovery.

[22] It is important to consider the context of these questions. For example, the following:

> Q: Okay. **Now, I'm going to take you back to the very beginning of our chat this morning about the meeting that you had**.
>
> A: Yes.
>
> Q: Was Bruce Graham ever at those meetings?
> A: No.

Q: No. Was anybody else other than the Plaintiffs at those meetings?

A: There were a few that didn't become Plaintiffs.

Q: Okay. Who were they?

A: I can't list off names, just because I can't remember all of them.

Q: You can't remember them. Could I get you to undertake to – if you remember them, to provide us with a list of those names? [u]

A: Yeah

Q: Okay. Thank you.

A: If we can come up with the attendance list that I told you, their names would be on it but – because we had everybody sign as much I can imagine. And a lot of those records – I've got to look and make sure what I've got, but a lot of those records would have been turned over to Dan Best and Mark Scales.

But I might be able to go back to the lady that was keeping the minutes and see if she had any copies of that too. But when they took over I turned everything over, and I had to do that due to health reasons.

[Emphasis added]

(*Paul Wadden Affidavit, September 23, 2020, Tab "A", p. 76 (lines 11 -25) - p. 77 (lines 1 – 10))*

[23] It is clear that "... the very beginning of our chat this morning about the meetings..." refers to the line of questioning that appears to begin the bottom of page 11 and culminated in some "undertakings" that were rendered by Mr. King on pages 16 – 17 of the transcript.

[24] The exchange begins with the question, "how many meetings have you as a group of Plaintiffs had since the start of this litigation?" It continues on page 12 of the transcript as such:

A: Since the starting of the litigation?

Q: Yeah. Well, let's say 2016.

A: 2016. I can't state a number on that.

Q: Okay. Would you say that it was more or less than five?

A: More.

Q: More. Would you say it was more or less than ten?

A: More.

Q: More. Would you say it's more or less than 15?

A: I'd say it could be more, yes.

Q: Okay. More or less than 20?

A: I'd say between 15 and 20 someplace maybe.

Q: Okay. Who's organizing these meetings?

A: In the first place, for the first few meetings, I was involved in organizing it.

Q: Along with who?
A: Along with – do you want names or –

Q: Yes, please.

A: Yeah. There was – there'd be Pat Henderson, there was Jack Campbell, there was the Yorkes, being Joan Yorke and Jim Yorke, and there were – I'm trying to think of the ones on the hill up there that was -- oh, there was Edie Leadbetter, I believe the last name is.

(*Paul Wadden Affidavit, September 23, 2020, Tab "A", p. 12 (lines 3 -25) – p. 13 (lines 1 -4))*

[25] Mr. King was then asked about the organization of the initial meeting and responded, in part:

A: The initial meeting was organized – there were a lot of questions being asked by a lot of neighbours and people from town and so on, being people that fished and all that type of thing down there, and so they were saying, "What are we going to do, what are we going to do?", and finally I said, "Listen, the best way I can think is let's sit down and talk about it." And so we said, "You are welcome to come over to our cottage and we'd have a discussion."

(*Paul Wadden Affidavit, September 23, 2020, Tab "A", p. 13, lines 11 -19)*

[26] All of this led to the following exchange at pages 16 – 17 of the transcript:

Q: Okay. Was there a sign-in sheet at these meetings?

A: There were sign-up sheets at this – these meetings. Well, there were – originally, I believe, there were some. Referring to who was attending, you mean?

Q: Yes, that's right.

A: I'd have to double check that.

Q: I'll get you to undertake to double check on the existence of these sign-up sheets, and if they do exist then to provide us with those sign-up sheets. [u]

A: Yeah.

Q: Were minutes taken during these meetings?

A: Yes.

> Q: Okay. I'm going to get you to undertake to provide us with a copy of those minutes for each of the meetings. [u]
>
> A: Yes. In those ---
>
> MR. FARRELL: So, we're going to have to make sure that those don't involve instructions to counsel.
>
> MR. WADDEN: Of course, and any ---
>
> MR. FARRELL: And they'll be subject, I guess, to review by counsel for anything that's privileged.
>
> MR. WADDEN: Yes.
>
> (*Paul Wadden Affidavit, September 23, 2020, Tab "A", p. 16 (lines 9 – 25) – p. 17 (line 1 -8))*
>
> [Emphasis added]

[27] A related request follows:

> Q: Now, I want to go back to how these meetings were organized. Did you communicate by way of email with the other Plaintiffs?
>
> A: I didn't do a lot of email, because I'm not a computer person.
>
> Q: Were you involved in any email lists?
>
> A: Yes.
>
> Q: Were anything emailed to you?
>
> A: Yes, it was.
>
> Q: Were these group emails sent to you?
> A: Yes.
>
> Q: Okay. Could I get you to undertake to provide us with the email distribution list of who was sent these emails and all of the emails as well. [u]
>
> MR. FARRELL: Once again, those will be subject to review for information that might be instruction to counsel or any other privileged information.
>
> MR. WADDEN: Of course.
>
> (*Paul Wadden Affidavit, September 23, 2020, Tab "A" p. 17 (lines 14 -25) – p. 18 lines 1 -6))*
>
> [Emphasis added]

[28] While this is not exhaustive, the foregoing contextualizes the circumstances under which the requests were made of Mr. King and the responses that he provided. It is not necessary that he repeat, or that counsel repeat, after every related request

that was made of him, the qualifier that provision of the information is subject to review with his counsel. This was made clear at the outset of the discussion of the subject matter to which each of the "undertakings" that are in issue relate.

[29] As a consequence, *Civil Procedure Rule* 18.16(6) has no application. He has reviewed (post-discovery) the information that is being sought with counsel, and counsel has taken the position that the requested information is not going to be provided primarily because it is not relevant, and infringes the privacy interests of the attendees who have chosen not to participate in this litigation. The Plaintiffs' secondary position is that, if the Court should nonetheless determine that it is relevant, it is privileged. All of the other witnesses of whom the same or similar requests were made at discovery refused to provide this information when it was requested of them.

B. Notwithstanding the above, should the Plaintiffs be directed to provide the information requested because it is relevant and not protected by privilege?

Relevance

[30] In my view, this factor is dispositive. The Defendants' motion fails because they have not shown that the information sought is relevant. I will explain.

[31] Relevance is the engine that drives the discovery process. If the moving party establishes that the information is relevant, then the presumption is that it must be disclosed. The onus then shifts to the party of whom the information has been requested to establish that it is privileged and ought not to be disclosed.

[32] Recall that *Civil Procedure Rule* 14.01(1) tells us that the appropriate vantage from which to interpret "relevance" is to assess "...whether a Judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant". I must try to construct that "vantage" as best I can in the circumstances (per *Brown, supra*, para. 12). The foundation of that construction, as imperfect as it may be at present, will consist of the pleadings and evidence known to me as I make this ruling.

[33] Recall further that this is an action whereby the Plaintiffs claim entitlement to use the Old Farm Road either on the basis that it continues to be a public road as it crosses the Defendants' property, or because they have established a prescriptive right to do so.

[34] The Defendants submit:

> The overarching theme of the outstanding and refused undertaking sought in this motion involve an email list, showing the individuals who are involved in this litigation, including individuals not named as Plaintiffs. The basis for refusing to provide this information, as set out Mr. King second response to undertakings (Exhibit "L") is that the contact information and the names of individuals are "confidential", and cannot be provided without their consent or court order. There is no assertion by the Plaintiffs that these emails with the names of individuals are covered by any type of recognized privilege or are not relevant to these proceedings. (*Defendants' brief, p. 6*)

[35] With respect, it is certainly correct to say that Mr. King did claim that the list of individuals who attended the meetings, as well as those to whom invitations were extended (but who decided not to participate in this proceeding) is confidential. It is also correct to argue that privacy interests must yield to the right of the participants to this litigation to possess information relevant to it, unless that information can be shown to be privileged.

[36] However, counsel for the Plaintiffs has argued that this information is simply not relevant, and that the disclosure/discovery provisions of *Civil Procedure Rule* 18 are not triggered as a result.

[37] The only information provided about those individuals (attendees, and those who were invited via email list to attend the meeting(s) and did not do so) is either that they are not Plaintiffs, and did not want to be, or that they did not even bother to attend some or any of the meetings to which they were invited.

[38] True, there is reference made to a "couple from Parrsboro" at one point (*Leadbetter discovery, Wadden Affidavit, Tab "E", p. 12*) who the deponent described as, to her knowledge, "...friends of the Quinns". They told the organizers that they were not interested in participating in the action. It is also true that Mr. Richard King, in an excerpt from his discovery evidence earlier quoted herein, did vaguely refer to some general characteristics of the people who were invited to attend the meetings (*at p.13*).

[39] However, simply put, there has not been enough presented by the Defendants to show that people on this list of either non-Plaintiff attendees, or non-attendees, are in possession of information that is either relevant, or likely to lead to the discovery of relevant information. The Defendants argue that they are entitled to know who may be called as witnesses by the Plaintiffs against them. The Plaintiffs, in the oral submissions of their counsel and in his brief, have undertaken to provide a list of their witnesses to the Defendants in short order.

[40] The Defendants further argue:

> The discovery evidence makes it clear that these individuals have been participating in the discussions about this action, and there is a distinct possibility that these individuals may have evidence that informs the claim of a public right-of-way. Therefore, these emails and the recipients of same are relevant to the proceedings. (*Defendants' brief, p.7*)
>
> [Emphasis added]

[41] With respect, the onus is upon the Defendants to show that the very sensitive information that has been requested will likely lead to the discovery of relevant evidence. Merely to say that there is a "distinct possibility" that it will do so is to admit the corollary: there is a "distinct possibility" that it will not. Such a thesis/antithesis is the hallmark of a fishing expedition.

[42] To state the obvious, many of the people to whom the sought after emails, contact information, and attendance lists relate, may have chosen not to participate as Plaintiffs simply because they felt they do not have an interest in doing so, or that they do not have anything to add, or because they have no knowledge that would be of assistance in moving the claim forward. Some may have simply attended the meetings (or some of them) because they are family, friends, or well-wishers of the Plaintiffs (or Defendants, for that matter). And some may have attended, or received invitations to attend and chose not to, who have relevant information. But whether they are possessed of relevant information, and if so, of what it consists, is purely speculative.

[43] This is to be distinguished from a situation in which another witness testified (for example) at discovery, or a document was discovered, which revealed the name of another individual who was seen or heard to say or do something that could be shown to be relevant to the issues that will be canvassed at trial. The contact information with respect to that individual would, in such an event, be subject to disclosure, as it could be shown that this information was likely to lead to relevant evidence.

[44] The Defendants have not shown a connection between the name and/or contact information of people who are not parties, whose only involvement may have been to attend a preliminary meeting or two, or to have been sent an invitation to one or more of them (and chosen not to attend any) and the likelihood of uncovering relevant evidence. Essentially, they ask that the Court direct that their

names and contact information be disclosed to the Defendants so that they may be contacted by the Defendants to find out if they do have any relevant information.

[45] There is simply not enough before the Court to establish relevance and override the clear privacy interests that these people have in their identities and contact information.

[46] The situation, however, is fluid. For example, Plaintiffs' counsel has indicated:

> ... I can indicate to the court that I received from Plaintiff, James Yorke, a series of emails from the period in question which would satisfy for all of the named Plaintiffs the emails, the names of the parties and the distribution list in relation to those emails. I'm prepared to provide this to the defendants but to redact from those emails the email addresses and names of the individuals who specifically indicated that they do not wish to have their name and email address given to the Defendants.

[47] Should this disclosure, or any further disclosure, provide the Defendants with the aforementioned "relevance link" which they presently lack, this motion could be revisited.

Privilege

[48] In light of my conclusion that the information sought has not been shown to be relevant, I do not need to deal with the issue of privilege.

Conclusion

[49] With respect to the information requested by the Defendants relating to Joan Andrusaitis and Shelley Dow, I have been advised by the parties that this has been provided. That of James Yorke has just been discussed above.

[50] With respect to the information sought from Mr. Timothy King, Plaintiffs' counsel has indicated that he is it in agreement that it should be produced and he has requested it from Mr. King (who resides in the United States). He is confident that he will be in receipt of it shortly, and he will produce it to the counsel for the Defendants when he receives it.

[51] Finally, with respect to all other information that the Defendants have requested this Court to compel various individual Plaintiffs to provide, their motion is denied.

Costs

[52] Costs ordinarily follow the event. The Plaintiffs have been substantially successful in resisting the Defendants' motion. That said, they did not file their brief until the day before the motion was to be heard, and extremely late in the day at that. So much so that I would have granted counsel for the Defendants an adjournment of this motion (with costs) had one been requested. Although Mr. Wadden did advert to the difficulty that the Plaintiffs' late filing had caused with respect to the preparation of his argument, he did not wish for the matter to be adjourned. He also declined the opportunity extended to him to provide further written submissions to the Court, post hearing, dealing with arguments in the Plaintiffs' brief (if any) that he had not anticipated.

[53] Mr. Shatford did not offer explanation to the Court as to why his brief was so exceedingly late. Court time was expended and court inquiries were necessary before it was filed.

[54] Under the circumstances, I decline to make a costs award.

Gabriel, J.