SUPREME COURT OF NOVA SCOTIA
Citation: *Fraser v. MacIntosh*, 2024 NSSC 184

Date: 20240702
Docket: 522091
Registry: Halifax

Between:

Donn Fraser, and DLF Law Practice Incorporated, a body corporate

Plaintiff

v.

Bruce Tait MacIntosh

Defendant

DECISION ON DISCLOSURE OF DOCUMENTS

Judge: The Honourable Justice Scott C. Norton

Heard: June 18, 2024, in Halifax, Nova Scotia

Decision: July 2, 2024

Counsel: Donn Fraser, self-represented
DLF Law Practice Incorporated, on its own behalf by its officer Donn Fraser
Bruce Tait MacIntosh, KC, self-represented

By the Court:

Introduction

[1] The Plaintiff moves for an order requiring the Defendant to produce a new and complete Affidavit Disclosing Documents ("ADD") that complies with all the *Civil Procedure Rules* and that contains additional disclosure.

[2] In the underlying proceeding, the causes of action claimed in the existing Second Amended Statement of Claim include breach of fiduciary duty, defamation, inducement or encouragement of contractual breach, interference with contractual or economic relationships, and the civil tort of conspiracy.

[3] This motion comes before me as the judge assigned to case manage this proceeding.

[4] The Plaintiffs' motion raises the following issues:

1. Does the Schedule "A" to the Defendant's ADD comply with the Rules?
2. Did the Defendant improperly redact or exclude relevant evidence from the productions?
3. Should the Defendant be ordered to make additional production?
4. Should the Defendant be ordered to provide the Plaintiff with exact copies of documents filed with the court?

Analysis

1. *Does the Schedule "A" to the Defendant's ADD comply with the Rules*?

[5] I find no valid objection to the form of Schedule "A" to the ADD filed by the Defendant.

[6] Neither party filed with the Court a copy of the impugned ADD. Mr. MacIntosh briefly passed up a copy to me at the hearing to show how the documents were attached. The copy was not exhibited or kept by me. It agreed during submissions that the parties had discussed and agreed that Mr. MacIntosh would provide Mr. Fraser with a copy of the ADD on a portable hard drive. The documents

produced with the ADD were PDF copies of emails and text messages. Below is a copy of the Schedule "A" produced by the Defendant in this proceeding:

Tab 3 36-80	Feb 26/20-Apr 13/23	Texts between DF & Bruce T. MacIntosh (BTM)
Tab 4 81-104	Apr 1/19-Apr 19/21	Texts between Julie MacPhee (JM) & BTM
Tab 5 105-108	Feb 18/21-May 4/21	Texts between Joel Sellers (JS) & BTM
Tab 6 109-113 114 missing	Jan 29/21-Mar 11/21	Texts between Sarah MacIntosh (SJM) & BTM
Tab 7 115-260	Mar 11/19-July24/23	Various email exchanges between and amongst DF, BTM, JM, SJM & other MacMac&Mac personnel
Tab 8 261-297	Mar 25/20-May 13/21	Various inter-office and client email exchanges re MacMac&Mac client [redacted] (client identity confidential) [client identifying information redacted]
Tab 9 298-359	Apr 11/19-Apr 20/21	Various inter-office and client exchanges re MacMac&Mac client [redacted] (client identity confidential) [client identifying information redacted]
Tab 10 360-375	Jan. 21/12 to Sept 21/14	Various inter-office and client exchanges re MacMac&Mac client [redacted] (client identity confidential) [client identifying information redacted]

[7] The *Rules* state that making full disclosure of relevant documents, electronic information and other things is presumed to be necessary for justice in a proceeding (14.08(1)). What is relevant is defined by *Rule* 14.01: relevance has the same meaning as at the trial of the action.

[8] Making full disclosure includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party and to preserve those documents and electronic information. A party who proposes to a judge to modify an obligation to make full disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to the likely probative value of evidence that may be found or acquired if the obligation is not limited and the importance of the issues in the proceeding to the parties.

[9] The requirements for an ADD are found in *Rule* 15. The *Rule* requires that the ADD attach a Schedule "A" listing all relevant, non-privileged documents that are

possessed by the party. Each schedule attached to the ADD should describe a document so it is easily identifiable from the description, and if copies are to be delivered in an electronic form, rather than a printed booklet, Schedule "A" must conform with *Rule* 16.09(3)(d). The documents in an ADD must be provided in a sequence and with identifying numbers or letters to that they are easily matched with the list in the Schedule, and each page of a document containing more than one page must have a sequential page number (15.05(2) and (3)).

[10] As stated, if the ADD is delivered in electronic format, Schedule "A" must be provided in print and describe each discrete item of electronic information according to identification number or letters, date of creation, type of communication or other information, author or author and organization, and recipient (16.06(3)(d)).

[11] The legal principles relevant to this motion are found in the following authorities: *Intact Insurance v. Malloy*, 2020 NSCA 18; *Saturley v. CIBC World Markets*, 2011 NSSC 4; *Sack v. Canada (Attorney General)*, 2023 NSSC 35.

[12] The *Rules* apply equally to both represented and non-represented parties, but *a fortiori* to law school graduates and members of the bar such as the parties in this proceeding.

[13] The Plaintiffs say that the Schedule "A" should provide for the detailed information required by *Rule* 16.09(3)(d) for each record. In other words, the Plaintiff asserts, each specific text message and email message must be separately listed in the Schedule with date of creation, type of communication or other information, author or author and organization, and recipient.

[14] In this case, the Defendant did not produce his ADD pursuant to *Rule* 16 to disclose "electronic information" as that term is defined in *Rule* 14.02. The Defendant's ADD was prepared in paper format and produced pursuant to Rule 15. It was then scanned into a PDF format for delivery on a portable hard drive (also known as a thumb drive or USB drive) as agreed between the parties. *Rule* 16 does not apply to an ADD delivered in this form.

[15] The question is then: whether the format of Schedule "A" describes the documents, such that the documents are easily identifiable are provided in a sequence with identifying numbers or letters so that they are easily matched with the list in the Schedule, and that each page of a document containing more than one page must have a sequential page number.

[16] Based on the form of Schedule "A", and the few examples of actual documents produced (as exhibits to the Plaintiffs' affidavit), I find that the form of Schedule "A" allows the Plaintiffs to identify the type of document, who it was sent to or from, and whether it was by text message or email. It provides a date range, and each separate record has a page number for identification. The Plaintiffs did not provide the Court with any specific explanation of why this is unworkable.

[17] In preparing for the hearing, Mr. MacIntosh advised that he had noted certain text messages produced that did not clearly identify the sender and undertook to provide those particulars to Mr. Fraser and to respond to any other unintentional oversights, when and if brought to his attention, as the *Rules* require. This is the expected conduct of a party to litigation before the courts in Nova Scotia.

[18] In conclusion on this issue, I find no fault with the form of Schedule "A" to the Defendant's ADD. This claim for relief is denied.

2. *Did the Defendant improperly redact or omit relevant evidence from the productions*

[19] The second claim for relief on the Plaintiffs' motion is that the Defendant has been selective or has otherwise failed to make proper disclosure of records or communications in his control or possession.

[20] Much of the Plaintiffs' supporting affidavit and brief focused on making allegations about the content of the material produced or the impugned motives or background of its authors, as opposed to what information is allegedly redacted or omitted.

[21] The Defendant acknowledges that he has not produced every text message or email exchanged with these individuals, only those that are relevant to the claims made by the Plaintiffs.

[22] I have reviewed the examples of documents that were attached to the Plaintiffs' affidavit. I find that Mr. MacIntosh has displayed the necessary due diligence in producing documents that speak are relevant to the allegations in the Second Amended Statement of Claim and are responsive to the duty to disclose.

[23] I am unable, on the record before me, to conclude that the editing of text or email chains to exclude irrelevant information is improper. As noted, no specific request for further production was made by the Plaintiffs to the Defendant prior to

the motion. As noted by the Court of Appeal in *Intact*, these concerns might be quickly resolved by a few questions during a discovery examination and, if appropriate, requests for additional information to be produced. That said, if the Defendant is later found to have strategically excluded, or redacted relevant information that ought to have been disclosed, there will be consequences.

3. *Should the Defendant be ordered to make additional production?*

[24] The Plaintiff seeks an Order that the Defendant produce documents relevant to paragraphs 6 to 35 of the Plaintiff's original Statement of Claim. Because those paragraphs were withdrawn by amendment, I find they are not relevant and accordingly the Defendant is not required to produce documents related to them unless otherwise relevant to the remaining claims. This issue arose because after the paragraphs were removed, the Defendant filed an amended defence in which he pleaded responses to the withdrawn allegations. In the course of argument, the Defendant undertook to file a further amended Statement of Defence to remove the paragraphs pleaded in response to the withdrawn paragraphs from the Statement of Claim. In my view, this further amendment will best resolve the issue and avoid the need to produce irrelevant material.

[25] Next, the Plaintiff seeks an order for the Defendant to produce:

> all communications or records of any from in the possession of the Defendant concerning controversy, adversity or dispute with Donn Fraser, views on Donn Fraser, any negative characterizations of Donn Fraser or allegations concerning him, and/or involving in any way since Donn Fraser and the former law firm of MacIntosh, MacDonnell & MacDonald or its partners or employees, including (without limiting the generality of the forgoing) any and all communications, publication or information exchange or disclosure involving any of the Defendant Bruce MacIntosh, Sarah MacIntosh (or Sarah Wiseman or Sarah MacIntosh Wiseman), Julie MacPhee, Joel Sellers, Mary Jane Saunders, Gerlad Green, Mary Jane McDonald, Angie Scanlan, anyone with the Nova Scotia Barristers' Society and anyone with any policing authority, and/or any other person.

[26] Other than as previously addressed, I find that the record before me does not support such an order. This requested relief is a fishing expedition that is contrary to the objects of the *Rules*. The Defendant is only required to produce documents relevant at trial to the issues raised by the Statement of Claim or Defence.

[27] The Court of Appeal in *Intact* weighed in on the proper test for relevancy Justice Farrar stated as follows:

> [35] Although the pleadings are a factor to be taken into consideration in determining whether documents are relevant, they are not the only factor. If that were the case, adroit counsel could draft pleadings in such a manner to allow a party to embark on a fishing expedition. This is precisely what the Rules were intended to avoid when they were amended to move from the "semblance of relevance" test to relevancy. The motions judge's decision, in my view, reverts to the "semblance of relevance" test. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application. This is particularly true here, where there was a dearth of evidence before the motions judge.

[28] The request for an order for this additional production is refused.

4. *Should the Defendant be ordered to provide the Plaintiff with exact copies of documents filed with the court?*

[29] The Plaintiffs seek an Order that the Defendant must produce to the Plaintiffs an exact copy of the documents that are filed with the Court. The Defendant acknowledges this responsibility and says the only time he has not done so was due to oversight in not scanning a signature page before emailing the copy to the Plaintiff. The Court sees no requirement to make the Order requested in these circumstances.

Conclusion

[30] As the Defendant has been substantially successful, I order that costs be payable to the Defendant forthwith and in any event of the cause. Tariff C costs on this application would normally be in the range of $1,000. However, the Plaintiff filed an affidavit containing extensive irrelevant, scandalous and vexatious dialogue, opinions and accusations against persons who are not parties to this proceeding. Mr. Fraser also filed a brief containing similar irrelevant, scandalous, and vexatious accusations against Mr. MacIntosh. The courts must exercise a gatekeeping and supervisory role on the material that a party files with the court under the rubric of evidence. While litigation is not a tea party, it is also not a forum for making these types of uncalled for allegations, particularly against persons who are not before the court to respond. In the result, I order costs payable by Mr. Fraser in the amount of $2,500.

[31] Mr. MacIntosh shall prepare the form of Order and deliver it in Word form via email to the Court and Mr. Fraser within 5 days from receipt of this decision. Mr.

Fraser may provide his consent or comments to the Court within 2 days of its receipt. The court will then determine the form of order.

Norton, J.