

SUPREME COURT OF NOVA SCOTIA

Citation: *Armstrong v. Halifax County Condominium Corporation No. 9*,
2014 NSSC 208

Date: 20140623

Docket: Hfx No. 422305

Registry: Halifax

Between:

Christopher Armstrong and Andrew Prisciak

Applicants

v.

Halifax County Condominium Corporation No. 9

Respondent

Judge: The Honourable Justice M. Heather Robertson
Heard: May 8, 2014, in Halifax, Nova Scotia
Decision: June 23, 2014

Counsel: Justin E. Adams, for the applicants
Mark T. Knox, Q.C., for the respondent

Robertson, J.:

[1] On a motion for an order requiring that the respondent produce, by way of supplementary disclosure, un-redacted versions of various documents (emails) contained in the respondent's affidavit disclosing documents, the Court chose to review the un-redacted documents in question, to better determine the relevancy of any redacted portions.

[2] The applicants, the owners of a unit in Halifax County Condominium Corporation No. 9 ("H.C.C.C. No. 9"), purchased several years ago from a previous owner. Water leakage was discovered in the unit and investigated by a contractor of the Condominium Corporation, whom the applicants elected to have complete the repairs. The applicants sold the unit and now seek reimbursement from the Condominium Corporation, claiming the damage is to common elements.

[3] At issue is section 4.12 (Maintenance and Repair of Units and Parts of Common Elements – Owners' Duty) of the Declaration of this older condominium that applies to the applicant's unit, which requires that each unit owner shall maintain "... exterior door frames and doors, exterior window frames and windows . . . at his own expense."

[4] Permission to replace the windows must be obtained from the Condominium Corporation as provided in the Declaration at 4.03(g):

Prior to making any alternations or repairs to his unit, the owner shall submit his plans to the Board of Directors of the Corporation for approval; and the Board shall approve the plans unless the proposed alternations or repairs or the manner of carrying them out are likely to damage or impair the value of any other unit or the common elements.

[5] The respondent says the previous owner did not obtain consent from the Condominium Corporation, replaced the windows doing a poor job, leading to the eventual need to replace the windows and repair the window frames and surround.

[6] In a series of emails covering an eight-month period, the respondent defends various redactions made in their disclosure of the documents saying:

The Applicants' complaint was dealt with during the course of approximately eight (8) months (January to August 2013) by way of e-mails from the Applicants to the Condominium corporation; by e-mails between the Condominium

Corporation and its own Board members; by e-mails between the Condominium and its Property Manager (Mr. Pat Power); and correspondence and e-mails by counsel for the Applicants (Mr. Adams) and the condominium corporation. Additionally, the Condominium Corporation's documentation includes correspondence with one of its solicitors, Mr. Pat Cassidy, Q.C.

The e-mails between Board members often contain "the thread" of previous communications from the Property Manager to the Board members and between the Board members, etc. Defence counsel has attempted to "pare down" the repetition and redundancy of this feature in the production of the materials in order to adhere to the spirit of the current Civil Procedure rules: full disclosure of **relevant** information is necessary for justice. Communications between Board members and the Property Manager, which contain irrelevant content or personal opinion which we consider irrelevant, have been redacted. Counsel for the Respondent has gone through the materials on two separate occasions (before and after the Applicants' counsel brought up the issue) in order to ensure that compliance has been obtained with respect to the law on this topic.

[7] Counsel for both parties have recited the appropriate *Civil Procedure Rules* and case law in Nova Scotia; *Banks v. National Bank Financial Ltd.* 2011 NSSC 70; *Halifax Dartmouth Bridge Commission v. Walter Construction Corporation*, 2009 NSSC 403; *Kairos Community Development Ltd. v. Nova Scotia (Community Services)* 2007 NSSC 330 and others.

[8] The applicants urge the Court to adopt *McGee v. London Life Insurance Company Limited*, 2010 ONSC 1408, and hold that the redaction of documents should be the exception rather than the rule and also place the burden on the redacting party to show that there is important interests that requires protection.

[9] Part 5 of the In this Part, "relevant" and "relevancy" have the same meaning as *Civil Procedure Rules* deal with discovery and disclosure. *Rule 14.01* defines relevance:

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.

[10] *C.P.R.* 14.02 (1) defines “document” and “electronic information” (i)(ii)(iii) and (iv):

14.02 (1) In Part 5,

...

“document” means a document that is not electronic information, including a print version of electronic information and a non-digital sound recording, video recording, photograph, film, plan, chart, graph, or record;

“electronic information” means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information:

- (i) an e-mail, including an attachment and the metadata in the header fields showing such information as the message’s history and information about a blind copy,
- (ii) a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts,
- (iii) a sound file including the metadata, such as the date of recording,
- (iv) new information to be produced by a database capable of processing its data so as to produce the information;

[11] There is a presumption of full disclosure.

14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[12] A judge may make an order for disclosure.

- 14.12 (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
- (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
- (3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
- (a) a requirement that a person assist the party in obtaining temporary access to the source;
 - (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
 - (c) appointment of an independent person to exercise the access;
 - (d) appointment of a lawyer to advise the independent person and supervise the access;
 - (e) payment of the independent person and the person's lawyer;
 - (f) protection of privileged information that may be found when the access is exercised;
 - (g) protection of the privacy of irrelevant information that may be found when the access is exercised;
 - (h) identification and disclosure of relevant information, or information that could lead to relevant information;
 - (i) reporting to the other party on relevant electronic information found during the access.
- (4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.
- (5) A motion for an order for production must be made on notice, unless it is permitted to be made *ex parte* as provided in Rule 22 - General Provisions for Motions.

[13] In Nova Scotia since *Banks, supra*, the test for production is unchanged and the moving party must demonstrate that the information sought is relevant and

should be disclosed. One should ask if the information sought relates to matters in question and could reasonably be calculated to lead to admissible evidence.

[14] The respondent's counsel has sorted the electronic documentation and followed *Rule* 14.02(1)(i) and (ii):

“sort” means to do all of the following:

- (i) physically separate relevant, non-privileged documents from other documents and distinguish relevant, non-privileged electronic information from other electronic information,
- (ii) separate or redact irrelevant or privileged information from a document or electronic information containing some information that is relevant and not privileged,

[15] The applicants, however, believe the emails maybe relevant to the dispute and say they are left guessing the nature of the redacted information, despite the respondent's assurances.

[16] I have reviewed the redacted emails. The redactions were noted as being “opinion,” “irrelevant,” or “privilege.”

[17] The respondent's redactions are appropriate. The redactions relate to irrelevant portions of the documents, most comments of a personal nature properly identified as opinion. The redactions would not assist the applicants in proving any fact at issue or in advancing their claim.

[18] The respondent has met its obligations in the disclosure of relevant rather than irrelevant information pursuant to Part 5 of the *Rules*.

Robertson, J.