

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Hatfield v. Intact Insurance Company*, 2014 NSSC 232

**Date:** 2014-06-20

**Docket:** *Syd. No.* 316086

**Registry:** Sydney

**Between:**

Linda Hatfield

*Plaintiff*

v.

Intact Insurance Company

*Defendant*

**Decision on Motion**

**Judge:** The Honourable Justice Robin C. Gogan

**Heard:** May 29, 2014, in Sydney, Nova Scotia

**Written Decision:** June 20, 2014

**Counsel:** Linda Hatfield, self-represented  
Guy LaFosse, Q.C., for the Defendant

**By the Court:**

**Introduction**

[1] In August of 2007, Linda Hatfield's home was damaged as a result of an oil spill. She had a policy of homeowners insurance with ING Insurance Company (now "**Intact**"). She put them on notice of a claim. The parties disagreed on a remediation plan. Linda Hatfield then sued Intact.

[2] In the course of litigation, Linda Hatfield made disclosure to Intact. At the time, Ms. Hatfield was represented by counsel. The disclosure included the content of a file from the Department of Community Services (the "**Department**"). Linda Hatfield now moves for an Order returning the file material to her. She says that her lawyer disclosed it without her consent.

[3] In the alternative, she asks for a "ban or sealing of the file". Linda Hatfield is of the view that she is not obligated to disclose the contents of the file because it is a violation of her privacy. She claims protection under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c.5, s.4 ("**PIPEDA**") and the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c.5, s. 2 ("**FOIPOP**").

[4] Linda Hatfield is or has been a litigant in multiple proceedings. She seeks a “ban” on reference to other legal proceedings.

[5] Intact contests the relief claimed by Linda Hatfield. The motion was heard on May 29, 2014.

### **Background**

[6] Linda Hatfield commenced an Action against Intact on August 28, 2009. Her claim alleges that on August 29, 2007, her property suffered loss and damage as a result of an oil spill from a residential oil tank. Intact was then the insurer of Linda Hatfield’s property and she notified her insurer of a claim.

[7] Linda Hatfield alleges that Intact carried out remediation without her consent and in a negligent manner. Linda Hatfield claims damages from Intact and says that it is responsible for damage to her real and personal property and to her health “resulting from her continued residence in the dwelling.” Ms. Hatfield further seeks various damages from Intact, including punitive and aggravated damages and mental distress damages.

[8] At the time she commenced her action against Intact, Linda Hatfield was represented by counsel. Her initial lawyer was permitted to withdraw in 2010. Ms.

Hatfield acted on her own for a period until she retained new counsel in November 2012. Linda Hatfield then moved for a renewal and amendment of her claim. This motion was granted on April 11, 2013.

[9] Intact filed a Defence on May 28, 2013. It denied any negligence. It said that all remediation efforts carried out were done so with Linda Hatfield's knowledge and consent. It further alleges that Linda Hatfield refused to accept expert remediation plans which prevented further remediation from proceeding. She failed to mitigate by maintaining heat in her home and totally disregarding it while she dealt with other legal proceedings. Finally, Intact raises a causation issue saying that any health damage, including any mental health damage, either pre-existed the oil spill was caused by other events, unrelated conditions or other litigation.

[10] Linda Hatfield's new counsel proceeded with the litigation against Intact until March 6, 2014 when he was permitted to withdraw as counsel. Linda Hatfield has acted on her own since that time.

[11] After obtaining her file from her former lawyer, she found that her file with the Department had been obtained and disclosed to Intact. On April 15, 2014,

Linda Hatfield moved for an Order returning the file contents to her. She also seeks a “ban” on any reference to her involvement in other litigation.

[12] In support of her motion, Linda Hatfield filed her affidavit. She says in her affidavit that the Department’s file was obtained by her lawyer and disclosed to Intact without her knowledge or consent. She says that the information is sensitive and irrelevant and its disclosure is a breach of her privacy. She also says that the disclosure was an “abuse of process” by both parties’ lawyers. She later explained this to mean that the disclosure took place before the close of pleadings.

[13] Ms. Hatfield was cross-examined. She said that she gave her lawyer permission to disclose a portion of the Department’s file which she identified as the Community Housing portion of the file. This material amounted to 4-5 pages out of the total file material of 162 pages. She said that she didn’t understand that this material would be part of the Department’s file as she dealt with Community Housing and Community Services by way of separate office locations.

[14] Linda Hatfield acknowledged giving her lawyer a general written consent to obtain information on October 25, 2012 but said that she varied and limited the consent during a later conversation with him. She acknowledged not really

understanding the implied undertaking rule and felt that the documents in the Department's file were private and sensitive and not relevant.

[15] Near the conclusion of her cross-examination, Linda Hatfield acknowledged that she has to disclose "what is relevant".

### **Issues**

[16] Linda Hatfield's motion raises the following issues:

- (a) Can Linda Hatfield claim the protection of PIPEDA or FOIPOP to avoid disclosing documents relevant to a legal proceeding?
- (b) Is Linda Hatfield's consent necessary?
- (c) Is the content of the Department's file relevant to an issue in the proceeding?
- (d) Is there any basis to ban reference to other legal proceedings?

[17] For the reasons that follow, I find that neither *PIPEDA* nor *FOIPOP* apply. The motion can be disposed of by way of application of the Civil Procedure Rules. The content of the file is relevant or will likely lead to relevant evidence and would be the subject of a disclosure Order if not already disclosed.

[18] Further, there is no basis at this point in the proceeding to seal or ban reference to the content of the file as it has not been filed with the Court. Any objection to relevancy at trial can be determined by the Trial judge.

[19] Finally, there is no basis on which to ban reference to other litigation. This information is public information.

## **Analysis**

### ***Position of the Parties***

#### ***(a) Linda Hatfield***

[20] Linda Hatfield says that the Department's file was disclosed to Intact without her consent. In her view, she is entitled to privacy and the content of the Department file was personal and sensitive and irrelevant to her claim. Disclosing the content of the file (except the pages from Community Housing) was a breach of her privacy. She says that the disclosure of the Department's file contravenes both *PIPEDA* and *FOIPOP*.

[21] Ms. Hatfield seeks return of the Department's file. She says that to the extent the file may contain relevant information, this information can be provided to Intact from other sources.

[22] She further seeks a “ban” on any reference to other legal proceedings in which she has been or is currently a litigant. Presumably, she believes this information to be irrelevant to her present claim.

***(b) Intact Insurance Company***

[23] Intact has refused to return the content of the Department’s file to Linda Hatfield. It submits that the file was disclosed by Linda Hatfield’s former lawyer in the normal course of disclosure and that the content is relevant to the claims being advanced.

[24] Intact further submits that neither *PIPEDA* nor *FOIPOP* apply in these circumstances. The Civil Procedure Rules are determinative of this motion. There is nothing in the Rules which prevent the disclosure of sensitive information if it is relevant.

***Determination***

***(a) Can Linda Hatfield claim the protection of PIPEDA or FOIPOP to avoid disclosing documents relevant to a legal proceeding?***



[25] Intact submits that neither *PIPEDA* nor *FOIPOP* are relevant to the motion. I agree. Review of both the *PIPEDA* and the *FOIPOP* legislation reveals no application to the disclosure of relevant information required in the context of a legal proceeding.

[26] The federal *PIPEDA* states that it applies only to the collection, use, and disclosure of personal or employee information by private organizations in the course of commercial activities. Section 2(1) of the *Act* defines “commercial activity” as “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.”

[27] The relationship between Linda Hatfield and Intact in the context of this legal proceeding is not one that can be described as commercial. The *PIPEDA* was not intended to apply to litigants in a legal proceeding and accordingly it provides no protection to Linda Hatfield in the present circumstances.

[28] Nova Scotia’s *FOIPOP Act* is designed to facilitate access to public records while protecting the privacy of individuals. Its provisions only govern the disclosure (or non-disclosure, as the case may be) of information in the hands of public bodies. Section 2 of the *Act* provides:

2 The purpose of this Act is

(a) to ensure that *public bodies* are fully accountable to the public...

(b) to provide for the disclosure of all *government information* with necessary exemptions...; and

(c) to protect the privacy of individuals with respect to personal information about themselves *held by public bodies* and to provide individuals with a right of access to that information.

[29] More to the point, the *Act* expressly exempts civil litigation from the scope of its application. Section 4(3) provides:

4(3) This Act does not

(a) limit the information otherwise available by law to a party to litigation including a civil, criminal or administrative proceeding;

(b) affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents.

[30] Accordingly, there is no basis to grant Linda Hatfield the relief she seeks under either *PIPEDA* or *FOIPOP*. Given this finding, I turn now to the question of whether the Department's file must be returned in the absence of Linda Hatfield's consent to its disclosure.

**(b) *Is Linda Hatfield's consent necessary?***

[31] There remains the issue as to whether Intact should return the content of the Department's file to Linda Hatfield on the basis that it was disclosed without her consent.

[32] I note as a preliminary point that the issue of Linda Hatfield's consent is a contested fact on this motion. There is evidence on the motion that Linda Hatfield signed a written Consent which was used by her former lawyer to obtain the Department's file. Linda Hatfield says that she subsequently limited the consent as she told her lawyer that she did not want the Department's file disclosed.

[33] I decline to make any finding as to whether Linda Hatfield provided her consent or not or whether she provided a written consent that was subsequently limited in some way. I find it unnecessary to make any credibility finding on this aspect of Ms. Hatfield's evidence. In my view, the relevant *Civil Procedure Rules* dispose of the issue completely. Linda Hatfield's consent is not required.

[34] The *Rules*, broadly speaking, require all relevant, non-privileged documents to be disclosed. Rule 15.02 imposes an obligation to make disclosure of documents:

**Duty to make disclosure of documents**

**15.02 (1)** A party to a defended action or a contested application must do each of the following:

- (a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;
- (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim the document is privileged;
- (c) acquire and disclose relevant documents the party controls but does not actually possess.

[35] *Rule 14.08* contains the fundamental presumption of full disclosure:

**Presumption for 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.

(2) Making full disclosure of documents or electronic information 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 the documents and electronic information.

(3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make the cost, burden and delay proportionate to both of the following:

- (a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;
- (b) the importance of the issues to the parties.

(4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

[36] Consideration must also be given to *Rule 15.07* which authorizes directions on the matter of documentary disclosure. However, judicial discretion is limited by the presumption of full disclosure. *Rule 15.07* provides:

**Directions for Disclosure**

**15.07(1)** A judge may give directions for disclosure of documents, and the directions prevail over Rule 15.

(2) A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption in Rule 14.08, of Rule 14 – Disclosure and Discovery in General, is rebutted.

[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.

[38] Linda Hatfield does not argue that the content of the Department file is privileged. Her issue is with the sensitivity and relevance of the file material and the resulting lack of consent to its disclosure.

[39] In *Neville v Livingston*, 2011 NSSC 252, the court ordered disclosure of the plaintiff's medical records, including highly sensitive information about the plaintiff's depression, anxiety, and suicidal thoughts, because they were relevant to his ability to return to work following a motor vehicle accident. The plaintiff

argued that the records should not be disclosed because they were either irrelevant or sensitive. Murray J. responded as follows beginning at paragraph 2:

[2] Production and disclosure is fundamental to the process of litigation and to the purpose of the Nova Scotia *Civil Procedure Rules* which promote a just, speedy and inexpensive determination of matters before the Court (Rule 1.01).

[3] This is evident when viewing Rule 14.08 which states that there is a presumption that full and complete disclosure will be given and is the norm.

...

[4] This presumption is one that is rebuttable but if a party intends to provide less than full disclosure of relevant information, the onus is clearly on that party to convince the Court that full disclosure ought not be provided.

[40] The presumption of full disclosure may only be rebutted in keeping with the Rule 14.08(3). In *Casey v Halifax (Regional Municipality)*, 2011 NSSC 267 Rosinski J. considered a motion for disclosure in advance of a motion for summary judgment on evidence. The defendants argued that the Court had no jurisdiction in the proceeding and refused disclosure. Justice Rosinski determined that the defendant's arguments as to jurisdiction had not rebutted the presumption of full disclosure and ordered each of them to provide disclosure by a set date.

[41] Having reviewed the foregoing authorities, I conclude that Linda Hatfield's consent for disclosure is not required. The presumption of full disclosure applies and has not been rebutted. No argument was made before me that any modification

to disclosure obligations are necessary as required by *Rule 14.08(3)*. It would have been difficult to make those arguments given that the Department's file has already been disclosed.

[42] The discretion in *Rule 14.08(3)* is the only basis in the *Rules* on which full disclosure of relevant information is circumscribed. Lack of consent, privacy or sensitivity of the information sought are not reasons to limit full disclosure of relevant documents except to the extent that those considerations are part of the *Rule 14.08(3)* analysis. Linda Hatfield made no attempt to rely on this *Rule* to limit her disclosure obligation. In my view, she had no basis to do so. Given that the presumption has not been rebutted, *Rule 15.07* prohibits any directions that limit disclosure of relevant documents. It matters not that Linda Hatfield does not consent.

[43] In the event that the content of the Department's file is relevant, it should be disclosed. Non-disclosure of relevant documents has consequences under *Rules*. These consequences need not be discussed here as the Department file has already been disclosed.

[44] What is required is an assessment as to the relevancy of the content of the Department's file.

***(c) Is the content of the Department's file relevant to an issue in the proceeding?***

[45] The test for relevance is “trial relevance”. In others words, the Chambers judge must determine the relevancy as if she were the judge at the trial or hearing.

*Rule 14.01* provides:

**Meaning of “relevant” in Part 5**

**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 that 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.

[46] Although the test for relevancy is assessed from the vantage point of a trial judge, in *Halifax Dartmouth Bridge Commission v Walter Construction Corp et al*, 2009 NSSC 403 LeBlanc J. nevertheless observed at paragraph 21 (quoting



Hallett J.) that “there are very narrow limits within which a document will not be ordered to be produced”. At paragraph 16, he further observed:

[16] I am of the view that the object of the rule is to make available information and documents that are likely to lead to relevant evidence at trial, which I take to mean that the information will probably lead to relevant evidence at trial. The key feature of the current rule is that evidence has to be relevant to an issue at trial. It is important...to be mindful that at the pre-trial stage, the parties are still investigating the claim to determine whether there is a basis to defend. Consequently, at discovery, witnesses can be examined both as to relevant evidence and also for information that is likely to lead to relevant evidence. **Similarly, witnesses could be examined on documents that are relevant and also on documents that are likely to lead to relevant evidence.** (emphasis added)

[47] In *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, Moir J. discussed the importance of fulsome disclosure to do justice. He then considered the meaning of relevance in the context of disclosure. At paragraph 46 and 47, he concluded:

[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.

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 point of trial, as best as it can be constructed.

The determination of 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.

[47] In my opinion, these conclusions do not suggest a retreat from the broad or liberal approach to disclosure and discovery of relevant information that has prevailed in this province since 1972.

[48] Intact submits that the content of the Department's file is relevant to the claims advanced by Linda Hatfield in this proceeding and its defence of those claims. Ms. Hatfield's claims are in negligence and breach of contract. The pleadings reveal comprehensive damage claims, including general, special and punitive damages. There is an allegation of bad faith. There are specific allegations of damage to Linda Hatfield's physical, mental and emotional health arising from her pleading that she was "left living in a toxic environment" and "forced to move back into a toxic environment".

[49] Intact's defence alleges that Linda Hatfield was unreasonable in the face of good faith efforts to carry out its contractual obligations. It also alleges a failure to mitigate in a multitude of respects. Finally, Intact raises causation of damages.

[50] The proceeding has moved slowly in terms of disclosure. Some disclosure has been provided. No discoveries have taken place. In spite of the age of the proceeding, the parties are still at the stage of investigating and gathering evidence.

[51] It was uncontested that the Department's file contains information about where Linda Hatfield resided in the years following the oil spill at her home. It also contains information about the type of assistance provided to Linda Hatfield during this same period as well as the basis for the assistance provided. I have no doubt that there are references to personal and sensitive information in the file.

[52] In my view however, this type of information is relevant to Intact's ability to defend the allegations made against it and assess Linda Hatfield's credibility. For example, the Department's file likely contains relevant evidence or information which will likely lead to relevant evidence on the broad issues of mitigation and causation as well as more specific information relating to the state of Linda Hatfield's health, the reason for requiring assistance, the reason why Linda Hatfield did or did not pursue her claims against Intact for periods of time; and when and where Linda Hatfield lived after the oil spill.

[53] Linda Hatfield argues that the information in the Department's file is not relevant to her claims and even if it is, she can use other documentation to prove

the necessary facts in issue. I find however, that Linda Hatfield's ability to prove facts by other means is not a reason to limit disclosure of otherwise relevant documents. As I said, the documents are relevant to issues raised by Intact's Defence and for this reason, should not be returned.

[54] Linda Hatfield takes the position that the documents should be "sealed or banned" if they are not returned. The documents are not filed and are therefore not accessible by the public. Accordingly, there is no basis on which I can grant the relief sought.

*(d) Is there any basis to ban reference to other legal proceedings?*

[55] As I understand this issue, Ms. Hatfield seeks to "ban" any reference to other proceedings in which she is a litigant. The information sought to be banned is public information. From a review of the Defence, the information appears relevant, however the trial judge will ultimately determine relevance. For the present time, I see no basis or authority on which to grant the requested ban.

**Conclusion**

[56] This motion made by Linda Hatfield is largely without merit and is dismissed. Specifically, I dismiss the motion for return of or sealing of the content

of the Department file. Similarly, I dismiss the motion to ban any reference to Linda Hatfield's involvement in other litigation.

[57] I am unsure based upon the information before me whether Linda Hatfield has provided an Affidavit Disclosing Documents in compliance with the *Rules*. In the event that she has not, this must be provided no later than September 15, 2014.

[58] I provisionally order costs payable by Linda Hatfield to Intact in the amount of \$125.00 dollars. This order shall be payable in any event of the cause at the end of this proceeding and is contingent only upon the outcome of Linda Hatfield's motion under Rule 77.04.

[59] In making this Order for costs, I have considered the following: (a) the financial circumstances of Ms. Hatfield; (b) the fact that this motion was largely without merit; and (c) Linda Hatfield is without legal counsel and believed that her privacy had been breached.

Gogan, J.