NOVA SCOTIA COURT OF APPEAL

Citation: *Laushway v. Messervey*, 2014 NSCA 7

Date: 20140128
Docket: CA 412677
Registry: Halifax

Between:

Peter Laushway

Appellant

v.

Albert Messervey & Sobeys Group Inc.

Respondents

Judge: Mr. Justice Jamie W.S. Saunders

Appeal Heard: September 16, 2013, in Halifax, Nova Scotia

Subject: **Search for Truth. Privacy. Computer Hard Drive. Metadata. Electronic Information. Forensic Analysis. Civil Procedure Rules 14 and 16. Production Orders. Standard of Review. Judicial Discretion. Relevance. Presumption. Burden of Proof.**

Summary: The appellant, a self-employed businessman, who earns his income selling health products over the Internet claimed that as a result of injuries sustained in a motor vehicle accident the amount of time he was able to devote to his business was substantially reduced as he was only able to sit at his computer for short periods of time. Before the mishap he said he spent 12-15 hours a day at his computer, but is now limited to 2-3 hours each day at most. Part of his suit against the respondents included a significant claim for lost income.
The respondents sought an order for production requiring the appellant to produce the metadata from his computer's hard drive, intending to have it analyzed by a forensic expert to determine usage patterns in the years following the accident. The Chambers judge granted the production order. The

appellant appealed.

Held: Appeal dismissed. The Court undertook a lengthy analysis of Rules 14 and 16 and established a 3-step test for the application of those Rules when deciding whether compelled production of electronic information is justified.
Based on the unique circumstances in this case the appellant had put his computer use squarely in issue. There was a clear, direct link between the hours he said he spent at his computer, and his income as a salesman. The information was relevant, and the respondents should be entitled to access that information in order to test the extent and reliability of the appellant's claim.
The precise terms and conditions contained in the production order properly addressed the important privacy, policy and technical issues triggered by the requested forensic analysis.
The Court provided a list of ten topical questions to guide trial judges when applying the law and exercising their discretion in weighing the evidence and balancing competing interests before deciding whether to grant or refuse production orders in cases such as this one.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 26 pages.

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Respondents

Judges: Saunders, Beveridge and Bryson, JJ.A.

Appeal Heard: September 16, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Saunders, J.A.; Beveridge and Bryson, JJ.A. concurring.

Counsel: Nicolle A. Snow, for the appellant
C. Patricia Mitchell, for the respondents

Reasons for judgment:

[1] This is a case of first instance. To this point the issues on appeal have not been considered by this Court. The principal question that arises in the somewhat unusual circumstances of this case is how does one balance, and when necessary establish, a hierarchy between legitimate privacy interests on the one hand and fairness to litigants in the search for truth on the other?

[2] Here, the Chambers judge granted the defendants' motion and issued a production order compelling the plaintiff to turn over his computer so that a forensic analysis could be conducted of its hard drive, on the basis that it was thought to contain relevant information which was necessary for a fair trial of the dispute on the merits.

[3] The plaintiff says the judge went too far and asks that her decision and confirmatory order be set aside.

[4] For the reasons that follow I would dismiss the appeal. I am of the respectful opinion that while the Chambers judge's analysis was somewhat incomplete, she ultimately came to the correct result. In these reasons I will identify and explain the legal principles that ought to be applied in circumstances such as these.

[5] I will start with a brief summary of the facts that give rise to this dispute. They are unique and it is important to emphasize at the outset that the result in any given case is likely to be fact-driven and dependent upon the weight given to a variety of criteria by the judge hearing the matter.

Background

[6] The appellant (plaintiff) is a self-employed businessman who makes his money selling health products over the Internet. He started the business in 2000. He was injured in a motor vehicle accident in December 2005. He claims that as a result of the accident the amount of time he was able to devote to his Internet business was substantially reduced as he was only able to sit at his computer for short periods of time. Consequently he says he has suffered considerable financial loss.

[7] The respondents challenge the veracity and extent of the appellant's claim.

[8] The respondents brought a motion citing Civil Procedure Rules 14 and 16:

> ...for an order for production requiring the Plaintiff to produce the metadata from his computer's hard drive.

intending to have it analyzed by an expert to determine usage patterns in the years following the accident.

[9] The motion was heard by Nova Scotia Supreme Court Justice M. Heather Robertson in June and November, 2012. The extensive record before her included several detailed solicitors' affidavits referencing important correspondence among counsel; extracts from discovery testimony; evidence from the appellant describing his computer usage; the opinions of two experts regarding the proposed forensic analysis; and counsels' extensive briefs on the law.

[10] At the hearing, Mr. Laushway was cross-examined on his affidavit as were the two experts: Ms. Megan Ritchie who had been retained by the respondents to conduct the sought-after forensic analysis of the appellant's hard drive, and Mr. Gregory Jewett, who had been engaged by the appellant to challenge the respondents' motion.

[11] In a decision dated February 8, 2013 (reported 2013 NSSC 47), Robertson, J. allowed the respondents' motion and issued a production order obliging Mr. Laushway to turn over the hard drive in his computer to the respondents' expert for forensic analysis. Justice Robertson's order contains very specific terms and conditions intended to define, prescribe and limit the scope of that analysis. I will refer to those terms later in these reasons.

[12] At the Chambers hearing, and again on appeal, the appellant argued strongly that the respondents' motion violated his expectation of privacy, was too broad in its scope and that the investigation was a wasted effort that would not produce any relevant information. To quote from the appellant's brief:

> ¶5 ...the request of the Defendant to have his meta data is overly intrusive, offends his right to privacy and confidentiality over information stored on his computer, and will yield little information that will be probative in value. The request is little more than a fishing expedition which sets a dangerous precedent in terms of the privacy rights of a party versus the probative value of the information sought. As will be seen by a review of the case law, this kind of general request for

> metadata has been denied time and again in situations directly on point with the case at Bar.

Issues

[13] As is sometimes the case, the host of alleged errors set out in the appellant's Notice of Appeal are not the same as the issues addressed in his factum; nor are they the ones listed and argued by the respondents in theirs.

[14] As I see it, we should dispose of this appeal by addressing two simple questions:

1. What is the proper standard for appellate review of the decision and order under appeal?
2. Did the Chambers judge err in law or in the exercise of her discretion when she granted the production order ?

Standard of Review

[15] To answer the first question we must consider the nature of the application and the function the judge was performing in disposing of it. That inquiry starts with an examination of the particular Rule(s) under which the respondents claimed relief.

[16] The Notice of Motion filed by the respondents to initiate this proceeding declared:

> The moving party relies on the following legislation, Rules, or points of law:
>
> Rule 14
>
> Rule 16

No other particulars were provided. The pre-hearing brief filed by the respondents made specific reference to CPR 14.02; 14.08; 14.12; and 16.02.

[17] The confirmatory order issued by Robertson J. states as its first preamble:

> **UPON MOTION** being made by the Defendants, Albert Messervey and Sobeys Group Inc., pursuant to ***Civil Procedure Rules*** 14, 15, 16 and 18;

[18] Respectfully, it is difficult to see how Rules 15 and 18 have any bearing on this case. Rule 15 concerns documents, not electronic information. Rule 18

concerns oral discovery. Perhaps the reference to Rule 15 and/or Rule 18 refers to the specific term in the Production Order obliging Mr. Laushway to provide the additional documentation and information set out in a letter from the respondents' counsel to the appellant's counsel dated January 25, 2012.

[19] And so I turn to Rules 14 and 16. I observe at the outset that these two rules are complementary and very much interrelated. In simple terms Rule 16 deals with preserving electronic information, whereas Rule 14 deals with producing it. Both Rules need to be read together. They inform the duty to protect, disclose and produce relevant evidence so that it may then become part of the record for trial.

[20] While Rule 16 is entitled "DISCLOSURE OF ELECTRONIC INFORMATION", even a cursory reading of the Rule makes it clear that it has to do with much more than mere disclosure. For example, CPR 16.01 begins:

> **Scope of Rule 16**
>
> 16.01 (1) This Rule prescribes duties for preservation of relevant electronic information, which may be expanded or limited by agreement or order.
>
> (2) This Rule also prescribes duties of disclosure of relevant electronic information and provides for fulfilling those duties ...

[21] Then under the heading "Duty to Preserve Electronic Information", CPR 16.02(1) begins:

> 16.02 (1) This Rule 16.02 provides for preservation of relevant electronic information after a proceeding is started, and it supplements the obligations established by law to preserve evidence before or after a proceeding is started. (Underlining mine)

[22] The Rule then goes on to explain in considerable detail the various obligations of the parties to diligently search for, describe, declare and disclose any and all relevant electronic information. Penalties, including contempt for failure to comply, are set out in Rules 16.13 and 16.15.

[23] A judge's discretionary authority to grant directions for disclosure of relevant information are contained in Rule 16.14 which provides:

> 16.14 (1) A judge may give directions for disclosure of relevant electronic information, and the directions prevail over other provisions in this Rule 16.
>
> (2) The default Rules are not a guide for directions.

> (3) A judge may limit preservation or disclosure in an action only to the extent the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted. (Underlining mine)

[24] CPR 14 is a lengthy and very detailed Rule entitled "DISCLOSURE AND DISCOVERY IN GENERAL" which begins with an important definition section and goes on to explain procedures and deadlines for complying with, challenging, or resisting the obligation to produce electronic information or other types of evidence during the litigation process.

[25] The Rule also contains a clear statement of applicable presumptions which is important in recognizing and properly assigning the burden of proof. I will come back to these definitions and presumptions later in these reasons because they were not adequately canvassed by counsel or the Chambers judge when this motion was argued.

[26] Finally, Rule 14.12 describes the judge's discretionary authority to compel production:

> 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. (Underlining mine)

The Rule goes on to offer guidance to trial judges as to the terms which might be included in such an order, to protect for example, privileged information or otherwise control the way in which access is to be exercised. This Rule also suggests various criteria the judge may wish to take into account when exercising his or her discretion in deciding whether or not to grant the production order. See for example, Rule 14.08(3) and 14.12(4) to which I will also refer in more detail later.

[27] From this brief summary of the rules engaged in this case, it is obvious that the production order which is the subject of challenge in this appeal is an interlocutory, discretionary order. It is settled law that in such cases we will only intervene if we are persuaded that the judge erred in law, or to the extent the judge was exercising a discretion, our failure to intervene would produce an obvious injustice. See for example, **A.B. v. Bragg Communications Inc.**, 2011 NSCA 26; **Innocente v. Canada (Attorney General)**, 2012 NSCA 36; **Aliant Inc. v.**

Ellph.com Solutions Inc. , 2012 NSCA 89; **Burton Canada Co. v. Coady**, 2013 NSCA 95; and **Fawson v. St. Clair**, 2013 NSCA 123.

[28] In deciding the motion Justice Robertson performed two functions. The first required an interpretation and application of the law. The second involved the exercise of discretion. Each attracts a different standard of review.

[29] Here the Chambers judge was obliged to correctly interpret and apply the law to the issues and the evidence before her. In fulfilling that function, she had to be right. Accordingly I will evaluate her legal analysis on a standard of correctness (**Ellph.com**, ¶37). On the other hand, her assessment of the evidence and the weight to be attached to it, her preference of one expert opinion over another, her balancing of the several criteria and competing interests before deciding to issue the production order are all matters that fall squarely within a judge's discretion, reviewable on a standard of reasonableness (**Ellph.com**, ¶50)

[30] These are the standards I will apply in my review of the judge's decision in this case. I will start by considering the principal legal issues the judge had to decide. In my opinion there were three:

a. Did the sought-after metadata in the appellant's computer fall within the definition of "electronic information" in Rule 14.02?

b. If so, was the metadata "relevant" as defined in Rule 14?

c. If so, which party bore the burden of satisfying the court that the production order ought to be granted, or refused?

(a) Did the sought-after metadata in the appellant's computer fall within the definition of "electronic information" in Rule 14.02?

[31] This issue was not the subject of any probing analysis by the Chambers judge. She simply said at ¶17 of her decision:

> [17] Metadata is included in the definition of electronic information. *Rule* 14.02 Interpretation in Part 5(1).

[32] I am not persuaded that the judge erred in her conclusion. The answer seems straightforward to me.

[33] A logical place to begin the inquiry is to ask oneself "what is metadata?" The word is not defined in the Rules. In his affidavit setting out his opinion, the

appellant's expert Mr. Gregory Jewett did not offer a definition of metadata, although several other terms of reference were defined. Instead, Mr. Jewett repeatedly used the phrase "the metadata collected on the hard drive" in his affidavit. For her part, Ms. Megan Ritchie, the expert retained by the respondents, provided a definition of metadata and in her affidavit deposed:

> 7. ESI Specialists Inc. ("ESI") was retained by the law firm of Stewart McKelvey to provide information relating to the analysis of metadata from the Plaintiff's computer and how it can be used to assess user patterns and frequency from any individual computer hard drive. ESI specializes in comprehensive litigation support services, from early case assessment, forensics and collection to eDiscovery data management, processing, production and document hosting.
>
> ...
>
> 9. I have conducted more than ten analyses of metadata in similar cases. I have testified in criminal court with respect to data found on digital media.
>
> **Copying Meta Data**
>
> 10. Metadata is defined as data providing information about one or more aspects of data such as creation dates, data authorship, and placement of data and sometimes purpose of the data. The analysis of metadata and other computer artifacts provides information about the nature of a computer including, when and sometimes by whom a computer is being used including details about file creation, access and modification to particular files, websites or programs contained on the computer including dates, duration of use and times.
>
> 11. To obtain the metadata from a computer, ESI will create a forensic bit stream image of the hard drive of the Plaintiff's computer.

[34] At the hearing and again during argument in this Court, the appellant's counsel took the position that metadata was not electronic information because it did not and could not be "associated with" or "help explain" some "other intelligible thing" as those words appear in the definition of "electronic information" in Rule 14. Counsel put it this way in her brief to the Chambers judge:

> ¶25 Nova Scotia Civil Procedure Rule 14 allows for the disclosure of metadata *which is associated with a piece of relevant electronic information.* The Rule does not condone the mass collection of computer metadata as a fishing expedition. ... (Italics in original)

[35] Respectfully, that is not what the Rule provides.

[36] Under the so-called Interpretation Section in Rule 14.02 we see this definition of "electronic information":

> "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;

[37] From this we know that metadata is an example of the sorts of things that fall within the definition of "electronic information" (since the Rule uses the word "includes") such that metadata which is "associated with ... a record produced by a computer processing data ..." is electronic information and consequently will be subject to the Rules pertaining to it.

[38] There is nothing in the Rule which would – as appellant's counsel suggests – limit the disclosure of metadata to only that type of metadata "*which is associated with a piece of relevant electronic information*". I would respectfully reject this submission.

[39] Neither Mr. Jewett nor Ms. Ritchie suggested that the data contained within Mr. Laushway's computer was not "metadata", or that metadata was not electronic information. On the contrary, it seems to me that each expert took that as a "given" and focused their attention on the real point in contention between them which was whether, and to what extent, any accurate and reliable information could be extracted from the metadata.

[40] As far as Ms. Ritchie was concerned, her forensic analysis of Mr. Laushway's hard drive would be designed to obtain from the metadata within it an

intelligible, digital record. From that she hoped to produce a reliable report to determine the appellant's computer usage patterns. Robertson, J. accepted Ms. Ritchie's evidence and I see no error on her part in doing so.

[41] To summarize on this point, it seems to me almost self-evident that the metadata found on the hard drive of any computer constitutes "electronic information" and therefore satisfies this initial threshold step, in the chain of steps necessary to force its production under our Rules. If it were otherwise, the data from any computer in every case would *never* be producible in the search for truth during any stage of the litigation process. Clearly, that cannot be the law. Rather, the overarching question is and continues to be whether the sought-after information is relevant, having regard to the issues and circumstances of the case, and after due consideration of any factors which might require its exclusion.

[42] Our **Civil Procedure Rules** are written with the intention that they will keep pace with the rapid advances of technology and every day commerce. This is reflected in the radical transformation brought about by the 2009 amendments. Rules 14 and 16, so intimately engaged in this dispute, reflect the principles and procedures intended to guide judges in the just preservation and disclosure of evidence in this new digital world.

[43] This leads me to a consideration of the second principal legal issue, that being the judge's conclusion that the digital information which might be found in Mr. Laushway's computer was relevant to the litigation.

(b) If so, was the metadata "relevant" as defined in Rule 14?

[44] The next step facing the judge in the procedural sequence for compelled production was to decide whether the sought-after information was relevant. If it was not, Mr. Laushway would not be obliged to produce it.

[45] Rule 14.05(2) says:

> 14.05 (2) A provision in a Rule in Part 5 for disclosure of a <u>relevan</u>t document, <u>electronic information</u>, or other thing means disclosure of a <u>relevant</u> document, <u>electronic information</u>, or other thing that is not privileged. (Underlining mine)

[46] The words "relevant" and "relevancy" are defined in Rule 14.01. It 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 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.

[47] From this we know that Robertson, J. was obliged to imagine herself in the shoes of the trial judge and from that perspective decide whether she (if she were presiding over the trial) would find the metadata from Mr. Laushway's computer to be relevant or irrelevant. In arriving at that decision she would apply a "trial relevance" test, which replaced the old "semblance of relevancy" test when the new Rules came into effect on January 1, 2009. See for example, the decisions of Bryson, J.A., writing for a unanimous Court, in **Brown v. Cape Breton (Regional Municipality)**, 2011 NSCA 32; and Moir, J. in **Saturley v. CIBC World Markets Inc.**, 2011 NSSC 4.

[48] In **Brown**, my colleague Justice Bryson expressed this Court's endorsement of Justice Moir's comments in **Saturley**. He declared:

> [12] ... 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.
> > - 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.

> - 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.
>
> [13] I also agree with Justice Moir that this does not mean a retreat from liberal disclosure of relevant information.

[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 ¶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.

[50] In my opinion, Justice Robertson did exactly that. She applied the proper test to the issues and evidence before her. She said:

> [1] ...The plaintiff claims that as the result of the accident the amount of time he was able to devout his internet business (sic) was much reduced as he was only be able (sic) to sit at his computer for short periods. As a result he says he has suffered financial loss.
>
> [2] The defendant seeks an order for a copy of the plaintiff's computer hard drive to conduct a metadata analysis to determine computer usage patterns. ...
>
> [13] I am satisfied that metadata showing the plaintiff's active use of the computer can be compiled and that third-party use can be distinguished. In any event, it will be a trial judge who ultimately decides the quality of evidence.

> ...
>
> [19] The relevance of the metadata in this case is directly related to the amounts of time that the plaintiff spends using his computer and is directly related to the general damages and income loss components of his claim. This information is both relevant and probative.

[51] Justice Robertson's conclusions are sound and find ample support in the record.

[52] Respectfully I am not persuaded by the appellant's submission that the judge's decision in this case will "open the flood gates" by forcing every plaintiff who owns a computer, in any case, to turn over that computer for analysis thereby granting a defendant a free license to rifle through the private aspects of any plaintiff's life. One must remember the particular circumstances of this case.

[53] Here, for example, we are not concerned with a lawsuit brought by a construction worker who claims that as a result of a slip and fall at a jobsite, he has been left with a partially disabled wrist which prevents him from enjoying his computer as he once did. In that example the complaint would relate to the plaintiff's functionality at the keyboard which would have little to do with the plaintiff's claim for loss of income based on the worker's interrupted wages while laid off.

[54] That example is to be contrasted with the evidentiary basis for Mr. Laushway's claim. He works on a commission basis, earning all of his income sitting at a computer in his home. He is not in a shared workplace where one might expect there to be a boss, or another employee, or some other physical record to verify what Mr. Laushway was doing. Here he works in a completely solitary and isolated space, within his residence. He says that the defendants' negligence caused him injury and that as a direct consequence he has been unable to spend the 12-15 hours a day at his computer, as he did before this mishap.

[55] He testified at the hearing that as a result of his injuries he is now limited to two-three hours at the computer each day, at most, which represents both business and personal use combined.

[56] Under cross-examination by the respondents' counsel we see this exchange:

> Q. Okay ... How much time it takes you to do the computer work before and after, or I should say ... how much time you would dedicate to that before the accident versus after the accident ...

> A. ... I was putting in 12 ... at least 12 hours a day.
>
> Q. Okay. And after?
>
> A. After the accident, I might only put in two hours a day. ... Now I ... if I'm lucky, I might be able to do three hours a day now. ... Right now I'm looking at those two or three hours a day as personal and business.
>
> Q. Combined.
>
> A. Yeah.
>
> Q. Okay. And I guess just so I'm clear, your position is that the accident is ... has resulted in a direct loss of income to you because of your inability to sit at the computer, is that right?
>
> A. Yeah.

[57] The plaintiff has put his computer use squarely in issue. That is how he earns his income and he blames the defendants for causing that significant financial loss. Based on the circumstances in this case there is a clear, direct link between the hours Mr. Laushway says he spent at his computer, and his income as a salesman selling health products on line. That is what makes this information relevant. The respondents should be entitled to access that evidence in order to test the extent and reliability of the appellant's claim. As counsel for the respondents admitted at the appeal hearing in this Court, her attempt to have Mr. Laushway's computer forensically analysed may well backfire on them. In other words, the ultimate analysis may in fact corroborate the appellant's claim. However, that is a risk the respondents are prepared to take.

[58] At the hearing counsel referred Robertson, J. to case law from other Canadian jurisdictions where legal terms such as relevance, probative value, privacy, and proportionality were incorporated into argument with little or no consideration given to the fact that the law in other provinces may differ markedly from that which applies in Nova Scotia.

[59] In my opinion the judge properly distinguished the cases relied upon by the appellant as having little application to the circumstances before her. For example, those cases arose in jurisdictions where the procedural architecture was quite different than ours. More significantly many of the cases where production orders were refused involved plaintiffs who had suffered brain injuries and whose claims for damages were based on diminished functionality due to cognitive impairment. That of course is not at all the issue here where there exists a clear, direct link between computer usage and alleged loss of income. I need not go any further in

my review of the case law except to say that I endorse the judge's reasoning in that regard.

[60] Neither can I accept the appellant's submission that the judge erred by distinguishing the facts of his case from the circumstances in other cases relied upon by the appellant (where production orders were refused) on the basis of the nature and extent of the injuries suffered by the plaintiffs in those other jurisdictions. The gist of the appellant's argument was that the result (refusal to order production) should be the same no matter what the plaintiff's circumstances or injuries happen to be. Such an argument is without merit.

[61] It is axiomatic that deciding whether something is "relevant" involves an inquiry into the connection or link between people, events or things. Relevance cannot be determined as if it were contained in some kind of pristine, sealed vacuum. One is always expected to ask "relevant to whom? Or to what?"

[62] Here, the judge was bound to consider the particular circumstances of Mr. Laushway's case which would of course include the nature of his injuries, the particular heads of damages, and the evidentiary basis for his claim in order to compare his circumstances to those of the plaintiffs in other cases. This seems so obvious to me as to hardly bear repeating. The Rule itself contemplates that the judge will have regard to the surrounding circumstances. For example, Rule 14.08 says that when a judge considers such criteria as cost, burden, delay and proportionality, he or she will evaluate:

> (b) the importance of the issues in the proceeding to the parties.

[63] In conclusion on this point I see no error on the part of the judge in finding that the metadata from the appellant's computer was both relevant and probative.

[64] I turn now to the last of the three legal issues I posed earlier, which relates to the burden of proof on motions such as this. This is the area where I say, respectfully, that both counsel and the judge veered slightly off the mark.

(c) If so, which party bore the burden of satisfying the court that the production order ought to be granted, or refused?

[65] Rule 14 contains an important presumption. Under the heading **Presumption for Full Disclosure**, Rule 14.08 says:

> (1) Making full disclosure of relevant ..., electronic information... is presumed to be necessary for justice in a proceeding.
>
> ...
>
> (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 cost, burden and delay proportionate to both of the following:
> ...
>
> (4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found. ...
>
> (5) The presumption for disclosure applies, unless it is rebutted. ...
>
> (6) In an application, a judge who determines whether the presumption has been rebutted must consider the nature of the application, whether it is chosen as a flexible alternative to an action, and its potential for a speedier determination of the issues in dispute, when assessing cost, burden, and delay.

[66] On appeal in this Court, counsel acknowledged that neither they nor the judge considered this presumption, or its effect, on which party bore the burden of proof. During questioning by the panel counsel for the appellant admitted that once a finding of relevance was made, the burden then shifted to her to attempt to rebut the presumption and thereby defeat the motion for production.

[67] While the Chambers judge failed to consider this important presumption and its impact in the course of her reasoning, I have concluded – based on my own extensive review of the record – that her ultimate conclusion is sound and ought to be affirmed. In the main she asked herself the right questions and reached the correct result.

[68] Of particular significance here of course was the fact that this order relates to the appellant's personal computer.

[69] While written in the context of a party objecting to the production of third party records on the basis of privilege, the prescient observations of Justice McLachlin (as she then was), writing for the majority in **A.M. v. Ryan**, [1997] 1 S.C.R. 157, 143 D.L.R. (4th) 1 at ¶30 and 38 bear repeating:

> [30] ... the common law must develop in a way that reflects emerging Charter values. ... One such value is the interest affirmed by s. 8 of the Charter of each person in privacy. ...
>
> [38] I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict.

> But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.

[70] So too are the comments of Justice Cromwell, writing for a unanimous Court in **R. v. Vu**, 2013 SCC 60. While there he was dealing with a challenge to police search and seizure powers and a claimed violation of the appellant's s. 8 **Charter** rights, the Court's recognition of the facts that make computers and their capacity for storage unique and different than other "receptacles" of information that might be found during the course of a search, serves as an important reminder whenever judges are called upon to authorize access to someone's computer. As Justice Cromwell explained:

> [41] First, computers store immense amounts of information, some of which, in the case of personal computers, will touch the "biographical core of personal information" ... The scale and variety of this material makes comparison with traditional storage receptacles unrealistic. ...
>
> [42] Second, ... computers contain information that is automatically generated, often unbeknownst to the user. ... it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly. ... This kind of information has no analogue in the physical world in which other types of receptacles are found. ...
>
> [43] Third, ... a computer retains files and data even after users think that they have destroyed them. ... Computers thus compromise the ability of users to control the information that is available about them in two ways: they create information about the users' knowledge and they retain information that users have tried to erase.
>
> [44] Fourth ... While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer. .... computers serve as portals to an almost infinite amount of information that is shared between different users and is stored almost anywhere in the world. ...
>
> [45] These numerous and striking differences between computers and traditional "receptacles" call for distinctive treatment under s. 8 of the *Charter* ...

[71] Having carefully reviewed the record and the judge's decision I am satisfied that Justice Robertson recognized the importance to be attached to Mr. Laushway's legitimate privacy interests and took all reasonable steps to ensure that the terms and conditions of the production order effectively protected those interests while at the same time afforded the respondents proper but limited access to the appellant's computer in order to fairly defend his claim.

[72] The judge was alive to the serious issues in dispute, she carefully evaluated the expert opinion evidence presented by both sides and she addressed the very important privacy, policy and technical challenges raised by the appellant. Simply to illustrate I will reproduce this portion of the Chambers judge's decision:

> [2] The defendant seeks an order for a copy of the plaintiff's computer hard drive to conduct a metadata analysis to determine computer usage patterns. The analysis is proposed to be conducted by ESI Specialists Inc. ("ESI") a company with litigation support expertise in forensic assessment of this nature. ESI's plan of information recovery is set out in the affidavit of Megan Ritchie, who also gave evidence before me.
>
> [3] Her affidavit sets out in detail the process for copying metadata, the scope of the information reviewed, the methods of dealing with privacy screening issues and the ultimate objective of determining the frequency of use of the computer by the plaintiff, in light of the assertion that others also use the computer.
>
> [4] The plaintiff resists the application saying this requirement for disclosure, if granted, would be overly intrusive, effect (sic) the plaintiff's privacy rights, yield little useful information and amount to a mere fishing expedition.
>
> [5] The plaintiff's response to the application is supported by the affidavit of Gregory Jewett (who testified as well), an electronics engineering technologist, who expressed the opinion that little useful information could possibly be retrieved by the proposed metadata analysis.
>
> [6] In particular he raised the points that the software Internet Explorer version 7 ("IE7") does not clock the browser from sharing some personal data with third-party websites (largely relating to commercial online purchasing habits raising privacy concerns about banking information) and further that the metadata may show web traffic to sites never actually visited by the browser.
>
> [7] He also deposed that the plaintiff had a virus attack in 2011 that wiped out all the browsing history which could possibly effect (sic) actual metadata stored.
>
> [8] He pointed out that there are as many as four email accounts on IE7 and G-Mail, raising third-party privacy concerns. He noted the presence of documents and communications that are the subject of solicitor-client privilege.
>
> [9] He expressed other concerns based on various website access points relating to what information is actually tracked and logged.
>
> [10] Mr. Jewett has been in the computer business for 35 years and demonstrated a broad and comprehensive knowledge of computer systems generally. Although he had no personal experience or expertise in the use of forensic software and retrieval procedure referenced by Ms. Ritchie.
>
> [11] As a preliminary matter, I will say that having heard the cross-examination of these witnesses and reviewed their affidavits and credentials, I am satisfied that

> Ms. Ritchie met the challenges and objections raised by plaintiff counsel and Mr. Jewett.
>
> [12] The defendant seeks information about the plaintiff's hours of usage through metadata analysis. The defendant does not seek access to the content on the plaintiff's computer. The defendant does not seek permission to read the plaintiff's emails, the private information of clients, or correspondence or documents of solicitor-client privilege. They do not seek a list of websites visited. This alleviates many of the privacy concerns raised.
>
> [13] I am satisfied that metadata showing the plaintiff's active use of the computer can be compiled and that third-party use can be distinguished. In any event, it will be a trial judge who ultimately decides the quality of evidence.
>
> [14] At this stage the defendant seeks to test the plaintiff's claim that he is only able to work at his computer two to three hours a day. By providing passwords, or login numbers for separate users, by providing information as to the times when others used his computer (some of this information has now already been provided in the plaintiff's discovery evidence), his use of the computer can be narrowed down. Evidence by others as to their use of the plaintiff's computer would also be a useful filter. At trial the plaintiff would have the opportunity to address this issue of third-party usage.

[73] In conclusion, while the judge's legal analysis was incomplete, such a failing did not undermine the correctness of her decision. In the main she applied the proper legal principles in deciding to grant the respondents' motion.

[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.

[75] I turn now to the final inquiry which is whether the judge erred in the manner in which she exercised her discretion.

[76] After reviewing the judge's thoughtful and well-reasoned decision I am satisfied that she properly exercised her broad discretion and that there is no basis for us to intervene. Again I will refer to portions of her judgment which reflect her thorough review of the evidence and her weighing and balancing of the competing interests which this motion engaged:

> [19] The relevance of the metadata in this case is directly related to the amounts of time that the plaintiff spends using his computer and is directly related to the general damages and income loss components of his claim. This information is both relevant and probative.
>
> [20] The issue before the Court in this application is the balancing of relevance against privacy interests of the plaintiff and potential third parties. As well there is the concern that an overly intrusive investigation may yield little of relevance at considerable expense and necessitate expert witnesses in this field....
>
> [26] I agree with the defendant's (sic) counsel that these cases are quite distinct, in the information sought and the purpose for which the information was sought, compared to this case.
>
> ...
>
> [32] ... These are all brain injury or cognitive defect cases, not the mere direct inquiry of time spent at work on the computer, a strictly quantative inquiry. This is logically relevant to the plaintiff's claim for loss of income and loss of earning capacity.
>
> [33] At this stage of the trial proceeding all relevant information should be disclosed. The disclosure of the metadata does not, in my view, amount to an unreasonable infringement of the plaintiff's privacy and the Court ought not to exercise its discretion in this direction.
>
> [34] I am also satisfied that the protocols and screens that will be in place as described by Ms. Ritchie will protect the plaintiff's privacy interests. For example, no reference will be made to actual websites visited by the plaintiff. There can therefore be no "profiling" of the plaintiff, nor is it the defendant's (sic) intention to do so.
>
> [35] As to the issue of proportionality, this is not a concern as the defendant has agreed to bear the costs of this investigation.
>
> [36] As to the implementation of Ms. Ritchie's analysis the plaintiff will have to provide further disclosure, as has been requested in the past and refused (Ms. Mitchell's correspondence of January 25, 2012).

> [37] This information will facilitate a supplementary metadata analysis report intended to exclude certain irrelevant materials from review, as contemplated in para. 7 of the defendant's draft order.

[77] From these extracts as well as the detailed exchanges between the judge and the experts and counsel seen in the transcript from the hearing, it is clear that the judge was very attentive to the importance of the evidence, and the contrasting positions asserted by Mr. Jewett and Ms. Ritchie.

[78] Ms. Ritchie's extensive and impressive curriculum vitae was filed with the court. After graduating from university with a Bachelor of Science degree and completing advanced graduate studies in computer security and investigations, Ms. Ritchie was an IT and Security Analyst with the Canada Revenue Agency before joining ESI as Senior Project Manager and Digital Forensic Analyst at its offices in Victoria, British Columbia. She has had extensive experience in computer analytics and has been qualified to give expert evidence in criminal trials. Ms. Ritchie has held high level security clearances, is often seconded to police departments in British Columbia to assist in highly sensitive criminal investigations and was the first woman in Canada to attain her certified examiner designation.

[79] In her affidavit and testimony Ms. Ritchie explained how she would isolate and back out other users of the appellant's computer so that Mr. Laushway's usage patterns could be established. She described how she and her staff would run reports on usage of Mr. Laushway's computer "without viewing the content of the files or emails" and "track website and Internet usage without viewing the nature or specific websites visited". She explained how she would "exclude solicitor/client privilege material and emails" and how such "materials can be screened from view in a way that would screen "simply for frequency and time ... and block all text". Ms. Ritchie explained how she and her team would create a forensic bit stream image of the hard drive of Mr. Laushway's computer and how no one but ESI would have access to that image through its own secured network.

[80] In his affidavit and testimony Mr. Jewett identified several factors he thought could compromise the viability of the investigation.

[81] Robertson, J. found that Ms. Ritchie had provided sound explanations and solutions for any such impediments to her analysis. The judge found:

> [10] Mr. Jewett has been in the computer business for 35 years and demonstrated a broad and comprehensive knowledge of computer systems generally. Although he had no personal experience or expertise in the use of forensic software and retrieval procedure referenced by Ms. Ritchie.
>
> [11] As a preliminary matter, I will say that having heard the cross-examination of these witnesses and reviewed their affidavits and credentials, I am satisfied that Ms. Ritchie met the challenges and objections raised by plaintiff counsel (sic) and Mr. Jewett.

[82] By the terms of the judge's order ESI is required to create two metadata reports, the first being much broader than the second, with specific directions given as to the matters that were to be excluded from review in the second report. Counsel advised that the rationale behind such an approach and specific directions was that submissions concerning the admissibility or reliability of either or both of these reports could then be made to the judge presiding at the trial.

[83] Obviously Justice Robertson was satisfied with these measures and saw fit to incorporate them in her order. Respectfully, her directions seem perfectly sound and sensible to me.

[84] Having weighed the differing opinions of the two experts, and observed first hand their responses while cross-examined under oath, it was entirely open to the Chambers judge to prefer the expert opinion and approach urged by the respondents before moving on to the other important questions relating to such things as Mr. Laushway's (and other third parties') privacy interests, proportionality, and the efficacy of imposing appropriate limiting terms and conditions.

[85] This function engaged the judge in the exercise of discretion and involved fact-finding and inference-drawing while weighing the evidence and balancing competing interests. These are matters which always attract considerable deference and are reviewable on a reasonable standard. See **Ellph.com, supra**, at ¶39 and ¶50. I am satisfied that the manner in which the judge applied her discretion was reasonable and fully supported on the record. The very detailed terms and conditions contained in the judge's Order reflect her careful attention to and balancing of those interests:

> **IT IS ORDERED THAT:**

1. Mr. Laushway shall provide his computer or his computer hard drive to ESI Specialists Inc. ("ESI")
2. ESI shall create a forensic bit stream image of the hard drive of Mr. Laushway's computer. This image will be stored in a secured forensic laboratory and only accessed through a secured network.
3. No one but ESI shall be permitted to access the forensic bit stream image.
4. Files relating to Mr. Laushway's communication with his legal counsel shall be screened from view.
5. ESI shall not access the content of files stored on the hard drive any more than is necessary to create the metadata analysis reports provide (sic) for in this order.
6. ESI shall create a metadata reports identifying:

   (a) Whether programs, websites or functions are open for what periods of time;

   (b) Whether an open program, website or function is being actively used by registering and recording key strokes, navigating away from, or to, a website, or clicking on different links on a specific site or program.

   (c) A summary of file creation and modification history;

   (d) A summary of internet usage history by website, with each non-business related website identified by a pseudonym;

   (e) The deletion of internet history due to a computer virus, specifically identifying what occurred, when the computer had a virus and what impact, if any, the virus had on the internet history. If the internet history has been deleted, it shall be recovered through forensic methods and determine whether the deletion was accidental or whether it was intentional; and

   (f) Reports produced will identify specific websites of the plaintiff's business by name, but other websites visited will be tracked with a pseudonym for usage only.
7. ESI shall create a second metadata analysis report identifying the same matters as in paragraph 6 above, but excluding the following from review:

   (a) Emails to and from Ms. Green's daughter's email address;

   (b) Games usage;

   (c) Use related downloading and movie watching;

   (d) Use relating to the files associated with Mr. Laushway's bookkeeping by the bookkeeper on the days she worked;

(e) Use on the dates on which Raymond Messervey worked for Mr. Laushway; and

(f) Use on the dates on which Mike MacPhee attended to copy computer materials.

8. To facilitate paragraph 7 above, the Plaintiff will provide to the Defendants the documents and information set out in Patricia Mitchell's letter of January 25, 2012 to Ms. Snow.

9. The cost of the transportation of the hard drive and the reports shall be borne by the Defendants.

10. Costs of this Motion shall abide further Order of the Court.

[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.

[88] For the reasons stated I am satisfied that the judge exercised her discretion in a manner that was reasonable having regard to all of the circumstances. I would not intervene.

Conclusion

[89] In deciding whether or not to grant the production order the judge was required to correctly interpret and apply the law to the facts she found and the inferences she drew from the evidence before her. She was also obliged to exercise her discretion judicially when weighing and balancing the competing interests that arose in this particular case. As this is the first time the interpretation and application of Rules 14 and 16 has come before us, the judge did not have the benefit of this Court's explanation of the proper legal test to be applied in such matters. Accordingly, while the judge's analysis was somewhat incomplete, such shortcomings are not enough to undermine her ultimate conclusion, which was correct. The manner in which she exercised her discretion was reasonable. Her

decision has not produced an obvious injustice. Nothing on this record would warrant our intervention.

[90] I would dismiss the appeal and affirm the Chambers judge's decision and confirmatory order. Because this is a case of first instance and a matter of considerable importance to the practicing Bar, I would fix costs for this appeal at $3,000 inclusive of disbursements, but would direct that they be made payable in the cause.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.