Tribunal File No.: 2010-07633-I

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

MICHAEL JACK

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, AS REPRESENTED BY THE MINISTER OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES AND OPERATING AS THE ONTARIO PROVINCIAL POLICE

Respondent

RESPONDENT'S CASEBOOK

April 20, 2012

Ministry of Community Safety and
Correctional Services
Legal Services Branch
655 Bay Street
Suite 501
Toronto, Ontario M7A 0A8

Lynette D'Souza
Tel: (416) 326-1237
Fax: (416) 314-3518

Counsel for the Respondent

TO: Michael Jack
c/o Lloyd Tapp
252 Angeline Street North
Lindsay, Ontario K9V 4R1

Applicant

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INDEX

HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Darlene Lampi

Complainant

-and-

Ontario Human Rights Commission

Commission

-and-

Princess House Products Canada Inc. and James B. Smith

Respondent

INTERIM DECISION

Adjudicator: Sherry Liang

Date: January 3, 2008

File Number: HR-1183-06

Citation: 2008 HRTO 1

Indexed as: **Lampi v. Princess House Products Canada Inc.**

Human Rights Tribunal of Ontario
400 University Avenue, 7th Floor
Toronto ON M7A 1T7
Phone (416) 314-0004 Fax (416) 314-8743 Toll free 1-800-668-3946
TTY (416) 314-2379 / 1-800-424-1168
E-mail hrto.registrar@ontario.ca
Website www.hrto.ca

INTRODUCTION

[1] This interim decision deals with a request by the Respondents for production of the will of Darlene Lampi, who died on August 14, 2006. Prior to her death, the deceased had filed a complaint with the Ontario Human Rights Commission (the Commission) against the Respondents, alleging discrimination on the basis of sex and other violations of the *Human Rights Code*, R.S.O. 1990, c. H.19. This complaint was referred to the Tribunal for hearing on October 17, 2006.

[2] Steve Zullo and Linda Lennard claim to be the executors of the estate of Darlene Lampi, and wish to participate at the hearing of the complaint on behalf of the estate. The Respondents requested documentary evidence to support the request to participate. They were provided with portions of the will of the deceased, but seek to have the entire document. The Commission, Mr. Zullo and Ms. Lennard oppose this request.

[3] The portions of the will produced to the Respondents, and which are also before me, consist of the first and last pages. The first page appoints Steven Zullo to be the Estate Trustee, Executor and Trustee. Linda Lennard is appointed to act in the event that Steven Zullo is unable or unwilling to. The last page bears the signature of the deceased and two witnesses. Also produced is an affidavit from one of these witnesses attesting to having been present when the will was signed.

[4] The parties were given the opportunity to file written submissions. Only the Respondents and the Commission provided submissions, most of which I find unnecessary to detail here. For present purposes, it is sufficient to state that the Respondents question the "standing" of Mr. Zullo and Ms. Lennard, their motivation in wishing to participate in the proceedings, and their authority to act on behalf of the estate.

[5] The Commission states that production of the entire will is unnecessary and would also be a significant invasion of the deceased's privacy. Further, it states that the

will has nothing to do with the Respondent's ability to make full answer and defense. The only relevance of the will is in the determination of who has the authority to appear on behalf of the estate. The Commission submits that the relevant portions, showing the appointment of Mr. Zullo as executor, have been disclosed.

[6] Further, the Commission submits that if the Tribunal finds the document arguably relevant, it can order it to be produced to the Tribunal for inspection for relevance.

[7] Rules 41 to 48 of the Tribunal's Rules of Practice, dated July 2004, set out the obligation to make disclosure as between the parties. In particular, the Tribunal has the discretion to direct further disclosure under Rule 47 which states:

> At any time in a proceeding, subject to determining any claim of privilege asserted, a panel may order any party to deliver to any other party particulars, physical or documentary evidence, expert reports, lists of witnesses and witness statements for the purpose of the hearing and anything else the panel considers appropriate for a full and satisfactory understanding of the issues in the proceeding.

[8] The threshold for production and disclosure of documents before the Tribunal is "arguable relevance" – not a particularly high bar. There must be some relevance and the party seeking production must demonstrate a nexus between the information or document sought and issues in dispute before the Tribunal: *Neusch v. Ontario (Ministry of Transportation)* (2002), 43 C.H.R.R. D/171 (Ont. Bd. of Inquiry) at para 38.

[9] Finding that documents are arguably relevant for production does not mean that such documentation will be admissible at a hearing: *Neusch, supra* at para 41.

[10] Documents which are arguably relevant may nevertheless not be ordered disclosed if they are privileged, the probative value is outweighed by potential prejudice to the party producing them, or the timing of the request risks derailing a just and expeditious hearing.

[11] The Tribunal is also sensitive to privacy issues, particularly in relation to the production of medical records. Even where such records are arguably relevant, compelling privacy interests can be protected through such techniques as limiting the documents ordered to be produced, restricting the individuals who may view the documents, or ordering production to the Tribunal for inspection or redaction before disclosure: see, for instance, *McEwan v. Commercial Bakeries Corporation* 2004 HRTO 13. The Tribunal may also order production without screening. It is, of course, understood that parties may not use material disclosed to them through the Tribunal's processes for purposes other than its proceedings.

DECISION

[12] I find that the will ought to be produced in its entirety. The document is arguably relevant to a preliminary issue in this proceeding, which is the authority of Mr. Zullo and Ms. Lennard to participate in the hearing on behalf of the estate. The Respondents are thus entitled to disclosure of the document. Although the pages already disclosed seem to cover the issue of the appointment of the executor, parties cannot normally produce only those portions of a document they deem to be relevant. I see no reason why the Respondents should not be able to view the entire will.

[13] Further, it is not necessary for the Tribunal to view or redact the document before it is produced to the Respondents. The Commission submitted generally that production of the will would lead to a "significant invasion of the deceased's privacy", but provided no further detail or reasons to support this position. This broad assertion of a privacy interest would apply to a lesser or greater degree to many documents relevant to proceedings before the Tribunal. Although some, such as medical records, may warrant special attention and procedures, no reason has been given to support the application of such procedures to the document at issue here.

[14] I conclude by repeating that the preliminary issue pertinent to this production order is the authority of Mr. Zullo and Ms. Lennard to participate in the hearing of this

complaint, on behalf of the estate of the deceased. Put another way, may Mr. Zullo and Ms. Lennard make submissions, call evidence and conduct cross-examination of the Respondent's witnesses, if they wish to? This is a different, and arguably narrower issue, than whether they ought to be added as parties (which they do not, but on which the Respondent provided submissions), or whether they have the authority to receive and distribute assets of the estate (on which the Respondents also provided submissions).

[15] In the conference call with the parties, I stated that after I determined whether to order further production, the Respondents could indicate whether they continue to challenge Mr. Zullo and Ms. Lennard's authority to act on behalf of the estate in this complaint, and would be given an opportunity to provide submissions. In this order, I will set a date for the Respondents to provide any additional submissions after they have reviewed the will, if they wish to supplement those already before me.

ORDER

[16] The Tribunal orders the estate of the Complainant to produce, by January 11, 2008, the last will and testament of Darlene Lampi in its entirety.

[17] Additional submissions from the Respondents, if any, on the issue of Mr. Zullo and Ms. Lennard's authority to act on behalf of the estate in this complaint shall be delivered to the Tribunal by January 18, 2008. Dates for submissions from the other parties will be set if necessary.

Dated at Toronto, this 3rd day of January, 2008.

"signed by"

Sherry Liang
Vice-Chair

HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Larisa Gridin

Applicant

-and-

Integrated Technology Ltd.

Respondent

INTERIM DECISION

Adjudicator: Geneviève Debané

Date: February 23, 2012

File Number: 2010-06679-I

Citation: 2012 HRTO 389

Indexed as: **Gridin v. Integrated Technology Ltd.**

[1] This Application was filed on August 27 2010 pursuant to s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*") alleging discrimination in employment on the basis of sex and sexual solicitation and/or advances. The respondent Integrated Technology Ltd. has filed a Response denying the allegations in the Application. This matter is scheduled for a hearing in Toronto on June 11, 12 and 13 2012.

[2] This Interim Decision addresses a Request for an Order During Proceeding filed (the "Request") by the applicant seeking the production of documents and that the respondent be compelled to provide her with the last known address of a material witness.

Production Request

[3] The respondent terminated the applicant's employment for just cause on August 25, 2010 alleging amongst other reasons that it had received numerous customer complaints with respect to the applicant's attitude and failure to respond in a timely manner. The applicant alleges that she was terminated because she raised a complaint that she was being subjected to harassment and discrimination on the basis of her sex. In her Application she denies that there were any customer complaints made against her.

[4] In the Request the applicant asks that the Tribunal order "that the respondent produce to the applicant all emails in its possession relating to the employment of Larisa Gridin, specifically:

1. All emails received by or sent by ITL which mention "Laura", "Larisa", "Laura Gridin" or "Larisa Gridin" in the subject or the body (except those which are solicitor-client privileged);

2. All messages sent from Laura Gridin's ITL email account;

3. All messages received by Laura Gridin's ITL email account;"

[5] The applicant states in the Request, amongst other reasons in support of the production of these documents, that the respondent is relying on a tiny subset of "thousands of emails" that the applicant sent to coworkers, suppliers and vendors during her employment and that it is not fair for the respondent to be the one in the position to determine the relevance of the emails in question. The applicant also alleges that there are emails from vendors containing "glowing praise" for her work. The applicant asserts that she is entitled to respond to the respondent's reliance on unfavourable emails by showing that there are far more favourable emails in existence and that the Tribunal's view with respect to the applicant's work performance should not be skewed by a heavy reliance on isolated incidents. The applicant states that the respondent need not review the emails in question and that they can be copied on an electronic file which would take less than an hour. In the alternative the applicant requests "that the above emails be produced in accordance with the Supreme Court of Canada's O'Connor procedure" and that the Tribunal review the thousands of emails to determine their relevance. In the further alternative, the applicant requests that the Tribunal not permit the respondent to rely on the emails filed in its Response.

[6] The respondent objects to the production Request on the basis that the documents sought by the applicant are not relevant to the proceedings and that she is engaging in a "fishing expedition". The respondent also takes the position that it manufactures circuit boards that have military applications and that it is subject to a

number of laws and regulations including the International Trade in Arms Regulations, the Controlled Goods Program and *Defence Production Act* and that it must comply with strict confidentiality guidelines. In addition the respondent states that it would have to review all of the emails to determine whether there are any confidential and/or proprietary information and that this would not take one hour as alleged by the applicant. Further, the respondent notes that the Tribunal does not award the reimbursement of legal costs which would be significant in these circumstances.

[7] The Tribunal has the power to order a party to produce any document that is arguably relevant to the proceeding. There must be some relevance and the party seeking production must demonstrate a nexus between the information or document sought and issues in dispute before the Tribunal: *Lampi v. Princess House Products Canada Inc.*, 2008 HRTO 1 at para. 8. Finding that documents are arguably relevant for production does not mean that such documentation will be admissible at a hearing: *Lampi* at para. 9.

[8] The issue before the Tribunal is to determine whether the respondent infringed the applicant's right to be free from harassment and/or discrimination in the workplace. The applicant asserts, in essence, that the respondent's reliance on cause for her termination is a pretext for a discriminatory motive. In this context, documents that either demonstrate or refute the respondent's position about the applicant's performance may be arguably relevant. However, this does not warrant ordering production of every email in the respondent's possession that contains a reference to the applicant, or every email ever sent to or from the applicant during her employment. In the absence of any indication that any specific email contains information relevant to the issues in the Application, I agree that requesting such broad disclosure would

amount to a fishing expedition. The applicant's request for production in this respect is denied.

[9] It is unnecessary, given my determination, to consider whether this would be an appropriate case to follow the procedure set out in the Supreme Court of Canada's decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (O'Connor").

Disclosure of the identity of a material witness

[10] In the Application, the applicant alleges that a short term employee named "Michelle" was a witness to at least one incident of harassment. In the Request the applicant asks the Tribunal to compel the respondent to disclose "Michelle's" full name and last known contact information because she is a material witness.

[11] The respondent takes the position that it is not certain as to whether or not "Michelle" does indeed have any relevant information. Further, it notes that absent consent from "Michelle" that it cannot provide this information to the applicant because of privacy concerns.

[12] Having reviewed the pleadings, I agree with the applicant that "Michelle" is a material witness who may have relevant evidence and in the circumstances I find it appropriate to order the disclosure of her full name and last known address.

Order

[13] The Tribunal orders that within 10 days from the date of this Interim Decision the respondent must provide to the applicant the full name of "Michelle" and her last known address.

[14] I am not seized.

Dated at Toronto, this 23rd day of February, 2012.

"signed by"

Geneviève Debané
Vice-chair

CITATION: Javitz v. BMO Nesbit Burns Inc., 2011 ONSC 1332
COURT FILE NO.: CV-10-8951-00 CL / CV-10-8937-00 CL / CV-10-8950-00 CL
DATE: 20110228

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:	
ELI JAVITZ Plaintiff	*W. Michael G. Osborne* and *David N. Vaillancourt*, for the Plaintiff
– and –	
BMO NESBITT BURNS INC. and THE BANK OF MONTREAL Defendants	*Jeremy Devereux* and *Michael Kotrly*, for the Defendants
AND BETWEEN:	
SOURCE 4 REALTY INC. Plaintiff	*W. Michael G. Osborne* and *David N. Vaillancourt*, for the Plaintiff
– and –	
BMO NESBITT BURNS INC. and THE BANK OF MONTREAL Defendants	*Jeremy J. Devereux* and *Michael Kotrly*, for the Defendants
AND BETWEEN:	
KATEL TRADING INC. Plaintiff	*Jeremy Devereux* and *Michael Kotrly*, for the Plaintiff
– and –	

BMO NESBITT BURNS INC. and THE BANK OF MONTREAL Defendants	)	*Peter R. Greene* and *David N. Vaillancourt*, for the Defendants

PEPALL J.

REASONS FOR DECISION

[1] Three related plaintiffs have sued BMO Nesbitt Burns Inc. ("Nesbitt"), an investment dealer, and The Bank of Montreal ("BMO") for damages arising from fraud committed by Gregory Rao ("Rao"), an investment advisor employed by Nesbitt but based in a BMO branch in Woodbridge, Ontario. Rao is bankrupt. The defendants bring three motions to strike portions of three substantially similar statements of claim pursuant to Rule 21.01(1)(b) and pursuant to Rule 25.06(1) and 25.11. They submit that the scope of the three actions should be limited to whether Nesbitt is vicariously liable for the actions of Rao and whether BMO had actual knowledge that Rao was engaging in fraudulent activity.

Javitz Claim

(a) Facts

[2] I will address the Eli Javitz ("Javitz") claim first. The facts derive from his statement of claim. Javitz claims damages of $180,000 plus other relief. Javitz had known Rao for approximately 10 years. He knew Rao was employed as an investment advisor with Nesbitt. Javitz had discussions on investment opportunities with Rao, some of which took place in Rao's office at the BMO branch in Woodbridge. Rao presented Javitz with a Nesbitt business card and made various representations to him. Javitz decided to participate in an investment opportunity presented by Rao. Based on statements made by Rao, Javitz understood that he was investing his money with Nesbitt and that Rao had opened a Nesbitt's account on behalf of Javitz. The investment was meant to be short term in nature and funds were returned to Javitz in the form of

a BMO bank draft within one month of the original investment. Javitz also received payment intermittently by bank drafts and cheques drawn on the account of Rao and Rao's wife. In fact, Rao had fabricated the investment product and the investment account. Rao had converted Javitz's money to his own use. Javitz now blames the defendants for his losses.

[3] Javitz pleads that Rao's personal bank account at BMO was the subject of numerous large cheque deposits of a questionable nature drawn on the accounts of a number of individuals. Rao enjoyed unfettered and unmonitored access to BMO's banking systems at the Woodbridge branch and he frequently processed banking transactions from BMO workstations. Javitz pleads that in allowing Rao to process banking transactions, Rao was a de facto employee of BMO. Furthermore, Rao's access to BMO's systems facilitated Rao's fraudulent activities within his own BMO account and within the BMO accounts of other BMO customers. The defendants failed to take any steps to distinguish the employment status of individuals employed by BMO and those employed by Nesbitt. The Woodbridge branch operated as one business entity with little if any distinguishing between the business operated by BMO and that of Nesbitt. On July 3, 2009, Rao was terminated for cause by Nesbitt on account of his misappropriation of customer investment and/or bank funds.

(b) Claims against BMO

[4] Javitz had several accounts at BMO but not at the Woodbridge BMO branch. Javitz claims negligence against BMO but does not assert that BMO had a duty of care because Javitz had accounts with BMO at another BMO branch nor does he claim that the funds he provided to Rao came from any of his BMO accounts. Rather, he pleads that as collecting bank, BMO was negligent in failing to recognize Rao's fraudulent activity in Rao's BMO bank account. BMO knew or ought to have known that a fraud was being perpetrated through Rao's BMO account and that Javitz's cheques were being deposited in association with that fraud. In addition, Javitz pleads that BMO was negligent in allowing Rao to have unfettered access to its banking systems. BMO failed to monitor Rao's account and failed to take appropriate steps in the face of suspicious and/or fraudulent activity.

[5] BMO was also negligent in failing to fulfill its statutory duty to detect unusual and potentially fraudulent transactions in Rao's BMO account pursuant to the provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

(i) Constructive Knowledge Claim

[6] The moving party defendants seek to strike Javitz's constructive knowledge negligence claim. The defendants submit that it is plain and obvious that BMO owed no duty of care to Javitz unless it had actual knowledge of Rao's fraudulent activity. BMO submits that *Dynasty Furniture v. Toronto-Dominion Bank*[1] is a complete answer to Javitz's claims in constructive negligence against BMO. It states that *Dynasty* makes it clear that a bank cannot be liable in negligence without actual knowledge of fraudulent conduct.

[7] Javitz states that the existing case law is not dispositive of the issue of the existence of a duty of care. Secondly, under the *Anns/Kamloops* analysis, BMO owed a duty to investigate Rao's suspicious transactions and to prevent him from improperly accessing its banking systems under circumstances where Javitz came into a BMO branch to see Rao, a representative of its subsidiary, Nesbitt. They submit that these facts created a relationship of proximity.

[8] The legal principles applicable to striking all or part of a statement of claim pursuant to Rule 21 are well known.

- it must be plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action;

- the onus is on the defendant to establish that it is plain and obvious;

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[1] 2010 ONSC 436.

- the length and complexity of the issues, the novelty of the cause of action and the potential of the defendant to present a strong defence are insufficient to prevent the plaintiff from proceeding with its case;

- the facts as pleaded are presumed to be true unless patently ridiculous or incapable of proof;

- no evidence is permitted on a Rule 21 motion without leave of the court or the consent of the parties;

- the court should not dispose of matters of law that are not fully settled in the jurisprudence; and

- the statement of claim should be read generously with allowance for inadequacies due to drafting deficiencies.

[9] See in this regard *Hunt v. Carey Canada Inc.*[2], *Nash v. Ontario*[3], and *Harris v. GlaxoSmithKline Inc.*[4]

[10] The key issue for me to decide is whether the decision in *Dynasty* is dispositive of the constructive knowledge negligence claim against BMO. As noted in *Dynasty* at paragraph 17, constructive knowledge refers to knowledge of facts that would put an honest person on inquiry. In *Dynasty*, Wilton-Siegel J. engaged in a detailed discussion of this issue. The Court of Appeal upheld his decision but expressly stated that it did not "find it necessary to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual knowledge (willful blindness or recklessness) of the fraudulent activities being conducted

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[2] [1990] 2 S.C.R. 959.

[3] (1995) 27 O.R. (3d) 1.

[4] 2010 ONSC 2326.

through an account of its customer." The Court left the question of whether such a duty existed to another day. As such, I do not believe that the *Dynasty* decision may be relied upon as a complete answer to the proposition advanced by the moving parties, namely that a bank cannot be liable in negligence to a non-customer in the absence of actual knowledge.

[11] I must therefore determine whether as pleaded, the relationship between Javitz and BMO involves a duty of care. First I must determine if BMO and Javitz are in a relationship involving a recognized duty of care. If not, I must apply the *Anns/Kamloops*[5] analysis to ascertain whether there was a duty of care between Javitz and BMO. As noted by Perell J. in *Goodridge v. Pfizer*, whether a duty of care exists involves satisfying three requirements: forseeability; sufficient proximity; and the absence of policy considerations that would negate a prima facie duty.

[12] The fresh as amended statement of claim relies on BMO's position "as the collecting bank vis-a-vis the cheques invested by Javitz." Its position as banker to Javitz is not relied upon and this was conceded in argument. The law has not recognized a duty of care in the circumstances as pleaded in the fresh as amended statement of claim.

[13] Applying the *Anns/Kamloops*, in my view, these three requirements are not met by the pleading in this case. Rao's access to banking systems generally and his presence in the Woodbridge branch are insufficient to ground a duty of care in favour of the plaintiff. Based on the facts as pleaded, the parties are not in a relationship of sufficient proximity such that a prima facie duty is owed. I also agree in general with the policy considerations enumerated by Wilton-Siegel J. in his *Dynasty* decision.

[14] I conclude that it is plain and obvious that the claim in negligence against BMO based on constructive knowledge should be struck. The defendants do not take issue with the claims in

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[5] *Anns v.Merton London Borough Council* [1978] A.C. 728 and *Kamloops (City of) v. Nielson* [1984] 2 S.C.R. 2.

negligence based on actual knowledge which includes willful blindness and recklessness and those allegations will survive.

(ii) Statutory Duty

[15] The second issue to address with respect to BMO relates to paragraph 33 of the fresh as amended statement of claim. Javitz pleads that BMO had a statutory duty to detect unusual and potentially fraudulent transactions in Rao's BMO account pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("the Act") and that BMO's failure to fulfill its statutory obligation was negligent. Firstly, there is no cause of action for breach of a statutory obligation: *Canada v. Saskatchewan Wheat Pool.*[6] Secondly, the Act cannot ground a private duty of care: *Dynasty*[7] and *Ramias v. Johnson.*[8] Thirdly, no provision of the *Act* is pleaded and it is unclear that the *Act* requires a financial institution to detect "potentially fraudulent transactions".

[16] The threshold test is met and in my view, the allegations relating to the Act should be struck.

(iii) Rao's Status at BMO

[17] Pursuant to Rule 25.11, a pleading or part of a pleading may be struck where it is irrelevant, frivolous, vexatious, or may prejudice or delay the fair trial of the action. The moving parties submit that the allegations in the fresh as amended statement of claim regarding Rao's role at BMO should be struck. These include the allegations that Rao was a de facto employee of BMO and that the defendants failed to distinguish the employment status of BMO and Nesbitt.

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[6] [1983] 1 S.C.R. 205 (S.C.C.).

[7] Supra at paras. 89, 90 and 93.

[8] 2009 A.B.Q.B 386 at para. 44. It is incorrect to state that the allegation was permitted to stand in either this case or in *Dynasty* although in the latter, leave to amend was granted.

It is pleaded that at all material times Rao was an employee of Nesbitt and nowhere is it suggested that Javitz thought he was an employee of BMO.

[18] It is not pleaded that any BMO duty flowed from the allegation that Rao was a de facto BMO employee and quaere its jurisprudential basis in any event. I agree with the moving parties that these allegations have no relevance to the remaining claims against BMO and that they should be struck pursuant to the provisions of Rule 25.11. The one exception is that part of paragraph 32 dealing with unfettered and unauthorized access to BMO's banking systems as this is relevant to whether BMO knew, was willfully blind or was reckless with respect to Rao's fraud within Rao's BMO account.

(c) Claims Against Nesbitt

[19] Javitz claims against Nesbitt for breach of contract, negligence and negligent supervision of Rao. The defendants submit that paragraphs 20 to 24 of the fresh as amended statement of claim disclose no cause of action and there is no proximity to suggest that Nesbitt owes a duty of care to Javitz regarding the supervision of Rao. In addition, paragraphs 20 and parts of paragraphs 22 and 30 contain allegations relating to persons other than the plaintiff and should be struck as scandalous, frivolous, vexatious and as an abuse of process.

(i) Contract

[20] The pleading on the existence of a contract with Nesbitt is not straightforward. While Javitz does not expressly state that he had an account at Nesbitt or that he executed any documents opening an account, he does plead that Rao was employed and terminated by Nesbitt and presented Javitz with a Nesbitt business card. Further, he pleads that he understood that a Nesbitt account had been opened on his behalf and that he invested funds and suffered a loss as a result of Nesbitt's breach of contract. On the other hand, he does state in paragraph 15 of the pleading that the Nesbitt account was fabricated. While it would be preferable for the contract claim to have greater clarity and while ultimately it may be proven that no contract existed, reading the fresh as amended statement of claim generously, and in light of the contents of paragraphs 4, 7, 8, 9, 10, 11, 14 and 24, in my view, the claim for breach of contract against

Nesbitt should not be struck. Put differently, it is not plain and obvious that those provisions of the fresh as amended statement of claim should be struck.[9]

(ii) Failure to Supervise

[21] The next issue to consider is Javitz's claim of negligence for Nesbitt's failure to supervise Rao. This claim falls within a previously recognized duty of care: *Blackburn v. Midland Walwyn Capital Inc*[10]. In that case, the Court of Appeal noted that the trial judge had found liability against Midland Walwyn Capital Inc. for negligence in failing in their duty to supervise its investment dealer properly. The Court concluded that the findings were well supported by the evidence and wrote: "It was reasonably foreseeable that if the brokerage firms did not supervise Georgiou, did not properly monitor the accounts, and did not warn clients, some would sustain losses at the hands of Georgiou." [11]As noted by Feldman J. A. in *Anger v. Berkshire Group Inc.*[12], it could not be unequivocally said that an officer of an investment company did not owe a duty of care to investors if he or she was negligent in the supervision of the sales force. By extension, the same is true with respect to an investment company. This claim should not be struck. In my view, it is not plain and obvious that Javitz's negligence claim against Nesbitt fails to disclose a reasonable cause of action. In light of my conclusion, there is no need to consider the *Anns/Kamloops* analysis.

(iii) Other Customers

[22] I will next consider the allegations regarding Rao's other fraudulent activities. In paragraph 20 of the fresh as amended statement of claim, Javitz pleads that Nesbitt failed to

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[9] In any event, it is likely that a more explicit contract pleading would survive an amendment motion.

[10] [2005] O.J. No.678 (C.A.).

[11] Ibid, at paras 7 and 10.

[12] [2001] O.J. No. 379.

supervise Rao in regard to a number of Nesbitt's customer accounts in addition to Javitz's account and in paragraph 22, that Rao perpetrated a massive fraud over several years while in the employ of Nesbitt. Lastly, in paragraph 30, the defendants misrepresented Rao's employment status to Javitz and the public at large.

[23] The defendants seek to strike these allegations based on Rule 25.11. They submit that these allegations expand the complexity and expense of the litigation while providing little or no probative value. Furthermore, the case of *Brodie v. Thomson Kernaghan & Co.*[13] where such a pleading was disallowed is remarkably similar to this case. They also state that the principle of proportionality set forth in Rule 1.04 should be applied.

[24] Javitz submits that a pleading of similar facts is permissible so long as the added complexity resulting therefrom does not outweigh the probative value of the allegations and that this is an issue for the trial judge to decide. Furthermore, the systematic failure of the defendants is crucial in determining whether there has been a breach of a standard of care. In addition, the moving parties have not filed any evidence in support of this aspect of the motion and this is fatal to its success.

[25] In my view, these portions of the pleading should be struck on a number of grounds. These allegations will greatly expand the breadth, complexity and expense of the litigation in circumstances where the corresponding probative value is minimal. Discovery of the massive fraud including other customer accounts would be required. An examination of the circumstances of each fraud and what Nesbitt knew of each of them and disclosure of detailed, confidential financial information of other Nesbitt customers would be required. As Molloy J. stated in *Brodie* on the issue of an investment advisor's conduct relating to other investors:

> It adds very little to the plaintiff's claim and its absence could not deprive her of a cause of action or reduce any compensatory damages to which she might be entitled. On the

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[13] [2002] O.J. No. 1850.

> other hand, allowing the pleading to stand will result in a far more expensive and complex proceeding. Production and discovery will be considerably more protracted and complicated. There will likely be numerous interlocutory motions in respect of confidentiality issues and the rights of non-parties to protect their privacy.[14]

[26] The day after the motions were argued before me, Allen J. released her decision in *Caporrella v. BMO Nesbitt Burns Inc.* Due to the similarity of some of the allegations, counsel requested the opportunity to make written submissions which they now have done. Even though the allegations bear some similarities, I have reached a somewhat different conclusion based on the facts before me.

[27] Significantly in my view, Rule 1.04(1.1) must also be considered. It provides that "In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amounts involved, in the proceeding."

[28] This Rule was introduced as a result of the recommendations made by the Honourable Mr. Coulter Osborne in his November, 2007 Report on Civil Justice Reform. It is fair to observe that the system of justice in Ontario is under severe strain. Cases are taking too long and costing too much for the litigants. The Honourable Mr. Osborne recommended that the concept of proportionality be introduced into the Rules.

> Proportionality, in the context of civil litigation, simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake. It should be expressly referenced in the Rules of Civil Procedure as an overarching, guiding principle when the court makes any order.
>
> In my view, the civil justice system somehow has to recognize the principle of proportionality as having a broad application to all civil proceedings, so that courts and parties deal with cases in a manner that reflects what is involved in the litigation, its jurisprudential importance and the inherent complexity of the proceeding.

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[14] Ibid, at para 33.

[29] I have no hesitation in concluding that on a Rule 25.11 motion, the principle of proportionality should inform the balancing of the added complexity and potential prejudice against the potential probative value of the alleged facts. I disagree with the plaintiff's position that it would be redundant to overlay the similar fact test with the Rule on proportionality. The language of Rule 1.04 (1.1) is clear as to the court's obligation in this regard and its language is not limited in any way. In addition, in my view, it is unnecessarily cumbersome, inefficient and expensive to leave the issue of proportionality to the discovery phase of the litigation as submitted by counsel for the plaintiff.

[30] In this case, the amounts in issue are $180,000[15] and $100,000 for punitive damages. While these amounts are no doubt significant to the plaintiff, the costs of pursuing the impugned claim are not merited. I reach the same conclusion in the other two actions. In the Katel Trading Inc. ("Katel") case, the claim is for $40,000[16] and $25,000 for punitive damages and in the Source 4 Realty Inc. ("Realty") case, the claim is for $852,000[17] and $100,000 for punitive damages.

[31] Examination of other customers' accounts and the massive fraud issues would be a distraction from the main issues in the litigation, namely: did BMO have actual knowledge of Rao's fraud and fail to fulfill its duty of care to the plaintiffs; is Nesbitt vicariously liable for Rao's actions; was there a contract between Nesbitt and Javitz; and did Nesbitt breach its duty to Javitz in failing to supervise Rao. These are the issues truly engaged by this litigation and narrowing the scope serves all of the parties' interests in obtaining a timely judicial resolution to their dispute. As to evidence of increased complexity and prejudicial effect, it is obvious to me

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[15] plus amounts not yet particularized for interest and loss of expected return on investment

[16] plus an amount not yet particularized for interest and loss of expected return on investment

[17] plus an amount not yet particularized for interest and loss of expected return on investment

that the scope of the litigation would be expanded greatly were the pleading to stand and evidence of that fact is unnecessary.

[32] The striking of the impugned portions of the pleading will not prevent the plaintiff from making some inquiry on discovery as to when and how the defendants learnt of Rao's conduct and how many customers were involved but this should not extend to an examination of the details of each fraudulent act that does not involve Javitz. Indeed, as part of the powers set forth in Rule 1.04(1.1), I am directing that Nesbitt respond to those questions. In my view, this determination and direction is proportionate to the importance and complexity of the issues and to the amounts involved in each of the three proceedings.

[33] The moving parties' motion should succeed in this regard and those provisions in the fresh as amended statement of claim relating to other customers are struck.

(d) Realty and Katel Motions

[34] The submissions of counsel focused on the Javitz case but the motions in all three actions are similar. There are certain factual differences but they make no difference to the end result. I have noted and considered the differences in the amounts claimed. In Realty and in Katel, the plaintiffs had a BMO account at the Woodbridge branch as did the principal of Realty. He also had Nesbitt brokerage accounts. In addition the plaintiff in Realty did execute account opening documents with Nesbitt although, as in Javitz, the plaintiff pleads that Rao fabricated a Nesbitt investment account. In spite of these differences, the two pleadings are substantially similar to that of Javitz and the same result should ensue.

(e) Conclusion

[35] In conclusion, the relief requested by the moving parties is granted but not including the Nesbitt contract and failure to supervise claims and the aforementioned portion of paragraph 32 together with the corresponding paragraphs in Realty and Katel. Consistent with the provisions of Rule 26, leave to amend is granted to the plaintiffs. That said, the real issues in dispute in these actions are well defined and in a practical sense, absent some cataclysmic economic event,

success against one defendant should lead to financial recovery for each of the plaintiffs. Put differently, this is not a case of two defendants, one of which is improvident. In my view, the parties should use their best efforts to get on with their cases, address the real issues and obtain a judicial resolution as soon as reasonably possible.

[36] Some thought should be given to having these three actions and the Caporrella action tried together or one after the other. In addition, one judge should be assigned to case manage all of these actions. Counsel should attend before Morawetz J. as Team Leader of the Commercial List at a 9:30 am appointment to speak to that issue.

(f) Costs

[37] The parties should attempt to resolve the issue of costs themselves, failing which, they may make brief written submissions.

Pepall J.

Released: February 28, 2011

CITATION: Javitz v. BMO Nesbit Burns Inc., 2011 ONSC 1332
COURT FILE NO.: CV-10-8951-00 CL
DATE: 20110228

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

ELI JAVITZ

Plaintiff

– and –

BMO NESBITT BURNS INC. and THE BANK OF MONTREAL

Defendants

AND BETWEEN:

SOURCE 4 REALTY INC.

Plaintiff

– and –

BMO NESBITT BURNS INC. and THE BANK OF MONTREAL

Defendants

AND BETWEEN:

KATEL TRADING INC.

Plaintiff

– and –

BMO NESBITT BURNS INC. and THE BANK OF MONTREAL

Defendants

REASONS FOR DECISION

Pepall J.

Released: February 28, 2011

Human Rights Code

R.S.O. 1990, CHAPTER H.19

Consolidation Period: From December 15, 2009 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 2, s. 35.

SKIP TABLE OF CONTENTS

CONTENTS

Interpretation of Part and rules

41. This Part and the Tribunal rules shall be liberally construed to permit the Tribunal to adopt practices and procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Tribunal, will facilitate fair, just and expeditious resolutions of the merits of the matters before it. 2006, c. 30, s. 5.

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From June 1, 2011 to the e-Laws currency date.

Last amendment: 2009, c. 33, Sched. 6, s. 87.

SKIP TABLE OF CONTENTS

CONTENTS

Interpretation

2. This Act, and any rule made by a tribunal under subsection 17.1 (4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits. 1999, c. 12, Sched. B, s. 16 (1); 2006, c. 19, Sched. B, s. 21 (1).

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From January 1, 2011 to the e-Laws currency date.

Last amendment: O. Reg. 436/10.

This is the English version of a bilingual regulation.

SUMMARY OF CONTENTS

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

RULE 29.2 PROPORTIONALITY IN DISCOVERY

DEFINITION

29.2.01 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a). O. Reg. 438/08, s. 25.

APPLICATION

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 34 (Procedure on Oral Examinations).
4. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

CONSIDERATIONS

General

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

Overall Volume of Documents

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

Case Name:

Ottawa (City) v. Civic Institute of Professional Personnel (Contracting In Grievance)

IN THE MATTER OF an Arbitration
Between
The Corporation of the City of Ottawa, and
Civic Institute of Professional Personnel
Contracting in Grievance

[2010] O.L.A.A. No. 41

Ontario
Labour Arbitration
Ottawa, Ontario

Panel: Richard Brown (Chair); John Henderson (Union Nominee); Ron LeBlanc (Employer Nominee)

Heard: November 9, 2009.
Award: January 12, 2010.

(40 paras.)

Labour arbitration -- Process and procedure -- Arbitration -- Production.

The union brought a policy grievance alleging that people providing services to the employer city that were being treated as contractors were actually employees whose employment should have been governed by the collective agreement. The union sought documents related to six workers, and in particular work-related emails sent or received by the individuals during their employment with the employer. The employer strenuously objected to the production of the emails.

HELD: Preliminary order granted. Fishing expeditions ought not to have been encouraged under the guise of a policy greivance. If a union wanted the unfettered right to compel an employer to produce documents showing whether it was complying with the collective agreement, the union should have negotiated a contractual provision requiring that sort of disclosure. In the absence of such a requirement, there had to be some limit on a union's entitlement to documentation. In this case the emails sought were arguably relevant to the issue in dispute because they were likely to shed signif-

icant light on the degree of control exercised by the employer over the contested individuals. The request was also specific enough to allow the employer to identify the documents to be produced. Production was limited to certain employees.

Appearances:

For the Union: David Migicovsky.

For the Employer: Charles Hofley.

INTERMIM AWARD

1 This policy grievance is about people providing services to the City of Ottawa who are being treated as "contractors." The union contends that they are actually employees whose employment should be governed by the collective agreement. This interim award concerns a *subpoena duces tecum* which the union proposes to issue and to which the employer objects.

I

2 The union seek documents relating to six individuals: Denis St. Pierre, Paul Jefferson, Victoria Colizza, Vladimir Chaknov, Snezjana Braunstein and James Benedict. The union requested all work-related emails sent or received by them using their City of Ottawa email accounts during the term of their contracts. The employer strenuously objected to the production of these emails.

After a period as a "contractor" Mr. St. Pierre was formally appointed as an employee. The union seeks all documents relating to his change of status, all posting and competition documentation and any written employment contracts. When the issue of production was argued, employer counsel did not specifically mention these St. Pierre documents, but counsel did argue that no additional production was warranted.

3 The grievance, dated November 15, 2007, names two individuals and states they are "only two examples and the grievance covers all other individuals performing ... work that falls within the scope of the bargaining unit." After the grievance was filed, the employer conducted a survey of its managers relating to the use of contractors. The people about whom managers were questioned apparently included all individuals listed as having a computer account at the City of Ottawa who were not being treated as employees. Managers were asked to answer a number of questions relating to these people. The list of individuals included in the survey apparently was updated as new "contractors" were engaged and eventually grew to contain over two hundred and fifty names. The results of the survey were shared with the union. Fifty-one names were later removed by agreement of the parties. Union counsel contends that the employer conducted the survey on its own initiative and that the bargaining agent played no part in formulating the questions asked. Counsel for the employer did not agree with this contention.

4 In an order dated April 22, 2009, issued with the consent of the parties, we directed the employer to produce the following documents relating to thirty named "contractors":

1. All written contracts between them and the City or a third-party agency;

2. All documents relating to the retention of these people to perform work for the City; and

3. All source documents used to compile the survey results.

Union counsel contends the materials produced exceeded those required by our order but he did not specify which documents he regarded as surplus.

II

5 The employer raised three primary objections to producing all work-related emails sent or received by the six "contractors" from their City of Ottawa email accounts: (1) the union has not demonstrated that these electronic documents are relevant to the matter in dispute; (2) the cost of production would be disproportionate to the relevance of the documents and the importance of the interests in at stake; and (3) the union is engaged in a "fishing expedition." Counsel submitted the union's request lacks the degree of "reasonable particularity" that would ensure the employer was not required to produce more documents than necessary. In addition, counsel noted work-related emails are "interspersed" with personal ones and the two would have to be separated manually. We were reminded the employer has already made substantial disclosure in this matter. Employer counsel also submits the union has failed to particularize its grievance or to explain why it needs more documents.

6 In support of the argument about proportionality, employer counsel relies upon a draft report of The Sedona Conference Working Group 7 also known as Sedona Canada. The Sedona Conference is an American think tank devoted to the advanced study of complex litigation. Sedona Canada was comprised of the organizers of The Sedona Conference, lawyers and judges from across Canada and a representative of the United States federal judiciary. The draft report of Sedona Canada, entitled *The Sedona Canada Principles*, was issued for public comment in 2007. Counsel referred us to the summary of principles found at page (iv) of the report. For present purposes, the pertinent ones are:

1. Electronically stored information is discoverable.

2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information. ....

5. The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.

6. A party should not be required, absent agreement or a court order based on

demonstrated need and relevance, to search for or collect deleted or residual electronically stored information. ...

9. During the discovery process parties should agree to, or if necessary, seek judicial direction on, measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data. ...

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

7 Effective January 1, 2010, the Ontario the *Rules of Civil Procedure* will be amended by adding the following provisions incorporating the notion of proportionality:

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

Section 30.01(1) defines a document to include "data and information in electronic format."

8 The employer also relies upon a number of arbitral awards: (1) *F.W. Fearman Co. and United Food and Commercial Workers* (1990) L.A.C. (4th) 294 (Marcotte); *West Park Hospital and Ontario Nurses' Assoc.* (1993) L.A.C. (4th) 160 Knopf); *Vancouver Hospital and Health Sciences Centre and British Columbia Nurses' Union* (1998) 72 L.A.C. (4th) 297 (Kinzie); *Canadian Mental Health Assoc. and Canadian Union of Public Employees* (1999), 78 L.A.C. (4th) 353 (MacLaren); and *City of Toronto and Canadian Union of Public Employees* (2009), 182 L.A.C. (4th) 232 (Nairn).

9 In *West Park Hospital* Arbitrator Knopf summarized the factors governing a request for disclosure:

> [W]here the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing. Further, the Board should be satisfied that disclosure will not cause undue prejudice. In this regard, the criteria set out in the *Desmarais and Morrissette* case are applicable in terms of weighing whether or not privileged information should be protected. (page 167)

The grievor in that case had been discharged based on "professional concerns" about her work as a nurse. Arbitrator Knopf declined to grant the employer's request for pre-hearing disclosure of medical reports, because of their confidential nature, even though they might be relevant and admissible at the hearing.

10 The above passage from *West Park Hospital* was cited with approval in *City of Toronto and Canadian Mental Health Assoc.* In *Canadian Mental Health Assoc.* the grievor was an unsuccessful applicant in a job competition. The union sought production of the questions asked when interviews were conducted. The employer opposed this request, arguing that significant time and effort had been devoted to developing the questions and they would lose their value once public. In addressing this issue, Arbitrator MacLaren determined the factor of "undue prejudice" could include extraordinary expense. He wrote:

> The overriding consideration of undue prejudice could include within its concept extraordinary expense or inconvenience in being forced to divulge the questions being used by the agency. ...[T]he concern is that there will be knowledge of the questions and this will distort the results of the selection process. This problem can and will occur amongst the Employer's work force whether there is disclosure or not. ... I find, that while there is an expense to developing interview and selection questions, it has not been demonstrated that this is so extraordinary that it would prejudice the Employer if disclosure were compelled. I therefore, do not find that there would be undue prejudice in this case because of an order to disclose the particulars by way of production of the requested materials. (para. 20)

Having decided undue prejudice could include cost, Arbitrator MacLaren granted the union's production request because the employer failed to demonstrate the cost would be extraordinary.

11 In *City of Toronto* the grievor contended her application for a job had been rejected due to discrimination on the basis of sex. Arbitrator Nairn ordered the employer to produce all documents related to the job competition. She declined to order production of other materials sought by the union: (1) prior job postings for the same position over the last decade, the list of applicants in those competitions and the sex of the successful applicant in each case; (2) organizational charts; and (3) certain training programs and opportunities offered to women. Rejecting this request, the arbitrator wrote:

> This material is arguably relevant to the claim of discrimination. However, the union has not particularized its allegations in that regard and *the request at this stage more resembles an attempt to determine whether it has a case*. While the reasons for any denial of a posting are within the employer's knowledge, the onus remains on the union. Certain of this information is available in some form to the union through the exercise of its own investigative activities. (para 33; emphasis added)

The union had failed to provide any particulars indicating prior job competitions had been tainted by discrimination. In this factual vacuum, Arbitrator Nairn declined to order production relating to past competitions, viewing the union's request as an attempt to determine whether it had a case.

12 The other two cases cited by the employer involved a grievance analogous to the one at hand. In *F.W. Fearman* the union alleged cleaners supplied by a third-party, known as PSSI, were actually employees within the meaning of the collective agreement. Arbitrator Marcotte wrote:

> It would thus appear that, between, on the one hand, the prohibition against a *subpoena duces tecum* being used for purposes of conducting a fishing expedition, and, on the other, the recognition that some measure of discovery is allowable through the summons, arbitrators seem to be inclined towards requiring the production of documents that are either *prima facie*, or arguably, or sufficiently relevant, *i.e.*, demonstrative of a "rational link" ... to the issues in dispute, provided that the subpoena states with reasonable particularity the documents which are to be produced, and, that if the subpoena is not abusive, in the sense that great numbers of documents are called for that do not appear relevant to the issues in dispute ... (page 304)

Arbitrator Marcotte declined to order the employer to produce financial statements requested by the union because the request lacked "reasonable particularity, especially in the absence of a specified time period" (page 305). He did order the employer to produce all of the other documents sought by the union:

1. all documents "relating in any way whatsoever" to the contract between the employer and PSSI;

2. all documents "relating to the work" performed by PSSI for the employer including but not limited to specific categories of documents;

3. the personnel records of one named person for a specified period;

4. the time sheets for three named people for the same period

5. all documents relating to the assignments of two named people for the same period;

6. overtime records for employees who performed cleaning work over the same period. (See pages 305 and 306)

13 In *Vancouver Hospital* the union alleged certain nurses were employees of the hospital. The hospital contended they were independent contractors or employees of some other entity including certain physicians. Arbitrator Kinzie denied the union's request for documents from the nurses' personnel files. He based his decision on a provision in the collective agreement saying the contents of personnel files were confidential and on the union's failure to indicate how the documents were "potentially relevant" to the matter in dispute (page 304). Arbitrator Kinzie did order the employer to produce the following materials:

1. documents "describing the make-up of the various hospital committees" whose membership included the physicians said by the hospital to be the true employer;

2. documents "reflecting [the hospital's] charges to the physicians for the payroll services it provides to them";

3. "registration and enrolment status reports sent by [the hospital] to the Registered Nurses' Association of British Columbia";

4. documents "describing the employee assistance program and the different categories of people entitled to access it"; and

5. "policies and procedures" relating to work done by the contested nurses (See pages 302 and 303).

III

14 Counsel for the union argues it is not engaged in a fishing expedition whereby it randomly chose six people and then asked for their emails in an attempt to begin building a case. Counsel contends the information contained in the survey document contains several indications that these six are properly characterized as employees. Each reports to the City's premises on a daily basis and generally works 7.5 hours a day. The employer provides each with a work station, pens and paper, telephone, computer and intranet access. The duration of their engagement as a "contractor", as recorded in the survey document, ranges from a low of eleven months in the case of Benedict to a high of three years in the case of Braunstein.

15 For four of the six--Braunstein, Chaknov, Colizza and Jefferson--the survey document state the reason they were retained as "contractors" as:

> Advanced skill set/contracted to address workload created by ongoing position vacancies due to difficulties attracting qualified and skilled candidates.

For these same four, the survey report also states:

> Working with Employee Services for over a year to complete Market Value Assessment. Review recently completed and have tentative CIPP agreement for revised compensation strategy. Plan to post positions once communications out to staff has been completed. Previous postings unsuccessful.
>
> St. Pierre was first engaged as a "contractor" and then converted to employee status. In short, the specific work done by five of the six as "contractors" is already being done by someone formally appointed as an employee or the employer plans to assign it to someone so appointed.

16 There is no indication the employer intends the work performed by Benedict, who is the sixth "contractor", to be assigned to someone formally appointed as an employee. Mr. Benedict is the only one of the six retained through a third-party. His services were retained through BIR consulting but the survey report makes no mention of BIR supervising him, saying instead "city staff review contract performance."

17 Union counsel contends the emails requested are arguably relevant to the matter in dispute because they will shed light on the true legal nature of the relationship between the employer and the six individuals. In this regard counsel relies upon the seven factors utilized by the Ontario Labour Relations Board in *York Condominiums Corp.* [1977] OLRB Rep. 445 to determine whether someone is employed by the employer bound by a collective agreement or by some third-party:

1. the party exercising direction and control over the employee performing this work;
2. the party bearing the burden of remuneration;
3. the party imposing discipline;
4. the party hiring employees;
5. the party with the authority to dismiss the employees
6. the party which is perceived to be the employer by the employees; and
7. the existence of an intention to create the relationship of employer and employee.

Union counsel argued the emails are arguably relevant to the first factor because they are likely to show whether the contested individuals work under the employer's direction and control. Counsel suggested the emails may also contain information relevant to factors 3, 5 and 6.

18 Union counsel argued the request for emails is sufficiently particularized to allow the employer to identify the electronic documents requested. Counsel stated the union could be more specific but that would only increase the amount of work required to separate the specified emails from the rest. Counsel also told us the union was willing to receive all emails and sort through them to weed out those that are not work-related.

19 Counsel for the union contended the documents already produced have no bearing on its entitlement to those now requested. He argued the onus of proving that production would be costly rests with employer and he noted no such evidence was adduced. Counsel submitted we should be guided by the arbitral jurisprudence and not by the Sedona Canada Principles which have no legal force.

20 In the event we decide to apply the notion of proportionality, union counsel urged us to conclude there is no interest more important to his client than the integrity of its bargaining unit which is at stake here. Characterizing the scenario at hand as "contracting in", counsel cited the following passage from the decision of the Court of Appeal in *Hydro Ottawa Ltd. and International Brotherhood of Electrical Workers* (2007), 85 O.R. (3d) 727 about the difference between "contracting in" and "contracting out":

> A review of the arbitration decisions dealing with the subject reveals that there are factual differences between the two types of situations that are significant in terms of the collective bargaining relationship. As well, there are reasons for concluding that the same policy considerations do not necessarily apply. For example, while contracting out (which involves the effective abdication of the work by the employer to the subcontractor) admittedly impinges upon the bargaining unit work that would otherwise be done by union members, it is far less inherently destructive of the collective bargaining relationship than contracting in (where the work of the two groups is virtually indistinguishable). Consequently, the rationale for protecting management's general right to control the assignment of work may be less compelling in the latter situation than in the former. (para. 43)

21 The union cited a number of awards dealing with disclosure, one of them being *West Park Hospital* upon which the employer also relies. The other cases cited by the union are: *Canada Post Corp. and Canadian Union of Postal Workers* (1994), 43 L.A.C. 285 (Burkett); *Children's Aid Society of Belleville, Hastings and Trenton and Canadian Union of Public Employees* (1994), 42 L.A.C. (4th) 259 (Briggs); *Toronto and District School Board and Canadian Union of Public Employees* (2002), 109 L.A.C. (4th) 20 (Shime); and *Ontario Liquor Control Board and Ontario Public Service Employees Union* (2006), 84 C.L.A.S. (Grey).

22 In *Canada Post* the union claimed that casual employees were being used to an extent that contravened the collective agreement. Arbitrator Burkett wrote:

> The purpose of a *subpoena duces tecum* is to facilitate the discovery of the truth in a judicial or quasi-judicial hearing. ...
>
> [T]he subpoena [is] not be used for the purpose of fishing; that is that it not be used to obtain information to ascertain if a case exists but rather to obtain evidence to support a case. ...
>
> The point is that arguably there must be a probative nexus between the information sought and the issue to be decided. Furthermore, where production of a great number of documents is sought the probative nexus must be sufficiently

> strong as to warrant the time and expense of locating and producing these documents. ...
>
> In my view, so long as the union can establish a prima facie case through its own investigative efforts (which it had not done in *Re Bell Canada Bell Canada and Communication Workers of Canada* (P.C. Picher), supra) it is entitled to seek documentary evidence in support of its case by means of a *subpoena duces tecum* and, where that evidence is within the exclusive knowledge and control of the other side, it cannot be denied this evidence on the grounds that it has failed to identify it by date and/or author. (para. 2 to 7)

Arbitrator Burkett decided the union had made out a *prima facie* case arising from the information already provided by the employer. Based on this *prima facie* case, he concluded the bargaining agent was entitled to "any and all documents" relating to the use of casual employees over a period of thirteen months and "all policies and directives" concerning their use during the same period. The employer was ordered to produce these documents because the probative nexus between them and the issue and dispute was sufficiently strong to warrant the time and effort associated with production.

23 Mr. Burkett did not elaborate on what he meant by saying a party was entitled to production only if it had established a *prima facie* case through its own investigative efforts, but he did cite *Bell Canada and Communication Workers of Canada* (1980), 25 L.A.C. (2d) 200 (Picher) as a case applying the same concept. In that case, a probationary employee had been dismissed for absenteeism. The union alleged discrimination, claiming other probationers with equally poor attendance had been made permanent employees. A *subpoena duces tecum* was issued requiring the employer to produce attendance records for 320 people and the employer objected to this production request. At the hearing the union was unable to name a single person whom it had reason to believe had passed probation with a record as bad as the grievor's. Ruling the employer was not required to produce the attendance records of other employees, Arbitrator Picher wrote:

> In this vacuum the union is, in essence, asking the Board to require the company to locate 320 attendance records and bring them to the hearing solely on the grounds that the records might in fact show dissimilar treatment in similar circumstances. Although the Board agrees ... that some measure of "discovery" can be permitted through the use of a *subpoena duces tecum*, the Board is of the view that in the context of grievance and arbitration procedures, to put the company to the task of isolating documents out of employees' files, the union should at least be able to point to someone whose record it has reason to believe will substantiate a claim of discrimination. This the union has not done. It is neither unfair nor unreasonable to expect the union to do the amount of investigation necessary to enable it to point to certain individuals whose records it expects would support its claim of discrimination and thereby justify the subpoena's assistance. (para. 18)

In short, the employer was not required to produce the attendance records of other employees because the union lacked reasonable grounds to believe that discrimination had occurred.

24 The grievor in *Children's Aid Society* was dismissed for allegedly assaulting a child. Arbitrator Briggs granted the union's request for production of the following materials:

1. incident reports and files relating to the child;

2. the daily log book for the residence in question for the period of the child's residency; and

3. documents relating to the employer's investigation of the alleged assault.

Ms. Briggs directed the union to "ensure the identity of other [children] remain anonymous." Based on the large number of documents to be disclosed, the employer was ordered to allow the union access to this material and directed to provide copies of only those documents requested by the union after it had reviewed them. The arbitrator noted that "neither party can definitely know if a document which the other party possesses is actually relevant until it has reviewed it" (para. 23).

25 The *Toronto District School Board* case involved a management grievance alleging the union had contravened the collective agreement by using the employer's computer system to distribute a political message to members of the bargaining unit. Arbitrator Shime ordered the union to produce all documents requested by the employer but he did not specify what those documents were. He did set out the following guidelines about production in general:

> Anything which can assist in the preparation and presentation of a party's case, the refining of issues, the facilitation of settlement and a fair process should be encouraged ... Arbitration by ambush should not be condoned. All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. ...
>
> [T]he request for particulars should not be scrutinized too carefully for precision. ...To require a party who has not had possession, power or control over the documents, or who may not be completely aware of the documents or their contents to identify them with any precision or particularity seems contrary to common sense. (para. 24)

26 The grievor in *Ontario Liquor Control Board* alleged she had been threatened and harassed by management in relation to her testimony in a proceeding before the Alcohol and Gaming Commission. The union sought production of all arguably relevant emails and other correspondence between managers about the grievor over a period of about two years. Arbitrator Gray directed the employer to produce all arguably relevant emails about the grievor sent by the specific managers alleged to have retaliated against her. Addressing the notion of a fishing expedition, Arbitrator Gray wrote:

> The difficulty with the "fishing expedition" metaphor, however, is that it may evoke irrelevant considerations, such as whether the party seeking production already has some evidence to support the allegations of fact it has put in issue. (para. 20)

Arbitrator Gray also made the following comments about the particularity of a production request and the cost of disclosure:

> The law relating to summonses duces tecum is that such a summons should identify the documents sought with sufficient particularity to enable the summonsed witness to know what it is that s/he must bring to the hearing. ...
>
> In addition it is hardly an objection to the doing of justice that its requirements may be burdensome. (para. 21 and 26).

All of these comments were made in the context of a grievance filed by an individual and not a policy grievance.

IV

27 We have no hesitation in saying that fishing expeditions ought not to be encouraged under the guise of a policy grievance. If a bargaining agent wants the unfettered right to compel an employer to produce documents showing whether it is complying with part of a collective agreement, the union should negotiate a contractual provision requiring this sort of disclosure. In the absence of such a requirement, there must be some limit on a union's entitlement to documentation.

28 The need for such a limitation was acknowledged in *Canada Post* upon which this union relies. Arbitrator Burkett drew a distinction between seeking production to support a case already having some independent basis and seeking production in an attempt to determine whether a case exists. Mr. Burkett stated: "so long as the union can establish a *prima facie* case ... it is entitled to seek documentary evidence in support of its case by means of a *subpoena duces tecum*." On this approach, there would be no entitlement to production if a *prima facie* case had not been established. Concluding the union had met this test, based on information already supplied by the employer, Mr. Burkett ordered the production of further documentation about the use of casual employees which had been contested in a policy grievance.

29 A similar legal framework was applied by Arbitrator Nairn in *City of Toronto*, but she arrived at a different result based on the facts before her. She denied the union's request for documents relating to a decade of job competitions, basing her denial on the union's failure to specify any independent basis for its allegation of discrimination. The grievance in *City of Toronto* was filed by an individual employee, who had been an unsuccessful applicant in one competition, but the production request relating to prior competitions was analogous to one that might have been made in the context of a policy grievance.

30 We digress to note a different approach to production may be warranted when dealing with a more typical individual grievance, like the one before Arbitrator Gray in *Liquor Control Board of Ontario*, where he suggested that whether a party seeking production had any independent proof was an irrelevant consideration.

31 Arbitrator Burkett in *Canada Post* did not elaborate on what he meant by a *prima facie* case in the context of a production request. In a different setting, a *prima facie* case means sufficient evidence to prevail if the opposing party calls no evidence. This is the standard applied on a non-suit motion when an arbitrator decides whether to dismiss a grievance on its merits. We do not understand Mr. Burkett to have meant a party is entitled to disclosure only if it has sufficient evidence to defeat a motion for non-suit. Setting the standard that high would mean a request for production could be rendered moot by a successful non-suit motion. On that approach, a grievance could be

dismissed on its merits before the preliminary matter of production had been addressed, putting the cart before horse and thereby defeating the purpose underlying disclosure. Arbitrator Burkett's approval of the *Bell Canada* decision indicates he had a lower standard in mind. In *Bell Canada* Arbitrator Picher had concluded the union was not entitled to production because it did not have reasonable grounds to believe that its collective agreement has been violated. We are persuaded that the correct standard is one of reasonable grounds.

32 How does the reasonable-grounds standard apply here? The facts at hand are much more analogous to the scenario in *Canada Post* than to the one in *City of Toronto* or *Bell Canada* where the union had no independent evidence. Like the bargaining agent in *Canada Post*, the union here already has some support for its case. That support comes from the survey report provided by the employer, just as the data supporting disclosure in *Canada Post* had come from the employer. The information in the survey report provides reasonable grounds to support the union's contention that the six "contractors" are actually employees.

33 In our view, the union's request for documents is sufficiently specific to allow the employer to identify what is being requested.

34 We also conclude the emails sought are arguably relevant to the issue in dispute because they are likely to shed significant light on the degree of control exercised by the employer over the contested individuals. The element of control is one important factor in determining whether a person is an employee. We note the employer did not suggest that the documents already produced provide an adequate basis to assess the control it exercises over these people.

35 We agree with the employer that the cost of production may be a relevant consideration to be weighed along with the probative value of the material requested and the importance of the issue in dispute. In this respect, we follow the lead of Arbitrator Burkett in *Canada Post* and Arbitrator MacLaren in *Canadian Mental Health*. In our view, the proper approach lies in the concept of proportionality. A party should not be required to produce documents if the associated cost is disproportionate to the probative value of the materials and the importance of the matter at stake.

36 We are inclined to think the relevant cost includes not only that associated with the production now being requested by the union but also the expense already incurred by employer to comply with our earlier consent order. Taking account of cumulative cost in this way would be consistent with s. 29.2.03(2) of the Rules of Civil Procedure. On the other hand, any cost incurred by the employer on its own initiative should not be taken into account.

37 The party opposing disclosure bears the burden of proving that it would entail substantial cost. The employer provided a list of about 250 documents already disclosed in relation to the six "contractors." The production of these documents no doubt entailed significant cost but we cannot determine that expense with any degree of precision. For example, we do not know whether the approximately 150 documents relating to Mr. St. Pierre represent the entire contents of a singe file or were collected from multiple files in different locations after much searching and sorting. In addition, we do not know that any part of the survey was conducted at the union's request. As to the expense of providing the emails now requested, we note one element of that cost would be comprised of the time and resources devoted to making electronic copies. If the emails were to be sorted manually, either to remove those that are not work-related or based on some other criteria, the sorting would entail additional effort. It is reasonable to assume that manual sorting would be much more

expensive than electronic reproduction. As noted above, the union has offered to do the manual sorting if the employer provides all emails including those that are not work-related.

38 There is one particular feature of this case that is relevant to the application of the notion of proportionality. The grievance involves a large number of people. Some of them are likely to be in analogous circumstances, so that a final award about one person may provide guidance that allows the parties to reach a settlement about others. For this reason, we have concluded that the proper approach at this stage in the proceedings is to order production of emails for some but not all of the six "contractors" covered by the subpoena. The union may renew its application for emails relating to the remaining "contractors" at a later time if it wishes to do so. If the bargaining agent does reapply, the only issue that will need to be addressed is proportionality. There will be no need to revisit our decision that the union has reasonable grounds to think a contract violation has occurred, that the materials are arguably relevant and that the production request adequately identifies those materials.

39 In deciding whose emails should be disclosed at this stage, we note that Mr. St. Pierre has already been formally converted to employee status. The use of his services in future is no longer a matter in dispute. The union's only outstanding claim about him is for dues for the period he was engaged as a "contractor." For this reason, we have decided at this stage not to require the employer to produce emails or any other documents relating to Mr. St. Pierre.

40 The information in the survey report cited by union counsel suggest that four of the "contractors"--Braunstein, Chaknov, Colizza and Jefferson--were utilized in analogous circumstances. In our view, the employer should produce emails for only two of these four at this stage, with the two to be selected by the union. The employer should also produce emails for Mr. Benedict, the only one of the six who was engaged through a third-party. The employer is directed to produce these emails subject to the following conditions which are designed to fairly allocate the burden of sorting while safeguarding the privacy of non-work related emails:

1. All emails shall be produced whether work-related or not:

2. The emails shall be viewed only by union counsel and his advisers, shall be used solely for the purpose of this proceeding and shall be returned to the employer upon the completion of this matter, unless we vary this order.

Richard M. Brown, Chair

I concur.
John Henderson, Union Nominee

I concur.
Ron Leblanc, Employer Nominee

Ottawa, Ontario

January 12, 2010

qp/e/qlspi/qlaxw