

Saint John (City) Employee Pension Plan v. Ferguson 2009 NBQB 121

S/C/53/07

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

THE BOARD OF TRUSTEES OF THE CITY OF SAINT JOHN EMPLOYEE PENSION PLAN, consisting of at material times NORMAN MELBOURNE McFARLANE, ANDREW BECKETT, ANDREW ERIC BELYEA, WILLIAM HENRY BUCKLEY, KEVIN PAUL ESTABROOKS, DAVID JOHN GOULD, JOHN LAWLOR NUGENT, FREDERICK LEE SLIPP, PAUL GLENDON TAIT, CHRISTOPHER THOMAS TITUS, TERRENCE LORNE TOTTEN, JAMES PATRICK THOMAS WOODS AND GREGORY JOHN YEOMANS

Plaintiff

-and-

JOHN FERGUSON

Defendant

BEFORE: Justice Peter S. Glennie
HEARING HELD: Saint John
DATES OF HEARING: March 27 and April 29, 2009
DATE OF RULING: April 29, 2009

COUNSEL:

Barry R. Morrison Q.C. on behalf of the Plaintiff

David N. Rogers and Catherine Fawcett on behalf of the Defendant

Nancy G. Rubin on behalf of the Respondent, Eric Marks

RULING**GLENNIE, J. (Orally)**

[1] The Board of Trustees of the City of Saint John Employee Pension Plan (the "Pension Board") seeks an order that the defendant, John Ferguson, and/or the Editorial Page Editor of the Telegraph Journal, Eric Marks, a person who is a non-party to this action, identify and produce for inspection by the Pension Board all relevant documents in their possession including emails, letters, notes and faxes pursuant to *Rules 1.03(2), 1.08, 31.06(c), 31.07 and 31.11* of the *Rules of Court*.

[2] Mr. Ferguson through his counsel has confirmed that he has no further documentation in his possession and in particular emails between himself and the Telegraph Journal during the time periods of December 14, 2005 to January 14, 2006 and May 28, 2006 and June 28, 2006. Mr. Ferguson also says that the hard drive on his personal computer has been destroyed. His service provider, Rogers Communications Inc., has advised that it does not back-up its customers' email. Mr. Ferguson says that there are no emails relating to this matter on his work email account. Accordingly, this ruling deals with that portion of the motion seeking an order against the non-party, Eric Marks, the editorial page editor of the Telegraph Journal.

[3] In an affidavit filed in support of the Pension Board's motion, one of the Trustees of the Pension Board suggests that the editorial page editor of the Telegraph Journal likely made contributions to the final version of a commentary written by Mr. Ferguson and published in the Telegraph Journal on September 1, 2006.

[4] The deponent of the affidavit advanced by the Pension Board goes on to depose as follows:

"I am informed by counsel, Barry R. Morrison, and do verily believe he spoke to Eric Marks on January 19, 2009, who stated he had been corresponding by e-mail with the defendant in past with numerous commentaries which appeared in the Telegraph Journal but had deleted copies of his e-mail file."

[5] For his part Mr. Marks says in an affidavit that the Telegraph Journal's letter and commentary policy is published on the opinion page each day and with regards to the issue of editing it reads as follows:

" 'We reserve the right to edit letters for length, libel, taste or non-verifiable information.' The reserved right to edit also applies to submitted commentaries."

[6] Mr. Marks goes on to depose as follows:

"In the summer of 2006, I received an unsolicited commentary by then Saint John City Councillor John Ferguson on political debate over Saint John's pension fund deficit. This was, and is, an issue of great public interest.

...

I responded to Mr. Ferguson's submission with an e-mail regarding structural weaknesses that might make the commentary difficult for readers to follow. If a submission arrives by mail and editing suggestions are made, I will commonly have the hard-copy typed into an e-mail to facilitate editing by e-mail. The fact I responded by e-mail does not necessarily imply the original submission was sent electronically.

....

I can say with confidence that no other editor or employee of the Telegraph-Journal was involved in editing Mr. Ferguson's submitted commentary or corresponded with him regarding his submission.

Mr. Ferguson revised his commentary and it was published in the Telegraph-Journal on September 1, 2006.

....

Mr. Ferguson's commentary received the same editorial scrutiny that any commentary submitted to the Telegraph-Journal would receive. My practice is to read each commentary and make an assessment of its strengths and weaknesses. I contact the writer by phone or e-mail to make editorial suggestions. The writer is free to accept, reject or seek clarification of any editorial concerns.

The goal of the editing process is to help the writer make his or her argument in a way that is clear, engaging and within the bounds established by the editorial policy of the Telegraph-Journal. Editing may range from correcting errors of spelling, grammar or punctuation to offering the writer suggestions on how to structure the argument more effectively. If a commentary seems to wander or to lose its focus, I engage the writer in a conversation about where the argument is going.

Correspondence concerning my editorial function is routine and confidential. Only the final revised draft is published, and only then if it meets the newspaper's editorial policy and space permits.

The Telegraph-Journal does not accept or publish anonymous or unattributed commentaries or letters to the editor.

Owing to the volume of letters, commentaries, press releases and political cartoons I receive, e-mails are saved for a period of time and then routinely deleted or destroyed in the usual course of business. The usual retention period of time in 2006 was one calendar year. The same one year time period applied to faxes and letters.

On or about January 19, 2009, Barry Morrison, counsel for the Plaintiffs, called me to request copies of correspondence between myself and Mr. Ferguson in relation to the September 1, 2006 opinion piece. I advised him at that time that if any such correspondence existed, it would have long ago been deleted or destroyed.

Since that conversation, I have conducted a further search and I have verified that any such correspondence does not exist and is

not retrievable from my e-mail, nor do I possess paper copies of any notes, letters, faxes or papers respecting Mr. Ferguson's published commentary of September 1, 2006.

To the best of my knowledge, the editorial correspondence with Mr. Ferguson which is the subject of this motion no longer exists in any readily accessible form.

....

In short, given that the computer software archiving program was only coming on-line in the period of time immediately preceding the published September 1, 2006, commentary, the burdensome and time-consuming exercise to retrieve archived e-mails may end up being a fool's errand, in any event, there would be no degree of certainty regarding the completeness of the responses.

Apart from the fact that the correspondence sought does not exist in any readily accessible form, the Telegraph-Journal is extremely reluctant to be drawn into this litigation. As Editorial Page Editor, I take very seriously the media's role in offering an important forum for public discourse. The Telegraph-Journal's Opinion page provides a unique platform for citizens to exercise their rights to free expression."

[7] As mentioned, Mr. Ferguson says that he has searched for and provided all correspondence in his possession between himself and Eric Marks of the Telegraph Journal which relates to the September 1, 2006 commentary. He goes on to say that the Pension Board through its legal counsel suggests that "Eric Marks and/or other staff of the Telegraph Journal contributed to the substance of at least one of my opinion pieces that appeared in the Telegraph Journal."

[8] Mr. Ferguson deposes that he is "the sole author of my commentaries and I stand behind every single word thereof."

[9] Mr. Ferguson says that throughout his examination for discovery, counsel for the Pension Board questioned him with respect to any assistance,

encouragement and advice he may have received from the Telegraph Journal, its editorial staff and reporters. He says that the questions were posed in a manner suggesting that he was acting on behalf of the Telegraph Journal and not on his own behalf.

[10] Mr. Ferguson goes on to depose as follows:

"I vehemently deny any implication from Mr. Woods or Plaintiff's counsel, that I am little more than a mouthpiece for the Telegraph-Journal. I am capable of forming and articulating my own thoughts and opinions – I find any suggestion to the contrary to be offensive and insulting.

I, and I alone, am the author of, and take full responsibility for my opinion pieces which appeared in the Telegraph-Journal. I, and I alone, am the author of, and take full responsibility for the various statements I made as a member of the City of Saint John Common Council. I, and I alone, am the author of, and take full responsibility for the July, 2006 presentation before Common Council."

[11] Counsel for the Pension Board asserts that the Affidavit of Documents filed by Mr. Ferguson did not include the Marks email and that the August 23, 2006 Marks email was only revealed after counsel for the Pension Board found the second page of it attached to another unrelated document during the course of the examination for discovery. He also says that the second page, on the face of it, led a reader to believe that it was an email from somebody who was an editor somewhere and that the email had something to do with Mr. Ferguson and that Mr. Ferguson conceded at discovery that it must have been an email to him and that some editor at that Telegraph Journal was preparing and wording or commenting on the wording for the commentary which eventually appeared in the Telegraph Journal. Counsel for the Pension Board goes on to say that when asked at discovery for the email author's name, Mr. Ferguson replied that he did not know and that an undertaking was specifically given to attempt to locate the

first page of the Marks email and, if located, provide a copy of the first page as well as the identity of the author of the email. In addition to that undertaking, an undertaking was given to provide all emails in the possession or control of Mr. Ferguson. Counsel for the Pension Board says that only after repeated requests to have the undertakings answered and a message to counsel for Mr. Ferguson on January 6, 2009 advising him that the Pension Board would be obliged to make a motion to have the undertakings answered was the Marks email undertaking, answered by way of a letter dated January 9, 2009, and the first page of the email in question was provided as well as the identity of the author of the email. The email was dated August 23, 2006 from Mr. Marks to jpferguson@rogers.com.

[12] During the course of argument during the hearing of this Motion on leave to cross-examine, counsel for Mr. Ferguson informed the Court that the first page of the Marks email had been in his possession and by inadvertence had not been included in the documents provided to counsel for the Pension Board. Counsel for Mr. Ferguson also informed the Court that Mr. Ferguson had the first page of the email at his home. As mentioned, counsel for the defendant also informed the Court that the hard drive of Mr. Ferguson's computer at home had been destroyed about a year ago.

[13] Counsel for the Pension Board asserts that if Mr. Ferguson had filed a complete Affidavit of Documents in the first place this Motion would not have been necessary. Counsel for the Pension Board also asserts that Mr. Ferguson was aware in September of 2008 that his Affidavit of Documents was incomplete and disclosure of documents not yet fully made and did not provide disclosure of the Marks email until January of 2009.

[14] Counsel for Mr. Ferguson states as follows:

“Pat Wood’s Affidavit in support of the Plaintiff’s motion, and the discovery evidence attached thereto, contained a number of strong allegations of improper conduct by Mr. Ferguson and the newspaper. These meritless allegations include inferences that there was conspiracy, collusion, or concerted effort between the Telegraph-Journal and John Ferguson, and that he was simply the newspaper’s mouthpiece. These unfounded allegations were aimed at, and resulted in embarrassing John Ferguson and his family.”

Analysis and Decision

[15] Rule 31.11 of the *Rules of Court* provides as follows:

31.11 (1) Where a document is in the possession or control of a person not a party to the action, any party may apply to the court, on notice to such person and to every other party, for an order for the production for inspection of such document if it is not privileged.

(2) The court may order a corporate party to the action to disclose all documents which are in the possession or control of a subsidiary or affiliated corporation, and which relate to a matter in issue, and to produce for inspection all such documents which are not privileged.

(3) No order shall be made under this subrule for the production for inspection of a document unless the court is satisfied that the document relates to a material issue in the action and that it would be inequitable to require the applicant to proceed to trial without having discovery of that document.

(4) On an application under this subrule, where

(a) privilege is claimed for a document, or

(b) the court, with respect to a document, is in doubt as to

(i) its relevance, or

- (ii) the necessity for its discovery,
the court may inspect the document.

[16] Chief Justice Drapeau in *Stone v. Sharp*, 2008 CarswellNB 393, outlined at paragraph 39 the criteria required for the issuance of a production order directed at a non-party:

- (1) the document in question must be in the possession or control of the non-party;
- (2) the document must not be privileged;
- (3) the document must relate to a material issue in the action; and
- (4) it would be inequitable to require the applicant to proceed to trial without having discovery of the document.

[17] The onus is on the moving party to establish each part of the test for non-party disclosure. The moving party must satisfy the Court that the application is not in the nature of a fishing expedition. See *Sun Alliance Insurance Co. v. A & F Albert Ltd.*, 1990 CarswellNB 122. The onus is also on the party bringing the motion to establish that the materials sought are relevant in that they relate to a material issue in dispute. The Pension Board appears to have unresolved concerns over the role that Mr. Marks or others at the Telegraph Journal may have played in drafting Mr. Ferguson's commentary.

[18] In my opinion *Rule 31.11* and the discretion to be exercised pursuant thereto must also recognize and balance the unique position of the media when it is the non-party from whom production is sought.

[19] This action is a defamation suit. Mr. Ferguson is the sole defendant in this litigation. He has admitted sole authorship of the September 1, 2006

commentary. He has stated that "*I, and I alone, am the author, and take full responsibility for my opinion pieces which appeared in the Telegraph-Journal.*"

[20] In my opinion there is no relevance for unpublished documents when the defendant has assumed responsibility. I am of the view that the scrutiny of the editorial process is irrelevant. The Pension Board has failed to articulate the probative value of the information being sought.

[21] The Pension Board now has the full two-page email with the editorial comments made by Mr. Marks. Should it be necessary, the Pension Board's counsel can ask further questions of Mr. Ferguson in this regard.

[22] As mentioned, Mr. Ferguson continues to maintain that he is the sole author of the commentary in question and that Mr. Marks was simply performing his editorial role. For the purposes of this motion I accept the statements of Mr. Ferguson and Mr. Marks in this regard as contained in their respective affidavits.

[23] I must also apply appropriate balancing of interests to protect the newsgathering role that the media plays in our society. If media organizations are subjected to open-ended searches in relation to documents that may have been produced in relation to editing and publishing a letter to the editor or a commentary, the effect on involving the public in the generation of news content would, in my opinion, be significant.

[24] I am of the opinion that the granting of the Pension Board's motion would create a chilling effect both on public participation and on the willingness of media organizations to allow for such public participation. I am of the view that the Telegraph Journal and its Editorial Page Editor should not be drawn into the crossfire between the Pension Board and Mr. Ferguson. Mr. Marks is a true

stranger to this litigation. He is a non-party and was simply fulfilling the role of the media in offering a forum for free expression.

[25] The Telegraph Journal does not want to be perceived as too closely involved with this litigation “or the issues which it has been and will continue to cover as a matter of public interest.” In my opinion it should be allowed to do so unfettered.

[26] In my view it would impede the newsgathering function and responsibility of the media by drawing media companies into legal proceedings which they have been covering and risk tainting their perceived objectivity.

[27] In my opinion the emails sought do not relate to a material issue in this action and it would not be inequitable to require the Pension Board to proceed to trial without having discovery of such emails. Mr. Ferguson has acknowledged that he is the sole author of the commentary in question. In any event Mr. Marks says that the correspondence being sought does not exist in any readily accessible form.

Conclusion and Disposition

[28] I conclude that the emails sought by the Pension Board from the Editorial Page Editor of the Telegraph Journal are not relevant. Mr. Ferguson is the sole defendant in this litigation and he has admitted sole authorship of his September 1, 2006 commentary. I am satisfied that Mr. Marks simply played an editorial function in reviewing the submission of Mr. Ferguson prior to publication.

[29] The Pension Board has failed to establish a significant reason to intrude upon the interests of freedom of the press and its newsgathering and editorial function. In my opinion the Pension Board should have exhausted its recourse against Mr. Ferguson before going after Mr. Marks.

[30] After weighing all the equities in this case, I am of the view that the Pension Board has not established that this is an exceptional case where Mr. Marks, a non-party and member of the media, should be ordered to make production.

[31] For these reasons, the motion with respect to the third party Eric Marks is denied, with costs payable forthwith by the Pension Board in the amount of \$15,000.00, inclusive of disbursements.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick