

**IN THE MATTER OF** the *Public Utilities Act*, R.S.N. 1990, c. P-42 (the "Act")

**AND**

**IN THE MATTER OF** a 2003 Capital Budget Application (the "Application") by Newfoundland Power Inc. ("Newfoundland Power")

**NOTICE OF MOTION**  
**(November 13, 2002)**

At CA87(e) in these proceedings the following Information Request was put to the Applicant:

- Q. Please provide minutes of the Company's Board of Director's meetings where the 2003 Capital Budget was discussed and where corporate approval was granted for the Capital Budget.**

By response provided November 8, 2002, the Applicant stated as follows:

- A. In Order No. P.U. 4 (1996-97), the Board decided that minutes of the meetings of the Company's Board of Directors were not public documents and denied a request of the Consumer Advocate for disclosure of such minutes.**

**Newfoundland Power is not prepared to public disclose minutes of meeting of its Board of Directors.**

The Consumer Advocate takes issue with the aforesaid response and requests that the Board set a date for the hearing of the Consumer Advocate's Motion for an Order compelling the Applicant to provide full disclosure of the information requested in CA87(e).

The Consumer Advocate will rely upon relevant case law, Regulations made pursuant to the Public Utilities Act and the Rules of the Supreme Court.

**DATED AT** St. John's, Newfoundland and Labrador, this 13<sup>th</sup> day of November, 2002.

A handwritten signature in black ink, appearing to read 'Stephen Fitzgerald', is written over a horizontal line.

Stephen Fitzgerald  
Legal Counsel for the Consumer Advocate  
Whose address for service is:  
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Carter v. Municipal Construction Ltd. (Newfoundland  
Supreme Court (Trial Division))

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**Carter v. Municipal Construction Ltd.**

**DAVID CARTER (PLAINTIFF) AND MUNICIPAL CONSTRUCTION LIMITED (FIRST  
DEFENDANT) AND CARL HEALEY (SECOND DEFENDANT)**

**MUNICIPAL CONSTRUCTION LIMITED (PLAINTIFF BY COUNTERCLAIM AND DAVID CARTER  
(DEFENDANT BY COUNTERCLAIM))**

**Citation:** 2001 CarswellNfld 222, 204 Nfld. & P.E.I.R. 112, 614 A.P.R. 112,  
204 Nfld. & P.E.I.R. 112

**Court:** Newfoundland Supreme Court (Trial Division)

**Judge:** Green C.J.T.D.

**Judgment:** August 30, 2001

**Year:** 2001

**Docket:** 2000 01T 1812

**Counsel:** *Ian F. Kelly, Q.C., Gregory A. French*, for Plaintiff / Defendant by  
Counterclaim

**Gregory M. Anthony**, for Defendants / Plaintiffs by Counterclaim

**Subject:**

Civil Practice and Procedure

**Practice.**

**Cases considered by Green C.J.T.D.:**

*Barrett v. Newfoundland & Labrador Credit Union* (1997), 159 Nfld. & P.E.I.R. 83, 492 A.P.R. 83, 16  
C.P.C. (4th) 291 (Nfld. T.D.) -- considered

*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1991), (sub nom. *Bow Valley  
Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (No. 1)*) 93 Nfld. & P.E.I.R. 100, (sub nom.  
*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (No. 1)*) 292 A.P.R. 100, 7 C.P.C.  
(3d) 97 (Nfld. T.D.) -- followed

*Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55, 52 L.J.Q.B. 181 (Eng.  
Q.B.) -- referred to

*Corner Brook Pulp & Paper Ltd. v. Geocon* (1998), (sub nom. *Corner Brook Pulp & Paper Ltd. v.  
SNC Lavalin Environmental Inc.*) 170 Nfld. & P.E.I.R. 78, (sub nom. *Corner Brook Pulp & Paper Ltd.  
v. SNC Lavalin Environmental Inc.*) 522 A.P.R. 78 (Nfld. T.D.) -- referred to

*Dufault v. Stevens* (1978), 6 B.C.L.R. 199, 86 D.L.R. (3d) 671 (B.C. C.A.) -- considered

*Finn v. St. John's (City)* (1995), 130 Nfld. & P.E.I.R. 217, 405 A.P.R. 217 (Nfld. T.D.) -- considered

*Lawton's Drug Stores Ltd. v. Mifflin* (1995), 38 C.P.C. (3d) 135, 129 Nfld. & P.E.I.R. 33, 402 A.P.R.  
33 (Nfld. T.D.) -- considered

*Métropolitaine, cie d'assurance-vie c. Frenette*, 4 C.C.L.I. (2d) 1, (sub nom. *Frenette v. Metropolitan  
Life Insurance Co.*) 89 D.L.R. (4th) 653, 134 N.R. 169, (sub nom. *Metropolitan Life Insurance Co. v.  
Frenette*) [1992] I.L.R. 1-2823, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) 46 Q.A.C.  
161, (sub nom. *Frenette v. Metropolitan Life Insurance Co.*) [1992] 1 S.C.R. 647, (sub nom. *Frenette  
v. Metropolitan Life Insurance Co.*) [1992] R.R.A. 466 (S.C.C.) -- followed

*Mitchell v. Aldrete*, 18 C.P.C. 13, 26 Nfld. & P.E.I.R. 368, 72 A.P.R. 368, 1980 CarswellNfld 17  
(Nfld. T.D.) -- considered

*Mitchell v. Aldrete* (1980), 31 Nfld. & P.E.I.R. 340, 87 A.P.R. 340 (Nfld. C.A.) -- referred to

*Spellacy v. Marine Management Inc.* (1996), 141 Nfld. & P.E.I.R. 112, 443 A.P.R. 112, 3 C.P.C. (4th) 68 (Nfld. T.D.) -- referred to

*Strowbridge v. Re/Max United Inc.* (1992), 42 C.C.E.L. 51, 99 Nfld. & P.E.I.R. 64, 315 A.P.R. 64 (Nfld. T.D.) -- followed

*U.F.C.W., Local 1252 v. Cashin*, 20 C.P.C. (3d) 81, 1993 CarswellNfld 27 (Nfld. C.A.) -- referred to

*U.F.C.W., Local 1252 v. Cashin* (1992), (sub nom. *U.F.C.W., Local 1252 Fishermen's Union v. Cashin* (No. 3)) 104 Nfld. & P.E.I.R. 311, (sub nom. *U.F.C.W., Local 1252 Fishermen's Union v. Cashin* (No. 3)) 329 A.P.R. 311 (Nfld. T.D.) -- referred to

*U.F.C.W., Local 1252, Fishermen's Union v. Cashin* (1990), (sub nom. *U.F.C.W., Local 1252, Fishermen's Union v. Cashin* (No. 1)) 85 Nfld. & P.E.I.R. 118, (sub nom. *U.F.C.W., Local 1252, Fishermen's Union v. Cashin* (No. 1)) 266 A.P.R. 118 (Nfld. T.D.) -- referred to

*U.F.C.W., Local 1252, Fishermen's Union v. Cashin*, 66 Nfld. & P.E.I.R. 181, 204 A.P.R. 181, 1987 CarswellNfld 211, [1987] N.J. No. 297 (Nfld. T.D.) -- considered

#### Rules considered:

Nfld.*Rules of the Supreme Court, 1986*, S.N. 1986, c. 42, Sched. D

R. 32 -- considered

R. 32.01(1) -- referred to

R. 32.01(3) -- referred to

R. 32.07 -- considered

R. 32.07(1) -- considered

R. 32.07(3) -- considered

#### Forms considered:

Nfld.*Rules of the Supreme Court, 1986*, S.N. 1986, c. 42, Sched. D

Form 32.01A -- referred to

#### Green C.J.T.D.:

- 1 The plaintiff applies for an order pursuant to **Rule 32.07** of the *Rules of the Supreme Court, 1986* requiring the defendants to produce certain financial records for inspection by the plaintiff.
- 2 The plaintiff claims damages for wrongful dismissal and also claims that as a result of certain representations and undertakings made at the time of his original hiring, he is entitled to a shareholders' interest in the defendant corporation. The defendants respond by saying that the plaintiff was dismissed for cause and that he has no legal entitlement to any financial interest in the company.
- 3 The parties exchanged lists of documents as required by the rules of court. In Part II of their list, the defendants objected to produce certain financial information described as follows:

All financial statements, documents and information of Municipal Construction Limited and in particular audited financial statements of Municipal Construction Limited for the years 1995-1999, all financial records for the period March 1998 - April 29, 2000 including, inter alia, all journal entries, ledger accounts, interim financial statements, invoices, receipts and payroll information for Municipal Construction Limited.

4 The grounds for objecting to production of that information were stated to be that the information was

Confidential and proprietary and does not relate to the claim of the plaintiff ...

5 The plaintiff submits that the financial information in question consists of documents "relating to any matter in question" in the proceeding, within the meaning of **Rule 32.07** and no basis for objecting to production of the information has been established. The defendants assert that the information is "confidential and proprietary in nature" and that the disclosure thereof would "detrimentally affect the competitiveness" of the corporate defendant. They also assert that access to and disclosure of the financial information is not relevant or material to the plaintiff's claims. Alternatively, they suggest that if the information is relevant or material, production should be postponed until after liability is established or, at the very least, should be made subject to a protective order restricting disclosure of information.

6 **Rule 32.07** provides in pertinent part:

(1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.

...

(3) An order for the production of any document for inspection by a party to the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

7 For the court to exercise its discretion to order production under this Rule, at least three things must be satisfied:

(1) The documents in question must "relate" to a matter in question in the proceeding.

(2) The court must be of the opinion that an order of production is "necessary for disposing fairly of the proceeding or for saving costs" and is not injurious to the public interest.

(3) The document is not privileged from production. (Although there is no reference to privilege in **Rule 32.07** as a ground for resisting production, this requirement flows from the requirement in **Rule 32.01(1)** that a party must, in the list of documents, disclose all documents relating to every matter in question, whether privileged or not but, pursuant to **Rule 32.01(3)** may claim privilege from production by stating the grounds of the privilege in the list.)

8 In passing, it should also be noted that, in addition to the specific provisions of **Rule 32**, the court has inherent jurisdiction to ensure that all relevant documents are before it in order to determine properly and fairly the issues between the parties. See *Métropolitaine, cie d'assurance-vie c. Frenette*, [1992] 1 S.C.R. 647 (S.C.C.) at p. 689.

### Issues

9 In this case, the issues that present themselves are:

[9]

(1) Whether the financial information can be said to amount to documents "relating to" a matter in question in the proceeding.

(2) If the documents can be said to relate to a matter in question in the proceeding, whether a valid claim to privilege from production been made out by the defendants.

(3) If the documents are not privileged from production, should the court impose conditions with respect to production by either

(a) postponing production until some future date, or

(b) making an order protecting the confidential and proprietary nature of the information.

## Relationship to Matters in the Proceeding

10 As noted, the only documents which are required to be produced for inspection pursuant to **Rule 32.07**, are those "relating to any matter in question" in the proceeding.

11 In one sense, it could be said that by including a reference to the financial information in their list of documents, the defendants have acknowledged that those documents are ones "relating to" a matter in the proceeding. The opening paragraph of **Form 32.01A**, (which stipulates the format that a List of Documents should take) requires the inclusion of, and the List actually filed by the defendants in fact includes, the language: "The following is a list of the documents relating to any matter in question in this proceeding ..."

12 If counsel required to file a list of documents *bona fide* believes (after applying the proper test and complying with his other obligations to consult fully with the client and to advise of the obligation to disclose to counsel all documents that have a bearing on the case) that any documents do not relate to a matter in question in the proceeding, those documents should not be included in the List. In principle, therefore, inclusion in the List could be said to eliminate the issue of whether the listed documents relate to the proceeding. [Of course, there may well be cases where counsel reviewing documents to determine whether their existence should be disclosed in a List of Documents may genuinely be in doubt as to whether they can be said to relate to the proceeding or not; in such a case, the proper thing to do would be to disclose their existence by including a reference to them in Part II of the List and to claim either that they do not relate to the proceeding or that they will only be disclosed if the court determines they so relate].

13 In this case although the defendants included a reference to the financial records in their List, they specifically asserted as well that the documents nevertheless did not relate to the plaintiff's claims. It is apparent that the reason why the documents were referred to is because plaintiff's counsel in earlier correspondence had specifically requested disclosure of that information using virtually identical language. The defendants' reference to them in their List was therefore merely a means of acknowledging that the previously requested documents existed but that they did not agree that they related to the proceeding.

14 I am prepared therefore to treat this matter on the basis that the issue of whether the documents relate to a matter in the proceeding has been reserved notwithstanding their inclusion in the defendants' List of Documents.

15 It is axiomatic that **Rule 32** is to be interpreted liberally in order to effect full disclosure. Having said that, the outer parameters of the obligation to effect full disclosure and to produce a document for inspection are determined by the requirement that the document in question "relate" to a matter in issue in the proceeding.

16 It has been suggested in some decisions in this jurisdiction that the requirement that a document relate to a matter in issue in the proceeding is equivalent to the concept of relevance as that concept is applied to the reception of evidence at a trial or hearing. See, for example, *U.F.C.W., Local 1252, Fishermen's Union v. Cashin* (1990), 85 Nfld. & P.E.I.R. 118 (Nfld. T.D.) at para. [15]; *U.F.C.W., Local 1252 v. Cashin* (1992), 104 Nfld. & P.E.I.R. 311 (Nfld. T.D.) at paras. [7], [14] - [15]; *Lawton's Drug Stores Ltd. v. Mifflin* (1995), 129 Nfld. & P.E.I.R. 33 (Nfld. T.D.) at paras. [8], [11] - [13]; *Corner Brook Pulp & Paper Ltd. v. Geocon* (1998), 170 Nfld. & P.E.I.R. 78 (Nfld. T.D.) at para. [9]. The test of relevancy, as described in these cases, would require the parties seeking production to show that the document in question was relevant in the sense that it proves or renders probable the past, present or future existence of a fact in issue.

17 In the *Lawton's Drugs* case, as well as in *Finn v. St. John's (City)* (1995), 130 Nfld. & P.E.I.R. 217 (Nfld. T.D.) at para. [11] the concept of "relating to every matter in question in a proceeding" was also equated to the notion of materiality in the sense of a requirement

that the document must relate to a proposition within the range of allowable controversy in the lawsuit that would be required to be proved. Arguably, this is a narrower test than that of relevance, since, on the materiality formulation, the document *in itself* must refer to or touch and concern something within the range of the legal controversy as defined by the pleadings, whereas relevance would include a document which, on its face, may not refer to or touch or concern the allowable controversy but which could, either directly or indirectly as circumstantial evidence, render probable the existence or non-existence of a fact within the allowable range of controversy.

18 In *Métropolitaine, cie d'assurance-vie c. Frenette*, supra, the Supreme Court of Canada considered the scope of the notion of a document "relating to a matter in question" in the context of an application for production of third party records. L'Heureux-Dubé, J., speaking for the whole court, referred with apparent approval to the decision of the British Columbia of Appeal in *Dufault v. Stevens* (1978), 6 B.C.L.R. 199 (B.C. C.A.) wherein Craig, J.A. commented at pages 203-205:

The intent of R. 26(11) is to provide any party to an action with the means of obtaining the production and inspection of a document if the applicant is able to satisfy the judge that the document contains information which may relate to a matter in issue ... The comments of Brett, L.J. in *Cie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 63 (C.A.), as to what constitutes a document relating to a matter in question has been quoted by this court on several occasions

It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary ...

It follows from this that an applicant need not show that a document is admissible in evidence at the trial as the condition of his obtaining an order under this rule. If a party seeking the order is able to satisfy the judge that the document, or information in a document, may relate to a matter in issue, the judge should make the order unless there are compelling reasons why he should not make it, e.g., the document is privileged ...

[Emphasis added]

19 This notion of "relating", which is broader than the concept of relevance discussed earlier, would entitle a party to production of documents if he or she can satisfy the court that the production of the document might advance his or her own case or damage the case of his or her adversary even if the document may not in itself tend to prove or disprove a fact in issue or may not be admissible at trial. This concept was picked up and applied by Russell, J. in yet another *United Food and Commercial Workers* case which is unreported: *U.F.C.W., Local 1252, Fishermen's Union v. Cashin*, [(1987), 66 Nfld. & P.E.I.R. 181 (Nfld. T.D.)] [1987] St. J. No. 1453 (NFSC, TD, filed March 17, 1993) [leave to appeal to the Newfoundland Court of Appeal refused [20 C.P.C. (3d) 81 (Nfld. C.A.)] [1993] No. 65 (unreported); filed June 23, 1993]]. There, Russell, J. adopted the formulation in the *Cie Financière du Pacifique v. Peruvian Guano Co.* [(1882), 11 Q.B.D. 55 (Eng. Q.B.)] case referred to by the Supreme Court in *Frenette*.

20 In like manner, Hickman, C.J.T.D. in *Barrett v. Newfoundland & Labrador Credit Union* (1997), 159 Nfld. & P.E.I.R. 83 (Nfld. T.D.) would have included within the test "documents will throw any light on the case" and which "contain information which may either directly or indirectly enable a party ... either to advance his own case or damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of those two consequences" (para. [12]).

21 I would therefore state the rule as to what constitutes a document relating to a matter in question in the proceeding as follows: A document will be said to "relate" to a matter in question in the proceeding where, it is reasonable to suppose it may throw any light on the case in the sense that it contains information which may either directly or indirectly enable the party receiving or seeking the information to advance his or her own case or to damage the case of his or her adversary on which may fairly lead him or her to a train of inquiry

which may do so. With all due respect to those who have expressed a contrary view, I do not believe that the test for determining production of documents prior to trial should be tied to the concept of relevance at trial.

22 In this case, the plaintiff submits that the documents of which production is sought relate to matters in this proceeding in three respects. First, he relies on the allegation in the pleadings that the defendant, Healey, represented, promised and agreed that in addition to being employed with the corporate defendant, the plaintiff would become a partner with Healey in the management, direction and operation of the company and that Carter would receive 10% of the issued shares in his first year, a further 10% in the second year and a final 10% in the third year to the intent that he would become a shareholder with a total of 30% of the issued shares of the company. The defendants deny this allegation and say there was simply an employment relationship in existence. The plaintiff submits, therefore, that access to the financial records of the company becomes important insofar as they may circumstantially support or refute the allegation of a shareholder interest, if the records disclose transactions relating to the plaintiff which are either consistent or inconsistent with his allegation of the agreement that he could earn the alleged shareholder interest.

23 Secondly, the plaintiff relies on his allegations in the pleadings that he had been hired away from another company to promote the growth of the defendant corporation and that in fact in the two years following his hiring, he achieved a major expansion of the company's road construction operations. The plaintiff suggests that the financial records of the company are relevant to support or refute the plaintiff's claim that there was a significant growth in the value of the company due to his efforts. He further submits that this information is relevant not only to the assessment of damages but to liability as well in the sense that the financial information would be circumstantially relevant to support the plaintiff's allegation that he was promised an interest in the company, since it would be consistent with his allegations of being hired away from another company to promote the growth of the defendant company and would therefore render his allegations more probable. Further, the background circumstances might help the trier of fact determine who to believe as to whether an agreement for an interest in the company was in fact made.

24 Thirdly, the plaintiff refers to the fact that the defendant corporation has counterclaimed against him in respect of certain loans and advances which were allegedly made to the plaintiff and which have not been repaid. The plaintiff takes the position that these were not loans but were part of his remuneration or were advances to reimburse him for reasonable employment-related expenses. The plaintiff submits, therefore, that the financial information relates to the nature of the financial transactions that are in dispute.

25 The defendants, for their part, take the position that the financial information should not be disclosed because it is "not relevant" in the sense that it has no probative value as to whether the plaintiff was to receive an ownership interest in the defendant company, nor is it relevant, beyond the issue of assessment of damages, to the allegation that the plaintiff's efforts resulted in a substantial increase in value of the company.

26 The defendants also point to the fact that the basis of the plaintiff's claim that he became entitled to an interest in the company is his own "bare assertion" that such an agreement existed. They submit that something more than a bare assertion is required before entitling a party to delve into the confidential financial affairs of the opposing litigants. They argue that no other evidence provides any support for the plaintiff's assertions. I reject this submission in the context of this case. The nature of the claim is that there was an oral understanding with respect to the acquisition of an interest in the company. It is suggested, however, that the bargain was reduced to a draft written agreement and that the plaintiff had delivered the only copy to Healey, but that the defendants now deny that the document ever existed. The plaintiff has given evidence under oath at an examination for discovery as to his understanding of the existence of the oral agreement and the subsequent disposition of the written draft reflecting it. That is more than a bare assertion contained in the pleadings. It is sworn evidence. Its strength and viability, when judged against the totality of the



evidence, is for the trier of fact, not this applications court, to decide. This is not a case where it is clear and obvious that the claim is frivolous and vexatious or otherwise cannot possibly succeed.

27 I am satisfied that the claim of the plaintiff to access the financial records of the defendants relating to the development of the defendant corporation's road building business, the financial relationship between the corporation and the plaintiff which might be indicative of a shareholding interest and the financial relationship relating to loans and advances meets the test "of relating to a matter in question in the proceeding". Documents touching and concerning these matters certainly may contain information which may enable the plaintiff either directly or indirectly to advance his own case or to damage the case of the defendants or may lead him to a train of inquiry which may do so. I say this essentially for the reasons advanced by counsel for the plaintiff, as summarized above.

28 Counsel for the defendants suggested that before making a ruling in this regard, I should review all of the documentation to determine its relevancy. I do not agree with this suggestion. This is not the type of situation where a judge is asked to review documentation to determine, in cases of doubt, whether claims of privilege, such as solicitor-client privilege or public interest immunity, apply to particular documents. What counsel for the defendants is asking is that I review the documents to determine whether they "relate to a matter in the proceeding". This is a broader and much more fluid enquiry. As noted, the test of whether a document relates to a matter in the proceeding is not limited to the question of admissibility, in terms of relevance, at trial but encompasses information that may directly or indirectly advance the plaintiff's case or damage that of the defendants'. The significance of a particular document for such purposes will in large measure depend upon counsel's knowledge of the background of the case and the strategy to be adopted for its presentation. A judge ought to be wary of wading into such murky waters which would in effect require the court to second guess how such documentation might be used to advance counsel's trial strategy. Accordingly, I decline to accept defence counsel's invitation.

### Privilege

29 The categories of privilege which can be relied upon to resist production of a document include solicitor-client privilege, litigation privilege, and claims of public interest immunity. None of these have been asserted as a ground for refusing production in this case.

30 Instead, the defendants claim that the financial information sought is of a "confidential and proprietary nature" and that knowledge of it would provide a competitive advantage to business competitors of the defendant company.

31 While one can sympathize with the concerns of the defendants in this regard, those considerations do not support a claim of privilege that would in itself justify withholding the documents from production. While it is true that **Rule 32.07(3)** provides that an order for production may not be made unless the court is of the opinion that the order is "necessary for disposing fairly of the proceeding or for saving costs", generally speaking the disclosure of a document that might be considered confidential would not amount to an unfair disposition of the proceeding within the meaning of the rule, where the document can be said to relate to a matter in the proceeding. On the contrary, if a document relates to a matter in the proceeding, then *prima facie* a fair disposition of the proceeding would require its disclosure. It would be a rare case, perhaps where disclosure of vital intimate information would cause irremediable prejudice not compensable in money, where the requirement of a fair disposition of the proceeding would dictate non disclosure of documents that otherwise related to the proceeding. See *Barrett v. Newfoundland & Labrador Credit Union* (1997), 159 Nfld. & P.E.I.R. 83 (Nfld. T.D.) at para.[12] where Hickman, C.J. accepted the proposition that if discovery was necessary for fairly disposing of the proceedings, "discovery must be ordered notwithstanding the documents' confidentiality".

32 Accordingly, the defendants cannot resist production of the documents in question

simply by claiming they were of a confidential or proprietary nature. Rather, the defendants' legitimate interest in preventing public dissemination or use of information which would otherwise be of a confidential nature should be accommodated by the imposition of conditions, in the nature of a protective order, restricting the use to which the documents, as produced, can be put.

### **Conditions**

33 **Rule 32.07(1)** provides that the court may order production "at such time, place and manner as it thinks just". The court may therefore impose conditions to protect a party required to disclose private documents from unnecessary harm from unnecessarily wide distribution. This approach has been taken in a number of cases, notably, *Lawton's Drugs; Barrett*; and *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1991), 93 Nfld. & P.E.I.R. 100 (Nfld. T.D.); *Strowbridge v. Re/Max United Inc.* (1992), 99 Nfld. & P.E.I.R. 64 (Nfld. T.D.).

34 One must of course start from the proposition that, in the words of Hickman, C.J. in *Mitchell v. Aldrette* (1980), 72 A.P.R. 368 (Nfld. T.D.) [appeal allowed in part by the Newfoundland Court of Appeal on another issue (1980), 31 Nfld. & P.E.I.R. 340 (Nfld. C.A.)] at para. [33] "... there is an implied obligation on the party to an action who is given the right by the court to inspect documents not to make an improper use of such documents". Improper use in this context includes any use other than use strictly for the purpose of advancing one's own case in the litigation or defending against an opponent's case. Failure to comply strictly with this implied obligation is punishable by contempt.

35 Notwithstanding this general implied obligation which applies in all cases of production, the case law recognizes that the court may additionally impose, as a condition of production, requirements that: the document be held confidential by the party and his or her solicitor (*Strowbridge*); any copy of the document be maintained in the possession of the solicitor with no copies being made for distribution (*Lawton's Drugs*); if as a result of production any amended pleading refers to the document, the pleading be sealed and not available to public viewing (*Strowbridge*); and if the documents are to be shown to experts engaged by a party for giving advice in respect of the litigation, such persons be required to sign an agreement to keep the information confidential (*Bow Valley*).

36 In the *Lawton's Drugs* case, Barry, J. also recognized that production of financial records may be postponed pending determination of liability where there may be a disadvantage imposed upon a party by revealing financial statements and other private business information to a competitor. He also recognized, however, that financial records must nevertheless be produced if they assist the party in the presentation of his or her case. This would certainly be the case, as in *Lawton's Drugs*, where the documents of which production is sought are relevant to both issues of liability as well as damages.

37 As a general rule, discovery and production should be made earlier rather than later and, barring circumstances such as oppression, irreparable harm or other irremedial prejudice to the opposing party, the court should not postpone discovery or production to await determination of a preliminary question. See *Finnat* para. [23]. This approach has a practical justification: the rules of court are designed to facilitate discussion with a view to settlement short of trial; it is difficult to conduct settlement discussions effectively if the issue of damages is not before the parties and the presiding settlement conference judge at the same time as the issue of liability. See *Spellacy v. Marine Management Inc.* (1996), 141 Nfld. & P.E.I.R. 112 (Nfld. T.D.) at para. [32].

38 Counsel for the defendants invited me to consider postponing production of the financial information until the issue of liability was determined. I am satisfied, however, that the financial records of the company may relate to issues of liability as well, for the reasons given earlier. The evidence relating to the issues in this case, as they relate to the claim for an interest in the company, is so intertwined that it cannot be clearly segregated

into watertight compartments. In addition, no application has been made in this case to sever issues of liability and damages and to have them tried separately.

39 Although there should be no delay in the time for production of the documentation, and although there is in any event an implied obligation to use the documents only for the purposes of the litigation, I am satisfied that it is appropriate, as was concluded in the *Lawton's Drugs* case, to impose additional specific restrictions designed to limit the possibility of improper use, whether deliberate or inadvertent. I believe it would be appropriate to impose the restrictions that: the documents, or copies thereof produced pursuant to this order be maintained in the possession of the plaintiff's solicitors, without any additional copies being made and that, while the plaintiff's solicitors may consult with the plaintiff in respect of the documents for the purposes of obtaining instructions, the plaintiff shall not be entitled to retain possession of the documents or any copies. Furthermore, neither the solicitor for the plaintiff nor the plaintiff shall disclose, disseminate or discuss the documents or their contents with any other person without further order of this Court. In the event that as a result of production of the documents, reference has to be made to such documents in any amended pleadings, such pleadings shall be sealed and public accessibility shall be prohibited.

### **Summary and Disposition**

[40]1. The defendants shall produce or cause to be produced to counsel for the plaintiff for inspection on behalf of the plaintiff copies of:

- (a) the audited financial statements of Municipal Construction Limited for the years 1995-1999, inclusive;
- (b) all interim internal financial statements of Municipal Construction Limited covering all or a portion of the period from March 1998 to April 29<sup>th</sup>, 2000;
- (c) such other financial records, documents and information of Municipal Construction Limited as relate or refer to the development of the road construction business of Municipal Construction Limited covering the years 1997-2000 including, but not limited to, documents showing the value of contracts let and their dollar value and documents referring or relating to any involvement of the plaintiff in the acquisition or performance of such contracts;
- (d) all financial records, documents and information of Municipal Construction Limited indicating any involvement in or containing a reference to the plaintiff's involvement in Municipal Construction Limited as an employee, shareholder or otherwise;
- (e) all financial records, documents and information of Municipal Construction Limited that relate to or contain a reference to the plaintiff with respect to sums alleged by the defendants to be owing pursuant to the counterclaim.

2. All other documents referred to in Part II of the defendants' List of Documents need not be produced for inspection at this time, but the plaintiff shall have leave to make application for further production upon proper grounds.

3. Production of the documents shall be made upon the following conditions:

- (a) any documents or copies thereof produced pursuant to this order shall be maintained in confidence in the possession of the plaintiff's solicitors without any additional copies being made;

(d) If as a result of production of the documents, reference has to be made to the contents thereof in any amended pleadings, affidavits or other documents filed in the court, such pleadings, affidavits or documents shall be sealed upon filing and shall not be accessible to any person other than the judge, court officials and counsel for the parties without further order of this Court.

5. Costs shall be in the cause.

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