

COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

Citation: 2010 NBQB 233

M/M 49-10

Date: 2010/06/29

BETWEEN:

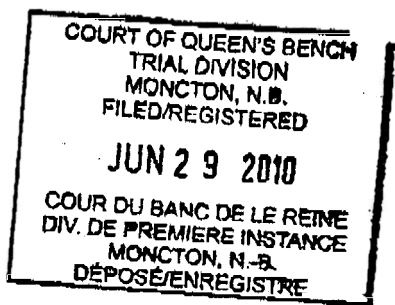
DARYL DOUCETTE

Applicant

- and

**BRUNSWICK NEWS, CANADAEAST
INTERACTIVE and CANADAEAST.COM**

Respondents



DECISION

BEFORE:

The Honourable Justice George S. Rideout

AT:

Moncton, New Brunswick

DATE OF HEARING:

June 23, 2010

DATE OF DECISION:

June 29, 2010

APPEARANCES:

Jo-Anne Moore on behalf of the Plaintiff

No one appeared on behalf of the Defendant

RIDEOUT, J.

1] The Applicant, Daryl Doucette, is bringing a **Norwich** Application under Rule 32.12 of the New Brunswick *Rules of Court*. The Applicant has requested the following order issue requiring the Respondents, Brunswick News, Canadaeast Interactive and Canadaeast.com to:

"B. Pursuant to Rule 32.12 of the Rules of Court of New Brunswick, the Respondent be ordered to provide to the Applicant all information in its possession regarding the identity of the person or persons who posted comments on the "Letters to the Editor" section of the canadaeast.com website namely:

- 1. A comment posted in the "Letters to the Editor" section on February 18th, 2010 under the web name "Anonymous Anonymous."**
- 2. A comment posted in the "Letters to the Editor" section on February 19th, 2010 under the web name "Anonymous Anonymous."**

C. The Respondent provide to the Applicant any information that they have regarding the identity of "Anonymous Anonymous" including but not restricted to: the name, address, telephone number, account status, any secondary email addresses, account services, account creation date, logfile information associated with this account, including times and dates of logins and activity on the account, as well as the IP address data associated with the account."

[2] The grounds for the Application state:

"a. The comments posted on the aforementioned dates, by "Anonymous Anonymous" in the "Letters to the Editor" section of the canadaeast.com website, contained defamatory statements about the Applicant.

b. The anonymous nature of web posts means that the Applicant is unable to determine the identity of the author of the defamatory statements. The Respondents are the only persons in possession of the information that will identify the author of these statements. The Applicant seeks production of the requested information to assist him in identifying potential defendants for an action in defamation."

RIDEOUT, J.

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The grounds for the Application state:

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- b. The anonymous nature of web posts means that the Applicant is unable to determine the identity of the author of the defamatory statements. The Respondents are the only persons in possession of the information that will identify the author of these statements. The Applicant seeks production of the requested information to assist him in identifying potential defendants for an action in defamation.”**

Counsel for the Respondents advised the Court that as the Applicant has withdrawn a request for costs, they take no position with respect to the Application.

Counsel for the Respondents stated in their letter, to the Clerk, of June 15, 2010:

“Ms. Moore’s Amended Notice of Application and supporting Affidavit of Mr. Doucette sworn May 18, 2010 withdraws the Applicant’s request for costs.

As communicated to Ms. Moore, due to its privacy obligations under the Personal Information *Protection and Electronic Documents Act* (PIPEDA) BNI is restrained from voluntarily disclosing private information simply on request. Nonetheless, disclosure may be made where it is authorized or required by law, that is, by Court Order.

Upon this Court being satisfied the Applicant is entitled to the equitable remedy of “pre-action discovery” to permit him to discover the identity of the proposed Defendant, and an Order issued, then BNI will certainly comply.”

Ms. Moore did not contest the issue of costs during submission and conclude an agreement between counsel was reached.

FACTS

As there is an extensive test requirement under a **Norwich** Application, am setting out Mr. Doucette’s Affidavit sworn May 18, 2010 in its entirety including some of the exhibits attached to that Affidavit:

- “1. I am the Applicant in this matter and as such have personal knowledge of the following:**
- 2. I am 49 years old and I reside in my own home at 71 Briardale Street in Moncton, New Brunswick.**
- 3. I am employed as a firefighter at the City of Moncton where I have been employed for 25 years.**
- 4. On February 16th, 2010, the Times Transcript published a report that stated that Ambulance New Brunswick, the body that oversees New Brunswick’s fleet of ambulances and**

paramedics, had made a small revision to the policy that dictated the speed at which ambulances could travel in an emergency. I attach hereto as Exhibit "A" a copy of that story.

5. I wrote a "Letter to the Editor", via email, in response to this story. The letter was published in the Times Transcript on February 18th, 2010. I attach hereto as Exhibit "B", a copy of my letter that was published by the Times Transcript.
6. On February 18th, 2010, various comments in response to my letter, were posted on Canadaeast.com, the online affiliate of the Times Transcript.
7. A poster called "Anonymous Anonymous" posted two comments that were directed at me, in that they named me by my first and last name (Daryl Doucette). The first defamatory comment, which was posted at 9:51 a.m. stated that "Daryl Doucette needs to be fired" and referred to me as a "cowboy", and stated that I was an example of the "goon mentality" of the Moncton Fire Department. I attach hereto as Exhibit "C" a copy of the statement made by "Anonymous Anonymous" on February 18th, 2010.
8. The second comment posted by "Anonymous Anonymous" was posted on February 19th, 2010 on canadaeast.com and stated that my "paid goons" were alive and well - insinuating that readers of my letter, who had expressed positive feedback, were "goons" who had been paid by me. I attach hereto as Exhibit "D" a copy of the comment posted by "Anonymous Anonymous" on February 19th, 2010.
9. I was very upset to read these comments on both occasions and I believe them to be a deliberate attempt to defame my reputation, professionally and personally.
10. I contacted Sebastien Godin, an employee of Brunswick News via email on February 23rd, 2010 at approximately 3:30 p.m. to ask that the identity of the person who had made these defamatory comments on canadaeast.com be revealed to me. I attach hereto as Exhibit "E" the email sent to Mr. Godin.
11. Mr. Godin advised me, via email on February 23rd, at approximately 5:00 p.m. that they could not provide that information without a court order, however if a court order was served on them, they would provide the information requested. I attach hereto as Exhibit "F" the email from Mr. Godin, stating the position of the Respondent.
12. I am requesting that the Court order that the Respondent provide to me, all information in its possession, regarding the identity of "Anonymous Anonymous."
13. I am requesting this information on the grounds that I cannot pursue civil action against "Anonymous Anonymous" as his or her identity is unknown to me and the Respondent is in

possession of information that will allow me to name "Anonymous Anonymous" as a defendant in a civil action.

14. I am also requesting that the Court grant an abridgement in this matter as the Respondent, through Mr. Godin, has agreed that the information will be provided, if a court order compels them to do so. I am very concerned that the information I am seeking could be deleted or accidentally lost and I believe it imperative that an abridgement be granted, so that the information may be retrieved immediately.
15. I make this Affidavit for no improper purpose and in support of the following relief:
 - A. The Court abridge the notice period required under Rule 16.08(3) of the Rules of Court of New Brunswick, and grant an abridgement of time, pursuant to Rule 3.02 of the rules of Court of New Brunswick;
 - B. Pursuant to Rule 32.12 of the Rules of Court of New Brunswick, the Respondent be ordered to provide to the Applicant all information in its possession regarding the identity of the person or persons who posted comments on the "Letters to the Editor" section of the canadaeast.com website, namely:
 1. A comment posted in the "Letters to the Editor" section of canadaeast.com on February 18th, 2010 at approximately 9:51 a.m. under the web name "Anonymous Anonymous";
 2. A comment posted in the "Letters to the Editor" section of canadaeast.com on February 19th, 2010, at approximately 7:13 a.m. under the web name "Anonymous Anonymous".
 - C. The Respondent provide to the Applicant any information that they have regarding the identity of "Anonymous Anonymous" including, but not restricted to: the name, address, telephone number, account status, any secondary email addresses, account services, account creation date, logfile information associated with this account, including times and dates of logins and activity on the account, as well as the IP address data associated with the account.
 - D. Costs of this Application."

Exhibit "B" to Mr. Doucette's Affidavit was his letter to the editor which

reads:

"Let ambulance drivers decide

To The Editor:

Just thought I would weigh into the debate regarding limiting the speeds of ambulances "to and fro" regarding emergency calls.

As a member of the Moncton Fire Department for 25 years I can attest to the "need for speed" in critical emergency situations and will throw my support totally to the paramedics that I and fellow firefighters work with on a daily basis!

These people are on the front line. Of course not every medical call warrants them responding full blast with the "pedal to the metal". They are not stupid!

This speed restriction imposed by some bureaucrat tells me they have no faith in the judgment of the employees. The paramedic union president Denis Beaulieu summed it up perfectly when he said that "common sense" should prevail in the determination of speed of response and delivery to the hospital.

I would bet that if something tragic was to happen to one of Ambulance N.B. spokesperson Sophie Cormier-Lalonde's loved ones and she found herself in the unenviable position of being a passenger in the front seat of one of our ambulances, she would be hollering to speed up!

**Daryl Doucette,
Moncton"**

There were negative and positive comments to Mr. Doucette's letter on February 18 and 19, 2010. I am reproducing the comments from "Anonymous Anonymous", Moncton which were identified as Exhibits "C" and "D":

Exhibit "C"

"Daryl Doucette needs to be fired. Obviously he's a cowboy who cares more about speeding than actually being safe. A shameful example of the mentality of the Moncton Fire Dept. What does the mayor think of this? Does Doucette talk for the entire City of Moncton and the entire Moncton Fire Dept.? Fire Departments kill people all the time by speeding. GOOD FOR YOU, cowboy . . . GOOD FOR YOU. Hey cowboy . .

.Google "speeding fire truck accidents" and see what pops up. If this is the goon mentality of the Moncton Fire Dept., it's time to clean house.

Exhibit "D"

I see Doucette's paid goons are alive and well."

As noted, both were signed Anonymous Anonymous, Moncton.

ISSUES

There are, in effect, two issues in the matter, (a) as to the general issue, should the Norwich order be granted and (b), if so, should the terms of the requested order be modified?

ANALYSIS

LAW

Rule 32.12 of the New Brunswick *Rules of Court* provides:

"32.12 Discovery before Commencement of Proceeding

- (1) **On such terms as may be just, the court may grant leave to any person to examine for discovery, before commencement of proceedings, any other person who may have information identifying an intended defendant.**
- (2) **An application under paragraph (1) shall be made by preliminary motion on notice to the person sought to be examined and shall show that**
 - (a) **the applicant has a *prima facie* case for relief against the intended defendant,**
 - (b) **the applicant, having made reasonable inquiries, has been unable to identify the intended defendant, and**

- (c) the applicant has reason to believe that the person to be examined has knowledge of facts, or has in his possession, custody or control documents or things identifying the intended defendant."

The Federal Statute which has bearing on this matter is *Personal Information Protection and Electronic Documents Act* R.S.C. 2000 c. 5 at paragraph 7(3)(c).

"7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

- (c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

In *GEA Group AG v. Ventra Group Co.* (2009), 96 O.R. (3d) 481, the Ontario Court of Appeal considered the matter of a Norwich order and whether a motion judge had misapprehended and misapplied the test for such an order. Cronk J.A., carried out a concise discussion on the then existing law at paragraphs 41-45:

"[41] The remedy of pre-action discovery derives from the ancient bill of discovery in equity. Contemporary consideration of this type of equitable relief began with the 1974 decision of the House of Lords in *Norwich Pharmacal*, a case of suspected patent infringement. *Norwich Pharmacal* holds that, in certain circumstances, an action for discovery may be allowed against an "involved" third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so. In a passage frequently quoted in subsequent authorities, Lord Reid described the basic principle, at p. 175 A.C.:

- [I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes

under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

[42] In his concurring speech in *Norwich Pharmacal*, at p. 199 A.C., Lord Cross of Chelsea rejected the suggestion that the recognition of an action for discovery to permit disclosure of the names and addresses of alleged wrongdoers would open the door to meritless "fishing requests" by prospective plaintiffs who sought to collect evidence or information from persons who had no relevant connection with the person to be sued or the events at issue. In so doing, he also identified the following factors as relevant to the determination of whether pre-action discovery of a third party should be allowed in the exercise of the court's discretion:

- (i) the strength of the applicant's case against the unknown alleged wrongdoer;
- (ii) the relationship between the alleged wrongdoer and the respondent (the person from whom discovery is sought);
- (iii) whether the information could be obtained from another source; and
- (iv) whether the provision of the information "would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant".

See, also, to substantially the same effect, the speech of Lord Kilbrandon in *Norwich Pharmacal*, at p. 205 A.C. [page494]

[43] In *Norwich Pharmacal*, pre-action discovery was sought for a narrow purpose -- to identify suspected wrongdoers where it was known that a wrong had occurred, in order to permit the injured parties to sue for redress. To achieve this focused objective, discovery was allowed against an "innocent" third party against whom the appellants had no direct cause of action.

[44] However, following *Norwich Pharmacal*, the reach of the equitable action for discovery in England was significantly expanded. In subsequent cases, pre-action discovery was granted where a cause of action against the respondent from whom discovery was sought was asserted on the basis of the respondent's own alleged wrongdoing (see *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096, [1981] 1 All E.R. 417 (H.L.)), as well as where the object of the relief was to permit the tracing and freezing of assets (see *Bankers Trust Co. v. Shapira*, [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (C.A.); *A. v. C.*, [1980] 2 All E.R. 347, [1981] Q.B. 956 (Q.B.)). In addition, in *P. v. T.*, [1997] 4 All E.R. 200, [1997] ICR 887 (Ch. D.), *Norwich* relief was granted to permit an applicant to determine if, in fact, he had a cause of action against a suspected wrongdoer.

[45] Moreover, in *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All E.R. 193, [2002] UKHL 29 (H.L.), it was held, at para. 44, that the "Norwich jurisdiction" was not linked "to any requirement that the information should be available to the individual who had been wronged only for the purpose of enabling him to vindicate that wrong by bringing proceedings". In other words, the court in *Ashworth* accepted that a Norwich order could be obtained in the absence of a settled intention to sue the alleged wrongdoer or the person from whom discovery is sought. (See, also, *Norwich Pharmacal*, at p. 175 A.C., per Lord Reid.) The rationale for this expansive approach to Norwich relief was explained by Lord Woolf C.J. in *Ashworth*, at para. 57:

New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy."

[1] In *Alberta Treasury v. Leahy* (2000) A.J. No. 993 which was affirmed in the Alberta Court of Appeal, with leave to appeal to the Supreme Court of Canada denied. The Court formulated a test or factors to be considered for **Norwich** orders. Mr. Justice Mason carried out a lengthy evaluation of the authorities and offered the following test or factors at paragraph 106:

"106 The foregoing review demonstrates that:

- a. Norwich-type relief has been granted in varied situations:
 - (i) where the information sought is necessary to identify wrongdoers;
 - (ii) to find and preserve evidence that may substantiate or support an action against either known or unknown wrongdoers, or even determine whether an action exists; and
 - (iii) to trace and preserve assets.
- b. The court will consider the following factors on an application for Norwich relief:
 - (i) Whether the applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim;

- (ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;
- (iii) Whether the third party is the only practicable source of the information available;
- (iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some refer to the associated expenses of complying with the orders, while others speak of damages; and
- (v) Whether the interests of justice favour the obtaining of the disclosure."

See also: **Glaxo v. M.N.R.** [1998] F.C.J. No. 874; **York University v. Bell Canada** [2009] O.J. No. 3689 and **Warman v. Wilkins-Fournier** 2010 CarswellOnt 2737.

[12] New Brunswick Courts have considered Rule 32.12. In **Shuve v. McDermott** (1989), 55 N.B.R. (2d) 316 Hoyt, J. as he then was, says at paragraphs 5 and 6:

"5 Paragraph 6 of Mr. Shuve's affidavit says:

"That I have been advised by Rodney J. Gillis [his solicitor], and do verily believe that I have a good cause of action against the said Arthur G. McDermott and others for conspiracy to induce breach of my employment contract."

6 In my view such a meagre statement does not meet the requirement of Rule 32.12(2)(a), which requires the applicant to show a prima facie case for relief against the intended defendant. Although, as Professor Fleming writes, the tort of conspiracy has "fallen into steep disfavour" and has been doomed to "practically negligible significance", it is in certain situations available. However, the fact that Mr. Shuve has been advised by his solicitor that he has a good cause of action against Mr. McDermott and others for conspiracy falls short of the requirement of the rule for a prima facie case to be shown before permitting this preaction examination."

As well, Turnbull, J., in **Rocca v. Crowther** (1987) 74 N.B.R. (2d) 146

comments, in denying a request for discovery, at paragraphs 3 and 4:

- “3 While the article is lengthier than this portion, it is this portion of the article that the intended plaintiffs complain about. They allege that they have been libelled and wish to know the sources that the Gleaner relied upon as the intended plaintiffs may well sue these sources. In denying the intended plaintiffs’ motion I want to make it clear that I am not attempting to define the intention of the Rule because I am satisfied that the applicant has not shown a prima facie case for relief against the sources.
- 4 Tom Crowther the publisher of the Daily Gleaner admits that he was the author of the article but in both correspondence between him and Pat Rocca and before me declines to reveal these sources based on privilege. Thus the intended plaintiffs have satisfied me on the requirements of subparagraphs (b) and (c). If the article is libellous there is nothing in the article itself which sets out a prima facie case of defamation against these sources. Indeed as I read the article the author is expressing his own opinion, based partly on rumor and partly on information gained from sources.”

[14] Finally, there are two, as yet, unreported decisions which consider the issue. Garnett J., in **Thomas v. Air Canada F/C/12/01** order the production of the names of two pilots involved in a plane skidding off a runway. In Nova Scotia, the Supreme Court considered **A.B., C.D. v. Bragg Communication Inc. et al** 2010 NSSC 215 and granted a **Norwich** order, but I am not aware of the facts.

APPLYING THE LAW TO THIS MATTER

Referring to **Leahy supra**, I am of the view that the case before this Court falls within subsection (i); namely, “the information sought is necessary to identify wrongdoers”. As well, rule 32.12(1) provides for discovery of; “any other person who may have information identifying an intended defendant”. Therefore, on both grounds the preliminary issue would appear to be met.

The question then turns to the factors outlined in **Leahy** and Rule 31.12(2). will first deal with Rule 32.12(1) and then turn to the factors in **Leahy**. Some of the evidence concerning the factors will be repetitive.

Rule 32.12(2) factors to be considered:

(a) Has the Applicant a *prima facie* case for relief against the intended Defendant?

The language used by "Anonymous Anonymous" suggests that the Applicant is a "cowboy" or a "goon" who needs to be fired. am not making a finding that these words, in and of themselves, establishes the Applicant's claim but they are words which could be actionable. Consequently, I am satisfied there is a *prima facie* case for relief against "Anonymous Anonymous".

(b) Has the Applicant made reasonable inquiries and not been able to identify the intended Defendant?

I would note paragraphs 10 and 11 of Mr. Doucette's Affidavit. In those paragraphs Mr. Doucette outlines his attempts to determine the identity of "Anonymous Anonymous". Given the circumstances of this case, believe this is all Mr. Doucette can do. Therefore, am satisfied that Mr. Doucette has made reasonable inquiries and is unable to identify "Anonymous Anonymous".

(c) Has the Applicant reason to believe that the Respondents have the knowledge or documents or things identifying the intended Defendant?

Again, would refer to paragraphs 10 and 11 of Mr. Doucette's Affidavit. On the face of these paragraphs, Mr. Doucette has established the Respondents' knowledge. The Respondents chose not to appear and contest the Applicant or the veracity of paragraphs 10 and 11. Consequently, am satisfied the Respondents have the knowledge or documents or things identifying "Anonymous Anonymous".

[18] Turning to the requested **Norwich** order, will review the factors set out in **Leahy** supra:

(i) Has the Applicant provided evidence sufficient to raise a valid, *bona fide* or reasonable claim?

have set out the comments of "Anonymous Anonymous" at paragraph 6 of these reasons. As noted, am not determining that the words used in the comment constitute a wrong but I believe that on their face they suggest that the Applicant has raised a valid, *bona fide* or reasonable claim. It may be that "Anonymous Anonymous" has a reasonable defence but that is for the trial judge to determine after hearing all the evidence. In any event, am satisfied that the Applicant has established factor (i).

Has the Applicant established a relationship with the Respondent such that it establishes that the Respondent is somehow involved in the acts of complained of?

The comments of "Anonymous Anonymous" appeared in the Respondents' publications and were associated with Mr. Doucette's letter to the editor. This clearly establishes the necessary relationship and establishes factor (ii).

Are the Respondents the only practicable source of the information available?

Again, in my opinion, the answer to that question is obvious. The only evidence before the Court and the only reasonable conclusion from the evidence is that the comment was sent to the Respondents. There is no information to suggest the comment went elsewhere. Consequently, the Respondents are the only practicable source of the information. Factor (iii) has been established.

Can the Respondents be indemnified for costs and expenses associated with complying with the orders?

In my view, the costs should not be that extensive. The Respondents are aware of this Application and as noted in paragraph 11 of Mr. Doucette's Affidavit, will make the information

available as soon as they receive the Court Order. Consequently, see little costs associated with providing the information. As to the possibility of associated expenses, cannot imagine these to be that large. Finally, the possibility of damages, in that regard cannot pre-judge the situation. However, on the facts before the Court, cannot imagine large damages. The intended Defendant wanted his comments published. While he or she probably did not want his or her identity known, that is or should be a risk in these circumstances. Therefore, am satisfied the Respondents can be indemnified for costs and expenses. Consequently, factor (iv) has been satisfied.

(v) Do the interests of justice favour the obtaining of the disclosure?

In my view, the interests of justice favour the Applicant being able to proceed and to obtain a final ruling on this matter. As is said, the Applicant is entitled to his day in court with all the attendant consequences of such proceedings. Consequently, believe the interests of justice favour obtaining the disclosure rather than non-disclosure. Factor (v) has been established.

[19] For these reasons, believe an order should issue. However, am of the view that the requested order as set out in paragraph 1 is too broad and could possibly affect the privacy of others. The order should be restricted to sufficient

evidence, if available, necessary to identify "Anonymous Anonymous" and the e-mails outlined in paragraph 6 of these reasons.

DISPOSITION

[20] The Motion of Daryl Doucette is granted in part. The Respondents, Brunswick News, CanadaEast Interactive and CanadaEast.com, are hereby ordered:

to produce to the Applicant, Daryl Doucette, all information in its possession regarding the identity of the person or persons who posted comments on the "Letters to the Editor" section of CanadaEast.com website under the web name "Anonymous Anonymous" on February 18th and 19th, 2010; and,

the Applicant, Daryl Doucette is to reimburse the Respondents for all reasonable expenses associated with the production of this information prior to the information being produced by the Respondents.

- (c) Costs of this Application to be costs in the cause should the intended action proceed.

SIGNED this 29th day of June, 2010 at Moncton, New Brunswick.



George S. Rideout
Judge of the Court of Queen's Bench