

Velsoft Training Materials Inc. and Velsoft International Inc. (plaintiffs) v. Global Courseware Inc., Glen Myers a.k.a. Joe Myers, Lori Gillin a.k.a. Michelle Masterson and Charissa Fraser a.k.a. Maria Fraser (defendants)
(Hfx. No. 341894; 2012 NSSC 295)

Indexed As: Velsoft Training Materials Inc. et al. v. Global Courseware Inc. et al.

Nova Scotia Supreme Court
Wood, J.
August 2, 2012.

Summary:

The defendants were former employees of one of the plaintiffs. The plaintiffs alleged that the defendants had (1) taken proprietary information and used it to compete unfairly; (2) breached their fiduciary duties to their employer and used confidential information pertaining to sales, pricing and items of information in order to solicit customers; and (3) infringed copyright and trademark rights. The plaintiffs obtained an ex parte Anton Piller order authorizing the seizure and copying of computers, hard drives, servers and other data storage accounts and devices. The order was executed. The defendants moved to set aside the order, seeking damages on the basis that the order amounted to an abuse, sullyng their reputations, disrupting their lives and interfering with their business.

The Nova Scotia Supreme Court, in a decision reported at (2011), 305 N.S.R.(2d) 232; 966 A.P.R. 232, set aside the order, but declined to award any damages. A number of issues arose regarding the disclosure of electronic information.

The Nova Scotia Supreme Court determined the issues.

Practice - Topic 4552

Discovery - Production and inspection of documents - General - Time when available - [See first **Practice - Topic 4573.3**].

Practice - Topic 4573.3

Discovery - What documents must be produced - Computerized documents or electronic data - At issue was disclosure of electronic information - The defendants asserted that the plaintiffs' disclosure was incomplete and moved for an order requiring them to fulfill their disclosure obligations - The Nova Scotia Supreme Court held that such an order was premature on the basis of the existing evidentiary record - The plaintiffs had identified and disclosed 2,783 relevant items - The defendants sought 68,202 records and pointed to the discrepancy as evidence that the parties had not applied the same search criteria in their review of the electronic records - However, if the court was to order further disclosure, it had to have an evidentiary basis for doing so - A mere discrepancy in the number of documents produced was insufficient - The defendants had not provided any specific evidence indicating that documents or categories of documents that were relevant had been omitted from the plaintiffs' production - See paragraphs 1 to 10.

Practice - Topic 4573.3

Discovery - What documents must be produced - Computerized documents or electronic data - At issue was disclosure of electronic information - The defendants asserted that the plaintiffs' disclosure was incomplete and moved for an order requiring them to fulfill their disclosure obligations - The Nova Scotia Supreme Court held that such an order was premature on the basis of the existing evidentiary record - The plaintiffs had identified and disclosed 2,783 relevant items - The defendants sought 68,202 records and pointed to the discrepancy as evidence that the parties had not applied the same search criteria in their review of the electronic records - The court agreed with the defendants that they were entitled to know the search criteria used by the plaintiffs in order to determine whether to challenge the scope of the information disclosed - However, the language of Civil Procedure Rule 16 did not require this information to be included in the affidavit of disclosure - The existing rules provided a number of avenues through which the parties could identify and deal with these issues, including (a) an agreement on search parameters under rule 16.05; (b) a request to use specific search criteria, the refusal of which would be relevant to the issue of costs; (c) interrogatories requesting disclosure of search parameters; and (d) questions at discovery regarding search parameters - See paragraphs 11 and 12.

Practice - Topic 4642

Discovery - Affidavit or list of documents - Computerized documents or electronic data - Production of - [See second **Practice - Topic 4573.3**].

Practice - Topic 4642

Discovery - Affidavit or list of documents - Computerized documents or electronic data - Production of - At issue was disclosure of electronic information - The defendants asserted that the disclosure affidavit provided by the plaintiffs was deficient and moved for an order requiring them to fulfill their disclosure obligations - The Nova Scotia Supreme Court agreed that the plaintiffs' affidavit of disclosure was deficient in some respects - Civil Procedure Rule 16.09(3)(d) identified specific information that had to be provided regarding each item of electronic information, including date of creation, type of information, author and recipient - The plaintiffs acknowledged that many of the entries failed to include this information and agreed to provide it - However, the defendants' request for a description of the device on which each record was found and the custodian of that device went beyond what was required under rule 16 and was more appropriately dealt with through the further discovery process - See paragraphs 13 to 16.

Practice - Topic 4642

Discovery - Affidavit or list of documents - Computerized documents or electronic data - Production of - At issue was disclosure of electronic information - The defendants asserted that the disclosure affidavit provided by the plaintiffs was deficient and moved for an order requiring them to fulfill their disclosure obligations - The affidavit included a general statement that some electronic information had been deleted in accordance with the normal course of business - The defendants, who were former employees of the plaintiffs sought more information regarding the complete destruction of important email accounts, including when the destruction occurred, for what reasons and the server on which the accounts had been stored - The Nova Scotia Supreme Court agreed that, while a general

statement was sufficient for routine deletions, the destruction of the defendants' email accounts fell into a different category - Some additional information should be provided - Civil Procedure Rule 16.03(2)(b) required disclosure of information concerning the destruction or deletion of electronic information, but did not indicate how that disclosure was to take place - The logical way to provide this information was through Schedule D to the affidavit of disclosure - Civil Procedure Rule 16.09(3)(h) required this to include details about electronic information that was no longer in the party's control as well as how they ceased to have control of it - The plaintiffs' disclosure obligation would be satisfied by identifying the date of destruction, the reasons and who made the decision to delete the accounts - Any further details were to be left to the discovery process - See paragraphs 17 to 22.

Cases Noticed:

Bow Helicopters Ltd. v. Textron Canada Ltd. (1981), 23 C.P.C. 212 (Ont. S.C. Master),
refd to. [para. 9].

Statutes Noticed:

Civil Procedure Rules (N.S.), 2009, rule 16.03(2)(b) [para. 17]; rule 16.08(1)(c) [para. 3];
rule 16.09(3)(b), rule 16.09(3)(d), rule 16.09(3)(h) [para. 4].
Rules of Civil Procedure (N.S.) - see Civil Procedure Rules.

Authors and Works Noticed:

Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery
(2010), p. 10 [para. 8].

Counsel:

Stewart Hayne, for the plaintiffs;
Dennis James, for the defendants.

This motion was heard at Halifax, N.S., on July 30, 2012, by Wood, J., of the Nova Scotia
Supreme Court, who delivered the following written decision on August 2, 2012.

Order accordingly.

Editor: Sharon McCartney