SUPREME COURT OF NOVA SCOTIA
Citation: Baird v. Barkhouse, 2013 NSSC 425

Date: 20131223
Docket: Syd 334436
Registry: Sydney

Between:

Jeffrey Warren Baird

Plaintiff/Respondent

v.

Brian Vincent Barkhouse

Defendant/Applicant

Judge:	The Honourable Justice Robin C. Gogan
Heard:	November 12, 2013, at Sydney, Nova Scotia
Final Written Submissions:	November 28, 2013
Oral Decision:	December 23, 2013
Written Release of Oral Decision:	January 8, 2014
Counsel:	Hugh R. McLeod, for the plaintiff/respondent Guy LaFosse, Q.C., for the defendant/applicant

By the Court (Orally):

Introduction

[1] Jeffrey Warren Baird was injured when the vehicle driven by Brian Vincent Barkhouse struck his motor cycle on July 26, 2009. Mr. Baird sued Mr. Barkhouse for damages. Discoveries were held. Mr. Barkhouse seeks production of documentation requested during discovery examinations. Mr. Baird contests the motion for disclosure.

Issue

[2] Should an order issue for the production of documents sought by Mr. Barkhouse?

Background

[3] This proceeding has taken a somewhat complex course to date respecting disclosure. The following is a brief summary of the evolution of the matter.

[4] On July 26, 2009, Mr. Baird was injured in a collision involving his motor cycle and the motor vehicle driven by Mr. Barkhouse. A notice of action was filed on August 18, 2010 in which negligence is pleaded and damages are claimed, including loss of income. A notice of defence was filed on September 15, 2010.

[5] On May 11, 2011, Mr. Barkhouse brought a motion seeking production of documents from Mr. Baird pursuant to Rule 15. An order issued requiring Mr. Baird to file the requested materials by July 31, 2011.

[6] Mr. Baird subsequently provided an affidavit of documents. Among the exhibits to the affidavit were documents related to Mr. Baird's personal income tax status and the status of a company he had operated for a period prior to his motor vehicle accident. The company was Glace Bay Cycle and Motor Company Limited, (the "Company").

[7] On September 26, 2011, Mr. Baird's personal and company accountant, James Cunningham, filed a report providing an opinion that the company's future loss would be a minimum of $26,000 per annum. Furthermore, it was his opinion that there was "a direct financial loss of $471,000 composed of inventory loss

$11,000 and earnings $460,000." The report asserts compliance with Rule 55.04, despite the fact that Mr. Cunningham's report did not contain a list of materials reviewed by him, nor relied on by him, in the preparation of his report. This failure resulted in a series of questions for Mr. Cunningham and a request for further information from Mr. Barkhouse.

[8] By notice of motion dated June 5, 2012, Mr. Baird sought an order setting discovery dates, limiting questions to be submitted to the expert, and a determination as to who should pay the costs for the expert to answer any required questions. Mr. Barkhouse opposed the setting of discovery dates pending disclosure of the material relied upon in the expert opinion.

[9] In response to the motion, Mr. Cunningham swore an affidavit dated June 27, 2012. Attached to the affidavit as exhibits was all of the material which he said that Mr. Baird had provided to him and which had been used to prepare the tax returns for 2008 and 2009. Further particulars were provided in the form of a letter from Mr. Cunningham to Plaintiff's counsel dated June 26, 2012. Lastly, a letter from Mr. Cunningham dated June 27, 2012 was provided and purported to explain the company’s total sales and inventory for 2008 and 2009.

[10] In a decision dated July 30, 2012, Bourgeois J. found all of the questions to be appropriate. The answers were to be produced at the expense of Mr. Baird. Discovery dates were to be set. By decision dated September 26, 2012, Mr. Baird was ordered to pay costs of $1,000 to Mr. Barkhouse in any event of the cause.

[11] Discoveries were subsequently held on December 11, 12, and 21, 2012. In the course of the discoveries, requests were made by Mr. Barkhouse to produce information. The list of information requested was produced as Schedule "A" to the discovery transcript. Six months later, the requested documentation remained outstanding. Mr. Barkhouse sought production of the outstanding documentation by way of appearance day motion dated June 18, 2013. Mr. Baird filed an affidavit in response on July 3, 2013. The motion was scheduled for July 10, 2013 and was adjourned by consent to November 12, 2013.

[12] Prior to the hearing of the motion, some of the information was produced as requested. The following items remained outstanding:

(a) The business records from Glace Bay Cycle and Motor for the period 2006 to 2009;

(b) Records from Dr. Macneill's Sydney Pain Clinic;

(c) A copy of all updated hospital and doctors files from May 19, 2011 to date;

(d) An update of Mr. Baird’s out of pocket expenses;

(e) A copy of any and all documentation Mr. Baird has relating to running the business in 2007;

(f) A complete copy of Mr. Baird’s personal income tax returns for the years 2007, 2008 and 2009;

(g) A copy of any and all records relating to the bike sale to Glen Mitchellitis in 2008;

(h) A copy of all invoices and receipts relating to the purchase and sale of motorcycle accessories for both 2008 and 2009;

(i) A detailed inventory list for 2008 and the details of how the values were determined;

(j) A detailed inventory list for 2009 and details of how the values were determined;

(k) The company's bank account records from Scotiabank for the period of 2006 to date;

(l) Documentation relating to the approximately fifty thousand dollars of inventory existing at the end of 2009; or if sold, advise to whom, at what price and when; and

(m) A copy of the HST records relating to the sale of the above-mentioned inventory.

[13] The motion proceeded on November 12, 2013. Mr. Baird was cross-examined on his affidavit and counsel made submissions. On November 26, 2013, Mr. Baird filed a supplemental brief. In response, Mr. Barkhouse provided correspondence dated November 28, 2013.

Analysis

Position of the Parties

[14] Mr. Barkhouse seeks an order for production of the outstanding items. Generally, Mr. Barkhouse's position is that the information was requested at discovery and no objection was made to production at that time. The documents are not privileged and they are relevant to Mr. Baird's medical condition, his financial damages or to the foundation of the Jim Cunningham report. Mr. Barkhouse argues that Mr. Baird has not made reasonable efforts to obtain the requested information.

[15] Mr. Baird's position, put simply, is that he has produced everything that he can with respect to the financial claims and the foundation for the Jim

Cunningham report. With respect to ongoing medical disclosure, Mr. Baird says that Mr. Barkhouse's request for updated information is unreasonable, unfair, onerous and premature.

The Law

[16] This motion was brought pursuant to Rules 1, 2.03(1)(a) and 18.18 which are reproduced as follows:

> Object of these Rules
>
> 1.01 These Rules are for the just, speedy and inexpensive determination of every proceeding.
>
> General judicial discretions
>
> 2.03(1)A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and(3), to do any of the following:
>
> > (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> Production or access after discovery or at adjournment
>
> 18.18 (1) A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other things referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:
>
> > (a) the document, information or thing is not in the control of the witness;

> (b) it is not relevant and is not likely to lead to relevant evidence;
>
> (c) it is privileged.
>
> (2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.
>
> (3) A party who requires production or access before the party completes the examination of a witness at discovery may adjourn the discovery.
>
> (4) A judge may relieve a party or a non-party witness from the requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 - Disclosure and Discovery in General

[17] The meaning of relevancy, for disclosure and discovery purposes, is contained in Rule 14.01. This rule provides that relevancy is to be determined on the threshold of relevancy at trial. LeBlanc J. in **Halifax Dartmouth Bridge Commission v. Walter Construction Corporation**, 2009 NSSC 403, commented on the object of Rule 14.01 when considered in the context of disclosure and discovery:

> [16] I am of the view that the object of the rule is to make available information and documents that are likely to lead to relevant evidence at trial, which I take to mean that the information will probably lead to relevant evidence at trial. The key feature of the current rule is that the evidence has to be relevant to an issue at trial. It is important, however, to be mindful that at the pre-trial stage, the parties are still investigating the claim to determine whether there is a basis to defend. Consequently, at discovery, witnesses can be examined both as to relevant evidence and also for information that is likely to lead to relevant evidence.

> Similarly, witnesses could be examined on documents that are relevant and also on documents that are likely to lead to relevant evidence.

[18] The reasoning of LeBlanc J. is instructive and is relied upon in the present case.

[19] During the motion hearing, and subsequent oral and written submissions, Rule 18.19 came under consideration as well. Rule 18.19 provides as follows:

> Error in Discovery Answer
>
> 18.19(1) A party who becomes aware that they, or their employee or officer, gave an erroneous or incomplete answer at discovery must immediately notify each other party of the error or incompleteness and, until the parties agree or a judge orders otherwise, provide the correct and complete information in a written statement signed by the person who gave the answer.

[20] A presumption of full disclosure is the operating principle as noted is Rule 14.08, which states as follows:

> Presumption for full disclosure
>
> 14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.
>
> (2) Making full disclosure of documents or electronic information ***includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exists*** and are in the control of the party, and to preserve the documents and electronic information. (Emphasis added)

> (3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden and delay proportionate to both of the following:
>
> > (a) the likely probative value of the evidence that may be found or acquired if the obligation is not limited;
> >
> > (b) the importance of the issues in the proceeding to the parties.
>
> (4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.
>
> (5) The presumption for full disclosure applies, unless it is rebutted, on a motion under Rule 14.12, Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.

[21] The presumption of full disclosure is fundamental. It ensures that fairness and justice is achieved. The failure to disclose relevant documentation or, at the discovery stage, failure to disclose information which will likely lead to relevant evidence, is a serious failure. A party is noncompliant at their peril. Noncompliance attracts consequences such as the exclusion of evidence at trial pursuant to Rule 51.03(1)(b) and (c). The failure to take the reasonable steps to ensure proper disclosure can also result in cost consequences. These consequences underpin the importance of disclosure under our Rules.

[22] In addition, the obligation to make full disclosure, including documentary disclosure, is ongoing throughout a proceeding. The Rules require a party who becomes aware of the existence of undisclosed relevant documents to take immediate action and deliver a supplementary affidavit to the other party.

[23] Finally, as already noted, the rules require immediate action in the event that a party becomes aware of an error or omission in answer to a question at discovery.

[24] The requirements in the Rules for ongoing and immediate action in the context of disclosure give effect to the object of the Rules as set out in Rule 1.01.

Ruling

[25] It is convenient to review the position of the parties, the evidence offered and my determination on an item by item basis as follows:

(a) The business records from Glace Bay Cycle and Motor for the period 2006 to 2009.

[26] Mr. Barkhouse seeks business records, including papers, receipts, and company books for the period 2006-2009. Mr. Barkhouse takes the position that the records are relevant to the claim for financial losses in the Jim Cunningham report totalling $471,000. Mr. Baird acknowledges that this information was requested on discovery. There was no objection taken to the production of these records on discovery.

[27] In his affidavit, Mr. Baird testified that he operated the company in 2008 and 2009. Prior to that, the company was run by his father. No business was carried on in the years 2006 and 2007. Mr. Baird stated that his father died in May of 2006 and that the company was defunct after his father's death until 2008, when he reinstated the company. The year 2007 in Mr. Baird's affidavit was referred to as a typographical error.

[28] This evidence was not consistent with discovery examination. During discovery, Mr. Baird indicated that his father continued to operate the company until the time of his death, after which Mr. Baird operated the business going forward including part of 2006, all of 2007, 2008 and 2009 to the time of his

accident. He said that he would have to look at his records to determine what business was carried on since he took over the operation. He said that he had receipts and records and that the accountant would have "a lot of that paper work".

[29] Mr. Baird now takes the position that no records are available for 2006 and 2007. For the years 2008 and 2009, Mr. Baird says that all of the business records that can be produced have been produced.

[30] Mr. Baird did not notify Mr. Barkhouse of any error in his discovery answers as contemplated by Rule 18.19(1). The discovery took place almost 1 year prior to the motion hearing. Mr. Barkhouse's motion was necessary to resolve the matter. Mr. Baird's affidavit filed in July, 2013 in response to the motion provided some notice under Rule 18.19(1). To further complicate the question, Mr. Baird's evidence when cross-examined was at times inconsistent with both his affidavit and discovery evidence. Mr. Baird's conduct respecting disclosure falls far short of the gold standard.

[31] Regardless of Mr. Baird's contradictory evidence, I am of the view that some records should exist to establish the extent of the company operations and ownership in 2006 and 2007. At minimum, the company minute books should be available for review and reasonable efforts should be made to review banking and other records to determine what, if any, relevant documentation exists that can be produced. There was no evidence, nor I am satisfied, that those efforts have been carried out. It is not sufficient, at this point, to convey the bare assertion that nothing is available.

[32] The present case can be distinguished from **Halifax Dartmouth Bridge Commission v. Walter Construction Corporation**, 2010 NSSC 350. In that case, LeBlanc J. found that he had no authority to require a party to explain the non-existence of documents that an opposing party believes should exist. He commented at paragraph 21:

> [21] ... I do not see any basis upon which the court can require a party to provide evidence on the non-existence of documents that are not shown to have existed previously, simply because the opposing party believes that such documents should exist. ...

[33] In that case, LeBlanc J. found the claim of inadequate disclosure was based on little more than speculation rather than credible evidence. In the present case,

the evidence clearly establishes that Mr. Baird undertook only minimal efforts to satisfy the reasonable disclosure obligation.

[34] I therefore order Mr. Baird to make all reasonable efforts to locate any and all relevant business records for the period 2006 to 2009. He shall disclose any and all records that have not been disclosed within 60 days. In the event Mr. Baird cannot produce any further documentation, then he must provide written particulars of his efforts to Mr. Barkhouse, as well as a written statement in compliance with Rule 18.19(1), within 60 days.

(b) Records from Dr. MacNeill's Sydney Pain Clinic.

[35] Mr. Barkhouse seeks these records on the ground that they are relevant to Mr. Baird's medical condition and damages claim. I agree. Mr. Baird did not object to the production of these records when requested at discovery. The evidence indicates that these records were requested by Plaintiff's counsel in July of 2011. The evidence further indicates that the records were sent by the doctor's office to Plaintiff's counsel in February, 2012.

[36] For some reason, the records have not been disclosed to Mr. Barkhouse. Mr. Baird's affidavit filed on the motion indicates that the request "at this time is not only troublesome and onerous, but it is premature because this case is a long way from being ready for trial." I disagree.

[37] On the hearing of the motion, there was some suggestion that the records may have been misplaced. Plaintiff's counsel shall make diligent searches for these records and disclose them to Mr. Barkhouse forthwith. In the event the records are not located and disclosed forthwith, then Mr. Baird shall obtain copies of the records and provide them to Mr. Barkhouse within 60 days.

(c) A copy of all updated hospital and doctors' files from May 19, 2011 to date.

[38] Mr. Barkhouse seeks these records on the ground that they are relevant to the various damage claims advanced by Mr. Baird. These records may also be the basis for a possible request for an independent medical examination. Mr. Barkhouse only seeks copies of records already in existence and is not seeking any information that does not presently exist or would have to be created. Mr. Baird

did not object to the disclosure of these documents at discovery. They are clearly relevant to Mr. Baird's claim and will likely be relied upon by Mr. Baird to prove his claim at trial.

[39] Mr. Baird says in his affidavit that he will disclose these documents to Mr. Barkhouse when all of his surgery has been completed. In oral submissions, Mr. Baird took the position that ongoing disclosure of this kind is onerous and premature. He also said that the request for updated disclosure is unfair and unreasonable and that all updates will be provided once Mr. Baird's medical treatment has been completed. This was thought likely to occur sometime in the middle of 2014.

[40] I disagree with Plaintiff's counsel that the requests for updated medical information are premature, onerous, unfair or unreasonable. There may be instances where ongoing and repeated requests for updated information may be unreasonable, but such is not the case in this instance. A request has been made for copies of updated medical records and the request has been made at a reasonable interval in the proceeding. The steps required to obtain these records are not onerous and would generally only entail a letter to the doctor or the

hospital with the required consents. These reasonable steps must be taken to provide ongoing disclosure.

[41] Mr. Barkhouse is entitled to know the case to be met and he is entitled to have information to investigate and prepare his case, which includes a decision about whether to request an independent medical examination. Ongoing, full and timely disclosure also promotes the development of settlement positions which is of benefit to both parties and the justice system as a whole.

[42] Mr. Barkhouse shall make requests for updated hospital and doctors records within 30 days and shall disclose these records to Mr. Barkhouse forthwith upon receipt.

(d) An update of Mr. Baird's out of pocket expenses.

[43] Mr. Barkhouse seeks this information by way of an update to Mr. Baird's claim. Mr. Baird agreed to provide this update at discovery. The information is clearly relevant and will have to be produced to prove any special damage claim. The question here is with respect to the timing of the disclosure.

[44] In his affidavit, Mr. Baird said that he would provide this update after his 2014 operation. On cross-examination, he indicated that he had provided an update of his expenses to his counsel but that he hasn't given everything he has to his lawyer. He agreed to provide what he has to his lawyer.

[45] As with the medical records, the documentation sought with respect to out of pocket expenses already exists. Presumably, disclosure will not require more than assembling the information and disclosing it to Mr. Barkhouse. This request is not onerous; it is not premature. There is no undue burden or cost associated with the request. The disclosure obligation is ongoing. The Rules do not allow parties to hoard information or disclose at their convenience. If relevant documents exist, the Rules create a positive and immediate obligation of disclosure. In some cases, it may be reasonable to disclose documentation at rational intervals in the absence of a specific request for updated information. It may also be the case that the obligation to disclose be modified in accordance with Rule 14.08(3).

[46] In the present case, I am satisfied that the request is reasonable and that documents exist which must be disclosed. This request has been outstanding for very close to a year at this point.

[47] Records and receipts relating to out of pocket or special damage claims shall be produced by Mr. Baird within 60 days.

(e) A copy of any and all documentation Mr. Baird has relating to running the business in 2007.

[48] Mr. Barkhouse seeks this documentation and states that it is relevant to the assessment of Mr. Baird's financial loss claims. Again, there was no objection to this request at discovery.

[49] In answer to Mr. Barkhouse's request for disclosure of these records, Mr. Baird's affidavit states that "the business didn't run in 2007".

[50] When cross-examined, Mr. Baird said that he had given all of his business records to his lawyer, but acknowledged that these records did not include any

records from 2007. Mr. Baird further acknowledged his discovery evidence which stated that he was working in the company in 2007 servicing motorcycles, that it provided him with a source of income, that he was sure that he had business records and receipts, and that he "was usually very meticulous about keeping my receipts and paperwork".

[51] This request is similar and likely inclusive of the request for business records for the period 2006-2009. Although Mr. Baird now denies the existence of any records, there was no effort to correct his discovery evidence as contemplated by Rule 18.19 (1). Neither was there any effort to explain what sources of potential information had been reviewed or what steps had been taken to determine whether any documentation could be produced. This lack of effort is troubling when assessed in the context of his discovery evidence. As a result, I am not satisfied that all reasonable steps have been taken to determine if relevant documentation exists. Any documentation found to exist would be relevant to the claims being advanced.

[52] Mr. Baird shall take all reasonable steps to locate any and all relevant business records for the year 2007 and shall disclose any and all records that have

not already been disclosed within 60 days. In the event that Mr. Baird cannot produce any documentation, then he will provide written particulars of his efforts to Mr. Barkhouse and he shall provide a written statement in compliance with Rule 18.19(1) within 90 days.

(f) A complete copy of Mr. Baird's personal income tax returns for the years 2007, 2008 and 2009.

[53] Mr. Barkhouse seeks disclosure of Mr. Baird's personal income tax returns for the years 2007, 2008 and 2009. These documents are clearly relevant to Mr. Barkhouse's assessment of Mr. Baird's financial loss and damage claims. Mr. Barkhouse did not object to the production of these documents at discovery. In his affidavit, Mr. Baird states that he agrees to produce this information. There was no explanation as to why this documentation had not been disclosed almost a year post request.

[54] In oral and written submissions, Mr. Baird says that he had no income for 2007 and no personal income tax return has been filed for 2007. This submission

was inconsistent with Mr. Baird's discovery testimony and his affidavit evidence.

[55] Mr. Barkhouse shall produce his 2007, 2008 and 2009 income tax returns forthwith, if not already disclosed. If Mr. Baird has not filed a 2007 Income Tax Return because he had no income in that year, then he shall provide a written statement to Mr. Barkhouse in compliance with Rule 18.19(1) confirming that he had no income in 2007 within 60 days.

(g) A copy of any and all records relating to the bike sale to Glen Mitchellitis in 2008.

[56] Mr. Baird did not object to the production of these documents at discovery. Mr. Baird was asked to produce any written records relating to the transaction. He did state on discovery that he was not sure if he had records relating to the transaction. He believed that title to the bike transferred directly from the vendor to Mr. Mitchellitis and that he was reimbursed with cash.

[57] In his affidavit, Mr. Baird claimed that the information was not relevant to his claim. He provided particulars respecting the purchase indicating that he had bought the bike on his friend's behalf in 2008 with his wholesaler's license. His friend then reimbursed him for the cost of the purchase. He stated that neither he nor his Company derived a benefit from the purchase.

[58] On the hearing of this motion, it was Mr. Barkhouse's position that the payment for the bike was drawn from the Company's bank account and it was relevant to determine whether the reimbursement funds went into the Company account in order to show the true assets and inventory of the Company.

[59] Having heard the evidence and the submissions on this point, I am satisfied that this information is relevant to the foundation of the Jim Cunningham report and to the assessment of the accuracy of the 2008 financial statements. I am not satisfied that Mr. Baird has taken reasonable steps to become knowledgeable or identify any documentation that may exist in relation to the transaction. He gave evidence in response to other inquiries that he had the records for his 2008 transactions and that he had given all of this information to the accountant. He did say that he had reviewed the cheques that he had written in 2008. He did not say

that he had reviewed his 2008 corporate records or his personal or business bank accounts to determine whether or not documentation as to this transaction exists.

[60] Mr. Baird shall take all reasonable steps to locate any and all documents relating to this transaction within 60 days. In the event that Mr. Baird cannot produce any documentation, then he will provide written particulars of his efforts to Mr. Barkhouse and he shall provide a written statement in compliance with Rule 18.19(1) within 90 days.

(h) A copy of all invoices and receipts relating to the purchase and sale of motorcycle accessories for both 2008 and 2009.

[61] Mr. Barkhouse says that Mr. Baird is noncompliant with this request. Mr. Baird's affidavit says that this information has been provided. Mr. Baird shall have 60 days to review his 2008 and 2009 records and ensure that all invoices and receipts relating to the purchase and sale of motorcycle accessories have been disclosed to Mr. Barkhouse.

(i) A detailed inventory list for 2008 and the details of how the values were determined.

[62] Mr. Barkhouse requested this information at discovery. Mr. Baird did not object to production but has not satisfied Mr. Barkhouse that he has been compliant with the request. Mr. Barkhouse seeks compliance and states that the inventory list is relevant to the foundation of the Jim Cunningham report. I agree.

[63] Mr. Baird's affidavit states that he gave all the information he could about the 2008 inventory during his discovery examination. A review of the portion of the discovery transcript entered as an exhibit does not give any information on the 2008 inventory. Quite to the contrary, during the discovery examination, Mr. Baird answered that he wasn't sure what inventory the company had at the end of 2008. Mr. Baird further says that he gave all his business records to Jim Cunningham and those materials have been disclosed to Mr. Barkhouse by way of the affidavit of Jim Cunningham dated June 27, 2012.

[64] When cross-examined during the hearing, Mr. Baird said that he had supplied an explanation to his lawyer and that Mr. Barkhouse would have to ask

his lawyer or his accountant for the information. He agreed to direct his lawyer to provide the information saying that was "no problem".

[65] In closing submissions, Mr. Baird relied upon the material exhibited to the Cunningham affidavit in satisfaction of this request. Tab 2 of the affidavit appears to be a series of sales receipts. Tab 3 appears to be documentation of the company purchases or inventory acquisition in 2008 and 2009. The affidavit of Jim Cunningham refers to Tabs 2 and 3 as "all of the materials that have been supplied to me".

[66] Mr. Baird further refers to the Jim Cunningham letter at Tab 4 of the affidavit as information to answer this request. This letter refers to the financial statements where a figure of $64,432 is stated as the value of the inventory at the end of 2008. Jim Cunningham's letter forms the basis for some of Mr. Baird's financial claims. Mr. Cunningham applies an average rate of return to the "unsold inventory" in order to calculate a loss to Mr. Baird. Nowhere in the financial statements is there a reference or note of any kind respecting the unsold inventory or how the figure in the financial statements was determined. Jim Cunningham says that he compiled his financial statements on the basis of the material provided

by Mr. Baird (and which has been disclosed) as well as his discussions with Mr. Baird.

[67] I note that Mr. Baird gave evidence on cross-examination that he had given this information to his lawyer. It was my impression of Mr. Baird's evidence on this point, and as a whole, that the discovery requests had not been taken seriously and that Mr. Baird hadn't turned his mind in a credible way to fulfilling the requests. Mr. Baird did offer that he had been dealing with medical issues and had been focussed on those since the discovery had taken place.

[68] I am satisfied that the information sought is relevant to the issues to be determined at trial which includes an assessment of Mr. Baird's financial losses and the foundation for the expert opinion. I am not satisfied based upon the evidence as a whole that reasonable steps have been taken to provide a detailed inventory list to Mr. Barkhouse. Mr. Baird gave answers in discovery for example, which indicated that the value of the inventory may suggest that there were only a few motorcycles in inventory to equal the value in the financial statements. To provide a list of the inventory should therefore not be an onerous task. If it isn't readily available, or already in the hands of counsel, Mr. Baird may need to review

the information given to his accountant to provide the inventory and explanation of the value. This task is not onerous enough in my view, to require modification to the required disclosure. This is especially so given the quantum of the potential claims being made.

[69] Mr. Baird shall provide a detailed listing of his 2008 year end inventory to Mr. Barkhouse within 60 days.

(j) A detailed inventory list for 2009, and the details of how the values were determined.

[70] This request is the same as the request for the 2008 inventory but for 2009. For the same reasons, Mr. Baird shall provide a detailed listing of his 2009 year end inventory to Mr. Barkhouse within 60 days.

(k) The company's bank account records from Scotiabank for the period of 2006 to date.

[71] Mr. Baird did not object to production of these bank account records during his discovery. In his affidavit, he agreed to supply the records "if they are available". In my view, this is not a sufficient answer given the approximately six months between the discovery and the filing of the affidavit. When cross-examined, Mr. Baird said that he had not yet checked to see if his bank account records were available. He acknowledged being asked for the records repeatedly.

[72] I am satisfied that the requested documentation is relevant and should be produced. Mr. Baird failed to take reasonable and timely steps to produce the requested documentation, some or all of which should be readily available to disclose. Mr. Baird is to request these documents from his bank forthwith and shall produce them to Mr. Barkhouse immediately upon receipt.

(i) Documentation relating to the approximately $50,000 of inventory existing at the end of 2009; or if sold, advise to whom, at what price and when.

[73] This information, as with all of the documentation requests, was sought during Mr. Baird's discovery examination. During discovery, Mr. Baird said that he had liquidated his company inventory to "whoever he could". He was asked for documentation. He said that any money from the sale of inventory would have been turned over to the company and then to him.

[74] In his affidavit, Mr. Baird answered this question by saying that the 2 pieces of inventory left at the end of 2009 were a Ford 250 Harley Davidson Edition worth $30,000.00 and some tools worth $2,000.00. On cross-examination, Mr. Baird stated that he still had the Ford 250 motor vehicle. It is unclear whether he personally, or the company, retained the vehicle.

[75] Mr. Baird's evidence on this point was contradictory. At discovery, the evidence was that the 2009 inventory was liquidated. On the hearing of the motion, the evidence was that the largest asset in the 2009 year end inventory remained in Mr. Baird's possession. There was no evidence as to the disposition of the tools.

[76] In spite of the contradictory evidence there was no evidence to suggest that Mr. Baird had attempted to correct his discovery evidence in compliance with Rule 18.19 (1). Mr. Baird shall provide a written statement in compliance with Rule 18.19(1) forthwith. If tools have been retained by Mr. Baird, this is to be addressed in the written statement. If the tools were liquidated, the details shall be produced within 60 days along with the details of any other items in the 2009 inventory that existed and which have been subsequently liquidated.

(m) A copy of the HST records relating to the sale of the above-mentioned inventory.

[77] As with all preceding requests Mr. Barkhouse sought these records at discovery and no objection was made at that time. Nonetheless, at the time of the motion hearing, the documentation remained outstanding.

[78] In Mr. Baird's affidavit he answered that there were "no records relating to the sale of approximately $50,000.00 worth of inventory existing at the end of 2009". Defendant's counsel properly pointed out that Mr. Baird's evidence on this point suggests that the inventory was sold. This was consistent with the discovery

answers but inconsistent with the oral evidence. Mr. Baird once again did not make any attempt to correct his discovery evidence in compliance with Rule 18.19(1). He shall do so forthwith.

Conclusion

[79] Parties are subject to the presumption of full disclosure under the Rules. Litigants must take reasonable steps to disclose relevant information. This obligation is ongoing throughout the proceeding and in certain instances requires immediate action.

[80] Mr. Baird's cavalier approach to discovery and disclosure is troubling. His responses were frequently inconsistent, evasive and expedient. His attempts to produce documentation and information were insufficient, even when consideration is given to his medical issues. Mr. Baird advances significant claims against Mr. Barkhouse, yet does little to produce the documentation required to support the claims. Mr. Baird has not taken his disclosure and discovery obligations seriously.

[81] Time periods in this decision shall commence on the date of the written decision.

[82] I invite submissions on costs. These submissions are to be filed on or before January 24, 2014.

J.