

**SUPREME COURT OF PRINCE EDWARD ISLAND
(GENERAL SECTION)**

B E T W E E N:

CAPITAL MARKETS TECHNOLOGIES INC. and 7645686 CANADA INC.

Plaintiffs

- and -

THE GOVERNMENT OF PRINCE EDWARD ISLAND, WES SHERIDAN, STEVE
MACLEAN, ALLAN CAMPBELL, CHRIS LECLAIR, BRAD MIX,
CHERYL PAYNTER, STEVEN DOWLING, WILLIAM DOW,
MELISSA MACEACHERN, ROBERT GHIZ, GARY SCALES, TRACEY CUTCLIFFE, NEIL
STEWART, PAUL JENKINS, and 7628382 CANADA CORPORATION

Defendants

**MOTION RECORD OF THE PLAINTIFFS
(Plaintiffs' Motion for Production and Preservation of Records)**

July 27, 2021

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Defendants

**NOTICE OF MOTION
(Plaintiffs' Motion for Production and Preservation of Records)**

THE PLAINTIFFS will make a motion to the Supreme Court of Prince Edward Island on August 6, 2021 by the Case Management Judge, to be heard at the Sir Louis Henry Davies Law Courts, 42 Water Street, Charlottetown, PE, C1A 7N8 by teleconference.

THE MOTION IS FOR:

- (a) An Order pursuant to Rule 30.04(5) of the *Rules of Civil Procedure* (“the Rules”) requiring the Defendants to produce for inspection to the Plaintiffs email correspondence, and all attachments to such correspondence, between the Defendants Chris LeClair and Wes Sheridan dated November 26, 2011 (the “RFP Email”) within 2 days of the making of the Order;
- (b) An Order pursuant to Rule 45.01(1) requiring that the Defendants take all necessary steps to preserve the RFP Email, including directing the Defendants to ensure that the RFP Email is immediately recovered by the Government of Prince Edward Island’s Information Technology Systems and Services (“ITSS”);

- (c) An Order pursuant to Rule 30.11 requiring that the Defendants take all necessary steps, in the event that the RFP Email has been destroyed, to recover the RFP Email and to have the document deposited with the court for safekeeping;
- (d) In the event that the RFP Email was deleted and cannot be recovered, an Order pursuant to this court's inherent jurisdiction, its general powers under the *Judicature Act*, RSPEI 1988, c J-2.1, and its discretionary powers under the *Rules*, requiring the Defendants to state in an affidavit when the RFP Email was deleted, who deleted the email, and the reasons for the deletion of the email;
- (e) In the event that the RFP Email was deleted and cannot be recovered, an Order pursuant to Rule 30.06(a) requiring Marie Kemp to attend for cross-examination on her affidavits of documents sworn on: November 6, 2018; December 18, 2018; and September 20, 2019;
- (f) If necessary, an Order pursuant to Rule 3.02(1) permitting the Plaintiffs to abridge the time required for service and filing of the notice of motion and motion record for this motion;
- (g) Costs of this motion, in the event that it is contested; and
- (h) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Plaintiffs discovered on or around July 16, 2021 that the Defendants are, or were, in possession of the RFP Email;
- (b) The RFP Email is a relevant document to this litigation generally and to the Plaintiff's forthcoming motion to amend pleadings;
- (c) The RFP Email, amongst other things, demonstrates that the Defendants were using confidential documents disclosed by the Plaintiffs after the Memorandum of Understanding was in place for improper purposes and purposes not sanctioned by the Plaintiffs;
- (d) The RFP Email was not disclosed in any schedule to Ms. Kemp's affidavits of documents previously filed in this action;
- (e) The RFP Email could not have been discovered at the time that the Plaintiffs' amended statement of claim was filed due to the Defendants' failure or refusal to comply with their discovery obligations and their statutory obligations under *FIPPA*;
- (f) The RFP Email was in the possession of the Defendant, the Government of Prince Edward Island's Access and Privacy Services Office ("APSO") as of January 6, 2020;

- (g) Since January 6, 2020, the RFP Email was deleted from APSO;
- (h) The Government of Prince Edward Island's Information Technology Systems and Services ("ITSS") is able to recover deleted documents within one year of a document's deletion;
- (i) The Plaintiffs provided the Defendants with a letter dated July 19, 2021 advising of the RFP Email and the need to take immediate steps to preserve the record;
- (j) The Plaintiffs, as of today's date, have received no confirmation that the RFP Email was recovered by ITSS;
- (k) The Defendants have previously failed to disclose relevant documents and have allowed relevant documents, including, in particular, the email records of the Defendant, Brad Mix, to be irreparably destroyed;
- (l) Given that the Defendants have previously failed to disclose relevant documents and have destroyed relevant documents, a court order compelling preservation and production of documents is expedient;
- (m) This motion is made expeditiously and must be heard expeditiously as the Plaintiffs will suffer irreparable prejudice due to the loss of the RFP Email;
- (n) The Defendants will not be prejudiced by the proposed Orders and were made aware as early as July 19, 2021 that such Orders would be sought;
- (o) The requested Orders are fair and just in the circumstances;
- (p) Rule 30.04(5) (Court may Order Production) permits this Court to order production, at any time, documents that are in the possession, control, or power of a party;
- (q) Rule 30.08 (Failure to Disclose or Produce Document) requires a party to disclose in an affidavit of documents or a supplementary affidavit, and to produce for inspection, all documents relevant to an issue in litigation that is not privileged and, if it fails to do so, the court may make such orders as it deems just;
- (r) Rule 30.11 (Document Deposited for Safe Keeping) allows this Court to make an Order requiring a relevant document to be deposited with the court for safekeeping;
- (s) Rule 32.01 (Inspection of Property) allows this Court to make an order for the inspection of property if the inspection of such property is necessary for the proper determination of an issue in a proceeding;
- (t) Rule 45.01 (Preservation of Property) allows this Court to make an interim order for the preservation of any property in question in a proceeding or relevant to an issue in this proceeding;
- (u) Rule 3.02(1) permits this Court to abridge any time prescribed by the rules on such terms

as are just;

- (v) Rules 1.04, 1.05, 2.01, 2.02, 2.03, 37, 39, and 57 of the *Rules*;
- (w) The *Judicature Act*, RSPEI 1988, c J-2.1;
- (x) The *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01; and
- (y) Such further and other grounds as Counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The affidavit of Paul Maines, sworn July 27, 2021;
- (b) The affidavit of Kevin Arsenault, sworn July 27, 2021;
- (c) All motion materials and affidavit evidence filed by the respective parties in support of or in response to the Defendants' summary judgment motion;
- (d) All motion materials and affidavit evidence filed by the respective parties in support of or in response to the Plaintiffs' motion to amend pleadings;
- (e) The Cross-Examinations of:
 - a. Brad Mix dated January 17, 2019;
 - b. Chris LeClair dated January 17, 2019;
 - c. Wes Sheridan dated January 17, 2019; and
- (f) Such further and other evidence as this Honourable Court may permit.

Dated this 27th day of July, 2021.



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