NOVA SCOTIA COURT OF APPEAL
Citation: ***Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)***, 2007 NSCA 37

Date: 20070405
Docket: CA 270800
Registry: Halifax

Between:

Cherubini Metal Works Limited,
a body corporate

Appellant

v.

The Attorney General of Nova Scotia representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	January 19, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal granted but appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Oland, JJ.A. concurring.
Counsel:	Michelle Awad, for the appellant Michael Pugsley, for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] Members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions. This rule of deliberative secrecy protects their time and independence and promotes candid collegial debate.

[2] At issue in this appeal is whether members of the former Board of Examiners under the **Stationary Engineers Act**, R.S.N.S. 1989, c. 440, should be compelled to testify on discovery about how and why they decided cases, including one involving the appellant. Justice C. Richard Coughlan in Supreme Court chambers ruled that they should not, finding that this information is protected by deliberative secrecy and that the appellant had failed to provide evidence that would justify lifting it. I agree and would, therefore, dismiss the appeal. (Decision reported at (2006), 248 N.S.R. (2d) 46).

II. FACTS AND DECISION UNDER APPEAL:

[3] This appeal arises out of the appellant's attempt to examine two former members of the Board of Examiners (Board) under the **Stationary Engineers Act** ("**Act**"). To put the issues in context, I must briefly outline the background events, the claims the appellant makes in its law suit and how the proposed discovery examination of the board members relates to them.

[4] The appellant operated a metal fabrication plant in Amherst, Nova Scotia. It experienced rancourous labour relations with the union representing its workers and encountered many difficulties with the Province respecting occupational health and safety issues. The plant closed in 2002. In a law suit brought against the Province and the local and international unions, the appellant alleges that the unions and the Province harassed it out of business.

[5] The appellant claims against the Province in negligence, abuse of public authority, conspiracy and intentional interference with economic interests. These allegations focus on numerous compliance orders issued under the **Occupational Health and Safety Act**, S.N.S. 1996, c. 7. The appellant alleges, among other

things, that the Province exercised its regulatory powers in an unusually harsh and harassing manner.

[6] The **Act**, which is the source of authority for the two Board members whom the appellant wants to examine, is not mentioned in the statement of claim or in any of the appellant's replies to several demands for particulars. However, it is common ground on appeal that certain actions taken by inspectors and by the Board under the **Act** are potentially relevant to the appellant's claims. I will, therefore, assume that the information sought meets the relevance threshold for discovery under **Rules** 18.01 and 18.09. The background in relation to the **Act** is this.

[7] An inspector for the Department of Environment and Labour, Mr Simms, ordered the appellant to have certified operators for some cranes at its plant. The appellant, so far as the record shows, did not challenge this order. It did, however, apply (under s. 48 of the Stationary Engineers Regulations, N.S. Reg. 134/1988, s. 4) to the Board of Examiners (established under s. 3 of the **Act**) to have certificates of qualification issued for its long-term employees. Had this application succeeded, I understand it would have permitted these employees to operate the cranes in compliance with Mr. Simms' order. The application, however, was dismissed by the Board (in April of 2000). The Minister dismissed the appellant's subsequent appeal to him. (The **Act** was repealed and the Board ceased to exist in 2001.)

[8] In connection with its law suit against the Province and the unions, the appellant issued notices of examination to two members of the Board, Messrs Fralic and Estabrooks. The Province moved successfully in Supreme Court chambers to quash the notices. The judge held, as noted, that the evidence sought was covered by deliberative secrecy and that the appellant had not shown sufficient reason to lift it.

[9] The appellant applies for leave to appeal and, if granted, asks that the decision of the chambers judge be set aside and that the notices of examination be restored. The appellant makes two basic points: first, deliberative secrecy does not protect the information it seeks; and second, even if it does, there were valid reasons to lift the secrecy. The Province, on the other hand, says that the evidence

which the appellant seeks is covered by deliberative secrecy and that the appellant did not show any valid reason to lift it.

III. ISSUES AND STANDARD OF REVIEW:

[10] The issues are:

1. Is the information the appellant seeks covered by deliberative secrecy?

This issue turns on the answers to three questions:

   a. Does deliberative secrecy apply to discovery sought in a tort action?
   b. If so, is the information which the appellant seeks covered by deliberative secrecy? and
   c. If so, what does the appellant have to show in order to justify lifting the secrecy?

2. If the information is covered by deliberative secrecy, did the appellant establish a valid reason to lift deliberative secrecy?

[11] The first issue is a question of law which is reviewed on appeal for correctness: **Garth v. Halifax (Regional Municipality)** (2006), 245 N.S.R. (2d) 108; N.S.J. No. 300 (Q.L.)(C.A.) at para. 13. The second issue involves both a question of law - that is, what did the appellant have to show in order to justify lifting deliberative secrecy - and a question of fact – that is, did the evidence meet this standard. The legal question is reviewed on appeal for correctness. The factual question is reviewed for palpable and overriding error: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

IV. ANALYSIS:

A. <u>The Applicability of Deliberative Secrecy</u>:

1. Does deliberative secrecy apply to discovery sought in a tort action?

[12] The appellant says that it does not have to meet any threshold other than relevance in order to discover the former Board members. While acknowledging that there are restrictions on discovery in judicial review proceedings or where the decision of a tribunal is being directly attacked, the appellant says that these do not apply in a civil action for damages such as this one.

[13] I agree with the appellant that the special rules limiting discovery in judicial review proceedings generally do not apply in tort actions such as this. However, I conclude that the principle of deliberative secrecy applies whenever evidence is sought about how or why an administrative tribunal reached a decision. The judge therefore, did not err in applying the principles of deliberative secrecy to the appellant's attempt to discover the former Board members.

[14] The principle of deliberative secrecy prevents disclosure of how and why adjudicative decision-makers make their decisions. This protection is necessary to help preserve the independence of decision-makers, to promote consistency and finality of decisions and to prevent decision-makers from having to spend more time testifying about their decisions than making them: see, for example, **Ellis-Don Ltd. v. Ontario (Labour Relations Board)**, [2001] 1 S.C.R. 221 at paras. 52 - 54; **Agnew v. Ontario Association of Architects** (1987), 64 O.R. (2d) 8 (Div. Ct.); R. E. Hawkins, "**Behind Closed Doors II: The Operational Problem - Deliberative Secrecy, Statutory Immunity and Testimonial Privilege**" (1996), 10 Can. J. Admin. L. & Prac. 39 at 42 - 49.

[15] At the core of the principle is protection of the substance of the matters decided and the decision-maker's thinking with respect to such matters: **Tremblay v. Quebec (Commission des affaires sociales)**,[1992] 1 S.C.R. 952 at 964-65. Deliberative secrecy also extends to the administrative aspects of the decision-making process - at least those matters which directly affect adjudication – such as the assignment of adjudicators to particular cases: **MacKeigan v. Hickman**, [1989] 2 S.C.R. 788 per McLachlin J (as she then was) at 831-33.

[16] The Supreme Court has confirmed that deliberative secrecy is the general rule for administrative tribunals. However, the Court has also made it clear that administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals: **Tremblay** at 968.

[17] The evidence in issue in **Tremblay** related to the tribunal's process for dealing with draft decisions. That process included approval by legal counsel and discussion at plenary meetings. Gonthier, J. found that deliberative secrecy should be lifted with respect to that material. He said that these matters did not touch "on matters of substance or the decision-makers' thinking" (964) and that while " ... secrecy remains the rule, ... it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice." (966)

[18] It is clear, therefore, that the Court in **Tremblay** conceived of deliberative secrecy as relating not only to "matters of substance or the decision-makers' thinking on such matters", but also to matters relating to the "formal process established by the Commission to ensure consistency in its decisions.": 964. If secrecy did not extend to the process of decision-making, the Court would not have had to consider whether secrecy should be "lifted" in the circumstances of the case. It is also clear from **Tremblay** that the party seeking to have the court lift deliberative secrecy with respect to the tribunal's process of decision-making has a threshold to meet. As expressed by Gonthier, J. in **Tremblay**, the party must show that there are "valid reasons" for doing so.

[19] **Tremblay**, of course, was an administrative law case in which the tribunal's decision was being challenged on the basis of an alleged denial of natural justice. Does deliberative secrecy apply when discovery of tribunal members is sought in a tort case?

[20] In my view, it does. Deliberative secrecy is concerned with the subject matter of the evidence which is sought, not the forum in which that evidence is to be used. The how and the why of decision-making are kept secret to protect the decision maker and the decision-making process. It seems to me, therefore, that the principles of deliberative secrecy must apply whether the evidence is sought for the purposes of judicial review proceedings or in the context of traditional civil litigation such as the appellant's tort action in this case. It is the secrecy which is important, not the forum in which it may be lifted.

[21] The authorities support this view. For example, deliberative secrecy has been found to apply in actions for damages arising from the conduct of

commissions of inquiry and of an advisory committee: **Stevens v. Canada (Attorney General)**, [2000] F.C.J. No. 1255 (Q.L.) (Prothonotary); aff'd [2002] F.C.J. No. 142 (Q.L.) (T.D.); **Stevens v. Canada**, [2003] F.C.J. No. 1589 (Q.L.) (F.C.); **Néron v Comeau**, [2004] J.Q. No. 13590 (Q.L.)(S.C.); **Apotex Inc. v. Alberta**, [2006] A.J. No. 435 (Q.L.) (C.A.) It is true, as the appellant points out, that these damage actions were founded on administrative law proceedings. However, I do not think that changes the principle. As noted earlier, the purpose of deliberative secrecy is to protect the confidentiality of the information regardless of the forum in which the information is sought.

[22] I conclude, therefore, that deliberative secrecy applies to both the actual decision-making of administrative tribunals and to the processes by which those decisions are reached - to both the how and the why of decision-making. At least with respect to the how of decision-making – that is, the process used, deliberative secrecy may be lifted if the party seeking the evidence establishes valid reasons for doing so. The principle of deliberative secrecy applies regardless of the nature of the forum in which the information is sought.

2. Is the evidence the appellant seeks protected by deliberative secrecy?

[23] As noted, Messrs. Fralic and Estabrooks were members of the Board of Examiners appointed under the **Act**. Their duties included assessing applications and determining if persons were suitably qualified: Stationary Engineer Regulations, s. 15. There is no suggestion that the Board was not the type of tribunal entitled to the protection of deliberative secrecy. The question is whether the information sought by the appellant falls within that protection.

[24] Counsel set out a provisional list of what the appellant seeks from Messrs. Estabrooks and Fralic:

1. their background
2. their experience on the Board
3. the information typically received in relation to Board decisions
4. previous Board dealings regarding applications similar to that brought by the appellant
5. the information received in relation to the appellant

6. any other information or matters considered in relation to the appellant
7. how the appellant was dealt with in comparison to other employers in similar situations.

[25] These items fall into three categories. Items 1 and 2 are not subject to deliberative secrecy at all, item 3 falls within the broader aspect of deliberative secrecy which relates to the process of the Board's decision-making and the remainder fall within the core of deliberative secrecy. I will explain.

[26] In my opinion, items 1 and 2 are not subject to deliberative secrecy as they do not relate to either the Board's actual decision-making or its decision-making process. These items simply relate to biographical details about the two former Board members.

[27] Item 3 relates to the process followed by the Board and, therefore, falls within the broader principle of deliberative secrecy as discussed earlier. This inquiry relates to the process followed by the Board in the same way in which the process of review and discussion of draft decisions was found to do so in **Tremblay**.

[28] Items 4, 5, 6, and 7 relate to the actual decision-making of the Board.

[29] Items 4 and 7 are similar. The inquiries concerning "previous Board dealings regarding applications similar to that brought by the appellant" and "how the appellant was dealt with in comparison to other employers" both seek information about the actual decision-making of the Board members. The "Board dealings" as referred to in item 4 must relate to the Board's decisions in other cases and the inquiry in item 7 about how the appellant was "dealt with" must refer, at least in part, to the Board's decision in the appellant's case. Replying to these inquiries would necessarily involve providing an explanation of the reasoning supporting the result, not only in the appellant's matter, but in other cases. It inevitably would involve an explanation of why the Board considered cases to be, or not to be "similar". That, of course, relates directly to the reasoning processes which the Board members followed.

[30] Items 5 and 6 concern the "information received in relation to the appellant" and "any other information or matters considered in relation to the appellant." These inquiries seek information about what the Board relied on in reaching its decision. The question of the contents of the record a decision-maker relies on in arriving at a given conclusion is an integral part of the adjudicative process: **MacKeigan, supra** per Lamer J. (as he then was) at 806; per McLachlin, J. at 831; see also, **R. v. Celmaster**, [1994] B.C.J. No. 287 (Q.L.)(S.C.) at para. 8. For example, in **Agnew**, some of the information sought related to whether the tribunal had considered the material put before it and whether it had made its decision on the basis of that material. The Court found that these inquiries related to matters at the heart of the decision-making process. I reach the same conclusion with respect to the material sought in this case.

[31] I conclude, therefore, that all of the information sought from the Board members, except items 1 and 2, is covered by deliberative secrecy.

3. What does the appellant have to show in order to justify lifting the secrecy?

[32] The judge found that the appellant had an onus to establish a proper evidentiary foundation for lifting deliberative secrecy. He described this onus as a requirement to show valid reasons for doing so by providing evidence that would "*prima facie* rebut the presumption of regularity": reasons para. 8, citing Freeman J.A. in **Waverley (Village Commissioners) et al. v. Kerr et al.** (1994), 129 N.S.R.(2d) 298 (C.A.). The judge looked for evidence that there had been any constraint on the Board members' ability to decide according to their opinions. He found none and, therefore, concluded that the appellant had "... not established a proper evidentiary foundation for the discoveries"(decision para. 20).

[33] The appellant does not attack the way the judge defined the threshold; rather, it challenges his conclusion that the appellant failed to meet it. I, therefore, do not have to make any firm decision about what the threshold should be when deliberative secrecy is invoked in civil litigation such as the appellant's tort action rather than in judicial review proceedings as in **Waverley**. A few comments, however, may be helpful.

[34] The Supreme Court in **Tremblay** lifted deliberative secrecy in relation to the process of decision-making, not with respect to the substance of the decision or the decision-makers' thinking. The case, therefore, is not authority for the view that deliberative secrecy may be lifted in any circumstances in relation to the substance of the decision or the decision-makers' thinking. I do not need to decide in this case whether this may be done and nothing I say should be taken otherwise. The threshold for lifting deliberative secrecy with which I am concerned is that which applies to the process of decision-making.

[35] In the context of administrative law challenges to a tribunal's decision, the party seeking to lift deliberative secrecy must show valid reasons for believing that the process followed did not comply with the rules of natural justice or procedural fairness or that the discretionary authority has been otherwise exceeded: **Tremblay** at 966 and **Waverley** at para. 17. In other words, the party must establish valid reasons for believing that lifting deliberative secrecy will show that the tribunal made a reviewable error.

[36] What is the threshold for lifting deliberative secrecy in the context of a tort action? By analogy to the judicial review cases, it would seem that there must be evidence of a clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed and that the proposed discovery will afford evidence of it. This is a slightly modified version of the approach taken by the Ontario Court of Appeal in a judicial review case in **Payne v. Ontario Human Rights Commission** (2000), 192 D.L.R. (4th) 315; O.J. No. 2987 (Q.L.)(C.A.) at para. 172 and which is adopted in Brown and Evans, **Judicial Review of Administrative Action in Canada**, vol. 2 (looseleaf, updated to July, 2006) (Toronto: Canvasback Publishing, 1998), section 6:5620. It serves at least as a useful starting point for defining the threshold in civil litigation as opposed to judicial review and related proceedings.

[37] I would also add this. The decision about whether to lift deliberative secrecy in a particular case involves a weighing of the competing interests of protecting tribunals from undue disclosure with the need of litigants to have access to information in order to assert their rights. Deliberative secrecy should not be lifted any more than necessary to provide access to the required information. It follows, therefore, that among the factors that may be taken into account in balancing these

interests is what other sources of information are available to the party that would not intrude upon deliberative secrecy.

4. Did the appellant show that lifting the secrecy is justified in this case?

[38] As noted, the appellant has not taken issue with the way the judge defined the evidentiary threshold in this case but with his finding that it had not been met. This is a question of the weight of the evidence and absent legal error, the judge's weighing of the evidence should only be disturbed on appeal if palpable and overriding error has been shown.

[39] In my respectful view, the appellant has not provided any clearly articulated basis to displace deliberative secrecy, let alone provide evidence to support it. The judge's conclusion to that effect should not be disturbed.

[40] The appellant points to two matters which, in its submission, provide sufficient evidence of possible irregularity and constraint on the decision-makers to justify lifting deliberative secrecy. First, it points to the involvement of the inspectors at each stage of the restricted certificate application and the fact that they appear to have been the main source of information for the Board. Second, the appellant refers to the fact that the Board in its decision relied on a draft policy and suggests that there is evidence that this draft policy was not applied consistently. It will be helpful to briefly review the record in relation to each of these points.

[41] Mr. Simms was the inspector who made the order requiring the appellant to have certified operators for cranes used in its operations. He deposes in his affidavit that he provided no recommendation or opinion to the Board or to the Minister in relation to the appellant's application and subsequent appeal and that he had "no input" into the content of the letter which set out the Board's decision.

[42] Mr. Siggers, Mr. Simms' superior at the time, deposed in his affidavit that he had no recall at all of providing the Board with any opinion or recommendation to deny the appellant's application and that he gave no recommendation or opinion to the Minister in relation to the appeal from the Board's decision. However, under cross-examination, he indicated that he had provided information to his Director and knew that the Minister had used some of it in deciding the appeal.

[43] Mr. Siggers, on discovery, testified generally about the way in which the Board worked, indicating that he and Mr. Simms gave them information and responded to their requests for information. He said that both he and Mr Simms probably made recommendations to the Board. He indicated in his evidence that he and Mr. Simms were two conduits of information from the field to the Board. He reiterated in his evidence before the judge, however, that he did not recall making a recommendation in this particular case. As I understand the record, Mr Siggers did not start his employment until May 1, 2000 which, of course, was after the Board's April 25th, 2000 decision.

[44] The appellant says that the problem with this is the sources of information placed before the Board. It submits that to have the decision-maker who is being challenged (and here I take it the appellant is referring to Mr. Simms who made the order which led to the application to the Board) be the sole source of information for the next level of review is "rife" with perceived and potential problems of constraint on the Board's decision-making. The appellant says that its "concerns" are heightened by the fact that Messrs. Simms and Siggers participated in and provided opinions to the Board. The submission, in essence, is that there was something improper about Mr. Simms providing information to the Board when it was sitting in review of his order.

[45] I cannot accept the appellant's position. The Board was not reviewing Mr Simms' order. He had made an order requiring the appellant to have certified operators for certain cranes which had been in operation at its plant for many years. The appellant applied to the Board to have certificates of qualification issued without examination for employees with long-term service under s. 48(1) of the Stationary Engineers Regulations. This was not a review of or, in any real sense, an appeal from the order Mr. Simms made. Rather, the appellant was seeking from the Board a means to comply with that order without requiring the employees to attempt the qualification examinations. I see no evidence that the Board was in any sense sitting in review of Mr. Simms' order or, for that matter, that the appellant was even attempting to challenge the correctness of that order before the Board. The appellant's suggestion that Mr. Simms' involvement may have been problematic because his order was under review is, on the material in the record, groundless. The evidence in the record does not support in any way an allegation

of “constraint” on the Board’s decision-making or for that matter, that there was anything even arguably wrong with Mr. Simms’ initial order.

[46] With respect to the draft policy, Mr. Simms’ affidavit stated that the Board had followed its usual policy in rejecting the appellant’s application based on the policy. He conceded on cross-examination, however, that he was not sure if there had been any other similar applications before the appellant’s. There was also evidence from Mr. Siggers that when policies were marked “draft” as this one was, it meant that it was up to the Board whether to follow it or not and its application was considered on a case by case basis.

[47] The appellant submits that there is evidence that this policy was not applied consistently by the Board. Implied in this submission is that there is evidence that the policy was applied in an arbitrary or discriminatory way. With respect, the record does not support this submission. The record does not go beyond suggesting that the policy was not applied in each and every case, but that does not afford any evidence of arbitrariness or discrimination. Respectfully, the fact the policy may have been applied on a case-by-case basis is not evidence which supports the appellant's suggestion that may have been “irregularity and possible constraint" in the Board's decision-making.

[48] In my view, the judge did not make any palpable and overriding error on this record in deciding that the appellant had failed to provide any evidentiary basis that would justify lifting deliberative secrecy.

C. Conclusion:

[49] I conclude that deliberative secrecy applies to all of the information which the appellant seeks except the biographical information about the two Board members. The judge did not err in finding that the appellant had not established any basis to lift the secrecy. It was not suggested that oral discovery was required to obtain the sort of biographical information sought in items 1 and 2. I would, therefore, uphold the judge’s decision to quash the notices of examination.

IV. DISPOSITION:

[50] While I would grant leave, I would dismiss the appeal with costs fixed at $2000 plus disbursements and payable forthwith.

Cromwell, J.A.

Concurred in:
Roscoe, J.A.
Oland, J.A.