NOVA SCOTIA COURT OF APPEAL

Citation: Coates v. Capital District Health Authority, 2011 NSCA 4

Date: 20110107
Docket: CA 326406
Registry: Halifax

Between:

Rosanne Coates

Appellant

v.

Capital District Health Authority, Dr. Anil Rickhi, and Dr. Stephen Sheehan, and Nova Scotia (Minister of Justice)

Respondents

Judges:	Oland, Hamilton and Fichaud, JJ.A.
Appeal Heard:	December 9, 2010, in Halifax, Nova Scotia
Held:	The Court of Appeal is without jurisdiction to hear the merits appeal and disposes the appeal per reasons for judgment of Oland, J.A.; Hamilton and Fichaud, JJ.A. concurring
Counsel:	Rosanne Coates, the appellant in person Peter M. Rogers, Q.C. and Carrie Ricker, for the respondent Capital District Health Authority Colin J. Clarke, for the respondents Drs. Rickhi and Sheehan Edward Gores, Q.C., for the Minister of Justice for the Province of Nova Scotia

Reasons for judgment:

[1] This decision deals with the effect of an inadvertent failure to give notice to the Minister of Justice of the Province of Nova Scotia of an appeal to the Supreme Court of Nova Scotia, pursuant to s. 41 of the *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5 ("*FOIPOP Act*").

[2] The issue raised pertains to the jurisdiction of this court to hear an appeal of the merits of the Supreme Court decision. For the reasons which follow, I have determined that, in the circumstances of this case, the court does not have such jurisdiction.

Background

[3] There is no dispute as to the core facts involved. The appellant, Rosanne Coates, sought access to certain records in the possession or control of the respondent, Capital District Health Authority ("CDHA"). What transpired prior to her appeal to the Supreme Court is not material to the appeal before this court.

[4] On July 17, 2009, pursuant to s. 41 of the *FOIPOP Act*, Ms. Coates commenced an appeal proceeding in the Supreme Court. Among other things, the appeal required the organization and review of a very substantial record. It was heard over three days. Ms. Coates represented herself on the first two of those days and attended with a lawyer on the third day. Justice Heather Robertson rendered her oral decision dismissing the appeal on March 9, 2010. Her written decision (2010 NSSC 143) was released on April 14, 2010, and her order issued on April 22, 2010.

[5] On March 22, 2010 Ms. Coates filed a notice of appeal of Justice Robertson's decision in this court. It was amended March 24 and May 10, 2010.

[6] When the matter came to Court of Appeal Chambers on April 15, 2010 to set down the hearing, it was learned that the Minister of Justice had not been served with the notice of appeal. This was done shortly afterwards.

[7] It was then discovered that the Minister had never been served with the notice of appeal to the Supreme Court. Section 41 of the *FOIPOP Act* reads in part:

> 41 (1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the Nova Scotia Civil Procedure Rules or by the regulations.
>
> (1A) An appeal is deemed not to have been taken pursuant to this Section unless a notice of appeal is given to the Minister by the person taking the appeal.
>
> (1B) Where a notice of appeal is given pursuant to subsection (1A), the Minister may become a party to the appeal by filing with the prothonotary of the Supreme Court of Nova Scotia a notice stating that the Minister is a party to the appeal. [Emphasis added]

Service on the Minister was effected on May 12, 2010.

[8] After several appearances in Court of Appeal Chambers, the Chambers judge issued an order that the jurisdictional aspects of the appeal be heard prior to its merits. The appeal was thus split into two. This decision results from the hearing of the jurisdictional appeal.

Issues

[9] The two issues on the jurisdictional appeal are:

1. Whether, the Minister of Justice not having received timely notice of the s. 41 appeal to the Nova Scotia Supreme Court, the Court of Appeal has jurisdiction to hear the merits of the appeal of the decision of the Nova Scotia Supreme Court; and

2. If not, what is the appropriate disposition of this appeal.

[10] In addition, Ms. Coates brought a fresh evidence motion. I will consider it before turning to the merits of the jurisdictional appeal.

The Fresh Evidence Motion

[11] In her affidavit in support of her motion, Ms. Coates set out in detail the history of the discovery of the failure to serve the Minister with notice of her appeal to the Supreme Court, her service of documents on the Minister, her subsequent conversations and correspondence on several matters with legal counsel for the Minister, the development of an Agreed Statement of Facts which was signed by the Minister, the CDHA, and Drs. Anil Rickhi and Stephen Sheehan (collectively, "the physicians"), but not by Ms. Coates, and the joining of the Minister as a party to this appeal by way of Consent Order.

[12] The motion for new evidence is made under *Rule* 90.47(1) which allows this court to admit new evidence on "special grounds". Those "special grounds" conform with the test for the admission of fresh evidence in civil cases set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . .
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[13] With respect, I cannot accept much of the material proffered as fresh evidence. The correspondence on attempts to resolve the matter between the parties or to strike a proposed Agreed Statement of Facts may be considered without prejudice correspondence and, in any event, is not relevant to the issues to be determined on the issue of lack of notice in the court below.

[14] What does meet all of the criteria in the *Palmer* test and so qualifies as fresh evidence is the Agreed Statement of Facts dated August 9, 2010 and signed by the Minister, the CDHA, and the physicians, but not Ms. Coates. In its entirety, it reads:

Agreed Statement of Facts

1. The Minister of Justice for the Province of Nova Scotia ("the Minister") was not served with any notice of the Appeal by Ms. Coates to the Nova Scotia Supreme Court pursuant to s. 41(1A) of the *Freedom of Information and Protection of Privacy Act* until May 12, 2010, after the decision and order of Justice Robertson were rendered and after the appeal from that decision was filed in the Nova Scotia Court of Appeal.

2. The Minister was not served with the Notice of the Appeal to the Nova Scotia Court of Appeal until shortly after an initial Chambers appearance before Oland J.A. held on April 15, 2010.

3. The Minister will not be appearing on the merits of the appeal to the Nova Scotia Court of Appeal, if this Court finds it has jurisdiction.

4. If this Court finds it does not have jurisdiction on the merits (i.e. to do anything except to set aside the decision of Robertson J. for want of jurisdiction) and remits the matter back to the Supreme Court, the Minister does not intend to appear on the merits of the Supreme Court appeal, but reserves his right to do so should circumstances require the Minister's participation.

5. If the Minister had been served with the s. 41(1A) notice in a timely way before the hearing was held by Robertson J. in the Supreme Court, the Minister would typically not have sought to have been involved in an appeal of this nature based upon receipt of the Supreme Court notice of appeal as filed in the court below alone. Whether circumstances at a later stage of the Supreme Court process might have unfolded differently as a result of the Minister having been served is not something the Minister is prepared to speculate upon one way or the other.

This Agreed Statement of Facts sets out the position of the Minister in regard to appearances in the Supreme Court and, on the merits of the appeal from its decision, in this court.

[15] Ms. Coates does not dispute any of the facts set out in the Agreed Statement of Facts. She simply sought to supplement it with the additional material included in her fresh evidence motion, which has been rejected for the reason I have explained.

The Jurisdictional Appeal

[16] I begin my consideration of this appeal with the standard of review. The issue of jurisdiction was not addressed in the court below. Accordingly, this is a fresh issue for this court to determine.

[17] Ms. Coates' failure to give notice to the Minister was innocent and inadvertent. She was unaware of the s. 41(1A) requirement. Her omission was not brought to her attention or to the attention of the Supreme Court before her appeal to that court was heard and the judge gave her decision and order.

[18] The arguments raised by Ms. Coates and/or the CDHA and the physicians can be summarized as follows:

(a) the Minister has not been prejudiced by lack of notice, thus late notice is sufficient to satisfy the objects of the *FOIPOP Act*;

(b) other *FOIPOP* provisions, but not s. 41(1A) refer to specific time lines so late notice can be allowed; and

(c) the court should proceed by way of a *nunc pro tunc* order to remedy the procedural irregularity of failure to give notice to the Minister.

[19] I will deal with the second and third submissions before considering the first.

[20] The time references are words or phrases such as "promptly" in s. 22(1) on notice by the head of a public body to third parties, "within thirty days" after certain notice by the head of a public body to an applicant in s. 23(1), and after notification of an applicant of the decision to appeal to the Supreme Court in s. 32(3), and "immediately" upon receipt of a notice of an applicant's appeal for the head of a public body to notify a third party. I reject the argument that the inclusion of firm times in other provisions of the *FOIPOP* Act, particularly where most pertain to notice to be given by the head of a public body rather than an applicant, leads inevitably to the conclusion that the s. 41(1A) notice to the Minister is less essential than those other notices. There is no indication in the legislation that the notice can be disregarded without consequences. Rather, the

wording in s. 41(1A) and 41(1B) firmly establishes that notice is to be given to the Minister in sufficient time prior to the hearing of the appeal before the Supreme Court that the Minister can decide whether to participate.

[21] I also reject the submission that this court could cure what has been described as a procedural irregularity by the issuance of a *nunc pro tunc* order. Ms. Coates acknowledged at the hearing that this argument is not "particularly relevant." The phrase "*nunc pro tunc*" has been defined as follows:

> **NUNC PRO TUNC.** [L. now for then] The order of a court that a proceeding be dated with an earlier date than the date it actually took place, or that the same effect be produced as if the proceeding had happened at an earlier date. *The Dictionary of Canadian Law*, Dukelow, D.A., and Nuse, B. (Carswell: Toronto), p. 703.
>
> ***nunc pro tunc*** (...). [Latin "now for then"] Having retroactive legal effect through a court's inherent power <the court entered a *nunc pro tunc* order to correct a clerical error in the record>. ... *Black's Law Dictionary (9th ed.),* p. 1174.

[22] Ms. Coates referred to several cases which considered a *nunc pro tunc* order, including *MacCulloch v. MacCulloch Estate* [*Trustee of*] (1992), 115 N.S.R. (2d) 131, *RoyNat Inc. v. Allan*, [1990] 1 W.W.R. 698, *Block v. Burlingham* (1988), 70 C.B.R. (N.S.) 311, *Cyanamid Canada Inc. v. Minister of Health and Welfare* 1992, 41 C.P.R. (3d) 512. However, such an order is not available in the circumstances of this case. Any motion for a *nunc pro tunc* order must be made in the court of original jurisdiction. Here, that would be the Supreme Court while it had the jurisdiction to consider such a request. Such relief is not available from this court on this jurisdictional appeal.

[23] I turn then to the main argument on this appeal by Ms. Coates, together with the CDHA and the physicians. They argue that the failure to give the Minister timely notice does not necessarily remove this court's jurisdiction to hear the appeal on the merits. They say there is no evidence of prejudice to the Minister, and evidence by way of the Agreed Statement of Facts that he would not have participated below and will not participate in the Court of Appeal. According to the appellant and these respondents, this is a case where this court should exercise its discretion and permit late notice to the Minister, thus giving it the jurisdiction to hear the appeal of the Supreme Court decision on its merits.

[24] The Supreme Court decision makes it clear that the appeal before it required the judge to conduct a detailed review of volumes of material in order to determine whether each of numerous redactions on the alleged bases of protected third party information, solicitor-client privilege, irrelevance, or otherwise was appropriate. The appellant, the CDHA and the physicians emphasize that there are practical as well as legal reasons for this court to take jurisdiction. Their position was captured in the CDHA's factum thus:

> 45. To frustrate an Appeal and send the parties back to the start of the process in circumstances when the Minister of Justice has no interest in the merits would place undue weight on an innocent oversight by the Appellant or her former counsel which, in the particular circumstances of this case, has caused no harm to the parties, to the public, or to the Minister of Justice. It would be an inefficient use of the Court's resources and would cause unnecessary expense and inconvenience for all parties involved. This is contrary to the Civil Procedure Rules which call for the just, speedy and inexpensive determination of every proceeding. The public interest would not in any way be served.

[25] Subsection 41(1A) of the *FOIPOP Act* has not been judicially considered. While counsel for the CDHA candidly acknowledged that its wording is "extremely unfavourable" to its position and Ms. Coates characterized the intent and purpose of s. 41(1A) as clear and undisputed, they and the physicians submit that the focus of the inquiry should be on whether the Minister has suffered any prejudice. The case law they relied upon to extrapolate their argument consists of jurisprudence dealing with other notice provisions in the *FOIPOP Act*, and notification to the Attorney General of challenges to the constitutional validity of legislation.

[26] In *Dickie v. Nova Scotia (Department of Health)* (1997), 156 N.S.R. (2d) 396 (NSCA) the head of a public body who had refused a request for all or part of a record failed, on receipt of a notice of appeal by an appellant, to give written notice to a third party as provided for by s-s. 41(2) of the *FOIPOP Act*. That subsection provides that the head of a public body "shall immediately" give notice to a third party. This court held that where no such notice had been given, the Supreme Court lacked jurisdiction and the judgment appealed from was set aside.

[27] In *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53, (2001) 193 N.S.R. (2d) 51, the issue before the court dealt with service of a notice on the

Attorney General under the *Constitutional Questions Act*, RS 1989, c. 89. There, in an appeal from a decision of a tribunal, it was argued that a regulation which set the time for filing a complaint was *ultra vires* the Governor-in-Council. After the appeal had been heard and the decision reserved, this court raised the issue of whether notice had been given to the Attorney General. Section 10(3) of the *Constitutional Questions Act* reads:

> 10 (3) Where, in a court of the Province, the validity or applicability of a proclamation, regulation or order in council made or purportedly made in the execution of a power given by an Act of the Legislature is brought into question on grounds other than those mentioned in subsection (2), the court shall not adjudge the proclamation, regulation or order in council to be invalid until after notice is served on the Attorney General for the Province in accordance with this Section. [Emphasis added]

The Attorney General was given notice and the opportunity to make submissions prior to the court's decision. He took the position that the court did not have jurisdiction to hear argument on the *vires* of the Regulation, and made submissions on the merits of that issue.

[28] In affirming the court's jurisdiction to determine the *vires* of the Regulation, Cromwell, J.A. (as he then was), for the court, held that this was a case of late notice rather than no notice. He stated:

> [44] What the statute requires is notice to the Attorney General before any finding of invalidity: s. 10(3). The notice is to be given at least 14 days before the day of argument: s. 10(4). In the present case, the conclusion of the argument of the appeal was postponed to permit the notice to be given and submissions to be made. In my view, what the statute requires is that the Attorney General have the opportunity to be heard prior to any adjudication of invalidity. While the notice required by the **Act** should be given as part of the normal sequence of events leading up to the scheduling of the hearing, failure to do so does not deprive the Court of discretion to permit the defect to be remedied provided, of course, that the right of the Attorney General to be heard on the issue is fully protected.
>
> . . .
>
> [46] I conclude, therefore, that complete failure to give notice precludes a finding of invalidity, but whether to permit late notice to be given is a matter for the Court's discretion. In my view, this is a case of late notice and the question is

> whether the Court should exercise its discretion to authorize late notice and address the substance of the appellant's attack on s. 6(3) of the Regulations.
>
> [47] Many factors are relevant to the issue of whether late notice should be permitted. The fundamental question, however, is a simple one: Will the right of the Attorney General or the other parties to address the substance of the issue of invalidity be prejudiced if late notice is permitted? In the particular circumstances of this case, the answer is clear. There is no suggestion by either the respondent or the Attorney General that there has been any prejudice to the right to address the substance of the appellant's *ultra vires* argument. This is an appropriate case to authorize the late notice and I would do so. [Emphasis added.]

[29] The CDHA submits that the situation here is the same as that in *Morine*. It says the purpose of s. 41(1) was to protect the Minister's right to participate and to make submissions if the Minister desired. According to the CDHA, here the Minister was not given notice but there has been no prejudice to the Minister or to the public interest.

[30] We were also referred to *Citation Industries Ltd. v. C.J.A, Local 1928*, (1988) 53 D.L.R. (4th) 360 (B.C.C.A.) and to *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98. In *Citation Industries*, the B.C. Supreme Court had held that s. 30(1) of the *Industrial Relations Act* was unconstitutional. In its decision, the majority of the British Columbia Court of Appeal stated:

> [4] Counsel for the Respondents does not dispute that the Chambers Judge should not have ruled section 30 unconstitutional without notice to the Attorneys General of Canada and British Columbia as required by section 8 of the *Constitutional Questions Act*, S.B.C. 1979, c. 63. After the launching of the Appeal, notice was given. All counsel asked that we deal with the merit of the Appeal. At this stage nothing turns on the absence of earlier notice.

[31] In *Eaton*, s. 109(1) of the *Courts of Justice Act* provided that the constitutional validity or applicability of a "regulation or by-law shall not be adjudged to be invalid unless notice has been served" on the Attorneys General of Canada and Ontario. No notice had been given either in the Divisional Court or in the Court of Appeal, and no issue had been raised regarding the constitutionality of the legislation which was the subject of the dispute.

[32] Sopinka, J. (for the majority) wrote:

> 49 While this Court has not yet addressed the issue of the legal effect of the absence of notice, it has been addressed by other courts. The results are conflicting. One strand of decision favours the view that in the absence of notice the decision is ipso facto invalid, while the other strand holds that a decision in the absence of notice is voidable upon a showing of prejudice.
>
> . . .
>
> 53 In view of the purpose of s. 109 of the Courts of Justice Act, I am inclined to agree with the opinion of the New Brunswick Court of Appeal in D.N. v. New Brunswick (Minister of Health & Community Services), supra, and Arbour J.A. dissenting in Mandelbaum, supra, that the provision is mandatory and failure to give the notice invalidates a decision made in its absence without a showing of prejudice. It seems to me that the absence of notice is in itself prejudicial to the public interest. I am not reassured that the Attorney General will invariably be in a position to explain after the fact what steps might have been taken if timely notice had been given. As a result, there is a risk that in some cases a statutory provision may fall by default.
>
> 54 There is, of course, room for interpretation of s. 109 and there may be cases in which the failure to serve a written notice is not fatal either because the Attorney General consents to the issue's being dealt with or there has been a de facto notice which is the equivalent of a written notice. It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly, s. 109 was not complied with and the Attorney General was seriously prejudiced by the absence of notice.

[33] Subsection 41(g) of our *Judicature Act* R.S. 1989, c. 240 has also been argued as support for this court's jurisdiction to proceed. It reads:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> . . .
>
> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such

> remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided; [Emphasis added.]

[34] In my view, these cases dealing with third party notice and constitutional validity relied on by the appellant, the CDHA and the physicians are distinguishable. In *Citation,* unlike here, all the parties agreed that the merits should be heard in the absence of notice. Most importantly, the wording of legislative provisions considered were very different from s. 41(1A) of the *FOIPOP Act*. None included wording which approaches the deeming provision which will be addressed later in my decision. As I will explain, the wording of s. 41(1A) does not allow the court latitude to exercise the discretion identified in s. 41(g) of the *Judicature Act* so as to take jurisdiction.

[35] In my view, the Minister of Justice not having received timely notice of the s. 41 appeal to the Supreme Court, whether this court has jurisdiction to hear the merits of the appeal of the decision of that court, turns on the interpretation of s. 41 of the *FOIPOP Act*. This is a question of statutory interpretation.

[36] In *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, (2009), 277 N.S.R. (2d) 350,this court reiterated:

> [36] The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See **Re Rizzo and Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27 at 41; **Canada (House of Commons) v. Vaid**, 2005 SCC 30, [2005] 1 S.C.R. 667; and **Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada**, 2006 SCC 46, [2006] 2 S.C.R. 447.

It then referred to Professor Ruth Sullivan's explanation of this modern approach in *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) and summarized:

> [40] . . . Professor Sullivan would invite us to answer three questions:
>
> > Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
> >
> > > what is the meaning of the legislative text?
> > >
> > > what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
> > >
> > > what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?
>
> [41] Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:
>
> > In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

(A) The Meaning of s. 41(1A)

[37] For convenience, I again set out this provision of the *FOIPOP Act*:

> 41 (1A) An appeal is deemed not to have been taken pursuant to this Section unless a notice of appeal is given to the Minister by the person taking the appeal.

[38] A reading of s. 41(1A) in its grammatical and ordinary sense tells the reader that if the person appealing the decision made by a public body to the Supreme Court fails to give notice of the s. 41 appeal to the Minister of Justice, the appeal is to be treated as one which had never been brought.

[39] The word "deem" has been explained as follows:

(a) "regard or consider something in a particular way": *The New Oxford Dictionary of English*, Oxford University Press, p. 481,

(b) "1. to treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have . . . 2. to consider, think or judge . . .": *Black's Law Dictionary* (9th ed.), pp. 477-478.

(c) "To consider something to be": *Mozley & Whitely's Law Dictionary* (11th ed.), Ivamy, E.R. Hardy (Butterworths, Toronto: 1993), p. 77

[40] *Sullivan on the Construction of Statutes* explains at p. 86:

> The most important use of "deems" is to create a legal fiction: a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes.

[41] The result of the use of deeming language in s. 41(1A) is that there had never been an appeal taken and, accordingly, none heard and determined by the Supreme Court. In other words, the Supreme Court did not have jurisdiction to hear the s. 41 appeal. Consequently, there is no appeal that this court could hear.

(B) The Intention of the Legislature

(C) The Consequences of the Proposed Interpretation

[42] As these two elements of statutory interpretation are inter-related in this case, I will deal with them together.

[43] The clear wording of s-ss. 41(1A) and (1B) shows that the Legislature intended that the Minister receive notice of all appeals under s. 41 of the *FOIPOP Act* to the Supreme Court and that the Minister have the right to participate in any such appeal by simply filing a notice with the Prothonotary of that court. Although they are given little weight since the meaning of the enactment is plain, the explanatory notes regarding these subsections, which were enacted by Bill No. 14, confirm this interpretation: Pierre-Andre Cote, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.; Carswell, 2000). They state that these subsections were intended to provide "that a notice of every appeal from a decision of the head of a public body to the Supreme Court shall be given to the Minister of Justice and that the Minister has the option of becoming a party to the appeal." [Emphasis added]

[44] The purpose of the *FOIPOP Act* is set out as follows:

> 2 The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
>
> (iii) specifying limited exceptions to the rights of access,
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

[45] The CDHA points out that *O'Connor v. Nova Scotia*, 2001 NSCA 132 stated at ¶ 41 that the *FOIPOP Act* should be "interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens", and that this court in *Dickie v. Nova Scotia (Department of Health)* (1998), 168 N.S.R. (2d) 108 at ¶ 14 described the legislation as a remedial statute and commented that "if there is a conflict between the literal meaning of the words and the clear purpose of the *Act*, any doubt arising from language difficulties may be resolved in favour of a broad and generous application of the purpose of the *Act*."

[46] I cannot agree that there is any conflict between the literal meaning of the words in s. 41(1A) of the *FOIPOP Act* and its purpose as stated in its s. 2(a). The meaning I have already explained. Subsection 2(a) shows that the legislative purpose relates to the public accountability of public bodies and this calls for the notification of s. 41 appeals to the Minister who is responsible for those bodies.

[47] In summary, on a proper statutory interpretation of s. 41(1A) of the *FOIPOP Act*, and its deeming wording, where the Minister was not served with notice of the appeal to the Supreme Court on a timely basis pursuant to that provision, the appeal to the Supreme Court was never been undertaken. Consequently, the decision and order of Justice Robertson are nullities and this court lacks the jurisdiction to hear an appeal.

The Disposition of this Proceeding

[48] Having decided that this court is without jurisdiction to hear any merits appeal, I must determine the proper disposition of this appeal.

[49] The materials for the appeal to the Supreme Court were voluminous and the parties other than the Minister had an opportunity to present their case. Without timely notice of that appeal, the Minister could not consider whether the Minister wished to be a party to the appeal, or make oral or written responses. I would remit the s. 41 appeal for hearing. This is not a remission for a *de novo* hearing, as might occur if, for instance, Ms. Coates' appeal had been allowed on its merits. This remission is for the limited purpose of repairing the failure to give advance notice to the Minister under s. 41(1A) of the *FOIPOP Act.*

[50] To protect the Minister's right to participate under s. 41(1B) and to preserve the rights of the appellant, the CDHA and the physicians, I would dispose of this proceeding as follows:

1. The s. 41 appeal is remitted to Justice Robertson. While I have found that her decision and order are nullities, should she so choose, the judge can use and rely upon the material filed earlier by the Ms. Coates, the CDHA and the physicians. It would not be necessary that those parties file or refile any of their materials;

2. The Minister shall have 21 days from the day this decision is released to file and serve notice that the Minister is a party under s. 41(1B) of the *FOIPOP Act*;

3. If, before the expiration of that period, the Minister advises it does not wish to do so, or does not file and serve notice under s. 41(1B), the Supreme Court may proceed to decide the matter. Each of the parties will rely on her, its or his earlier filings and submissions, without more;

4. If, before the expiration of that period, the Minister files and serves notice under s. 41(1B), the Supreme Court shall establish when the Minister's written submissions will be filed, when any responses by the appellant, the CDHA and/or the physicians will be filed and when, if at all, oral submissions shall be heard.

5. There will be no award of costs.

Oland, J.A.

Concurred in:
Hamilton, J.A.
Fichaud, J.A.