NOVA SCOTIA COURT OF APPEAL

Citation: Coates v. Capital District Health Authority, 2012 NSCA 4

Date: 20120120
Docket: CA 344161
Registry: Halifax

Between:

Roseanne Coates

Appellant

v.

Capital District Health Authority
Dr. Anil Rickhi and Dr. Stephen Sheehan

Respondents

Judges:	Oland, Beveridge and Farrar, JJ.A.
Appeal Heard:	September 21, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs of $1,500 inclusive of disbursements, payable by the appellant to the respondent, Capital District Health Authority, per reasons for judgment of Beveridge, J.A., Oland and Farrar, JJ.A. concurring.
Counsel:	Appellant, in person Carrie Ricker, for the respondent, Capital District Health Authority Colin Clarke, for the respondents, Dr. Anil Rickhi and Dr. Stephen Sheehan

Reasons for judgment:

INTRODUCTION

[1] The appellant is a nurse. She was an employee of the Capital District Health Authority (CDHA). In 2008 she had a personal relationship with a physician, also an employee of the CDHA. In the aftermath of the breakdown of that relationship he complained to their employer that the appellant was harassing him contrary to the employer's workplace policy. An external investigator was appointed. The investigator concluded that the conduct of the appellant did not breach the workplace policy. No disciplinary action was taken.

[2] Nonetheless, the appellant was upset both by the process and its outcome. She felt strongly that she had been denied basic fairness during the process. Things were said about her conduct that she did not get an opportunity to refute or otherwise deal with. The report, in her words, was full of falsehoods and innuendos. But what was she to do? She had won'. She brought an application under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (*FOIPOP*) seeking disclosure of personal information held by the CDHA about her, including of course the information gathered by the investigator in the course of conducting his investigation on behalf of the CDHA. In the weeks following the initiation of the *FOIPOP* process, the appellant was terminated for what the CDHA says were unrelated reasons. The *FOIPOP* application ended up before the Honourable Justice M. Heather Robertson of the Nova Scotia Supreme Court as an appeal pursuant to s. 41 of that *Act*.

[3] It is important to emphasize that the investigator's process and conclusions are in no way relevant to this appeal; nor is the termination of the appellant's employment. The only issue is did the judge who heard the appeal under s. 41 of the *FOIPOP Act* commit reversible error.

[4] The appellant, who is self-represented on this appeal says she did. The Notice of Appeal sets out 19 grounds of appeal. It is unnecessary to recite them. Many are not proper grounds. The appellant's factum reduces the number of complaints to nine. They are:

> 50. Did the Court error in its decision of February 9th, 2011 to "dismiss" the appellants Supreme Court FOIPOP Appeal?

51. Did the Court error in excusing the appellant and counsel, Mr. O'Neill, from the trial division hearing on March 9th, 2010 during a closed meeting with the respondent?

52. Did the Court error in denying the appellant access to the digital recorder and tape cassette recordings, Mr. Dunphy's investigation materials, and other relevant materials?

53. Did the Court error by failing to find the respondents in violation of s. 47 (1)?

54. Did the Court error in correctly identifying all s. 20 (1) as the personal information of third parties only, and not personal information privileged by the appellant.

55. Did the Court error in failing to deem Mr. Dunphy's "investigation" and subsequent report about the appellant legally unauthorized concerning his "unlicensed" activity pursuant to s. 4 of the *Nova Scotia's Private Investigators and Private Act*?

56. Did the Court error by failing to exercise its authority pursuant to s. 42 (4) and 47 (1A) concerning forms of public mischief where respondents attempted to falsely implicate the appellant in a criminal offence (i.e. car vandalism) in violation of s. 140 of the *2010 Annotated Criminal Code* and to consider criminal examination of tape recordings.

57. Did the Court error in assigning the CDHA legal counsel the task of "reconciling" materials for required redactions" returning all Volumes (except for one) to CDHA in the January 6th, 2010 hearing?

58. Did the Court error in accepting and filing on record communication (dated January 6th, January 13th and 18th, 2010) from a non- acting counsel, Mr. Gavras?

[5] The respondent CDHA expressed difficulty in attempting to fully appreciate the substance of the appellant's complaints as articulated in the Notice of Appeal and argued in a somewhat piecemeal fashion in her factum. It suggested the complaints by the appellant can be summarized into four:

1. Did the Court err in its decision of February 9th, 2011, in determining that the Appellant had received full disclosure of all available material held by the Respondent to which the Appellant was entitled?

2. Did the Court err in the conduct of the FOIPOP Review Appeal?

3. Did the Court err in finding no misconduct by the Respondent in its handling of the Appellant's request for access?

4. Did the Court err in finding that the appeal was dismissed rather than granted in part?

[6] At the hearing of the appeal, the appellant agreed with the respondent CDHA's organization and summary of the appellant's complaints. In order to put these complaints into context additional background information is required.

BACKGROUND

[7] Michael Dunphy, of Dunphy & Associates HR Consulting, was the external investigator retained to carry out an investigation into the harassment complaints. Dr. Anil Rickhi complained about the appellant. The appellant made a counter complaint against him. Mr. Dunphy's report was dated April 23, 2009. All complaints were dismissed, but he recommended conciliation if operational requirements necessitated the parties to work together.

[8] On April 30, 2009 the appellant submitted an application for access to information pursuant to the *FOIPOP Act*. The respondent CDHA acknowledged receipt of the application by letter dated May 19, 2009 and requested payment of the fee mandated by the *Act* and Regulations. The appellant has always maintained that she did not receive the May 19 letter. The respondent sent further correspondence dated June 29, 2009 making the same request for the fee they say was mandated by the *Act* and Regulations. The appellant acknowledged having received this letter, but chose to file an appeal to the Nova Scotia Supreme Court on July 19, 2009. A pre-hearing conference was held before the Honourable Justice Heather Robertson on August 26, 2009.

[9] The CDHA agreed to produce its response to the appellant's FOIPOP application by September 15, 2009, and file a copy with the court including not just the material provided to the appellant, but all documentation over which it may

deny access to the appellant. Such material was to be in a sealed envelope as envisaged by *Civil Procedure Rule* 85. Since CDHA did not yet have in its immediate possession the evidence gathered by Mr. Dunphy, it was to obtain, and file it, also in a sealed envelope with the Court. These pre-hearing agreements and directions were confirmed by Order of Robertson J. dated September 18, 2009.

[10] Notice of the appeal was given to the respondents Drs. Rickhi and Sheehan, as third parties, as that term is defined in the *Act*. They both elected to participate in the appeal process in the Supreme Court and in this Court.

[11] The appellant was dissatisfied with the materials she received from the respondent CDHA, and her appeal proceeded to be heard on January 4, 2010. The hearing was adjourned to permit Justice Robertson to review the sealed materials and compare them to what had already been provided to the appellant. The return date was January 6, 2010.

[12] On January 6, 2010, Justice Robertson noted the very large volume of materials at issue. It was apparent that there was considerable duplication of materials between what CDHA had already provided to the appellant and the six volumes of materials produced to the court from Mr. Dunphy's files. She requested the assistance of counsel for the CDHA in separating out what had already been provided to the appellant with what had not. The respondent CDHA agreed to prepare a table of concordance for the six volumes of Dunphy materials.

[13] The respondent submitted a letter to Justice Robertson dated February 4, 2010 attaching a 20-page table of concordance. The letter explained how the table was prepared. A copy of both was provided to the appellant and the third parties. The table set out the document or class of documents, whether it had been disclosed to the appellant and the position of the CDHA on why it had or had not been disclosed.

[14] The hearing continued before Justice Robertson on March 9, 2010. At this hearing, the appellant was represented by John O'Neill. Mr. O'Neill expressed his familiarity with what had already transpired in the appeal proceedings, and the materials being considered by the court. He made submissions as to why release of the remaining redacted materials would not constitute an invasion of any third party's privacy and should therefore be disclosed to the appellant.

[15] Two things happened on March 9, 2010 that cause the appellant to complain. The first is the sealing of tape recordings. The second was an in camera session between the judge and counsel for the respondent CDHA.

[16] The appellant and Dr. Rickhi both gave audio recordings to Mr. Dunphy. The one from the appellant was a small cassette. Dr. Rickhi's was in the form of a digital recorder. These materials were included in the sealed package delivered to the court from Mr. Dunphy. Justice Robertson had the audio recordings transcribed. Copies of the transcriptions were provided to the appellant on March 9, 2010. The appellant had earlier expressed concerns that someone may have altered the audio recordings. Justice Robertson pointed out to the parties that whether the tapes had been somehow doctored was beyond the scope of her mandate.

[17] The cassette belonged to the appellant but counsel for Dr. Rickhi objected to release of the digital recorder since it belonged to Dr. Rickhi. Mr. O'Neill suggested to Justice Robertson that the court retain the original cassette and digital recorder to maintain integrity of the items as they were delivered from Mr. Dunphy. Counsel for Dr. Rickhi agreed.

[18] During the hearing of March 9, 2010 Justice Robertson observed how few redactions CDHA had made to the documents that had been disclosed to the appellant. There were six bound volumes. Volume I, IV, V, and VI had been completely disclosed. In Volume II there were three pages that had been redacted, and in Volume III fewer than six. The appellant made detailed submissions about the legitimacy of the claimed redactions based on the criteria mandated by the *FOIPOP Act*. The material that had been redacted was solicitor client communications and third party personal information.

[19] After having heard the submissions of Mr. O'Neill on behalf of the appellant, the court recessed for lunch. On resumption of the hearing, the judge advised the parties that she had looked again at every redaction being requested by the respondent CDHA and announced that she would hear further submissions; and at the end of those submissions, she wanted to speak with Ms. Ricker to understand the reasons for redaction on two or three pages. Submissions were made by the respondent and third parties in the presence of the appellant and her counsel.

Reply submissions were made by Mr. O'Neill. The appellant also spoke personally. The Court then took a break, with the judge saying:

> Okay. Great. Thank you. Anything else, Mr. O'Neill? Okay, thank you. Well, would you like to take a little break and you and Ms. Coates go grab a coffee or something. I just would like to see Ms. Ricker for a moment so I can look over some pages again, and I'll give you my decision. So we'll adjourn for about ten minutes.

[20] On return from break, the judge put on the record what had transpired with Ms. Ricker. She said:

> THE COURT: Mr. O'Neill, just for the record, I met briefly with Ms. Ricker just now to review all the redactions, and they appear in the red volume that you don't have because you have the blue volumes of the redacted materials. And they also appear in two sealed documents that are before the Court, and I'll explain those in my Decision. So I was just trying to establish what had been given to Ms. Coates in the course of complete disclosure, and whether there was anything that was tagged in Mr. Dunphy's six volumes that needed to be redacted before they were given to Ms. Coates. ...

[21] Justice Robertson proceeded to give an oral decision. This decision was later reduced to writing and released on April 14, 2010 as 2010 NSSC 143. An order dated April 22, 2010 was issued that dismissed the appeal to the Nova Scotia Supreme Court. The appellant's first appeal to this Court was plagued by a procedural error. Section 41 of the *Act* requires that notice of the appeal to the Supreme Court be given to the Minister of Justice. This statutory requirement had not been fulfilled. As a consequence this Court decided that it was without jurisdiction to hear the merits of the appeal, and remitted the matter back to Justice Robertson to reconsider the appeal after the Minister was given an opportunity to participate in those proceedings (see 2011 NSCA 4).

[22] The Minister was given notice, but decided not to participate in the resumption of the Supreme Court appeal. Justice Robertson then re-issued her decision on February 9, 2011 dismissing Ms. Coates' appeal taken under s. 41 of the *Act* (see 2011 NSSC 62). An order was again taken out confirming the dismissal of the appeal by Ms. Coates. It now falls to this Court to decide the merits of Ms. Coates' complaints.

ANALYSIS

[23] It is with this background I return to the complaints of the appellant. Before addressing the substance of those complaints it is useful to recall that appeal court judges are sometimes constrained in interfering with a lower court's decision. Deference is frequently, but not always, owed to the decision under appeal. The existence and amount of deference is summed up in the phrase "standard of review".

[24] The standard of review on an appeal from a decision by the Supreme Court under s. 41 of the *Act* was first considered by this Court in *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132. Saunders J.A., after thoroughly canvassing the issue, succinctly concluded:

> [34] Accordingly, in the absence of clear statutory direction to the contrary, the standard of review under the **FOIPOP Act** of a lower court's findings of fact should be the same as in other civil cases, that is obvious, palpable and overriding error. In matters of law, for example conclusions with respect to the interpretation to be given to legislation, the test is one of correctness. These are the standards I have applied in this case.

[25] Some issues do not fit neatly into being a pure question of fact or law. They are known as issues or questions of mixed fact and law. Such questions, absent an error of law that can be isolated, are also entitled to the same deference as pure questions of fact – they can only be overturned if the appeal court is satisfied a palpable and overriding error was committed (*McPhee v. Gwynne-Timothy*, 2005 NSCA 80 at paras. 31-33).

[26] Since a number of the appellant's complaints concern how the Supreme Court judge conducted the appeal, it is important to realize that a judge or a court in fulfilling their assigned mandate may have to make any number of decisions about the conduct of the case. Most such decisions about how a hearing is held are discretionary and will not be interfered with on appeal absent an error in principle, or an injustice (see *Sharpe v. Abbott*, 2007 NSCA 6, paras. 83-85)

Conduct of the Appeal

[27] I see no error in principle or injustice in how Justice Robertson conducted the appeal. The powers of the Supreme Court on an appeal are found in s. 42 of the *Act*. It provides, in part as follows:

> 42 (1) On an appeal, the Supreme Court may
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> a) determine the matter de novo; and
>
> (b) examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.
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> (2) Notwithstanding any other Act or any privilege that is available at law, the Supreme Court may, on an appeal, examine any record in the custody or under the control of a public body, and no information shall be withheld from the Supreme Court on any grounds.
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> (3) The Supreme Court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the Supreme Court or any person of
>
> (a) any information or other material if the nature of the information or material could justify a refusal by a head of the public body to give access to a record or part of a record; or
>
> (b) any information as to whether a record exists if the head of the public body, in refusing to give access, does not indicate whether the record exists.

[28] In addition, there a variety of civil procedure rules that articulate a broad array of powers in how a judge can manage or direct the hearing of an appeal (see for example, *Nova Scotia Civil Procedure Rules* 85.07, 7, and 2.03).

[29] I agree with the submission of the respondent CDHA that the appeal to the Supreme Court was procedurally unusual because it was commenced prior to the CDHA having an opportunity to gather the documentation being requested, review it and respond to the initial application by the appellant. Documents ended up being delivered to the Court in a sealed package that had not been reviewed by the CDHA. As detailed earlier, Justice Robertson, in the course of reviewing the materials in the sealed package with the large volume of documents that had already been disclosed to the appellant, requested the assistance of the CDHA in understanding what had been disclosed, what had not been disclosed and why. No

objection was raised by the appellant to the request by Justice Robertson at any stage of the proceedings to the process, including on March 9, 2010 when the appellant had the assistance of counsel.

[30] The procedure utilized provided assistance and clarity to the court in being able to efficiently review the material in issue and make a timely decision. I see no prejudice whatsoever to the appellant. Her complaint is, with all due respect to her, without merit.

[31] Similarly, the complaint about the court ordering the cassette and digital recorder to be sealed is puzzling. It was the appellant that raised concern over maintaining the integrity of the recordings because she feared someone had doctored them. An order securing the integrity of the tapes to permit only authorized access to them addressed that concern. The action taken by Justice Robertson was one that was recommended by Mr. O'Neill, the appellant's counsel, in the presence of the appellant.

[32] It was decidedly not the function of Justice Robertson to have the recordings examined or attempt to make any factual findings about those recordings. The proceedings before the Supreme Court were about balancing the right of the appellant to have access to personal information about her with the rights of the respondents not to have privileged or third party, personal information disclosed that would be an unreasonable invasion of their personal privacy. The content of the recordings, as received by the court, were transcribed and disclosed without redaction to the parties. I fail to see any merit in the appellant's complaint that Justice Robertson erred.

[33] As a general rule, all the parties are entitled to be present and are privy to all representations and communications to a judge that is deciding a dispute. There can be exceptions. Section 42(1)(b) of the *Act* clearly permits a judge of the Supreme Court to examine any record *in camera*. Furthermore, s. 42(3) mandates that the court shall take every reasonable precaution, including where appropriate, to receiving representations without the other party being present or privy to them and conducting hearings *in camera*.

[34] On March 9, 2010 Justice Robertson alerted the parties to her desire to have counsel for the respondent CDHA meet with her in the absence of the other parties.

The appellant voiced no objection to the proposed *in camera* session between Justice Robertson and counsel for the CDHA. As noted above, immediately on returning to the courtroom, Justice Robertson put on the record what had happened between her and Ms. Ricker. This was confirmed in the decision later released, where Robertson J. wrote:

> [19] Lastly, at the conclusion of this hearing on March 9, 2010, the Court reviewed all of the volumes of the material before it with Ms. Ricker of CDHA for the single purpose of ensuring that all documents redacted by CDHA and reviewed by the Court had been actually delivered to Ms. Coates, the appellant, and that the materials Ms. Coates requested the Court to seal and hold (the Dunphy materials) were in the possession of the Court and did not remain with the CDHA.

[35] Even if some of the interaction between counsel for the CDHA and the judge could be considered as being in the nature of representations in the absence of the appellant, that process is permitted by the *Act*. The time to object to what a party claims to be a procedural irregularity is at the time they are aware of it. Here there was no objection. I see no merit in this complaint.

Misconduct in the handling of the appellant's request for access

[36] Under this category are complaints by the appellant that Justice Robertson erred in failing to exercise her authority under s. 42(4) and s. 47(1A) of the *Act.* The appellant also raises throughout her submissions claimed errors in the investigation process by Mr. Dunphy, and the suggestion that he had no authority to conduct an investigation by virtue of not being licensed pursuant to the *Private Investigators and Private Guards Act*, R.S.N.S. 1989, c. 356. For the following reasons, none of these complaints by the appellant have merit.

[37] Section 42(4) of the *Act* gives to a judge conducting an appeal a discretion to disclose to the Minister of Justice or the Attorney General of Canada information that may relate to the commission of an offence pursuant to another enactment by an officer or employee of a public body. Section 47(1A) is part of the penalty provisions of the *Act*. It makes it an offence for any person to knowingly alter a record that is the subject of a request in order to mislead.

[38] A judge conducting a FOIPOP appeal is not an investigator; nor is he or she a prosecutor. The transcript of the discussions between Justice Robertson and the appellant show that Justice Robertson was aware of the appellant's concerns. Despite cautioning the appellant about the defined role of a judge conducting an appeal under the *Act*, she assured the appellant that if she saw some impropriety it would not escape her attention. She saw no such impropriety. Justice Robertson said to the parties orally, and later released in her written decisions, the following:

> [50] In my view, there has been a very fulsome, open and appropriate disclosure to the appellant of the records she sought and with these records in hand she will be able to along with her counsel make decisions about the future course she may wish to take against the CDHA or third parties respecting the discharge from her employment, matters that are beyond the scope of this inquiry.

[39] Under s. 42(2) of the *Act*, no information may be withheld from a judge conducting an appeal on any grounds. It seems obvious that s. 42(4) of the *Act* is designed to permit a judge who has received information that may not be disclosable to an appellant to nonetheless disclose information to the Minister or Attorney General. The only information about any alleged offence concerns the appellant's claim that she had been falsely accused by persons identified by Mr. Dunphy in his report of having damaged a car, or her claim that the recordings had been doctored. The judge was not privy to any information about any alleged commission of another offence that was not already known to the appellant.

[40] The appellant raised with Justice Robertson her concern that Mr. Dunphy was not licensed under the *Private Investigators and Private Guards Act*. Justice Robertson wrote to the parties stating that any such concern was not properly part of her mandate conducting an appeal under the *FOIPOP Act*. Ms. Coates was represented by Mr. O'Neill on March 9, 2010. Justice Robertson specifically raised with Mr. O'Neill the status of what was to be in issue before her. He agreed that the issue of the conduct of the investigation and the licensing of Mr. Dunphy were not part of Justice Robertson's mandate. He said:

> ...I believe that you summed it up very, very nicely in the bottom line of the first page of that correspondence where you indicate, "My task is limited to a document review and it does not concern the merits of any future claim".

[41] I agree, and hence see no merit in the appellant's complaints.

Did the judge err in finding the appellant had received all she was entitled to?

[42] The appellant does not point to any error by Justice Robertson in her articulation of the relevant legal principles to be applied in determining if the respondent CDHA was entitled to withhold certain information. She is emphatic that she is not interested in obtaining third party personal information – only personal information about herself.

[43] The appellant refers to paragraph 38 of Justice Robertson's decision where she said:

> [38] I agree with the CDHA that the materials are fraught with highly personal information about both the appellant and third parties. Its disclosure in certain circumstances could lead to an unreasonable invasion of third party personal privacy and in certain circumstances breach of solicitor-client privilege.

[44] This paragraph is cited as evidence that the materials not disclosed to her contained highly personal information about her. With all due respect to the appellant, the judge's comments must be read in context. Justice Robertson noted the duty of the CDHA not to disclose personal information about third parties, and the duty on the CDHA. She earlier said:

> [34] CDHA has made its case for its redactions for some of the following reasons: that there was personal information under s. 3(1)(1) of the *Act*, i.e. names, addresses, telephone numbers, etc.; there were materials related to health care history of third parties; where the third parties expressed personal views or opinions including their concerns in participating in the harassment policy process or concerns over their own health or employment situation.
>
> [35] Where the third parties expressed opinions about the appellant CDHA did disclose in its entirety.

[45] Immediately after commenting in para. 38 about the extent of personal information in the materials she had reviewed, Justice Robertson set out the process she had followed. She had reviewed the redacted materials and the Dunphy materials; and then reviewed all the materials pursuant to the requirements of the *FOIPOP Act*. Robertson J. concluded:

> [42] The redactions made by the CDHA in the 2008 - 2009 responses were in my view reasonable and accord with the principles and requirements of the *Act*.
>
> [43] Similarly, the redactions subsequently made in what I call package two of the extra materials found in this process are proper redactions. One of the extra volumes of materials had already been released to Ms. Coates. The second package with its few redactions was then released to Ms. Coates.
>
> [44] In Mr. Dunphy's materials volumes one through six, there were certain pages in volumes two and three, redacted by CDHA in their January 2010 review. In my view, these are proper redactions. So all of the Dunphy materials have been disclosed minus a few pages that were redacted.
>
> [45] I have also excluded of Mr. Ricker's own work product, her own solicitor notes.
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> [46] The table of concordance provided by Ms. Ricker in her January 2010 analysis of the Dunphy materials has been very helpful and explains the exercise of her review of all of the materials. It clearly sets out the materials now disclosed and those few materials that are the subject of the redaction highlighted in green on the table. All of these materials have been reviewed by the Court.
>
> [47] In the result, I am satisfied that the redactions made in all circumstances are appropriate and were done in compliance with s. 20 or s. 16 of the *Act*.

[46] It is also important to emphasize, in light of the concern by the appellant, the judge stressed that the redactions she approved of were not really significant. She explained:

> [49] I appreciated that neither the appellant nor her counsel has access to the redacted pages. I can say, as I have earlier today, that none of the redacted materials are heavily significant, but simply are redactions properly made and identified as a necessity by CDHA pursuant to the statutory requirements either privacy interest or solicitor-client privilege.

[47] Read in the context of all of Justice Robertson's reasons, I see no basis to interpret the comments in para. 38 as indicative that personal information about the appellant was withheld. Justice Robertson reviewed all of the unredacted materials and was satisfied that the CDHA had made out its case that for the very few times that materials were redacted, it was appropriate to do so according to the statutory regime.

Form of the Order

[48] The appellant argues that since she was able to gain access to information through the appeal process, the order should have been "Appeal Allowed" rather than appeal dismissed. With respect to the appellant, I fail to see this an issue deserving of relief in this Court, even if the submission had merit.

[49] I earlier set out the unusual procedural history to the appellant's application for access under the *FOIPOP Act*. The respondent CDHA did not respond to the application, taking the view that unless and until the statutorily prescribed application fee was paid, there was no application to respond to. It wrote to the appellant telling her that. The appellant apparently did not get the initial letter, but did receive one a few weeks later. In the meantime she had applied to the Review Officer under the Act. That review did not proceed since there had been no consideration by the CDHA of the appellant's request.

[50] At the time of the first appearance on the appeal before Justice Robertson on August 26, 2009, counsel for the CDHA graciously took the position that it had no objection to the appeal proceeding if the court were prepared to hear the matter without first having the respondent's due consideration of the *FOIPOP* application. Justice Robertson agreed to do so, directing by Order dated September 18, 2009 that the CDHA file its response by disclosure of documents it currently had in its physical possession, with the Dunphy materials to be filed with the court in a sealed package, along with any documentation to which it was denying access.

[51] The appellant was not satisfied with the materials that were disclosed and the appeal progressed. I acknowledge that the appellant is quite correct that as the appeal process progressed, there were additional documents disclosed, but at the end of the day the judge was satisfied that the respondent CDHA had met its obligations under the *FOIPOP Act*.

[52] Not only do I see no error in the wording of the Order, the appellant consented to the form of the Order that her appeal was dismissed without costs, first in the Order dated April 22, 2010, and later in the Order dated February 28, 2011. I fail to see any merit in this complaint.

[53] I have carefully reviewed all the materials submitted by the appellant, the complete record of the proceedings below, and all of the matters that she has complained of. I can see no basis to intervene in the decision reached by Justice Robertson. Accordingly, I would dismiss the appeal.

[54] The respondent third parties did not seek costs. The respondent CDHA requested costs of $1,600 plus disbursements. If successful, the appellant also sought costs in the $1,500 to $2,000 range. In my view, some award of costs to the successful party is appropriate, and I would order the appellant to pay costs to the respondent CDHA in the sum of $1,500 inclusive of disbursements.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.