NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 31

Date: 20170421
Docket: CAC 457321
Registry: Halifax

Between:

The Office of the Ombudsman of Nova Scotia

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Hamilton and Bryson, JJ.A.
Appeal Heard:	March 24, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Fichaud, J.A., Hamilton and Bryson JJ.A. concurring
Counsel:	Roderick (Rory) H. Rogers, Q.C., for the appellant Jennifer A. MacLellan, Q.C., for the respondent

Reasons for judgment:

[1] The Ombudsman's Office investigates complaints of bureaucratic abuse and bungling. Its inquiry often is informal and relies on information freely given by persons, sometimes whistleblowers, who expect confidentiality. At times, that material pertains to a police investigation of possible criminal activity. The *Criminal Code* allows the police to obtain a Production Order to access pertinent information possessed by third parties, subject to conditions.

[2] The issues are whether the Ombudsman is one of those third parties and, if so, how those conditions should respect the Ombudsman's sphere of confidentiality.

Background

[3] In October 2011, the provincial Office of the Ombudsman received a complaint of alleged wrongdoing by the Cumberland Regional Development Authority. The Ombudsman investigated and, in August 2012, released its Final Report. The Final Report recommended a forensic audit.

[4] The Province then engaged an accounting firm to examine the Authority's finances. That examination resulted in a report of June 2014.

[5] The allegations went to the RCMP's Commercial Crime Unit. On August 10, 2015, the RCMP obtained and served the Ombudsman with a Production Order, issued by a justice of the peace. The Order was pursuant to s. 487.014 of the *Criminal Code*:

> 487.014(1) General production order – Subject to sections 487.015 to 487.018, on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.
>
> (2) Conditions for making order – Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that
>
> > (a) an offence has been or will be committed under this or any other Act of Parliament; and

> (b) the document or data is in the person's possession or control and will afford evidence regarding the commission of the offence.
>
> …

[6] The Production Order recited that there were reasonable grounds to believe that a named individual had defrauded the Province of over $5,000 contrary to s. 380(1)(e) of the *Criminal Code*. It required the Ombudsman to produce all documents and data relating to the Ombudsman's Final Report, including interview materials, documents gathered during the Ombudsman's investigation and documentary or electronic correspondence.

[7] Sections 487.0193(1) and (4) of the *Code* permit the recipient to apply to revoke the Production Order:

> 487.0193(1) Application for review of production order – Before they are required by an order made under any of sections 487.014 to 487.018 to produce a document, a person, financial institution or entity may apply in writing to the justice or judge who made the order – or to a judge in the judicial district where the order was made – to revoke or vary the order.
>
> …
>
> (4) Revocation or variation of order – The justice or judge **may revoke or vary** the order if satisfied that
>
> > (a) it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or
> >
> > (b) production of the document would disclose information that is privileged or **otherwise protected from disclosure by law**.
> >
> > [emphasis added]

[8] This appeal turns on the meaning and application of the bolded words.

[9] On September 22, 2015, the Ombudsman filed with the Provincial Court an application to revoke the Production Order. The Ombudsman cited s. 487.0193(4)(b) – that the information was "protected from disclosure by law". The law cited by the Ombudsman was the *Ombudsman Act*, R.S.N.S. 1989, c. 327, ss. 3(5), 16(1), 17(8) and 23(2):

> Ombudsman
>
> …
>
> 3(5) Before entering upon the exercise of the duties of his office the Ombudsman shall take an oath that he will faithfully and impartially perform the

> duties of his office and **will not divulge any information** received by him under this Act except for the purpose of giving effect to this Act.
>
> Nature of investigation
>
> 16(1) Every investigation under this Act is to be conducted **in private**.
>
> Furnishing of information
>
> …
>
> 17(8) Except on the trial of a person for perjury, evidence given by any person in proceedings before the Ombudsman and evidence of any proceeding before the Ombudsman **is not admissible** against any person in any court or in any proceedings of a judicial nature.
>
> No liability or compellability of Ombudsman or personnel
>
> …
>
> 23(2) The Ombudsman and any person holding any office or appointment under the Ombudsman **shall not be called to give evidence** in any court or in any proceedings of a judicial nature in respect of any thing coming to his knowledge in the exercise of his functions under this Act.
>
> [emphasis added]

[10] Judge Elizabeth Buckle of the Provincial Court heard the application on October 15, 2015 and, on December 8, 2015 issued an "Interim Decision". She held that (1) the Ombudsman's information was "protected from disclosure by law" within s. 487.0193(4)(b) of the *Criminal Code*, but (2) the word "may" in s. 487.0193(4) gave her a discretion to vary, rather than revoke the Production Order. The Interim Decision listed (para. 33) eight criteria that, in her view, affect the exercise of this discretion, then directed the parties to file further submissions:

> [51] ... I am satisfied on a balance of probabilities that the Production Order must be revoked or varied to safeguard the confidentiality of the Office of the Ombudsman. However, I require further submissions on whether it can be varied rather than revoked. Specifically, whether it can be limited to certain interviews and whether restrictions can be placed on the production of that information to lessen the impact on the Ombudsman.

[11] On January 21, 2016, the Ombudsman and the Crown returned to Judge Buckle's court for the further submissions. The Crown proposed a revised Production Order, that the Ombudsman would provide an "executive summary" to answer four questions respecting whether Cumberland Regional Development Authority had submitted false or improper information for project claims. On January 21, 2016, Judge Buckle issued an "Addendum Decision" that declined to revoke, and instead varied the Production Order. The Addendum Decision reformulated the points in the Crown's proposed revision, and concluded:

> [8] After balancing the interests in light of the factors previously identified, I am not persuaded on a balance of probabilities that I should exercise my discretion to revoke the Production Order. I am persuaded that it should be varied to require production of the following:
>
> > Prepare and produce a document that provides a summary of the following:
> >
> > 1. Any information uncovered during the Ombudsman's investigation into File #50299 that would suggest knowledge that Cumberland Regional Development Authority (CRDA) was submitting false or improper documentation for project claims, by any individual or organization, including but not limited to the following:
> >
> > a. Nova Scotia Department of Economic and Rural Development and Tourism (ERDT);
> >
> > b. Municipality of Cumberland County;
> >
> > c. Downtown Amherst Revitalization Society; or
> >
> > d. Any auditor retained by CRDA; and
> >
> > 2. The number of individuals from the former ERDT department who were interviewed or who otherwise provided statements relating to Ombudsman Investigation File #50299.

[12] On January 25, 2016, Judge Buckle issued a Varied Production Order to this effect.

[13] On February 8, 2016, Judge Buckle released her final decision that consolidated the reasons from her Interim Decision and Addendum Decision ("Final Decision"). I will cite the Final Decision.

[14] Also on February 8, 2016, the Ombudsman filed in the Supreme Court a Notice of Judicial Review by *certiorari* and *mandamus* of the Varied Production Order, and a Motion to Stay the enforcement of the Varied Production Order. On

February 25, 2016, by consent, Justice Arnold issued the stay. The judicial review hearing was set for June 2, 2016.

[15] On April 22, 2016, the RCMP laid charges for fraud against the individual who had been named in the original Production Order of August 10, 2015.

[16] On June 2, 2016, Supreme Court Justice Margaret Stewart heard the Ombudsman's motion for judicial review. The Ombudsman's motion cited s. 774 and the subsequent provisions of the *Criminal Code*, authorizing *certiorari* and *mandamus*, and Nova Scotia's *Civil Procedure Rules* 7 and 64, authorizing prerogative remedies in criminal matters. On October 13, 2016, Justice Stewart released her decision that dismissed the Ombudsman's motion. The judge held: (1) the information was "protected from disclosure by law" under s. 487.0193(4)(b) of the *Code*; but (2) s. 487.0193(4) gave Judge Buckle a discretion whether to revoke or vary the Production Order; and (3) Judge Buckle did not err in the exercise of her discretion.

[17] On November 7, 2016, the Ombudsman filed a Notice of Appeal of Justice Stewart's decision. The appeal is under s. 784(1) of the *Criminal Code* and *Civil Procedure Rules* 90 and 91. On December 22, 2016, Justice Beveridge of the Court of Appeal issued a stay of enforcement of the Varied Production Order, pending the decision of this Court on the appeal.

[18] On March 24, 2017, this Court heard the appeal from Justice Stewart's decision.

Issues

[19] The Ombudsman makes three submissions:

> (1) The Production Order required the production of information that is "protected from disclosure by law" under s. 487.0193(4)(b) of the *Criminal Code*.
>
> (2) The reviewing judge, and Judge Buckle before her, erred in law by interpreting s. 487.0193(4) of the *Criminal Code* to prescribe a discretion to vary the initial Production Order. The Ombudsman says that revocation is mandatory.

(3) Alternatively, if there is a discretion, the reviewing judge erred, as did Judge Buckle, by applying the discretion in these circumstances to require that the Ombudsman provide the information cited in the Varied Production Order.

Appellate Jurisdiction and Standard of Review

[20] The reviewing judge heard the Ombudsman's application for *certiorari* and *mandamus* brought under s. 774 of the *Criminal Code*. Section 784(1) of the *Code* permits an appeal to this Court from a refusal to issue *certiorari* or *mandamus*. See *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, para. 24, per Justice L'Heureux-Dube for the Court.

[21] The first matter is this Court's standard to the reviewing judge's ruling. On an appeal from a judicial review, the Court of Appeal determines whether the reviewing judge correctly chose and applied the standard of review. These are legal issues. If the judge erred, then this Court chooses and correctly applies the standard. For the legal issues, effectively this Court steps into the shoes of the reviewing judge, in this case Justice Stewart. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 43-44. *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, para. 46; *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, para. 247.

[22] Next is the reviewing judge's standard to the Provincial Court's Varied Production Order.

[23] The first issue on appeal involves the interpretation of "protected from disclosure by law" in s. 487.0193(4)(b). The second is whether s. 487.0193(4) is discretionary or mandatory. These are issues of law that attract correctness. See *R. v. Durling*, 2006 NSCA 124, paras. 13-14, and *Canadian Broadcasting Corp. v. Manitoba*, 2009 MBCA 122, paras. 20-22, that discussed similar issues.

[24] The third issue assumes the information is protected from disclosure subject to a discretion, and addresses the exercise of that discretion. For a discretionary weighing of criteria, "assuming the trial judge has correctly identified the appropriate approach and considered the relevant criteria, considerable deference is owed": *R. v. W.(R.E.)*, 2011 NSCA 18, para. 33, per Beveridge, J.A. Conversely, whether the outcome derives from an error of legal principle is reviewed for

correctness: *R. v. W.(R.E.)*, paras. 34-35. Generally speaking, this Court examines a discretionary decision either for error in legal principle or to determine whether the lower court's exercise of discretion caused a patent injustice: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, para. 29, where the Court reviewed the Nova Scotian authorities (paras. 16-28). As the law presumes that a court should not exercise its discretion to cause patent injustice, the latter criterion effectively is a subset of the former.

First Issue – "Protected From Disclosure by Law"?

[25] Section 487.0193(4)(b) permits the Provincial Court judge to revoke or vary the Production Order that would disclose information that is "privileged or otherwise protected from disclosure by law".

[26] Sections 3(5), 16(1), 17(8) and 23(2) of the *Ombudsman Act* are quoted above (para. 9). Judge Buckle concluded: (1) the provisions in the *Ombudsman Act* afforded "partial protection", though not "absolute protection from disclosure in all circumstances"; but (2) "otherwise protected from disclosure by law" in s. 487.0193(4)(b) is "broad enough to include partial protection". (Final Decision, paras. 17-18)

[27] The reviewing judge (para. 42) agreed with both Judge Buckle's conclusions.

[28] The reviewing judge (paras. 44-45) also discussed whether a provincial statute may determine the admissibility of evidence in a prosecution under the *Criminal Code*. This involves paramountcy principles. In my view, that point is unnecessary. First, we are dealing with disclosure, not admissibility. Second, s. 487.0193(4)'s reference to "law" is not confined to federal statutes. "Law" includes provincial statutes, which is the reason we are considering the *Ombudsman Act*. See, for instance: *R. v. Thomson Reuters Canada Ltd.*, 2013 ONCJ 568, para. 25. When Parliament adopts the standard from a provincial statute, no issue of paramountcy arises.

[29] Returning to the issue, the key phrase is "privileged or otherwise protected from disclosure by law". The words "privileged or otherwise …" signify that the "otherwise" category includes protections that are more temperate than full legal privilege. The *Ombudsman Act*'s plain wording (above, para. 9) extends some degree of protection to the Ombudsman's investigation file. The *Ombudsman Act* is to be read purposively: *British Columbia Development Corp. v. British*

Columbia (Ombudsman), [1984] 2 S.C.R. 447, p. 463, per Dickson J. (as he then was) for the Court. From the purposive perspective, I agree with the comments of Justice Dohm in *Levey v. Friedmann* (1985), 60 B.C.L.R. 101, para. 7:

> [7] The Ombudsman deals in complaints from members of the public who allege a governmental abuse. If he is not able to receive and obtain information and material in confidence and not able to give that assurance to the complainant, there would be little need for the office. The confidentiality aspect of the legislation is paramount and fundamental, and without it the Ombudsman could not function. …

[30] For those reasons, the reviewing judge and Judge Buckle correctly ruled that the phrase "otherwise protected from disclosure by law" under s. 487.0193(4)(b) encompasses the protection set out in the provisions from the *Ombudsman Act*.

[31] This conclusion suffices to engage s. 487.0193(4)(b). The next question is whether the protection is merely partial and discretionary or, as the Ombudsman submits, absolute and mandatory.

Second Issue – Discretionary or Mandatory?

[32] Section 487.0193(4) says the judge "may revoke or vary" a Production Order that pertains to information otherwise protected by law. The word "may" normally denotes a discretion.

[33] The Ombudsman submits this situation is not the norm. The factum puts it this way:

> 80. The Ombudsman respectfully submits that in the circumstances of this matter, "may" in subsection 487.0193(4)(b) of the *Criminal Code* should be interpreted as "must".

The Ombudsman cites the reasons of Justice Hall in *R. v. Newfoundland and Labrador (Citizens' Representative)*, 2013 NLTD(G) 134, para 53, which interpreted the former s. 487.015(4) of the *Criminal Code*, R.S.C. 1995, c. C-46. That provision has been replaced by the *Protecting Canadians From Online Crime Act*, S.C. 2014, c. 31, s. 20. The Ombudsman also cites Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), para. 4.62:

> …the use of "may" implies discretion, but it does not preclude obligation. The interpreter must determine whether there is anything in the statute or in the circumstances that expressly or impliedly obliges the exercise of the power.

To address *Sullivan*'s query, the Ombudsman cites the following circumstances:

> 94. The statutes in question here, namely the *Ombudsman Act* and the relevant provision of the *Criminal Code*, expressly contemplate privacy and confidentiality. The *Ombudsman Act* provides not only that the Ombudsman must make an oath of confidentiality but also that the Ombudsman's investigations are conducted in private. As illustrated above, it has been held in numerous Canadian jurisdictions that analogous Ombudsman legislation should be broadly interpreted to uphold the principles of privacy and confidentiality on which the legislation is premised.

[34] I respectfully disagree that "may" in s. 487.0193(4)(b) means "must". My view stems from both the interpretation of the *Criminal Code*'s wording and the scope of privilege as interpreted by the authorities.

[35] If the Ombudsman is correct, Judge Buckle had only one option – to revoke the original Production Order. Then the *Criminal Code*'s words "may … vary" would be meaningless – an untenable statutory construction.

[36] The Ombudsman asserts an absolute privilege. Yet even the elite "class privileges" – solicitor-client, spousal and informer privilege – are not absolute. What the Supreme Court of Canada has termed the "unique", "fundamental" and "distinctive" solicitor-client privilege yields to: (1) public safety, meaning a risk of serious bodily injury or death, (2) a "stringent" determination whether "innocence is at stake" that derives from an accused person's *Charter* right to make a full answer and defence, and (3) criminal communications. Other confidential relationships, with lesser gravitas than class privilege, "may be protected on a case-by-case basis". See *R. v. McClure*, [2001] 1 S.C.R. 445, paras. 27-35, 38-51, per Justice Major for the Court and *Smith v. Jones*, [1999] 1 S.C.R. 455, paras. 45, 51-59, 79-85, per Justice Cory for the majority.

[37] Neither statute nor caselaw supports the interpretation of "may revoke or vary" as meaning "must revoke". Judge Buckle had a discretion to vary. The question is whether she made a reviewable error in the exercise of that discretion.

Third Issue – Erroneous Exercise of Discretion?

[38] At the hearing in the Provincial Court, Judge Buckle suggested to counsel eight specific criteria to guide her discretion. She did not cite direct authority for the criteria. Counsel generally agreed that they were relevant (Final Decision, para. 54). Judge Buckle's Final Decision said:

> [34] As noted above, balancing the interests of privacy, confidentiality or even privilege against other competing interests such as those of law enforcement or the rights of an accused in a criminal prosecution is not new to criminal courts. Courts regularly balance the right of an accused to make full answer and defence against the right of a witness to privacy and confidentiality in the context of applications for production of records held by a third party under s. 278 of the *Code*, *O'Connor* and *McNeil*. Courts also balance the interests of law enforcement against various levels of confidentiality in the context of search warrants or production orders on entities such as media or medical professionals. Not all of the factors and principles identified in these contexts are relevant to the balancing to be done in this case. Here the right of an accused to make full answer and defence and the concept of innocence at stake are not directly or immediately at issue. The Ombudsman's statutorily protected confidentiality must be balanced against the legitimate interests of law enforcement in investigating crime.
>
> [35] I have concluded that the following considerations are relevant to the balancing process in this case:
>
> 1. The unique role of the Office of the Ombudsman, including its purpose, mandate and statutory protections, and the rationale for those protections;
>
> 2. The level of sensitivity and confidentiality of the information;
>
> 3. The potential harm that might be done by production, both to the role of the Ombudsman and the individuals or entities to whom the information relates;
>
> 4. The recognized moral and sometimes legal duty of third parties to assist with criminal investigations;
>
> 5. The nature and seriousness of the crime under investigation;
>
> 6. The relevance and necessity of the information to the investigation and the impact of non-production on the investigation;
>
> 7. Whether the information sought is already known to the police or is available from any other source; and
>
> 8. Are there conditions or restrictions that can be put in place to reduce the impact of an Order on the recipient.

[39] Judge Buckle's reasons then spoke to each criterion.

[40] As noted earlier, the reviewing court is to consider whether Judge Buckle erred in principle by applying the wrong criteria. The reviewing court does not recalibrate the scale by assigning different weights to the proper criteria.

[41] My concern is that the sources mentioned for Judge Buckle's criteria did not include the leading authorities on exceptions to privilege.

[42] The Supreme Court of Canada has addressed the rationale for exceptions to privilege. Earlier, I cited passages from *McClure* and *Smith v. Jones*. At issue here is how a judge may authorize an encroachment on a confidence that is "protected by law", a sibling of privilege. If there is no authority directly on point, then the criteria may be deduced and adapted from the principles established generally by the authorities on exceptions to privilege.

[43] I mention this as a concern because, in response to a question from the bench, counsel for the Crown said that the discretion under s. 487.0193(4)(b) should be exercised as freely to assist a police investigation as to sustain the accused's right to make a full answer and defence. With respect, I disagree with that suggested symmetry. In *McClure*, Justice Major premised the exception to solicitor-client privilege on the accused's right to make full answer and defence, an element of fundamental justice under the *Charter of Rights and Freedoms*. A police officer's authority to investigate, though fully legitimate, is not entrenched in the *Charter*. One may deduce from *McClure* that vindication of a *Charter* right to full answer and defence is a weightier criterion than a police officer's investigative strategy.

[44] Nonetheless, there is no basis to overturn the Varied Production Order. I say this for three reasons.

[45] First, none of the eight criteria cited by Judge Buckle is erroneous in principle. They speak to the balance between law enforcement and the Ombudsman's need for confidentiality. That balance is central to s. 487.0193(4)(b).

[46] Second, Judge Buckle's Final Decision said:

> [50] The most compelling evidence under this factor, in my opinion, is Cst. Ross' opinion that the information contained in some of the interviews could include exculpatory information which would impact his decision to lay charges or not.

The Judge neither cited *McClure* and *Smith v. Jones* nor adapted a criterion from "innocence at stake". But she considered a related exculpatory factor under her criterion # 6 – "the impact of non-production".

[47] Third and most important is that Judge Buckle's Varied Production Order applied a proportionality test.

[48] Proportionality inheres in a legal balancing exercise. The challenged interest is infringed no more than necessary to sustain the vindicated interest. *R. v. McNeil*, [2009] 1 S.C.R. 66, one of the authorities cited by Judge Buckle, dealt with the balance of privacy and full answer and defence in the context of third party records. Justice Charron for the Court said:

> 5.2.2 Guarding Against Unnecessary Intrusions Into Privacy Interests
>
> …
>
> [43] … As concluded in the Martin Report, at p. 181 …
>
> > The privacy of the victim and any other witnesses must yield to preparing a full answer and defence. But it need not yield any further. The Committee considers that, provided the making of full answer and defence is not impaired, it is desirable to permit limitations on the use of disclosure materials that recognize the privacy interests of victims and witnesses.
>
> [44] The same applies in respect of police disciplinary records, or any other third party records. The court should ensure that a production order is properly tailored to met the exigencies of the case but do no more. …

[49] If proportionality restricts access by an accused, despite his *Charter* right to make full answer and defence, then it also should constrain a police investigation that encroaches on a legally protected confidentiality.

[50] Judge Buckle's Final Decision said:

> [47] … In his affidavit and evidence before me, Cst. Ross indicated that he does not believe there are any documents in the possession of the Ombudsman that do not exist elsewhere. Further he acknowledges that many if not most of the same witnesses have already been identified and interviewed (or can be interviewed) by the police.
>
> …
>
> [52] … the Respondent [the Crown] has argued that information without attribution would still be of use to law enforcement. As a result, the identity of those who co-operated with the Ombudsman's investigation could be protected. This would significantly reduce the negative impact on the Office of the Ombudsman.
>
> …

> [57] … However, in this case the information is not sensitive personal information and the Production Order can be varied so that it does not identify individuals. That significantly reduces any negative impact on the public's confidence in the Office of the Ombudsman.
>
> [58] That limited impact must be balanced against the public interest in ensuring that law enforcement can investigate criminal allegations, particularly in cases of serious criminal allegations like the one here. …

[51] The Varied Production Order requires only that the Ombudsman "produce a document that provides a summary" of: (1) information that suggested knowledge of false claims, and (2) the "number of individuals" from the Government's Department who provided information to the Ombudsman (above, paras. 11). Names of informants and texts of statements are not producible.

[52] The Varied Production Order allows the police officers to perceive gaps in their own investigation, that the officers can then address directly with witnesses, without enlisting the Ombudsman as the police's interviewing agent. This is a principled application of proportionality that significantly relieves the sting of disclosure.

Conclusion

[53] Judge Buckle's Final Decision made no error of principle, and her exercise of discretion caused no patent injustice. I agree with Justice Stewart's dismissal of the Ombudsman's motion.

[54] I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred: Hamilton, J.A.

Bryson, J.A.