C.A. No. 02854

NOVA SCOTIA COURT OF APPEAL

Matthews, Chipman and Roscoe, JJ.A.

Cite as: McLaughlin v. Halifax-Dartmouth Bridge Commission, 1993 NSCA 202

BETWEEN:

PETER GORDON McLAUGHLIN Appellant	)	Alan V. Parish for the Appellant
- and -	)	Harvey L. Morrison for the Respondent
THE HALIFAX-DARTMOUTH BRIDGE COMMISSION Respondent	)	Appeal Heard: October 6, 1993
	)	Judgment Delivered: November 9, 1993

THE COURT: Appeal allowed; the decision of the trial judge shall be reversed; the application by the appellant, dated January 15, 1993, shall be granted; there shall be no order for costs on the appeal or on the hearing of the application, and costs paid by the appellant to the respondent as ordered by the trial judge shall be refunded, per reasons for judgment of Roscoe, J.A.; Matthews and Chipman, JJ.A. concurring.

ROSCOE, J.A.:

This is an appeal from a decision of a judge of the Supreme Court who dismissed an application under the **Freedom of Information Act**, S.N.S. 1990, c. 11. The appellant brought the application pursuant to sections 11 and 12 of the **Act** after he had been denied release of information concerning the Halifax-Dartmouth Bridge Commission.

The appellant, a reporter with the Daily News, had applied to the Bridge Commission for the release of Minutes of all its meetings for the years 1969 and 1973. He also sought copies of the Minutes, details and documents relating to the financing of the bridge debt and, in particular, information regarding loans with foreign banks.

The Halifax-Dartmouth Bridge Commission is a body corporate incorporated under the **Halifax-Dartmouth Bridge Commission Act**, S.N.S. 1950, c. 7 and continued under R.S.N.S. 1989, c.192. The objects and purposes of the Commission are to construct and maintain bridges across Halifax Harbour. The Commission consists of a Chairman, a Secretary and three members appointed by the Governor in Council, two members appointed by the City Council of Halifax, one appointed by the City Council of Dartmouth, and one appointed by the Council of the County of Halifax.

The information sought by the appellant was refused by the General Manager and Chief Executive Officer of the Commission on the basis that the Commission was not a "department" as defined in the **Freedom of Information Act**. The trial judge confirmed that decision.

The issue on this appeal is whether or not the Commission is a department under s. 3(b) of the **Freedom of Information Act** or, more specifically, whether or not the Commissioners are public officers under s. 3(b)(ii) of the **Freedom of Information Act**.

Section 3(b) of the **Act** is as follows:

"3 In this Act,

(a) . . .

> (b) 'department' or 'Government' means a department, board, commission, foundation, agency, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which
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> (i) are appointed by order of the Governor in Council, or
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> (ii) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,
>
> but does not include the Office of the Legislative Counsel;"

The appellant concedes that s. 3(b)(i) does not apply to this matter and that the members of the Commission are not "servants of the Crown". It is argued on behalf of the appellant that the members of the Commission are "public officers in the discharge of their duties". The appellant says that the duties of the Bridge Commissioners are duties requiring them to act in the public interest and therefore the definition of "department" includes the Commission.

The respondent submits that the expression "public officers and servants of the Crown" is a term of art in which the phrase "of the Crown" modifies both of the terms "public officers" and "servants". It is submitted therefore that public officers under s. 3(b)(ii) must be public officers of the Crown. The respondent further submits that even if the words "of the Crown" do not modify "public officers" that the Commissioners appointed by the municipal units are not public officers in the discharge of their duties as Commissioners.

The trial judge concluded his brief decision as follows:

> "Some of the Commission members are appointed as Commissioner independent of any control or reporting responsibility to their appointing authority or the Province and are not in the discharge of their duties as bridge commissioners, public officers or servants of the Crown."

In order to interpret s. 3(b)(ii) of the **Freedom of Information Act** it is helpful to examine the object and purpose of the **Act** so that the particular section can be read in light of the object. Section 2 of the **Freedom of Information Act** is as follows:

> "2 The purpose of this Act is to
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> (a) ensure that the Government is fully accountable;
>
> (b) 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,
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> (ii) ensure fairness in government decision-making,
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> (iii) permit the airing and reconciliation of divergent views;
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> (c) provide for an independent review of decisions on the disclosure of government information;
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> (d) protect the privacy of individuals with respect to information about themselves held by government, and provide those individuals with a right of access to that information."

Section 4 of the **Act** provides that information in the custody or control of a department is accessible unless it is exempt pursuant to s. 5. The **Act** is very similar to the **Access to Information Act (Canada)**, R.S.C. 1985 c. A-1, as amended. The purpose of the federal **Act** as stated in s. 2 thereof is almost identical to the provincial legislation. The scheme of the federal **Act** is also comparable except that instead of a definition such as that contained in s. 3(b)(ii), the federal **Act** applies to the departments, bodies and offices listed in a schedule to the **Act**.

Access statutes are a relatively new phenomenon in Canada. The first access statute was the **Freedom of Information Act** of Nova Scotia passed in 1977. A comparison of the 1977 **Act** with the 1990 **Act** reveals that the information now available to the public is much more extensive. The

enactment in many provinces and by the federal government of access to information statutes can, I believe, fairly be attributed to an acknowledgement by the legislators that in a democratic society individuals are entitled to the disclosure of information held by the government in order to effectively participate in the democratic process. It is also a recognition that governments are accountable to the electorate.

In the first case dealing with the federal **Access to Information Act, Re Maislin Industries Ltd. and Minister for Industry, Trade and Commerce** (1984), 10 D.L.R. (4th) 417 (F.C.T.D.) Jerome A.C.J. said at p. 420:

> " There was no disagreement that the burden of proof rests upon the applicant Maislin. It should be emphasized, however, that since the basic principle of these statutes is to codify the right of public access to government information, two things follow: first, that such public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the government. It is appropriate to quote s. 2(1):
>
> > 2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

I agree with that statement. A similar view is expressed in the following passage from **"The New Access to Information and Privacy Act: A Critical Annotation"** by Professor T. Murray Rankin (1983), 15 Ottawa Law Review, 1 at p. 3:

> " Both the Access to Information Act and the Privacy Act contain purpose clauses. Rather than taking the form of a mere hortatory preamble, it is significant that the purpose clause is contained in the main body of each statute. In the Access to

> Information Act, for example, section 2 enunciates a clear statement of the three main components of any worthwhile freedom of information statute:
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> 1. a clear statement of the public's right of access to information in government files;
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> 2. that necessary exception to the right of access should be limited and specific; and
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> 3. that decisions on disclosure . . . should be reviewed independently of government.
>
> A purpose clause of this sort is not a common feature in Canadian legislation; even preambles are increasingly infrequent. It is suggested that the entire statute should be read in light of this clear statement of legislative intent. If any ambiguity exists, this provision, reinforced by the mandate contained in the Interpretation Act for liberal construction of statutes, should mitigate in favour of disclosure."

The Nova Scotia **Freedom of Information Act** should be construed liberally in light of its stated purpose.

In determining whether or not the Bridge Commission is included in the definition of "department" contained in s. 3 of the **Act** it should be noted that the first part of the definition contains a wide range of types of government institutions and is indicative of the intention of the legislature to have the **Freedom of Information Act** broadly applied.

It is in this context that the definition of "department" must be interpreted. The first argument of the respondent is that the words "of the Crown" modify the words "public officers" as contained in the definition. The cases cited by the respondent in support of this argument include: **McArthur v. The King**, [1943] Ex. C. R. 77; **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416, and **Bear v. John Smith Indian Band** (1983), 148 D.L.R. (3d) 403. All deal with the term "officer or servant of the Crown". Those cases do not discuss the meaning of the term "**public** officers or servants of the Crown" as used in the **Freedom of Information Act**. The two cases cited by the respondent that do use the term "public officers" are **McKnight v. Province of New Brunswick** (1978), 21 N.B.R. (2d) 297 and **Haché v. New Brunswick** (1989),

97 N.B.R. (2d) 78. However, in those cases the term referred to is "public officers **and** servants of the Crown". Neither of those cases analyze the meaning of the phrase or otherwise determine whether or not "of the Crown" modifies "public officers".

I do not agree that the term "public officers or servants of the Crown" is a term of art. An extensive computer search of a broad Canadian database has not provided any case where that exact phrase is used other than the trial decision herein, **Haché** and one other case where there is likewise no discussion of the meaning of the phrase. (See **Manitoba v. Christie, MacKay and Co.**, unreported, May 13, 1992, Manitoba Q.B., No. 92-01-60305.) The words "public officers or servants of the Crown" do not appear in either the Revised Statutes of Canada or the Revised Statutes of Ontario. (The Statutes of Nova Scotia unfortunately have not been indexed for computer searches.)

If the words "of the Crown" are intended to modify the words "public officers" it is not self-evident or even apparent on the face of the legislation. It is necessary, therefore, to determine the issue by recourse to other aids in the interpretation of statutes.

One of the rules of interpretation of statutes is that the same words have the same meaning and, conversely, different words have different meanings. Another obvious rule is that every word means something. The word "public" must have a meaning. See E.A. Driedger, Construction of Statutes, Butterworths,second edition, 1983, at p. 93.

Another rule is explained by Driedger at page 111:

> ". . . simple logic tells us that where a class word is associated with a word that would ordinarily be a member of that class, then the class word does not for the purpose of the statute include the mentioned member. Thus, in the expression 'land and improvements' the implication is that 'land' does not include 'improvements'. Conversely, in the expression 'land except buildings' the implication is that 'land' includes 'buildings'."

The meaning of the term "public officers" must be something different from the meaning "servants of the Crown" otherwise the inclusion of the term "public officers" would be redundant.

What then is a "public officer"? In the **Interpretation Act**, R.S.N.S. 1989, c. 235 (as amended), s. 7(1)(w) is as follows:

> " 7 (1) In this Act and in any other enactment
>
> . . .
>
> (w) 'public officer' includes a person in the public service of a province;"

Sections 17, 18 and 19 of the **Interpretation Act** also refer to "public officer".

The respondent submits that the word "includes" used in s. 7(1)(w) of the **Interpretation Act** is exhaustive and says that therefore the municipal appointees cannot be public officers because they are not in the public service of the Province. Reference is made to **Dilworth v. Commissioner of Stamps**, [1989] A.C. 99 (P.C.) to support this argument. Driedger says at p. 18: "the standard guide for draftsmen is that *means* restricts and *includes* enlarges" and after quoting from **Dilworth v. Commissioner of Stamps** says "this usage violates standard practice of draftsmen in Canada". Driedger ends the discussion at p. 20 by saying: "it seems to be generally accepted now that *means* is restrictive and *includes* is enlarging". It is clear, therefore, that, as a result of the definition in s. 7(1)(w), the term "public officer" includes persons in addition to those who are members of the civil service.

I agree with the submission of the respondent that the definition of "public officer" in s. 13(b) of the **Public Offices and Officers Act**, R.S.N.S. 1989, c. 373, is not helpful to the present situation since that definition is preceded by the words "in this part". Additionally, the **Public Offices and Officers Act** is not ***in pari materia***, that is, of the same subject matter as the **Freedom of Information Act**. It is generally accepted (see Driedger p. 158)

that unless two statutes are ***in pari materia*** one should not be used to explain the other.

While other statutes may not be helpful in determining the meaning of words in a statute, judicial decisions on the meaning of words can be useful (see Driedger p. 158). This was done in **R. v. Jollimore** (1950), 12 C.R. 204 (N.S.), a case dealing with whether or not a member of the R.C.M.P. was a public officer as defined in the **Criminal Code**. In that case Doull J., speaking for the Supreme Court ***in banco***, said:

> " Apart from statute the term 'Public Officer' is a wide term.
>
> The definition given in **Henley v. The Mayor of Lyme**, 5 Bing. 92, is still quoted in Halsbury as authoritative:
>
> > 'Every one who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise'. "

Smith v. Christie (1920), 55 D.L.R. 68 (Alta. S.C.A.D.), is a case dealing with whether or not a veterinary inspector was a public officer entitled to the benefit of a limitation period contained in the Rules of Court of Alberta. In that case, Stuart, J. quotes **Henley v. The Mayor of Lyme** and states:

> ". . . Then, what constitutes a public officer? In my opinion everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer."

More recent cases have also considered the meaning of "public officer". In **Hill v. University College of Cape Breton** (1991), 104 N.S.R. (2d) 287 (N.S.S.C.), Davison J. considered the issue as to whether or not the President of the University College of Cape Breton was a public officer as defined in the **Interpretation Act**. Although the **Hill** case deals with the term "public officer" in the context of a wrongful dismissal action and whether or not the University was subject to the duty to act fairly, it does concern the question of how an autonomous body such as the University can be regarded to be a public body. Davison J. relies on several Supreme Court of Canada

decisions in coming to his conclusion including: **Knight v. Board of Education of Indian Head School**, [1991] 1 S.C.R. 653; **Cardinal and Oswald v. Direction of Kent Institution**, [1985] 2 S.C.R. 643, and **McKinney v. University of Guelph**, [1992] 3 S.C.R. 229. Davison J. concluded his analysis on the issue as to whether the President was a public officer as follows (at p. 295):

> " In the proceeding before me, it is clear that the Board is a statutory body created by statute and given the power to act by statute. It is further clear that the President's position is created and defined by statute. The bylaws, which are statutory instruments, make provisions for some of the duties of the President and sets forth his responsibilities and the manner in which he is to be appointed. All of this indicates that the statute has characterized the position of President as an office holder and that his duties and responsibilities are set out by the statute. He occupies an office created by statute and, although there are no powers in the bylaws for removal, section 18(1) of the **Interpretation Act**, to which there has been previous reference, would apply. The relationship between the parties is not 'pure master and servant'. "

In **Houle v. Minister of Employment and Immigration** (1987), 9 F.T.R. 248, Martin J. was considering whether a Vice-Chairman of the Immigration Appeal Board was a public officer within the meaning of the federal **Interpretation Act**. In that case, Martin J. held that the definition of "public officer" in the **Interpretation Act** is an inclusive one and it thus extends but does not exclude the common law meaning of the term established in **Henley v. Mayor of Lyme**.

Since the words "public officers" in s. 3(b)(ii) of the **Freedom of Information Act** are preceded by the words "in the discharge of their duties are", the duties of the Bridge Commissioners should be examined to determine whether or not the Commissioners are performing public duties. The **Halifax-Dartmouth Bridge Commission Act** enumerates several powers of the Commissioners which include the power to construct and maintain bridges, to charge and collect rates and tolls, to sell property, to expropriate property, to make bylaws, rules and regulations the breach of which can be prosecuted under the **Summary Proceedings Act**, and a variety of other

powers, some of which are subject to the approval of the Governor in Council. In addition, the Commission is deemed to be a public utility within the meaning of the **Public Utilities Act** and can be appointed a traffic authority pursuant to the **Motor Vehicle Act**. The Commission is required to make an annual report to the Province, the City of Halifax, the City of Dartmouth and the County of Halifax, which report must include an audited statement. The Commissioner's remuneration is determined by the Governor in Council.

In my view, it is clear that the Commissioners are acting on behalf of the public in the discharge of their duties and powers. The Bridge Commission is not a private corporation. It is similar to the university board in the **Hill** case, in that although members are appointed from various sectors, it is a statutory body created by statute and given the power to act by statute. The Commissioners' positions are created and defined by the statute. In my opinion they are public officers.

The fact that some of the Commissioners are appointed by municipal units and not by the Province or the Governor in Council does not, in my opinion, affect their status as public officers. Section 3(b)(ii) only applies to public officers or servants of the Crown **not** appointed by the Governor in Council. The fact that the positions are created by the Legislature and delegated statutory power has been conferred on them is what makes the Commissioners public officers.

This opinion apparently coincides with that of Ian MacF. Rogers, Q.C., the author of **"The Law of Canadian Municipal Corporations"**, 2nd edition 1971, (looseleaf service 1993) Carswells, as is evident from the following passage at p. 284:

> " Municipal officers and other officials may also be public or statutory officers in that, in addition to the duties prescribed by the statute requiring their appointment, they are obliged to perform duties by virtue of other statutes which are of a governmental and not of a municipal nature. They are appointed in this respect for the carrying on of the good government of the province, performing public services for the

> benefit not of the municipality in its corporate capacity but of the inhabitants and those of the province generally. Such officers are ***personae designatae*** in discharging their statutory duties and do not act as agents of the corporation. So when the municipal treasurer and the municipal clerk are acting in obedience to a statute imposing duties of a public character on them, the principle of ***respondeat superior*** does not apply to make the corporation responsible for their actions. Law enforcement officers appointed by the municipality fall into the same class."

The trial judge focussed not on the duties and powers of the Commissioners but rather on the fact that the Commissioners were independent of any control by the bodies that appointed them to the Commission. In my view the definition of "department" is sufficiently wide to include independent boards, commissions, agencies and foundations. Section 3(d) of the **Freedom of Information Act** is as follows:

> " (d) 'minister' means a member of the Executive Council and, in the case of a board, commission, foundation, agency, association or other body of persons not reporting directly to a minister in respect to its day-to-day operations, means the chief executive officer;"

This definition implies that it is not necessary for an independent commission to be reporting directly to a minister in order to be subject to the **Freedom of Information Act**. The Bridge Commissioners do report to the municipalities and the Province annually and the fact that they are not under the control of the Province or the municipalities in the exercise of their day-to-day duties is not determinative. If the Bridge Commission was subject to the control of the municipal units or the Province, presumably the information that is sought by the applicant in this case would be available from the Province or the municipal units. The **Municipal Act**, R.S.N.S. 1989, c. 295, as amended, in s. 48 provides that the "books, assessment rolls, records and accounts of the municipality shall be open at all reasonable hours and without payment of any fee to the inspection of any person".

I conclude that the Commissioners are public officers as defined in the **Act** and that the Halifax-Dartmouth Bridge Commission is a department

subject to the **Act**. This conclusion is in keeping with the object and purpose of the **Act** as interpreted liberally and, as indicated by Associate Chief Justice Jerome in the **Maislin Industries** case, "ought not be frustrated by the courts except upon the clearest grounds". The Halifax-Dartmouth Bridge Commission is, in effect, an arm of government. Its duties and its operations are of concern to many citizens of the Province who pay for it as users of the bridges and as taxpayers. It is, in my view, appropriate that it is subject to the **Freedom of Information Act.** The **Act** provides in s. 5 numerous exemptions from the **Act** so that personal information, policy options, trade secrets, privileged information, and numerous other categories of sensitive material will not be disclosed.

The respondent, in my view, had the burden of persuasion and the trial judge erred in law by finding that the burden had been met. The decision of the trial judge should be reversed and the application by the appellant, dated January 15,1993, should be granted. I would not order costs on the appeal or on the hearing of the application. Costs paid by the appellant to the respondent as ordered by the trial judge should be refunded.

Roscoe, J.A.

Concurred in:

Matthews, J.A.

Chipman, J.A.