NOVA SCOTIA COURT OF APPEAL
Citation: ***Nova Scotia (Education) v. Griffiths***, 2005 NSCA 91

Date: 20050609
Docket: CA 246680
Registry: Halifax

Between:

Nova Scotia Department of Education

Appellant

v.

Tom Griffiths

Respondent

- and -

A.B. and C.D.

Interveners

Judge:	The Honourable Justice Jamie W. S. Saunders
Application Heard:	June 2, 2005, in Halifax, Nova Scotia, In Chambers
Held:	Application for intervention allowed with directions
Counsel:	Rebecca L. Pitts & Jane O'Neill, for the applicants/interveners Edward A. Gores, for the appellant Bradley H. Ridge, for the respondent

Decision:

[1] At the conclusion of the hearing I informed the parties of the outcome and said detailed written reasons would follow. These are my reasons.

[2] First, some background. A.B. and C.D. applied for an order pursuant to **Civil Procedure Rule** 62.35 giving them leave to intervene in the appeal bearing CA No. 246680, amongst other forms of relief.

[3] Matters began when the respondent, Thomas Griffiths ("Griffiths") made a request for information from the appellant, Nova Scotia Department of Education ("appellant") under the **Freedom of Information and Protection of Privacy Act**, S.N.S. 1993, c. 5 ("***FOIPOP* Act**"). Griffiths is an active member of the International Brotherhood of Electrical Workers' Union ("IBEW"). He asked the Department to disclose the names of individuals on the current list of persons who hold certificates of qualification for the construction electrician trade in Nova Scotia.

[4] The Department refused to disclose this information on the basis that it would constitute an "unreasonable invasion of personal privacy of third parties" under s. 20 of the ***FOIPOP* Act**. The third parties at issue are those individuals who hold certificates of qualification for the construction electrician trade in Nova Scotia. Both A.B. and C.D. hold such certificates and are third parties under the ***FOIPOP* Act**.

[5] Griffiths sought a statutory review of that decision. In a report dated July 16, 2004, the Review Officer recommended disclosure of the sought-after information. The appellant declined the recommendation and again refused to disclose the information. Griffiths then exercised his right of appeal to the Supreme Court of Nova Scotia pursuant to s. 41 of the ***FOIPOP* Act**. In an oral decision delivered February 22, 2005, Robertson, J. allowed the appeal. An order was issued by the prothonotary on April 18, 2005, which directed that the requested list of names be released within 30 days, barring any further appeal.

[6] A.B. and C.D. were not given any notice by the Department of the original request made by Griffiths, nor any notice of his appeal before Justice Robertson. They first learned of the matter on or about March 18, 2005. Had A.B. and C.D. been given notice of the appeal before Justice Robertson, they swear that they both would have appeared as parties to object to the disclosure of their names on the ground that it constitutes an unreasonable invasion of their personal privacy.

[7] A.B. and C.D. originally applied to be added as parties for the purpose of bringing an appeal from the judgment and order of Robertson, J. (CA No. 245711). My colleague, Justice Bateman, heard their application on May 5, filing written reasons on May 11, 2005. As a judge of this court, sitting in chambers, Bateman, J.A. concluded that she did not have jurisdiction to add A.B. and C.D. as parties for the purpose of commencing an appeal. She adjourned the application and directed A.B. and C.D. (then having status as "proposed interveners/applicants") to make an application to the Supreme Court to be added as parties pursuant to **CPR** 5.04 for the purpose of bringing an appeal. Justice Bateman also directed that if the Department filed a notice of appeal, A.B. and C.D. might then apply to her or any judge of this court for intervener status.

[8] Following Justice Bateman's decision, on May 17, the Department filed its notice of appeal, stating the following grounds:

> 1. the Learned Justice erred in finding that s. 20(3)(d) of the *Freedom of Information and Protection of Privacy Act* (the "*Act")* did not apply to exempt the requested personal information from disclosure as being personal information which relates to employment or educational history;
>
> 2. the Learned Justice erred in finding that s. 20(3)(i) of the *Act* did not apply to exempt the requested personal information which is to be used for solicitation by the Respondent, Tom Griffiths;
>
> 3. the Learned Justice erred by failing to properly consider and apply s. 20(2)(f) of the *Act*;
>
> 4. the Learned Justice erred in her interpretation of s. 20(4)(b) of the *Act*;
>
> 5. the Learned Justice erred in finding that, upon balancing the factors enumerated in s. 20 of the *Act*, the disclosure of the personal information would not constitute an unreasonable invasion of a third party's personal privacy; and
>
> 6. such other grounds as may appear.

The Department asked that the judgment and order appealed from be varied such that the requested list of names not be disclosed to the respondent, Griffiths.

[9] On May 31 Griffiths filed a notice of contention urging that the judgment appealed from should also be affirmed on the basis:

1. That the information requested must be disclosed under s. 20(4)(h) of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, because it "reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body..."; and

2. Such other grounds as may appear.

[10] A.B. and C.D., as (then) proposed interveners brought an application before me in chambers seeking leave to intervene in the Department's appeal and further that they be granted leave to use the pseudonyms, A.B. and C.D. for the purpose of their participation in this appeal and any related proceedings.

[11] **CPR** 62.35 reads:

> 62.35. (1) Any person, including any person who intervened in a proceeding pursuant to Rule 8, interested in an appeal, may, by application in accordance with Rule 62.31 apply to a Judge in Chambers for leave to intervene upon such terms and conditions as the Judge may determine.
>
> (2) An application for intervention shall be filed and served within 20 days after the filing of the notice of appeal.
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> (3) An application for intervention shall briefly
>
> (a) describe the intervener and the intervener's interest in the appeal;
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> (b) identify the position to be taken by the intervener on the appeal; and
>
> (c) set out the submissions to be advanced by the intervener, their relevancy to the appeal and the reasons for believing that the submissions will be useful to the Court and different from those of other parties.
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> (4) An intervener has the right to file a factum.
>
> (5) Unless otherwise ordered by a Judge or the Court, an intervener
>
> (a) shall not file a factum that exceeds 25 pages;
>
> (b) shall be bound by the appeal books and may not add to them; and

(c) shall not present oral argument.

[Underlining mine]

[12] I am satisfied that A.B. and C.D. have a legitimate interest in the appeal. They say they were not given notice, to which they were statutorily entitled, and that had they received such notification they would have appeared as parties to object to the disclosure of their names as constituting an unreasonable invasion of their personal privacy.

[13] As their counsel Ms. Pitts asserted at the hearing, Griffiths' "real purpose" in seeking disclosure of the list of some 3,300 names is not "safety" as represented; but rather to "shop" for union membership. A.B. and C.D. say they were not given written notice of the appeal before Robertson, J. by the Department as required by s. 41(2) of the ***FOIPOP*** **Act** and therefore were denied the opportunity to make submissions before the judge as was their entitlement pursuant to s. 41(4).

[14] Consequently, if granted leave, A.B. and C.D. say they would then argue that Justice Robertson's judgment was made without jurisdiction, on account of the Department's failure to give the third parties written notice as statutorily required. They would ask this court to set aside the judgment and order in the court below, as having been made without jurisdiction, and remit the case back to the Supreme Court for a new hearing after the requisite written notice to third parties was given.

[15] In **1874000 Nova Scotia Ltd. v. Adams** (1996), 156 N.S.R. (2d) 208, Hallett, J.A., at page 217 referred to the factors typically considered in an intervention application. See, as well, **Dickie v. Nova Scotia (Department of Health)** [1997] N.S.J. No. 17 (C.A.); and **NsC Diesel Power Inc. (Re)** [1998] N.S.J. No. 92 (C.A.). Such circumstances include whether the intervention would unduly delay the proceedings; the possible prejudice to the parties if the intervention were granted; whether the intervention would widen the *lis* between the parties; the extent to which the position of the intervener may be already represented and protected by one of the existing parties; and whether the intervention would transform the court into a political arena.

[16] By virtue of the restrictions I will impose, I am satisfied that the participation of A.B. and C.D. will not delay the proceedings. They are bound by the record on appeal as between the appellant and the respondent and will not be permitted to supplement that record. Their written factum

will be limited to 25 pages. They will not be entitled to present oral argument at the appeal unless granted leave by the panel hearing it. I can see no prejudice to the parties in granting the intervention. Nor do I think that the intervention will significantly widen the scope of the appeal. In fact, I am satisfied that A.B. and C.D. have a particular interest and perspective, on an important question of law and jurisdiction, and may be expected to make a useful contribution to the court's consideration of the appeal. Their position and interests are distinct, and should be defended by their own counsel, without reliance upon the appellant Department.

[17] At the hearing in chambers I rejected counsel for Griffiths submission that it was "essential" that Griffiths be allowed to cross-examine A.B. and C.D. on their affidavits so as to "test" the *bona fides* of their "interest" and whether *in fact* no form of notice had been received. Counsel for the respondent suggested that A.B. and C.D. may well have had some form of *constructive* notice of these proceedings and that he ought to be able to challenge the affiants under cross-examination.

[18] This court is ill-suited to conducting hearings where *viva voce* evidence would be presented, parties examined and cross-examined, and arguments then made concerning the credibility of witnesses. Such inquiries are really the province of trial judges in courts of first instance. They do not lend themselves to an appellate court's rules of procedure. One might ask rhetorically; before whom would such a hearing take place: an appellate judge sitting in chambers? or a full panel? If the former, any conclusions reached by that single judge sitting in chambers with respect to credibility would, I suspect, be entirely irrelevant to any panel subsequently seized with the case. Similarly, if witnesses were examined and cross-examined in the presence of a panel of this court, one wonders what rules or customs would apply to the assessment of credibility, both individually and collectively, to say nothing of the weight to be attached to such evidence. That is not to say that such an eventuality will never arise. But it is to say that procedures to deal with it would only be considered in extraordinary circumstances. This is not such a case.

[19] I see no prejudice to the respondent in being refused leave to cross-examine A.B. and C.D. in this court in matters relating to this appeal.

[20] Section 41(2) of the ***FOIPOP*** **Act** obliges the head of a public body who has refused a request for access to a record, to immediately upon receipt of a notice of appeal by an applicant, "<u>give written notice of the appeal to any</u>

third party" (Underlining mine). In my opinion, the single ground of appeal relied upon by the interveners raises a narrow and very specific question of law: whether the Department's failure to give the requisite notice, resulted in the trial judge's decision being made without jurisdiction.

[21] Consequently, proof of written notice, (or as in this case, the failure to give it) as required by statute, ought not be in dispute between the parties on appeal. I indicated to counsel at the hearing that I expected they would be able to agree on this point and jointly prepare a form of stipulation to that effect which might then be included, by agreement as part of the record on appeal and commented upon in their facta.

[22] Failing agreement, counsel will come back before me in chambers to resolve this particular issue.

[23] Finally, I also declined counsel for the respondent's suggestion that the full names of A.B. and C.D. should be disclosed because either he "was quite certain he was already aware of their identities" in any event, or, because he was "willing to consent" to their names "being removed" from the sought-after list of some 3,300 people.

[24] The disclosure of the names of A.B. and C.D. through the appeal process would obviously defeat the very purpose of their appeal. Assuming, without deciding, that they had a "privacy right" to preserve their anonymity, together with a "statutory right" to notification and to attend and participate before Robertson, J. at the hearing, it is, with respect, a hollow and rather meaningless gesture, considering the circumstances of these proceedings and the grounds raised on appeal, to propose that the 3,298 *other* persons' names be provided, but that A.B. and C.D. could have their names left off the list.

[25] It was for these reasons that I allowed the application. I will grant an order with the following specific directions:

(i) The intervenors are granted leave to intervene in the appeal bearing CA No. 246680 to raise and to make written submissions in respect to the following ground of appeal:

> that the judgment was made without jurisdiction as notice of the appeal was not given to third parties as required by section 41(2) of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5;

(ii) The intervenors may file a factum that does not exceed 25 pages;

(iii) The intervenors shall be bound by the appeal books and may not add to them;

(iv) The intervenors shall not make any submissions in respect to the grounds of appeal stated by the appellant, Department of Education, unless the panel hearing the appeal otherwise orders;

(v) The question whether or not the intervenors ought to be granted leave to make oral submissions at the hearing will be left to the panel hearing the appeal;

(vi) The intervenors are granted permission to use the pseudonyms, A.B. and C.D. for the purpose of their participation in the appeal bearing CA No. 246680; and

(vii) The following dates for compliance are fixed:

Appeal Book: June 15, 2005

Appellant's Factum: August 26, 2005

Intervener's Factum: September 9, 2005

Respondent's Factum (including argument with respect to the Respondent's notice of contention): September 30, 2005

Appellant's Reply to the Respondent's Notice of Contention: October 11, 2005

The appeal will be heard: Wednesday, November 16, 2005 @ 2:00 p.m.