NOVA SCOTIA COURT OF APPEAL
Citation: Proposed Appellants v. Griffiths,
2005 NSCA 85

Date: 20050511
Docket: CA 245711
Registry: Halifax

Between:

Proposed Appellants

Appellant

v.

Tom Griffiths

Respondent

- and -

Nova Scotia Department of Education

Respondent

Judges:	The Honourable Justice Nancy Bateman
Application Heard:	May 5, 2005, in Halifax, Nova Scotia, in Chambers
Held:	Application adjourned with directions.
Counsel:	Jane O'Neill and Rebecca Pitts, for the proposed appellants Kimberley Turner, Q.C., for the respondent, Griffiths Edward Gores, for the respondent, Nova Scotia Department of Education

Decision Providing Directions:

[1] The proposed appellants have applied to this Court to be added as parties to a proceeding in the Supreme Court for the purpose of commencing an appeal. Although the appellants initially urged that a Chambers judge of this Court has authority to make such an order, it is now conceded that if such power exists, it rests with a panel of the Court not a judge sitting alone. (See **Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch**, [1986] 1 S.C.R. 549; **Labourers' International Union of North America, Local 1115 v. Dexter Construction Co.** (1999), 180 N.S.R. (2d) 129; N.S.J. No. 370 (C.A.)(Q.L.); **Children's Aid Society of Halifax v. R.B.** (2002), 207 N.S.R. (2d) 394; N.S.J. No. 381 (C.A.)(Q.L.)).

[2] Therefore, the application before me is one to refer this matter to a panel of this Court for consideration (**Civil Procedure Rule** 62.31(7)(d)). The intended respondents oppose the application.

[3] Tom Griffiths, one of the intended respondents, made a request for disclosure of information by the intended respondent, the Nova Scotia Department of Education, under the **Freedom of Information and Protection of Privacy Act**, S.N.S. 1993, c.5 ("**FOIPOP Act"**). Mr. Griffiths is a member of the International Brotherhood of Electrical Workers Union. Pursuant to s. 6(1) of the **FOIPOP Act**, he sought the current list of persons in possession of a Certificate of Qualification in the construction electrician trade, including apprentices. The Department refused to provide the names on the basis that it would constitute "an unreasonable invasion of personal privacy of third persons" (s. 20, **FOIPOP Act**).

[4] Mr. Griffiths requested a review of that decision by the FOIPOP Review Officer who recommended the list be provided. It was his opinion the list of names must be disclosed under s. 20(4)(h) of the **Act**, because it "reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body . . .".

[5] The Department declined to follow the recommendation of the Review Officer. Mr. Griffiths appealed to the Supreme Court. Justice Heather Robertson allowed the appeal by oral decision on February 22, 2005. The Order directing disclosure of the information was issued April 18, 2005.

[6] The two intended appellants are said to be persons whose names would be disclosed as holders of a certificate of qualification. The Department did not provide them with notice of the proceeding in the Supreme Court. By

affidavit each deposes that he did not learn of "the matter" until March 18, 2005, which was after the judge had rendered her oral judgment but before the Order was issued. Neither took no steps to intervene in the Supreme Court proceeding at that time nor have they since done so.

[7] The intended appellants say the head of the Department was required to provide them with notice of the appeal to the Supreme Court (ss. 41(2) and 22(1), **FOIPOP Act**). Citing the decision of this Court in **Dickie v. Nova Scotia (Department of Health)** (1997), 156 N.S.R. (2d) 396; N.S.J. No. 17 (C.A.)(Q.L.), they say, absent notice to them, the judgment in the Supreme Court was made without jurisdiction, must be set aside and the matter remitted.

[8] There are 3300 names on the list sought to be disclosed. The Department acknowledges that it did not notify anyone on the list of Mr. Griffiths' appeal to the Supreme Court. The Department submits the **Act** requires notice only "if practicable" and that it was not practicable to notify all 3300 persons (ss. 41(2) and 22(1) above and FOIPOP Reg. 13). There is no evidence before me about the reasons for the Department's decision not to notify the listees and whether it had the current contact information for those persons.

[9] In his affidavit each intended appellant attests to the fact that he holds a certificate of qualification which would include him on the Department's list; that he was not given notice by the Department of the original request for disclosure by Mr. Griffith or of the appeal; that had he had notice of the appeal he would have appeared before Justice Robertson to object to the disclosure; and that he only became aware of the matter on March 18, 2005.

[10] The intended appellants wish to pursue this application without their names being revealed. The very information which they seek to restrain from disclosure is the fact that their names appear on the list. To require them to proceed with the application using their names would defeat its purpose.

[11] Mr. Griffiths says he wishes to cross-examine each affiant on the timing of his knowledge of the proceeding in hopes of establishing that the affiant had actual notice of the request for disclosure. He says that such cross-examination cannot be effective if the affiants' names are withheld from him. Additionally, Mr. Griffiths submits he may have information about an affiant's actual knowledge of the proceeding, but can only determine that if he knows who they are. He further wishes to explore on cross-examination the efforts, if any, each affiant took to intervene in the

Supreme Court proceeding. Mr. Griffiths says, if it is established the affiants made a tactical decision not to intervene until the Supreme Court Order was issued, such may be relevant to this Court's decision to permit them to become appellants.

[12] The intended respondents submit, as well, there is a significant question as to what constitutes "notice" for the purpose of ss. 41 and 22 of the **Act** (and s.13 of the **FOIPOP Regulations**) and whether constructive notice is sufficient.

[13] Justice Robertson's Order delays the release of the information for 30 days, pending an appeal to this Court. The intended appellants are concerned that their time to prevent the release of the information is running out. They submit that is why they have applied to this Court rather than pursuing options in the Supreme Court.

[14] While I appreciate the intended appellants' wish to have this matter considered by this Court before the moratorium on the release of their names expires, I am not satisfied that it is appropriate to refer the application to a panel before they have explored other options. I am particularly concerned that the application to become parties may require the hearing of a substantial amount of *vive voce* evidence, a procedure for which the Supreme Court is far better suited than is this Court.

[15] Additionally, the time for appealing Justice Robertson’s decision has not yet passed. The Department may appeal the Order, in which case the intended appellants can apply to a judge of this Court for leave to intervene (**Civil Procedure Rule** 62.35).

[16] I adjourn the application without day and direct that before it resumes, the intended appellants should exhaust their options in the Supreme Court. This would include an application to that Court, pursuant to **Civil Procedure Rule** 5.04, to be added as parties to the proceeding there. The Supreme Court Order has not yet been appealed and the stay of the release of the information continues to operate. It is open to the intended appellants to argue that the proceeding remains alive in that Court. I offer no opinion on the merits of that argument. Should the intended appellants succeed on that application they will have party status for the purpose of appealing Justice Robertson’s Order. Should that application be dismissed, they would have a right to appeal to this Court from the Order refusing such status.

[17] The intended appellants have asked that I order a further moratorium on the disclosure of the information, pending their taking the necessary proceedings in the Supreme Court. I am not satisfied that I have the jurisdiction to do so,

there being no appeal pending in this Court. Counsel for the intended respondents have assured me that they will seriously consider the option of consenting to a delay in that disclosure pending the intended appellants pursuing their remedies in the Supreme Court. Failing agreement, the intended respondents may apply to the Supreme Court to vary (extend) that aspect of the Order. In so saying I offer no opinion on whether that Court retains jurisdiction to do so.

[18] At the hearing of this matter I had suggested I might grant a conditional referral to a panel, subject to the intended appellants pursuing their options in the Supreme Court. As directed above, I now think the better course is to adjourn the application until such time as the intended appellants have exhausted those options. Should the Department file a Notice of Appeal, I would dismiss this application since the intended appellants will then have the opportunity to apply to a judge of this Court for intervener status (if they have not been added as parties in the Court below).

[19] In the event a notice of appeal is not filed and a satisfactory resolution of the intended appellants' status to appeal is not forthcoming from the Supreme Court, and the matter has not been otherwise resolved, the intended appellants may bring this application back before me, on notice to the other parties, at which time I will determine whether it shall be referred to a panel of this Court. In the event I am unable to hear the resumption of this application, it may be brought before another judge of this Court in Chambers. The timing of the resumption of this application can be arranged in consultation with court staff.

[20] As mentioned above, the intended appellants wish to proceed with the application by pseudonym. I am satisfied that this is a reasonable and necessary request at this time. The intended appellants may use the pseudonyms A.B. an C.D. in the within application subject to further order of this Court or a judge of this Court.

Bateman, J.A.