PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Nova Scotia (Ombudsman) 2016 NSPC 58

Date: 20160208
Docket: (none)
Registry: Amherst

Between:

Her Majesty the Queen (Respondent)

v.

Office of the Ombudsman (Applicant)

DECISION ON APPLICATION FOR REVOCATION OF PRODUCTION ORDER, PURSUANT TO S. 487.0193(4) OF THE *CRIMINAL CODE*

Judge:	The Honourable Judge Elizabeth Buckle
Heard:	October 15, 2015 & January 14, 2016, in Amherst, Nova Scotia
Decision:	February 8, 2016
Counsel:	Mr. Jim Clarke, for the Respondent Mr. Roderick Rogers, for the Applicant

By the Court:

[1] In October of 2011, the Office of the Ombudsman (the Ombudsman) received a complaint alleging potential wrongdoing by the Cumberland Regional Development Authority (CRDA). The allegations were investigated and a Final Report released in August of 2012 entitled "Nova Scotia Economic and Rural Development and Tourism Cumberland Regional Development Authority File #50299". The Province of Nova Scotia engaged an accounting firm to conduct a forensic examination of CRDA's finances, resulting in a Report in June of 2014. The matter was then referred to the RCMP Commercial Crime Unit for investigation of possible criminal activity.

[2] The RCMP began their investigation in July of 2014 and on August 10, 2015, investigators obtained and served a Production Order on the Ombudsman. The Production Order requires the Ombudsman to produce all documents and data relating to the Final Report.

[3] The *Criminal Code* allows that before being required to comply with a Production Order, the recipient may apply to revoke or vary the Order. The Ombudsman has applied to revoke the Production Order pursuant to s. 487.0193(4) which reads as follows:

> 487.0193(4) The justice or judge may revoke or vary the order if satisfied that
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> (*a*) it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or
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> (*b*) production of the document would disclose information that is privileged or otherwise protected from disclosure by law.

[4] The Ombudsman applies on the basis that the information required to be produced is "otherwise protected from disclosure by law" under s. 487.0193(4)(b) and the Respondent has conceded that the documents are "otherwise protected from disclosure by law". The parties agree that the Applicant has the onus of satisfying the court, on a balance of probabilities, that the Order should be revoked.

[5] It is important to clarify at the outset that this is not an application to review the grounds for issuance of the Production Order. For the present purpose, the Production Order is presumed to be lawful. Specifically, that there were

reasonable grounds to believe that: an offence had been committed; the document or data was in the possession or control of the Office of the Ombudsman; and, would afford evidence respecting the commission of the offence.

[6] The issues before me are:

1. What is the meaning of "otherwise protected from disclosure by law"?
2. Does a judge have discretion to refuse to revoke a Production Order where there has been a finding that the information is protected from disclosure by law under s. 487.0193(4)(b)?
3. If the provision does give discretion, are there statutory limits on that discretion and how should it be exercised in this case?

[7] On December 8, 2015, I provided counsel with an Interim Decision in which I found that upon Application for revocation of a Production Order pursuant to s. 487.0193(4), a Judge does have discretion to refuse to revoke the Order even after a finding that the information is "otherwise protected by law" under s. 487.0193(4)(b). I also found that, in the circumstances of this case, the Production Order should be revoked unless it could be varied to safeguard the confidentiality of the Office of the Ombudsman. Subsequently, I heard submissions on whether the Order could be so varied and on January 21, 2016 provided counsel with an addendum to my earlier reasons in which I concluded that it could.

[8] These reasons are substantially the same as those provided to counsel but combine the two decisions.

Issue 1: What is the meaning of "otherwise protected from disclosure by law" in s. 487.0193(4)(b)?

[9] As stated above, Crown counsel has conceded that subsection (4)(b) is engaged because the information is "otherwise protected from disclosure by law". The meaning of that phrase was not addressed in counsel's briefs or in submissions before me. Despite the concession, in my view it is important to briefly address this issue because it informs the subsequent analysis.

[10] Counsel for the Ombudsman has provided the decision of the Supreme Court of Newfoundland in *Newfoundland and Labrador (Citizens' Representative) v. HMQ* 2013 NLTD(G) 134. That decision deals with similar issues to those before me. However, in that case, the argument focused on whether the information was

privileged so the meaning of “otherwise protected from disclosure by law” was not addressed.

[11] I have found two decisions that consider the meaning of the phrase, both in the context of applications for exemption for media. Justice Greene of the Ontario Court of Justice in *R. v. Thomson Reuters Canada Ltd.* 2013 ONCJ 568, rejected the submission that the phrase was limited to instances of "case by case" privilege. She concluded, correctly in my view, that if this had been the intention of Parliament, the provision could have simply exempted all privileged communication. Justice Greene did not seek to fully define the phrase but did say that it was reasonable to define it as including information that was protected from disclosure either under statute or common law. She found that, in the circumstances before her, the only basis for protection from disclosure was if there existed a case-by-case privilege so she assessed the information under those criteria. The second decision to consider this phrase is the relatively recent decision of the British Columbia Provincial Court in *CTV, a Division of Bell Media v. Canada (A.G.)*, 2015 BCPC 65. The court in that case, cited with approval the comments of Justice Greene.

[12] The protection from disclosure in the case before me is found in the *Ombudsman Act*, RSNS 1989, c. 327 and s. 4(2)(e) of the *Freedom of Information and Protection of Privacy Act*, RSNS 1993, c.5.

[13] The relevant provisions of the *Ombudsman Act* are as follows:

> s. 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.
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> s. 16 (1) Every investigation under this Act is to be conducted in private.
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> s. 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.
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> s. 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.

[14] Section 4(2)(e) of the *Freedom of Information and Protection of Privacy* Act states that it does not apply to "a record that is created by or is in the custody of… the Ombudsman… and that relates to the exercise of that person's functions pursuant to an enactment".

[15] It is not necessary in this case and perhaps not possible to fully define the phrase. In my view it is broader than class privilege and could include case-by-case privilege, statutory and common law protection from disclosure, and circumstances including both absolute protection from disclosure and partial protection. By "partial protection", I mean circumstances where disclosure is prohibited in some circumstances but not all. There are many circumstances where there may be partial protection from disclosure. Various actors owe a duty of confidentiality (doctors to patients for example) but do not enjoy an absolute protection from disclosure under search warrant or production order. Similarly, there are circumstances where there is a partial statutory protection from disclosure, such as the protection provided to "personal records" in s. 278.1 of the *Criminal Code*, but where that protection can be set aside if the test for production is met.

[16] In my opinion, interpreting the phrase as applying to situations where there is "partial protection" is consistent with the section as a whole. It maintains the distinction between "privilege" and "otherwise protected from disclosure by law" and also gives impact to the power to vary an order rather than revoke it in its entirety.

[17] I am not satisfied that the *Ombudsman's Act* provides an absolute protection on disclosure in all circumstances. The *Act* establishes confidentiality, places restrictions on disclosure in some circumstances, seeks to limit admissibility of information collected by the Ombudsman and seeks to prohibit the Ombudsman or his employees from being called as a witness. I am not persuaded that s. 17(8) and s. 23(2) of the *Act* would necessarily apply in a criminal proceeding. There is case law (for example: *R. v. Thompson* (1972), 9 C.C.C. (2d) 153 (Alta. C.A.)) which suggests that a provincial statute enacting a rule of inadmissibility "in any judicial proceeding" does not render the information inadmissible in a criminal prosecution under the *Criminal Code*.

[18] In conclusion, I am of the opinion that the phrase "otherwise protected from disclosure by law" is broad enough to include partial protection, that this is the

protection provided to the information in the possession of the Ombudsman's Office and this is the context in which I accept the Crown's concession in this case.

Issue 2: Does a judge have discretion to refuse to revoke a Production Order where there has been a finding that the information is protected from disclosure by law under s. 487.0193(4)(b)?

[19] The Applicant argues that the word "may" in s. 487.0193(4) should be interpreted as imperative; as obligating a judge to revoke a Production Order upon a finding that s. (4)(b) is satisfied. In support of his submission he relies primarily on the decision of the Supreme Court of Newfoundland in *Newfoundland and Labrador (Citizens' Representative)* which appears to be the only authority on point.

[20] In determining whether "may" should be interpreted in this manner, I will consider principles of statutory construction and the decision noted above.

[21] Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur. In the absence of ambiguity on the face of the provision, its clear words should be given effect and the task of further interpretation does not arise. The word "may" is generally permissive and, on its face, connotes a discretion (*R. v. Johnson* [2003] S.C.J. No. 45 at para. 16; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (2014 LexisNexis), p. 83). In fact, s. 11 of the *Interpretation Act* (R.S.C. 1985, c. I-21) states that "The expression 'shall' is to be construed as imperative and the expression 'may' as permissive". Further, in general, it is fair to say that if the drafters had intended a provision to be mandatory, the drafters would have used the word "shall". However, all of this creates a presumption that "may" connotes discretion, not a rule. There are instances where "may" can be interpreted as imperative and to determine the correct interpretation, the word must be assessed within the context of the section, its purpose, the legislative scheme, and other contextual factors. (Sullivan, at pp. 83-89).

[22] In *Newfoundland and Labrador (Citizens' Representative)*, the provision under consideration was s. 487.015(4)(a) of the *Criminal Code* (an earlier provision that permitted application for exemption from compliance with a Production Order) which read:

> 487.015 (4) The judge may grant the exemption if satisfied that
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> a) The document, data or information would disclose information that is privileged or otherwise protected from disclosure by law;
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> b) It is unreasonable to require the Applicant to produce a document, data or information; or
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> c) The document, data or information is not in the possession or control of the Applicant.

[23] The Court found that the permissive word "may", in the context of that provision, did not grant discretion to a judge to refuse an exemption where privilege had been found. The Court concluded that "may" simply permitted a fact finding exercise to determine whether privilege exists and, once found, the privilege would be absolute (*Newfoundland and Labrador (Citizens' Representative)*, at para. 53). Therefore, upon a finding of "privilege" under s. (4)(a), the judge was obligated to grant the exemption. For the reasons that follow, I do not agree that the provision I am dealing with can or should be similarly interpreted.

[24] The Court in *Newfoundland and Labrador (Citizens' Representative)* interpreted the provision in this way primarily because in the court's opinion, exemption was the only reasonable result upon a finding that the criterion in subsections (a) or (c) had been met. In other words, since discretion could not be properly exercised to refuse an exemption in those cases, the only reasonable interpretation of the provision would be that no discretion existed.

[25] This opinion was informed by the nature of what the court referred to as the "legislative privilege" established by the Citizens' Representative and by the circumstances described in subsection 4(c) of the provision. In the court's view, the process in the *Citizens' Representative Act* created "a complete and absolute prohibition against disclosure" and there could be no circumstance where the need for the information held by the Citizens' Representative would outweigh the confidentiality considerations established by the Citizens' representative. Further, in situations where subsection (c) applied (the documents were not in the possession or control of the recipient of the Production Order), it would be legally and practically impossible for a Production Order to be complied with – a recipient of a Production Order could not produce documents, data or information that was not in its possession or control.

[26] The current provision is different from that in *Newfoundland and Labrador Citizens' Representative* in two important respects. These differences influence the correct interpretation of the word "may". First, the new section adds the option to vary the Order upon a finding that the conditions of either subsection (a) or (b) are met. Second, subsection (c) is no longer part of the provision.

[27] The provision I am dealing with says "The justice or judge may revoke or vary the order if satisfied that…" one of the subsections applies. On a plain reading of the current provision, the addition of the words "or vary" changes the available interpretations such that, in my view, it is impossible to interpret it in the manner submitted by counsel for the Ombudsman. Even if I agreed that "may" should be interpreted as imperative, the section would then be interpreted as requiring a judge to "revoke or vary" if one of the subsections applies. I see no way to interpret the section as requiring a judge to revoke the Production Order upon a finding that one of the subsections applies. In other words, in my view, there is no reasonable interpretation that removes the judge's discretion to either revoke or vary the order upon a finding that s. 4(a) or (b) applies.

[28] The removal of subsection (c) from the current provision also impacts this aspect of interpretation because the issue with legal or practical impossibility that troubled the court in *Newfoundland and Labrador (Citizens' Representative)* no longer exists. In my opinion, there are circumstances where the criterion in either s. 4(a) or (b) are met and where a judge could properly exercise his/her discretion to refuse to revoke a Production Order. Under s. (4)(a), upon a finding that the impact of compliance with the Order was unreasonable, an Order could be varied so as to make it reasonable. With respect to a finding of "privilege" or that information is otherwise protected from disclosure by law under s. (4)(b), a Production Order could be varied to exclude those documents which were so protected, to require vetting of privileged information or to otherwise protect the information.

[29] In conclusion on this issue, in my view, a judge does have discretion to refuse to revoke a Production Order upon a finding that the information is protected from disclosure by law.

Issue 3: If the provision does give discretion, are there statutory limits on that discretion and how should it be exercised in this case?

[30] There are still ambiguities in the current provision. One ambiguity results from the use of the word "may" to introduce alternative courses of action. The interpretation issue that arises is whether another course of action is impliedly excluded (*Sullivan*, at p. 86). In the context of this provision, should "may" be interpreted to limit the judge's discretion to either revoke or vary only or to give discretion to revoke or vary or do neither? I have already decided that the Order must be either revoked or varied so do not need to determine that issue in this case. However, the limits of available discretion are still relevant. In some cases, the Production Order may apply to some documents or information that is privileged or protected from disclosure from law and some that is not. In those cases, the Order could be varied to require production of only that information which was not protected. In this case, the protection that is claimed is the result of the fact that it was collected by the Ombudsman's Office so would all be protected. So, if varied rather than revoked, the Order will still require production of information that is "protected from disclosure by law".

[31] As stated above, the court in *Newfoundland and Labrador (Citizens' Representative)*, was of the view that there could be no situation where privilege would give way to the interests of law enforcement. In this case I do not need to comment on the impact of privilege. In my opinion there are situations where law enforcement's need to obtain information could outweigh other protections on disclosure, particularly if I am correct that this phrase includes partial protections. The clearest examples that come to mind would be situations where there is an ongoing crime, a threat to public safety or risk of harm to a person.

[32] Therefore, in my opinion, upon a finding that information is otherwise protected from disclosure by law, a judge does have discretion to permit production of that information.

[33] The court in *Newfoundland and Labrador (Citizens' Representative)* concluded that the "legislative privilege" established by the Citizens' Representative was absolute. The court in that case was dealing with provisions that are similar to those in the *Ombudsman Act.* However, I respectfully disagree with the conclusion reached in *Newfoundland and Labrador (Citizens' Representative)*. As stated above, in my view the protection against disclosure in the *Act* is partial protection. I reach this conclusion with a full appreciation of the role of the Ombudsman and the importance of statutorily protected privacy or confidentiality. However, there are other situations where the law recognizes that

confidentiality and even privilege can give way to other important goals, including: solicitor/client privilege and informer privilege giving way when innocence is at stake; highly confidential records such as medical, psychiatric or therapeutic are subject to seizure by warrant or production order and can be ordered produced to the defence if necessary for full answer and defence; and, journalists can be required to disclose confidential sources. Whether it should be in this case or any other case, should be the subject of judicial balancing of the competing interests.

[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 those 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.

[36] I will now consider the circumstances before me under each of the considerations noted above.

1. **The unique role of the Office of the Ombudsman, including its purpose, mandate and statutory protections, and the rationale for those protections.**

[37] The Office of the Ombudsman is "a unique office that provides independent, unbiased investigations into complaints against provincial and municipal government departments, agencies, boards and commissions. It operates as an independent agency that considers and investigates complaints from people who believe they have been treated unfairly when using government services or when they believe a policy or procedure has not been followed correctly or is unfair (*Information to Obtain Production Order,* sworn by Wayne Ross, August 10, 2015, at para. 10).

[38] The specific provisions from the *Ombudsman Act* and *FOIPOP* that deal with the privacy and confidentiality of the Office and its investigations are set out above. I accept that they support the Applicant's submission that the role of the Ombudsman and the legal protections relating to the confidentiality of investigations is unique.

[39] The provisions of the Nova Scotia Act are similar to those in other provinces. In *Levy v. British Columbia (Ombudsman)* [1985] B.C.J. No. 1236

(S.C.), the court recognized that the confidentiality aspect of the complaint process was fundamental to the effective discharge of the duties of that office. The decision in *Levy* was rendered in the context of a civil case where a Plaintiff sought an Order compelling the Ombudsman to deliver documents and submit to discovery. The court held at paragraph 7 that:

> 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 be 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. Any narrow interpretation of Section 9(4) is, in my view, contrary to the overall intention of the legislation. To allow discovery by any of the methods outlined and in the form suggested would compel the Ombudsman to violate what he is obligated to protect: namely, the confidentiality of "anything coming to his knowledge in the exercise of his duties" and the privacy of the complainant. Nothing short of a broad interpretation of Section 9 will allow the Ombudsman to fulfil this obligation. See British Columbia Development Corporation and First Capital City Development Company Limited and Karl A. Friedmann, Ombudsman et al., November 22, 1984, S.C.C. (unreported) [since reported [1985] W.W.R. 193] p. 22.

[40] The Ontario Superior Court of Justice decision in R. *v. Paquin* (1999), 26 C.R. (5th) 356 is also instructive. In that case, the court was called upon to consider the role of the Office of the Correctional Investigator (the Ombudsman for federal prisoners). A role that is similar to that of the Office of the Ombudsman in the present case, albeit carried out with a particularly vulnerable segment of the population. The court was considering an application by two of its investigators to quash subpoenas issued by the Crown. The court noted that safeguarding the confidentiality and independence of the Office must prevail over the public interest in the prosecution of crimes, in the circumstances of that case.

[41] I have also considered the comments of Dickson, J. (as he was then) in the Supreme Court of Canada decision in *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] S.C.J. No. 50 wherein he canvassed the historical development of the institution of Ombudsman. These comments confirm the unique role of Ombudsman in society.

[42] It is also relevant that the Ombudsman is not implicated in any criminal activity and is a true third party in this circumstance. This factor has been found to be a relevant consideration in cases dealing with the exercise of discretion to grant

a search warrant for media outlets (See: *CBC v. Lessard,* [1991] 3 S.C.R.421). A production order does not have the same immediate impact as the execution of a search warrant. However, care must always be taken to minimize inconvenience or harm to innocent third parties.

2. **The level of sensitivity and confidentiality of the information.**

[43] The underlying information at issue in this case consists of statements, notes, interviews and documents all in the context of professional, financial dealings. I would not expect any of it to include particularly personal information; certainly not as compared to medical, psychiatric or therapeutic records or even personal financial information. Further, as stated in the Affidavit of Cst. Ross, many of the witnesses have already been identified and interviewed by police and divulged that they were interviewed by the Ombudsman, many of the documents have been obtained through other sources and were already disclosed to the accountant firm for the purpose of the preparation of the forensic accountant.

[44] The area of true sensitivity and need for continued confidentiality, to the extent that there is one, relates to the role of the Office of Ombudsman itself and the need for the public to have faith that the information collected by the Ombudsman is protected. I accept that many individuals who contact the Ombudsman and agree to provide information, do so with the expectation and understanding that their information and the fact that they provided information will be kept private. This is important to the ability of the Office of the Ombudsman to do its job.

4. 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.

[45] Counsel for the Ombudsman argues that the role of the Ombudsman and the ability to do the job would be harmed if production of information was permitted in this case. This is supported in the cases referenced above. However, I would not go so far as to conclude that the public confidence would be destroyed. Other confidential relationships continue despite there being no absolute protection on disclosure.

5. **The nature and seriousness of the crime under investigation.**

[46] The crime under investigation is a serious property crime. It involves an allegation of a fraud on the public purse of more than $250,000. The public interest in investigating and prosecuting such offences is high.

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.**

[47] Because these are related, I will address them together. 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.

[48] As I understand it, the main importance to the information in the possession of the Ombudsman, are the interviews of witnesses. Those witnesses can be or have been interviewed again by the RCMP. However, there is a risk that the quality of information will not be the same. This is because of the passage of time and the change in circumstance. We are now four years beyond the initial interviews and the memories of witnesses will have suffered. Further, at the time of the Ombudsman interviews, many of the witnesses were still employed in the roles they occupied during the period of the alleged offences. As a result their ability to recall when interviewed by the Office of the Ombudsman would have been better. Finally, the witnesses were interviewed prior to media attention or the knowledge of a criminal investigation, so their statements can be expected to have been more candid.

[49] Cst. Ross also states that the audiotaped interviews and/or notes of the interviewers from the Office of the Ombudsman are significant because any information provided by those investigators to witnesses may have influenced their subsequent statements to RCMP. This has merit.

[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.

[51] After considering the available evidence under this factor, I do not believe the information sought is "necessary" to the investigation or that the investigation

will be halted if the information is not produced. I accept that some of the information, particularly the interviews of witnesses who worked for the alleged "victim" and the notes of interviewers of those witnesses, are significant.

8. **Are there conditions or restrictions that can be put in place to reduce the impact of an Order on the recipient.**

[52] In this circumstance, all of the sought-after information is "otherwise protected from disclosure by law" so the Order cannot be varied to exclude specific documents or information. However, the Respondent 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.

[53] In conclusion on this issue, based on all of the foregoing and after a careful consideration of the law, the evidence and submissions, 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.

Conclusion

[54] The Applicant maintains that revocation is the only means by which the Office of the Ombudsman can be protected and the Respondent submits that the Order can be varied in a way that addresses the concerns raised by the Ombudsman but still allows for the valid aims of law enforcement to be accomplished, at least in a limited way. Given my decision that there is discretion to revoke or vary, the Applicant and Respondent agree that the public interest in the proper investigation and prosecution of crime must be balanced against the need to maintain public confidence in the role of the Ombudsman. The Applicant and Respondent also agree that if there is to be a balancing, the factors noted above are the appropriate factors to consider in that balancing exercise but disagree on the weight each should be given.

[55] The original Production Order essentially required production of all information in the possession of the Office of the Ombudsman relating to their investigation of Nova Scotia Economic and Rural Development and Tourism (NS ERDT) and the Cumberland Regional Development Authority (CRDA). This would have stripped the Ombudsman's investigation of any of its statutorily

protected confidentiality. The Respondent has provided me with draft wording for a varied Production Order. The varied Order would require the Office of the Ombudsman to produce a new document (an "Executive Summary") that would respond to questions posed by law enforcement. The new document would not include direct or attributed quotes and would not identify anyone by name or position. The information would still be useful to law enforcement in determining whether there is potentially exculpatory information available that they have not yet discovered, in assessing whether information gathered by the RCMP to date is accurate, in determining whether witnesses need to be re-interviewed or new witnesses interviewed, and would assist law enforcement in determining whether there are other avenues of investigation that need to be pursued, including whether there are other agencies that are involved.

[56] The Respondent's suggested varied Production Order does place a burden on the Ombudsman's Office in that they would be required to review the material in their possession and summarize portions of it. However, the Applicant candidly acknowledged that with the exception of the last item requested by the Respondent, preparation of the requested document would not over-burden the Office of the Ombudsman. The last request is essentially a "catch-all". It would require the Office of the Ombudsman to review all information in its possession, compare it to the information in Cst. Ross' Information to Obtain the original Production Order and summarize any "differences" between the two that had not been captured by the requests in the other categories. This would be an enormous task. It is also vague/subjective and overly broad. It would require the Ombudsman's Office to determine whether there was a "difference" and then summarize that difference, no matter how minor or irrelevant.

[57] As noted above, I accept the unique role of Ombudsman in society. In many cases the Ombudsman deals with sensitive information from people in vulnerable situations, including inmates in provincial institutions or employees, whose safety, liberty or livelihood could be jeopardized if their identities were made public. I accept that confidentiality is important to the public's confidence in the Office of the Ombudsman and the ability of the Office of the Ombudsman to do its job. 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 negative 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. The crime under investigation involves an allegation of a fraud on the public purse of more than $250,000. When assessing the competing interests, it is important to consider the potential impact on public confidence in the Office of the Ombudsman but also public confidence in the administration of justice.

[59] 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.

Elizabeth Buckle, JPC.