SUPREME COURT OF NOVA SCOTIA

Citation: Kirby v. Nova Scotia (Transportation and Infrastructure Renewal), 2011 NSSC 458

Date: 20111209
Docket: Hfx No. 352681
Registry: Halifax

Between:

Sean Kirby — Appellant

and

Department of Transportation and Infrastructure Renewal — Respondent

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DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: By correspondence

Last Submission: November 8, 2011

Counsel: Brian K. Awad, for the appellant

Catherine J. Lunn, for the respondent

Moir, J.:

[1] I am scheduled to hear Mr. Kirby's appeal under the *Freedom of Information and Protection of Privacy Act*. He makes a motion for an order that the Department need not issue notices to third parties under s. 41(2) of the statute.

[2] Alternatively, Mr. Kirby seeks directions on compliance with s. 41(2) including directions on these issues: "Which third parties should be given notice? What should the 'written notice of the appeal' state? What will be the impact of section 41(2) compliance on the current timetable for the appeal?"

[3] The subject was not considered on the motion for directions because documents with information pertaining to third parties were identified for inclusion in the record only after that motion was heard.

[4] The "head of a public body", in this case the Minister of Transportation, is the ultimate authority, before appeal, for determining a request for access to records under the *Freedom of Information and Protection of Privacy Act*.

[5] Under s. 20(1), the Minister must refuse disclosure of personal information that would constitute "an unreasonable invasion of a third party's personal privacy." Under s. 21(1), specific kinds of information about a third party are protected from disclosure by the Minister in certain circumstances.

[6] Section 22 concerns notice to a third party. Instead of providing for notice whenever a request calls for information about a third party, the section allows for an initial decision by the Minister. If the Minister decides not to disclose a record containing information about a third party, there is no need for notice to the third party: s. 22(1A)(a).

[7] If the Minister decides to disclose third party information, he must notify the third party and give him or her an opportunity to make representations unless notification is not "practicable", see s. 22(1), or regulations dispense with third party notice "where … it is not practical to give notice": s. 22(1A)(b).

[8] Subsection 42(2) deals with notice to third parties of an appeal. The Minister must give notice of the appeal to third parties whom he notified of the request. What of those not notified of the request? The Minister must give notice

to those who he "would have notified … if [he] had intended to give access to the record or part of the record": s. 41(2)(b). In other words, the statute requires the Minister to give notice of the appeal to third parties who he notified of the request, and those who he did not notify of the request only because he decided not to release the record, but not those for whom notice was not "practicable" or "not practical".

[9] Mr. Kirby appeals a decision of the Minister not to release unredacted copies of numerous records. The remedy he seeks is disclosure, but, he says, disclosure with third party information redacted.

[10] For Mr. Kirby, Mr. Awad submits that s. 41(2) needs to be interpreted in the context of an appeal that excludes release of third party information as a remedy. The court should direct the Minister not to issue s. 41(2) orders. The court's authority is in Rule 2.03(1)(a), which recognizes the general discretion to control a proceeding.

[11] For the Department, Ms. Lunn submits that I have no authority to interfere with the operation of s. 41(2). As for Rule 2.03(1)(a), "the Rule cannot and does not override the provisions of the FOIPOP Act".

[12] For reasons that I will soon get to, I do not have to decide whether Rule 2 can override a procedural provision in a statute, whether it does, and whether I have the authority to interfere with giving statutory notice of the appeal to third parties. However, I do want to make some comments about those issues without deciding them.

[13] The *Civil Procedure Rules* can override a procedural provision in a statute: *Judicature Act*, s. 49. So, the question would be whether the Rules override s. 41 of the *Freedom of Information and Protection of Privacy Act*. I make no comment on that, but possible authority to direct who gets, and who does not get, notice of an appeal is not limited to the Rules. There is also the inherent jurisdiction of the court to control its own processes.

[14] Mr. Awad makes the point that needlessly bringing in third parties increases expense and it creates risks of an adjournment. It is our policy to reduce expense

and increase speed. But the first word in the old trilogy maintained by Rule 1 - Purpose is "just".

[15] Justice trumps speed and expense, and justice usually demands notice. Rule 7.10(f) specifically applies the need for notice to persons interested in an appeal despite expense, which Rule 7.10(f) implicitly recognizes, and the risk of an adjournment, which the Rule explicitly recognizes.

[16] The remedy sought by Mr. Kirby will require me to make a determination about whether some of the redactions protect third party information. Mr. Awad puts it this way:

> - First, Mr. Kirby will ask the court to consider whether DTIR has shown that each redaction purportedly made pursuant to section 20 or 21 does actually protect third-party information of the types covered by those provisions. If the court finds that a redaction purportedly made pursuant to section 20 or 21 does not protect third-party information of the type covered by those provisions, Mr. Kirby will ask the court to order DTIR to produce a version of the redacted document that is consistent with the court's conclusions.
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> - Second, where the court finds that a redaction or part of a redaction does protect the type of third-party information covered by section 20 or 21, Mr. Kirby will ask the court to consider whether DTIR has shown that DTIR properly exercised its discretion in making the redaction. If the court finds on the evidence before it that DTIR's redaction was not the product of proper exercise of discretion, Mr. Kirby will ask the court to remit the issue (of whether to redact) back to DTIR for it to follow a proper decision-making procedure. If the court finds on the evidence

> before it that DTIR's redaction decision was the product of a proper exercise of discretion, Mr. Kirby will not be asking the court to over-ride DTIR's decision.

He concludes by saying "The court will not be asked to order any disclosure of section 20 [or] 21 third party information."

[17] The third parties may well have an interest in the determination of whether the redaction of information about them does not "protect the type of third-party information covered by section 20 or 21". They should be notified and given the opportunity to make submissions on that and any other issue in which they have an interest.

[18] As regards the alternative put forward for Mr. Kirby involving further directions, notification is the Minister's statutory obligation, and I would not give direction on who he must notify or on the form of notice, unless he asked for it. I see no reason to depart from the timetable, unless a problem arises.

[19] I am prepared to require the respondent to include with the notice of appeal a copy of a letter from Mr. Awad describing to the third parties the remedies his client seeks.

J.