SUPREME COURT OF NOVA SCOTIA

Citation: *Anderson v. Nova Scotia (Attorney General),* 2014 NSSC 71

Date: 20140306
Docket: Hfx No. 340060
Registry: Halifax

Between:

Frank Anderson, of Yarmouth, in the Province of Nova Scotia

Plaintiff

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia and Percy Paris, of Windsor Junction, in the Province of Nova Scotia

Defendants

Judge:	The Honourable Justice M. Heather Robertson
Heard:	January 16, 2014, in Halifax, Nova Scotia
Decision:	March 6, 2014
Counsel:	Barry J. Mason, for the plaintiff Alex M. Cameron, for the defendants

Robertson, J.:

[1] The plaintiff is the former Chief Executive Director of the Yarmouth Area Industrial Commission and the Southwest Shore Development Authority ("SWSDA"). In or about February 2010, SWSDA was the subject of an investigation and a highly critical report of the provincial ombudsmen and a subsequent audit report completed by Ernst & Young was also critical of SWSDA operations.

[2] In June 2010, the plaintiff was terminated as a board member of the Nova Scotia Trade Centre Limited, on which he had served from March 2, 2007. The plaintiff commenced an action against the Attorney General of Nova Scotia and Percy Paris, then Minister of Economic and Rural Development.

[3] The statement of claim makes the following complaint of defamation:

> 13. 2) In an article entitled "Anderson fired from Board of Trade Centre", found in the Chronicle Herald, June 18, 2010, the Defendants made the following defamatory comments:
>
> > "He was asked to leave.... Two reports, the ombudsman's report and the Ernst & Young Report, led this government to conclude that Mr. Anderson was inappropriate to represent the province on this board"
> >
> > (3) In an article entitled "Anderson ejected from Trade Centre Board", found in AllNovaScotia.com, June 18, 2010, the Defendant, Paris, made the following defamatory comment:
> >
> > "We came to the conclusion he just wasn't an appropriate individual to represent the Province of Nova Scotia on this Board"

and at

> 16. The Defendant, Paris, maliciously, recklessly and/or negligently engaged in the process to further defame and harm the Plaintiff by terminating the Plaintiff from the Trade Centre Limited Board. The Plaintiff was terminated by the Defendant, the Attorney General of Nova Scotia, from the Trade Centre Limited Board on June 17, 2010;

> 17. The Plaintiff states that the Defendant, Paris', statements and actions constitute defamation, abuse of power, unlawful interference with economic relations, misfeasance of public office, intimidation, bad faith and inducement of breach of contract, for which the Defendant, Percy Paris, is liable and for which the Defendant, Province of Nova Scotia is vicariously liable.

[4] The plaintiff brings a motion to compel the defendants to:

1. Produce Cabinet documents relating to Frank Anderson and to require

2. The defendants to answer questions concerning Frank Anderson that arose though Cabinet discussions.

[5] The plaintiff relies on the disclosure provisions of the *Civil Procedure Rule*s 15:02(1) and (b) and 18.01(1)(2)(3) which reads as follows:

> **Duty to make disclosure of documents**
>
> 15.02 (1) A party to a defended action or a contested application must do each of the following:
>
> (b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;
>
> **Scope of Rule 18**
>
> 18.01 (1) This Rule allows a party to question a witness by discovery, unless the question was answered by the witness in response to interrogatories.
>
> (2) Provisions about discovery in Rule 55 - Expert Opinion, and in Rule 57 - Action for Damages Under $100,000, prevail over this Rule.
>
> (3) A party may discover a witness by agreement, under a discovery subpoena, or by order, in accordance with this Rule.

[6] Prior to the motion being heard the defendants produced the Cabinet documents relating to Frank Anderson, as outlined in the affidavit evidence of

Jeannine Lagasse, Executive Director of the Executive Council Office for the Province of Nova Scotia, dated December 9, 2013.

[7] The documents disclosed are attached to her affidavit and include the following:

1. Minutes - Meeting of the Executive Council

2. Report and Recommendation to the Executive Council

3. Briefing note to the Minister of Economic and Rural Development

4. Communication Plan - Trade Centre Limited - Reappointment to the Board of Directors

5. Certified copy of an Order in Council dated June 17, 2010 revoking the appointment of Frank Anderson as the Director of the Trade Centre Board.

[8] Counsel agree, therefore this constitutes the complete disclosure of Cabinet documents relating to Frank Anderson's revocation.

[9] The issue remaining for this court to determine is whether the court should permit discovery examination of the defendants on Cabinet discussions related to Frank Anderson.

[10] The plaintiff relies on *Carey v. Ontario*, [1986] 2 S.C.R. 637. The Supreme Court ordered the production of Cabinet documents to the trial judge for inspection. The court addressed the government's position that disclosure of the government documents would be against the public interest and the plaintiff's position that they were entitled to all of the evidence that might be of assistance to the fair disposition of the issues being litigated. The court held that the balance between these competing interests should invite periodic judicial assessment. The court held that the non-disclosure was not a Crown privilege but a "public interest immunity" for the court not the Crown to weigh and decide.

[11] Where unconscionable behaviour is alleged the court stated at para. 84:

> . . . it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. . . .

[12] The plaintiff also relied on *O'Connor v. Nova Scotia (Deputy Minister of the Priorities and Planning Secretariat)* (2001), 191 N.S.R. (2d) 103 (C.A.). As para. 57 Saunders, J.A. addressed the *Freedom and Information and Protection of Privacy Act*, requests for disclosure. He stated:

> I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and to permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[13] The plaintiff argues that the courts have moved away from the concept of absolute Crown privilege as commented upon by Wright, J. in *Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada*, [2000] 189 N.S.R. (2d) 290 at para. 9:

> With respect to the Cabinet privilege claim, the Province acknowledges that having moved away from the concept of absolute Crown privilege in this country, the onus is upon it to demonstrate to the court that production of the subject documents would be injurious to the public interest such that it outweighs the interest in the administration of justice. . . .

[14] It is the position of the Attorney General that discovery examination could apply to the Crown, pursuant to the *Proceedings Against the Crown Act*, R.S.N.S. 1989 c.360 - s.11except where it would be "injurious to the public interest."

[15] The Attorney General says that having disclosed the relevant Cabinet documents it has met its disclosure obligations. The Attorney General cautions

the court to distinguish between the situations that address primarily disclosure of Cabinet documents versus oral Cabinet discussions. They say the judicial approach to Cabinet confidences has evolved over time and is best summarized by Chief Justice McLachlin writing for the majority in *Babcock v. Canada (Attorney General),* [2002] S.C.J. No. 58 at para. 19:

> 19 At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey, supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey, supra*.

[16] Whether or not the same test ought to apply for production of documents and Cabinet discussions has been the subject of much comment.

[17] In *Smallwood v. Sparling,* [1982] 2 S.C.R. 686, Wilson, J. appeared to apply the same test.

[18] The Attorney General refers the court to the Law of Privilege in Canada, Volume 1, November 2010, Canada Law Book at p. 5-25 where the authors distinguishes *O'Connor v. Nova Scotia, supra,* from

> In *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia,* the court applied the *Carey* approach in refusing to protect all Cabinet documents. The court drew a distinction between documents placed before Cabinet and documents that reveal the discussion of Cabinet. The court stated:
>
> > Ninth, the documents which will be disclosed by my Order do not disclose what was discussed by the Cabinet. Rather, the documents relate to what was before Cabinet when decisions were taken by it. Accordingly, the disclosure of the documents should in no way impede the active debate that one would expect at the Cabinet table.

[19] The Attorney General submits that this point has been made in earlier cases.

[20] In *Attorney-General v. Jonathan Cape Ltd.,* [1975] 3 All E.R. 484, Lord Widgery, C.J. wrote at p. 495:

> 1. In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by cabinet ministers in the course of cabinet discussions are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.
>
> 2. The maintenance of the doctrine of joint responsibility within the cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers.

[21] In Cooper Crown Privilege, 1990 Canada Law Book, pp. 48-49 the authors commented:

> . . . The reports and memoranda supplied to the Cabinet should contain opinions derived from every perspective from which the issue under discussion can be viewed. Likewise, the individual Cabinet members should conduct their deliberation from alternative approaches. The product of this exercise must, however, represent a single conclusion. The government cannot put forth a policy which contains a multitude of positions. The absolute necessity for Cabinet solidarity in policy formulation requires the compromise of certain of the positions taken in the memoranda and reports and by the individual Cabinet members. In this respect policy formulation operates after the fashion of the adversarial method of dispute resolution. Disclosure of tentative or "devil's advocate" opinions taken by individual Cabinet members at the pre-decisional stages may present a distorted view – indeed the very opposite perspective – of the Cabinet's conclusion.

[22] The Attorney General relies on *Babcock v. Canada (Attorney General), supra,* where McLachlin, C.J. at para. 18 strongly addresses the concept of Cabinet room confidentiality:

> 18 The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000]

> 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord Salisbury in the Report of the Committee of Privy Counsellors on Ministerial Memoirs (January 1976), at p. 13:
>
> > A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations -- members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future... . The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, -- ever compare his present contribution to the common fund of counsel with a previously expressed opinion... .
>
> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

[23] The Nova Scotia Court of Appeal in *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission into Donald Marshall Jr. Prosecution),* [1988] N.S.J. 358, addressed the general nature of Cabinet discussions and referenced the Royal Commission ruling on what they wanted to ask about why they thought inappropriate to examine:

> The limited immunity which now attaches to Cabinet documents and discussions in this case is outweighed by the public interest in the Commission having this evidence before it. In as much as we now wish to know the general nature of Cabinet discussions on the Marshall case, we will not permit questions relating to the views of individual Cabinet members, as this would lead to the possibility of hearing evidence from all ministers to "set the record straight". Not only would such individual

> views be irrelevant to this Inquiry, but this process would so encumber this commission as to lead to absurdity. Further, Cabinet members should be protected from public scrutiny in their discussions leading to the formulation of government policy and in other matters such as, for example, national security. In this case, the public interest argument is such that the limited protection granted should enable this commission to hear evidence relating to what issues dealing directly with the Marshall case were discussed in Cabinet, and what views were considered in arriving at particular decisions or policies. We feel that this maintains the appropriate and necessary balance between the interests protected by Cabinet secrecy and our interest in the proper administration of justice.
>
> In summary, while former and present members of Cabinet may be asked questions dealing directly with the Marshall case, they will not be required to reveal the opinions or cowments (sic) of individual members of Cabinet expressed during Cabinet meetings.

[24] The Court of Appeal found no favour with the Commission's reasoning and commented:

> It could very well be argued that the general views of the Cabinet as to why certain things were done have little or no relevance when weighed against their imprecision and mixture of hearsay and opinion evidence. This is even more so if individual views are sought. As well, the best evidence is what did Cabinet do and that is expressed only in the Orders-in-Council. What an individual said, if indeed it can be reported accurately in the absence of any minutes, may be of little relevance. However, relevancy is a matter solely within the Commission's jurisdiction.

[25] They concluded by stating:

> . . . we are of the opinion that a tribunal should be reluctant to compel a Cabinet minister to breach his oath of confidentiality. Given the importance of the oath in all legal proceedings, it is vital to the public interest in the administration of justice that a direction to breach an oath, such as that taken by a Cabinet minister, be made only in those rarest of circumstances where the information sought is most relevant, reliable and precise, and absolutely necessary for the determination of the matters under inquiry. Those considerations would necessarily be applied even after a decision was made permitting inquiry into the general nature of Cabinet discussions if a witness chose to refuse to testify on the grounds of his oath of office.

[26] In that circumstance, the Attorney General has disclosed the relevant Cabinet documents. It was a decision of the Executive Council to terminate Mr. Anderson. These documents are relevant, reliable and precise. They represent the single conclusion of Cabinet on the subject in the spirit the doctrine of joint responsibility. What opinions individual Cabinet ministers may have expressed are irrelevant.

[27] Indeed, Mr. Paris does not deny that he made the alleged defamatory statement. It closely follows the tenor of the Cabinet documents now disclosed. Mr. Paris stuck to the music and made ("published") the alleged defamatory statement in a press scrum. What his Cabinet colleagues had to say before this press scrum is irrelevant to the issue of the publication of the alleged defamation.

[28] The trial court will determine if the statement is defamatory. The trial court will also determine whether the termination of the plaintiff from the Trade Centre Limited Board, defamed the plaintiff's reputation.

[29] Again, what views individual Cabinet members expressed is not relevant to this quest.

[30] Nor do I accept that the bare assertion of malice or bad faith, abuse of power and interference with economic relations as set out in the plaintiff's statement of claim at para. 17, support the demand for oral discovery relating to Cabinet discussions. Similarly, the plaintiff has provided no particulars of these alleged causes as against Mr. Paris and the defendant the Province, vicariously. Cabinet discussions could not be relevant to these claims.

[31] In the result, the plaintiff's motion is dismissed. Costs will follow the cause.

Justice M. Heather Robertson