

Date: 20150803
Docket: 13/84
Citation: *Geophysical Service Incorporated v.*
Martin, 2015 NLCA 36

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED APPELLANT

AND:

ED MARTIN RESPONDENT

AND:

EDWARD P. RING, in his capacity as
THE INFORMATION AND PRIVACY
COMMISSIONER OF NEWFOUNDLAND
& LABRADOR INTERVENOR

Coram: Barry J.A.

Application Heard: June 30, 2015
Decision Rendered: August 3, 2015

Reasons for Decision by Barry J.A.

Counsel for the Appellant: Kate O'Brien
Counsel for the Respondent: Tracy Pasley
Counsel for the Intervenor: Andrew A. Fitzgerald

Barry J.A.:

I. FACTS AND STATUORY PROVISIONS

[1] Regulations of the Federal and Provincial governments require companies such as Geophysical Service Incorporated (“GSI”) doing geophysical exploration offshore in this Province to provide copies of the geophysical data to the Canada-Newfoundland Offshore Petroleum Board (“C-NLOPB”). The data is to be held confidential for 10 years.

[2] GSI alleges that after the 10-year non-disclosure period C-NLOPB has released to Nalcor (a public body where Ed Martin is president) some of the deposited data. GSI claims in a companion action where it is plaintiff and Nalcor and the Province are defendants that even after 10 years the C-NLOPB must still respect the confidentiality of the deposited data.

[3] GSI applied to Nalcor under the *Access to Information and Protection of Privacy Act* (“ATIPPA”), SNL 2002, c. A-1.1, for disclosure as follows:

Since the inception of Nalcor, any and all access it has had from any source to G.S.I. seismic data or work products. Please list dates, source of information, description of information, requisition forms, meetings, documents, digital or other media containing data, etc.

[4] Nalcor refused the application to disclose and claimed any such information and even the fact of whether it had received any information was commercially sensitive data which was protected from disclosure under the *Act*.

[5] GSI appealed at the Trial Division the refusal to disclose. The Trial Division judge hearing the *ATIPPA* appeal decided the appeal should be stayed on the basis that it is premature until the companion action has determined whether GSI retains any proprietary rights to the deposited data. That Trial Division decision is now the subject of an application for leave to appeal to this Court.

[6] Edward P. Ring, the Information and Privacy Commissioner of Newfoundland and Labrador, did not intervene at the Trial Division but has applied to intervene in this proceeding in this Court pursuant to rule 7.05 of the *Rules of the Supreme Court, 1986*.

[7] Rule 7.05 reads:

(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

(a) that person claims an **interest in the subject matter of the proceeding**, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the order therein, or otherwise;

(b) that person's claim or defence and the proceeding have a question of law or fact in common; or

(c) that person has a **right to intervene under a statute or rule**.

(2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.

(3) On the application, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

[8] The *ATIPPA* provides as follows for reviews and appeals:

Review and appeal

43(1) A person who makes a request under this Act for access to a record or for correction of personal information may ask the commissioner to review a decision, act or failure to act of the head of the public body that relates to the request, except where the refusal by the head of the public body to disclose records or parts of them is

(a) due to the record being an official cabinet record under section 18; or

(b) based on solicitor and client privilege under section 21.

...

(3) Notwithstanding subsection (1), a person who makes a request under this Act for access to a record or for correction of personal information may, within 30 days after the person is notified of the decision, or the date of the act or failure to act, appeal directly to the **Trial Division under section 60**.

(4) A person who has appealed a decision directly to the Trial Division shall not ask the commissioner to review a decision under this Part, but another party to the request may do so.

(5) The commissioner may refuse to review a decision, act or failure to act where an appeal has been made to the Trial Division.

Response of Public Body

50. (1) Within 15 days after receiving a report of the commissioner, the head of a public body shall

(a) make a decision to follow the recommendation of the commissioner or a decision that the head of the public body considers appropriate; and

(b) give written notice of the decision to the commissioner and a person who was sent a copy of the report.

(2) Whether or not the head of the public body follows the recommendation of the commissioner, the head of the public body shall, in writing, inform the persons who were sent a copy of the report of the right to appeal the decision to the Trial Division under section 60 and of the time limit for an appeal.

(3) Where the head of the public body does not give notice within the time required by subsection (1), the head of the public body is considered to have refused to follow the recommendation of the commissioner.

Appeal to Trial Division

60. (1) Within 30 days after receiving a decision of the head of a public body under section 50, an applicant or a third party may appeal that decision **to the Trial Division**.

(2) An appeal may also be commenced by an applicant under this section in accordance with subsection 43(3).

Appeal or intervention by commissioner

61. (1) The commissioner may, with the consent of the applicant or third party involved, appeal a decision of the head of a public body in accordance with section 60.

(2) The commissioner may intervene as a party to an appeal under section 60.

II. THE ISSUES

[9] Three issues arise:

- (i) On an application for intervention by the Commissioner at the Court of Appeal level, should the Commissioner be treated as having a “right to intervene under a statute or rule” within the language of Rule 7.05(1)(c)?
- (ii) If not, should the Commissioner be treated as having an “interest in the subject matter of the proceeding”?
- (iii) If leave to intervene is granted, should intervention be subject to conditions?

III. THE LAW AND ANALYSIS

(i) Rule 7.05(1)(c)

[10] The Commissioner submits that leave to intervene should be granted pursuant to rule 7.05(1)(c) on the basis of section 61(2) of the *ATIPPA*, which reads:

61(2) The Commissioner may intervene **as a party to an appeal under s. 60.**

[11] The Commissioner argues that since the decision of the justice of the Trial Division arises out of an appeal filed by GSI pursuant to section 60 of the *ATIPPA*, the Commissioner should be found to fall within the language of s. 61(2) and to have a statutory right to intervene under section 60.

[12] Nalcor objects to this characterization of the appeal as one under section 60 and points to subsection 43(3) of the *ATIPPA* and the reference to persons not obtaining disclosure appealing directly to the Trial Division under section 60. Nalcor says the Commissioner did not intervene at the Trial Division hearing, where it had the statutory right to do so, and neither section 60 nor section 43 provides a right to intervene at the Court of Appeal level. Nalcor argues that if the Legislature had intended for the Commissioner to have a right to intervene on an appeal from the Trial Division, it would have said so. I am not persuaded by this argument.

[13] I agree with the Commissioner’s submission that the present proceeding should be viewed as falling within the words of section 61(2), “an appeal under section 60”. The proceeding was commenced at the Trial

Division under section 60 and the present appeal to this Court arises from a decision rendered pursuant to the same section. The Application for Leave to Appeal filed by GSI stresses that leave is necessary because the Trial Division decision has brought GSI's ability to argue its *ATIPPA* appeal to a halt. If the Commissioner has the right to intervene at the Trial Division appeal hearing, I believe it reasonable to infer that the Legislature intended the Commissioner to have the right to intervene at any stage until the proceedings have been terminated or finally resolved. If this were not the case the Commissioner would have to incur unnecessary expense intervening at the trial level in every *ATIPPA* appeal to preserve its right of intervention, when the Commissioner, as in this case with the decision to stay, may only become concerned after an issue has been raised in the Trial Division decision on an appeal. Nothing in the *ATIPPA* indicates that the legislature sought that result.

(ii) Rule 7.05(1)(a)

[14] If I am wrong on the statutory right to intervene, I conclude in any event that this is an appropriate case for this Court to exercise its discretion and allow intervention by the Commissioner under rule 7.05(1)(a) because he has an interest in the subject matter of the proceeding.

[15] This Court has accepted that a person may apply for intervenor status at the Court of Appeal stage: *Elton v. Elton Estate*, 2009 NLCA 34, 287 Nfld. & P.E.I.R. 46.

[16] Hoegg J.A. in *Eastern Regional Integrated Health Authority v. Association of Registered Nurses of Newfoundland and Labrador*, 2014 NLCA 52, 358 Nfld. & P.E.I.R. 358 at paragraph 4, identified factors to be considered under Rule 7.05:

The jurisprudence addressing Rule 7.05 has identified sufficiency of an Intended Intervenor's interest, whether the Intended Intervenor will make a useful contribution to the proceedings, whether its participation will cause undue delay, and whether its participation will be burdensome, expensive or otherwise prejudicial to the parties as factors for consideration in determining Rule 7.05 applications. (See *Warford v. Weir's Construction Limited*, 2012 NLCA 37, 323 Nfld. & P.E.I.R. 174, *Forsey v. Eastern Regional Health Authority*, 2007 NLTD 101, 267 Nfld. & P.E.I.R. 19 and *Elton Estate v. Elton*, 2009 NLCA 34, 287 Nfld. & P.E.I.R. 46.) Whether public law issues are involved is also a factor for consideration (*Warford*, paragraph 8).

[17] The Commissioner is an independent statutory officer of the House of Assembly of Newfoundland and Labrador, responsible for the daily administration of the *ATIPPA*. His duties and responsibilities include conducting statutory reviews of decisions of public bodies under section 43(1) of the *ATIPPA* and investigating complaints about privacy and other matters pertaining to the *ATIPPA* pursuant to section 44. Clearly, in performing this statutory mandate the Commissioner has developed an expertise in the operation and administration of access to information law in the Province.

[18] The decision of the Trial Division under appeal involves interpretations of provisions of the *ATIPPA*, specifically, subsection 12(2) (content of response), section 24 (disclosure harmful to the financial or economic interests of a public body), and section 27 (disclosure harmful to the business interests of a third party). The Commissioner's office regularly conducts investigations and reviews decisions of public bodies which involve these same sections. The Commissioner's affidavit states, and I accept, that how these sections are interpreted will impact upon the manner in which the Commissioner will have to perform his statutory mandate.

[19] Other significant issues raised on this appeal, which the Commissioner deposes will significantly impact the operation and interpretation of the *ATIPPA*, include:

- The correct interpretation of s. 5.4(1) of the *Energy Corporation Act*, SNL 2007, c. E-11.01, in conjunction with the *ATIPPA*;
- Whether or not the identity of an Applicant seeking access to information and the reason(s) or motive(s) for the access to information request should be considered in determining an *ATIPPA* appeal;
- What role, if any, ongoing civil proceedings should have upon the proper and timely adjudication of an *ATIPPA* appeal;
- Whether a Court has the statutory power to order a stay of proceedings in an *ATIPPA* appeal, and if so, under what circumstances.

[20] In *Warford v. Weir's Construction Limited*, 2012 NLCA 37, 323 Nfld. & P.E.I.R. 174, I stated:

An “interest” within Rule 7.05(1)(a) extends to an interest in the outcome of an appeal when a legal issue to be determined on the appeal will be binding on future similar litigation to which the applicant will be a party; *Newfoundland (Minister. of Govt. Services and Lands) v. Drew* (2000), 191 Nfld. & P.E.I.R. 82 (Nfld. T.D.), at paras. 13-17. Here the question at issue is whether the Commission has the right under s. 46 to determine whether an action commenced by the Commission itself (as opposed to a worker) is prohibited by the *Act*. The decision will be binding on future similar cases. Also, it is a public law issue warranting a less rigid approach in the exercise of the Court’s discretion to permit interventions; *Drew*, at paragraph 23. The court and society will benefit by receiving different points of view on such an issue.

[21] The issues to be determined on this appeal will be binding in future similar litigation to which the Commissioner will be a party and have a public law aspect in that their resolution will likely impact individuals who request access to information in the future. The public law aspect of this appeal warrants the Commissioner being granted leave to appeal on the basis of rule 7.05(1)(a).

[22] By granting under subsection 61(2) of the *ATIPPA* the right to the Commissioner to intervene on an appeal to the Trial Division under section 60, the Legislature has clearly indicated that the Commissioner has an interest in the subject matter of proceedings such as this where the head of a public body has refused disclosure.

[23] I am satisfied the Commissioner has a significant interest in the interpretation and operation of the *ATIPPA* in this Province as set out in his affidavit and can provide a unique and enhanced perspective regarding the operation of access to information law. Drawing upon the Commissioner’s expertise will promote better, more informed decision-making and increased public acceptance of court decisions. See John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, (3rd. ed. Markham, ON: LexisNexis, 2012), at pp. 342-343.

[24] I do not accept Nalcor’s submission that leave to intervene should not be granted because the Commissioner will not be adversely affected by the judgment respecting the issues on appeal. As noted in *Warford*, a binding decision on a public law issue warrants a less rigid approach to intervention. Nor do I accept Nalcor’s argument that since statutory intervention is at the heart of the appeal, the Commissioner’s intervention will not be needed. A key factor in the process of statutory interpretation is determination of the effect of one or another interpretation on matters of public policy. The

Commissioner will provide useful information regarding how adoption of a particular interpretation will affect the operation of access to information law.

[25] I have considered whether the Commissioner's intervention will unduly delay or prejudice the parties and I am satisfied it need not have this effect. The Commissioner has made this application early in the proceedings and has committed to file his written submission in a timely fashion. To permit the Commissioner to intervene in these circumstances need not cause an injustice or excessive burden on the parties. See *Warford* and *Eastern Regional Health Integrated Authority*.

(iii) Conditions on Intervention

[26] Nalcor has requested that any intervention be limited in scope to providing only policy-based background submissions on the applicable sections of the ATIPPA, addressing only issues where the Commissioner can demonstrate specific expertise beyond the existing parties and the Court, and raising no new issues or issues not fully canvassed at the Trial Division.

[27] I am satisfied that Nalcor's concerns will be met by recognizing that this Court will retain a discretion to determine the scope of the issues to be addressed in order to avoid imposing an excessive burden on the parties or causing an injustice.

IV. SUMMARY AND DISPOSITION

[28] In summary:

(i) The Commissioner has a right to intervene under s. 61(2) of the *ATIPPA* and leave is granted to intervene pursuant to rule 7.05(1)(c).

(ii) The Commissioner should in any event be granted leave to intervene pursuant to rule 7.05(1)(a) as a person with an interest in the subject matter of the proceeding.

(iii) Out of an abundance of caution I order that the Commissioner's intervention be limited to addressing the issues and policy considerations raised by the parties and matters necessarily incidental to these, unless and until otherwise determined by the Court, and the Commissioner shall adhere to the time limits set out in the *Rules of Court* or as directed by the Court. The Commissioner shall not be entitled to costs but may be subject to these

if the Commissioner causes undue delay or prejudices in other ways the adjudicative rights of the parties.

(iv) There is no award of costs on this application.

L. D. Barry J.A.