



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

Citation: *Eastern Regional Integrated Health Authority v. Association of Registered Nurses of Newfoundland and Labrador*, 2016 NLCA 18

Date: May 6, 2016

Docket: 201401H0018, 201401H0029

BETWEEN:

EASTERN REGIONAL INTEGRATED
HEALTH AUTHORITY APPELLANT/RESPONDENT
BY CROSS-APPEAL

AND:

ASSOCIATION OF REGISTERED NURSES OF
NEWFOUNDLAND AND LABRADOR
RESPONDENT/APPELLANT
BY CROSS-APPEAL

AND:

DARRELL BOONE FIRST INTERVENOR

AND:

NEWFOUNDLAND AND LABRADOR
ASSOCIATION OF SOCIAL
WORKERS SECOND INTERVENOR

Coram: Welsh, Barry and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G2913
(2013 NLTD(G) 164 and 2014 NLTD(G) 33)

Appeal Heard: December 17 & 18, 2015
Judgment Rendered: May 6, 2016

Reasons for Judgment by Welsh J.A.
Concurred in by Barry and Harrington JJ.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Augustine F. Bruce Q.C.
Counsel for the Respondent/Appellant by Cross-Appeal: Trudy L. Button and R. Trent Skanes
Counsel for the First Intervenor: Peter N. Browne Q.C. and Aimee N. Rowe
Counsel for the Second Intervenor: Thomas E. Williams Q.C.

Welsh J.A.:

[1] In conducting a disciplinary investigation involving one of its members, the Association of Registered Nurses of Newfoundland and Labrador (the “Nurses Association”) sought production of certain documentation and information from the Eastern Regional Integrated Health Authority (“Eastern Health”). When production was not forthcoming, the Nurses Association issued a subpoena. Eastern Health applied for an order in the nature of *certiorari* to quash the subpoena. That application was dismissed and Eastern Health was ordered to produce the requested information. Before a formal order had been issued, the Nurses Association sought clarification of the decision.

[2] This appeal engages issues of statutory interpretation where it is alleged that conflict results from the operation of the legislation. In addition, the question of issuing a supplementary decision for the purpose of clarification is considered. Finally, the unusual nature of the dispute engages issues regarding the standard of review applied by the applications judge to the statutory interpretation adopted by the two parties.

BACKGROUND

[3] An incident involving a nurse employed by Eastern Health resulted in a request for disciplinary action based on an allegation filed with the Nurses Association. The incident also gave rise to a quality case review conducted by Eastern Health pursuant to guidelines authorized under the *Regional*

Health Authorities Act, SNL 2006, c. R-7.1. In conducting an investigation under the *Registered Nurses Act, 2008*, SNL 2008, c. R-9.1, the Nurses Association sought production of documents and information compiled by Eastern Health in the quality case review. Eastern Health refused, claiming evidentiary privilege under the *Evidence Act*, RSNL 1990, c. E-16. In response, the Nurses Association issued a subpoena. Eastern Health then applied to quash the subpoena. That application was dismissed (2013 NLTD(G) 164, 343 Nfld. & P.E.I.R. 214).

[4] In dismissing the application, the judge applied a standard of review of correctness to the Nurses Association's interpretation of the legislation. He resolved an apparent conflict among the statutes on the basis of which was most recently enacted. While I agree with his conclusion that, in the circumstances, Eastern Health could not rely on evidentiary privilege, I apply a different analytical approach based on the harmonious interpretation of the legislative provisions.

[5] At the request of the Nurses Association, the applications judge issued a supplementary decision for the purpose of clarifying the original decision (2014 NLTD(G) 33, 348 Nfld. & P.E.I.R. 177). Eastern Health submits that the judge was *functus officio* and without jurisdiction to issue the supplementary decision.

[6] The Nurses Association also filed a cross-appeal which appears to raise only one new issue, the others being addressed in response to the issues on appeal:

Whether the Learned Trial Division Justice erred in law by failing to consider that Eastern Health cannot extend its terms of reference of its quality assurance guidelines to encroach upon core issues of nursing competence, as nursing competence is within the Nurses Association's exclusive statutory domain under the *Registered Nurses Act, 2008*.

[7] In its factum, the Nurses Association states that the applications judge "failed to address this argument". If the Nurses Association wished to have this issue considered on appeal, in the circumstances, it was incumbent on it to raise the failure to address the point with the judge under rule 15.07 of the *Rules of the Supreme Court, 1986* and to request a decision. Rule 15.07 is discussed below as it applies to the supplementary decision released by the applications judge. Indeed, the application by the Nurses Association to have the first decision clarified provided the opportunity to have the judge

consider this omitted issue. This was not done. The result is the lack of a contextual framework and foundation for consideration of the question at first instance in this Court. Accordingly, I would decline to address this issue.

[8] Prior to the hearing, two parties applied for and were granted intervenor status: Darrell Boone, a physician, in support of Eastern Health; and the Newfoundland and Labrador Association of Social Workers, in support of the Nurses Association.

ISSUES

[9] The substantive issue in this appeal is the interpretation of legislative provisions regarding the evidentiary privilege asserted by Eastern Health.

[10] The additional issues relate to: (1) the standard of review that the applications judge applied to the decision of the Nurses Association to issue a subpoena; and (2) the jurisdiction of the applications judge to issue a supplementary decision.

ANALYSIS

Standard of Review

[11] The applications judge employed the analytical approach to the standard of review that applies when assessing the level of deference to be accorded the decision of an administrative tribunal (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). The judge applied the analysis to the decision of the Nurses Association since the request for production of documents and information came from that party. He determined that a standard of correctness applied.

[12] However, an approach that is directed to assessing the level of deference to be accorded the decision of an administrative tribunal does not provide an appropriate analytical framework for this case. This is not a situation of a tribunal interpreting legislation in order to determine an issue raised by a party that is before it. It is simply a dispute between two administrative bodies addressing the same issue.

[13] An example of the approach to resolution of such a conflict is found in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739. In that case, the Court concluded that curial deference

is not engaged. Resolution of the proper construction of the legislation is a matter for the courts. (*Shaw Cable*, at paragraphs 52 and 79. I note that, in resolving the question before the Court in that case, it was necessary to determine which tribunal had precedence over the other. That issue does not arise in this case.)

[14] This appeal involves two administrative bodies interpreting the same statutory provisions in the same context, but coming to conflicting decisions. In the circumstances, it is for the Court to apply the appropriate principles of statutory interpretation to determine whether the legislative provisions are, in fact, in conflict, and how they are to be construed. Deference to the decision of either the Nurses Association or Eastern Health does not arise.

Evidentiary Privilege – Obligation of Eastern Health

Presumption of Coherence

[15] In conducting the analysis of the legislation, the starting point is the presumption of coherence. This principle is stated in Sullivan, *Sullivan on the Construction of Statutes*, fifth edition (Markham, ON: LexisNexis, 2008), at page 325:

It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. ...

[16] In *Lévis (City) v. Fraternité des Policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, Bastarache J., for the Court, explained:

[47] The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other. ...

[17] Accordingly, in determining whether Eastern Health is entitled to the evidentiary privilege it asserts, an interpretation that avoids conflict among the legislative provisions will be preferred.

Interpretation of the Applicable Legislation

[18] The foundation of the dispute between the Nurses Association and Eastern Health is the mandate of each to investigate an incident that may result in both a review of hospital procedures and disciplinary proceedings against a registered nurse.

[19] Under the *Regional Health Authorities Act*, Eastern Health may conduct a quality case review. The applications judge described the purpose of such a review in this way:

[16] A Quality Case Review Committee is mandated to study, assess and evaluate the provision of health care with the view to identifying opportunities to improve the quality of care for the population served.

[20] Under the *Registered Nurses Act, 2008*, the Nurses Association has a mandate to investigate an allegation against a member. The judge explained:

[19] The [Nurses Association] is a self-governing body created by the *Registered Nurses Act, 2008*. It has a statutory mandate to regulate the practice of nursing in Newfoundland and Labrador with one of its primary objectives being to protect the public. To fulfill this objective, [the Nurses Association] has a statutory duty to investigate any allegation that a registered nurse has “engaged in conduct deserving of sanction” (reference *Registered Nurses Act* ss. 4 and 18).

[21] Both these procedures require investigation and the compilation of documents and information. Whether the Nurses Association in pursuing an investigation has the right to obtain access to documents and information compiled under Eastern Health’s quality case review depends on interpretation of the relevant statutory provisions.

[22] I begin with section 16(3) of the *Regional Health Authorities Act* which sets out the responsibilities of a Health Authority such as Eastern Health. Those responsibilities include that it

(i) monitor and evaluate the delivery of health and community services and compliance with prescribed standards and provincial objectives and in accordance with guidelines that the minister may establish for the authority under paragraph 5(1)(b); ...

[23] The “management and affairs” of a Health Authority are directed by a board of directors (section 8(1)). A board may make by-laws “relating to its internal organization and proceedings and for the general conduct and management of its affairs” (section 10(1)). As set out by the applications judge at paragraph 5, Eastern Health’s by-laws include a provision regarding quality assurance:

12.01(a) “Quality Initiatives” means Eastern Health’s systematic process of monitoring and evaluating the quality of care and service, identifying and resolving problems, and identifying and acting upon opportunities to improve care and service continually by monitoring the quality of structures, processes and outcomes.

[24] The applications judge reviewed the quality case review guidelines approved by Eastern Health:

[6] On September 22nd, 2011, Eastern Health adopted Quality Case Review guidelines (the “Guidelines”). These Guidelines describe when and how Eastern Health will conduct a quality case review as defined in the Guidelines (a “Quality Case Review”). A Quality Case Review is described at paragraph 1.1 of the Guidelines as follows:

This document provides direction for conducting a Quality Case Review. A Quality Case Review originates from the review of a single patient occurrence. ... A Quality Case Review is one quality assurance activity that consists of an inspection and evaluation of health care structures, practices, and/or results that are conducted or guided by health care practitioners.

[25] Eastern Health submits that the information and documentation compiled during a quality case review cannot be provided for purposes of an investigation regarding disciplinary proceedings under the *Registered Nurses Act, 2008*. In making this submission, Eastern Health, relying on section 8.1 of the *Evidence Act*, submits that the applications judge erred in failing to quash the subpoena because, under a quality case review, any reports, statements, evaluations, recommendations, memoranda, documents or information compiled for that purpose are not subject to disclosure. Section 8.1 of the *Evidence Act* provides:

(1) In this section

(a) “legal proceeding” includes an action, inquiry, arbitration, judicial inquiry or civil proceeding in which evidence may be given and also includes a proceeding before a board, commission or tribunal; ...

(2) This section applies to the following committees:

...

(b) a quality assurance committee of a member, as defined under the *Hospital and Nursing Home Association Act*, ...

[26] There is no dispute that a quality case review is conducted by a quality assurance committee falling under section 8.1(2)(b). Further, Eastern Health is a “member” under that provision as defined in the *Hospital and Nursing Home Association Act*, renamed the *Health Care Association Act*, RSNL 1990, c. H-8:

"member" means a hospital, nursing home, institution or organization that is represented within the corporate structure of the association by designated voting delegates;

[27] The limitation on disclosure is set out in section 8.1(3) of the *Evidence Act*:

No report, statement, evaluation, recommendation, memorandum, document or information, of, or made by, for or to, a committee to which this section applies shall be disclosed in or in connection with a legal proceeding.

[28] The effect of the operation of sections 8.1(2)(b) and (3) is that documents and information compiled in a quality case review by Eastern Health may not be disclosed in a “legal proceeding” unless other legislation provides an exception.

[29] I turn, then, to the *Registered Nurses Act, 2008*. Under section 22, an allegation against a nurse may be resolved by the Director of Professional Conduct Review. If the allegation is not resolved, as was the case here, the Director would refer the matter to the complaints authorization committee.

[30] Under section 23(1) of the *Act*, the complaints authorization committee may

- (a) refer the allegation back to the Director of Professional Conduct Review for an investigation or alternative dispute resolution, or both in accordance with the regulations;
- (b) conduct an investigation itself or appoint a person to conduct an investigation on its behalf; and
- (c) require the respondent to appear before it.

In this case, the complaints authorization committee appointed a person to conduct an investigation.

[31] Under section 23(4), the investigator may require

- (a) the respondent to
 - (i) undergo an examination or assessment he or she considers necessary and as arranged by the Director of Professional Conduct Review, and
 - (ii) permit the Director of Professional Conduct Review or a member of the complaints authorization committee or a person appointed by the complaints authorization committee to inspect and copy the records of the respondent and other documents relating to the subject matter of the investigation; and
- (b) another person to permit ... a person appointed by the complaints authorization committee to inspect and copy records and other documents relating to the subject matter of the investigation held by that person, ...

Section 23(6) states that the information under subsection (4) “shall be provided” within a specified period of time.

[32] Section 19(10) of the *Act* deals with the general powers of an investigator appointed by the complaints authorization committee:

The complaints authorization committee, an adjudication tribunal appointed under section 24 and a person appointed by either of them may summon a respondent or other person and require the respondent or other person to give evidence, orally or in writing, upon oath or affirmation, and produce the documents and things that either of them considers necessary to the full investigation and hearing of an allegation or complaint and shall have the powers, privileges and immunities that are conferred on a commissioner appointed under the *Public Inquiries Act, 2006*.

(Emphasis added.)

[33] The *Public Inquiries Act, 2006*, SNL 2006, c. P-38.1, in addition to powers conferred on a commissioner appointed under that *Act*, deals with powers of investigation conferred by another statute. Section 30 provides:

Where another Act confers upon a person or body the powers of a commission under this Act, the powers conferred on the person or body are those powers given under sections 9 and 10 unless otherwise ordered by the Lieutenant-Governor in Council.

[34] Section 9 confers the power to compel the production of documents and records “that may relate in any way to the subject of the inquiry”. Section 10 gives the power to inspect and seize documents and records.

[35] Section 12 of the *Public Inquiries Act* deals with evidentiary privilege. Subsection (1) provides for privilege that would apply in proceedings in a court:

(1) A person has the same privileges in relation to the disclosure of information and the production of records, documents or other things under this Act as the person would have in relation to the same disclosure and production in a court of law.

[36] Subsections (2) and (3) provide overlays to the privilege that applies under subsection (1). Subsection (2), which refers to the situation where “disclosure would be injurious to the public interest or would violate Crown privilege”, does not apply here. The relevant provision is subsection (3):

Notwithstanding subsection (1), a person shall not refuse to disclose information to a commission or a person authorized by a commission on the grounds that the disclosure is prohibited or restricted by another Act or regulation.

[37] “Commission”, for purposes of subsection (3), is defined to mean a commission of inquiry established by order of the Lieutenant-Governor in Council (sections 2(a) and 3). On its face, an investigation under the *Registered Nurses Act, 2008* would not fall within this definition. However, section 24 of the *Interpretation Act*, RSNL 1990, c. I-19, speaks to the application and operation of the *Public Inquiries Act* in the context of other statutes. Section 24 provides:

Where in an Act a person, board, commission or other body is given the powers that are or may be conferred on a commissioner under the *Public Inquiries Act*, or those powers are conferred by a form of words in an Act, the *Public Inquiries Act* applies in respect of an inquiry, investigation or hearing carried out by the person,

board, commission or body in like manner and with like effect as though that inquiry, investigation or hearing were an inquiry held by commissioners appointed under the *Public Inquiries Act* and vested with all powers that can be conferred upon commissioners under that Act.

(Emphasis added.)

[38] In the result, the powers set out in sections 9 and 10 of the *Public Inquiries Act* may be exercised by an investigator appointed by the complaints authorization committee under the *Registered Nurses Act, 2008*. Evidentiary privilege regarding the exercise of those powers is governed by section 12 of the *Public Inquiries Act*. As discussed above, section 12(3) of that Act provides an exception to the generally applied principle of evidentiary privilege; that is, where section 12(3) is engaged, disclosure of the information cannot be refused “on the grounds that the disclosure is prohibited or restricted by another Act or regulation”.

[39] The effect of applying section 12(3) in this case is that Eastern Health shall not refuse to disclose information to an investigator appointed by the complaints authorization committee on the grounds that the disclosure is prohibited or restricted by section 8.1 of the *Evidence Act*. There is no conflict. This interpretation allows each legislative provision to operate harmoniously with the others. Had the legislature intended a different result, clear language to that effect could have been included in, for example, section 8.1 of the *Evidence Act* or in the *Regional Health Authorities Act*.

[40] Given this interpretation of the legislation, it is unnecessary to determine what constitutes a “legal proceeding” under section 8.1(3) of the *Evidence Act*. The applications judge did not address the issue and it was not argued with comprehensive submissions on appeal. Accordingly, the definition of what constitutes a legal proceeding under that provision is left for another day.

[41] The conclusion that, in the context of an investigation authorized by the complaints authorization committee, Eastern Health cannot claim evidentiary privilege in respect of the information and documents compiled pursuant to a quality case review is consistent with the purpose of both the *Registered Nurses Act, 2008* and the *Regional Health Authorities Act*. Both are directed to public safety, the former by ensuring that registered nurses provide an appropriate standard of care and the latter by ensuring that

appropriate processes and procedures are in place in the health care environment.

[42] In addition, the sharing of information regarding a single incident has the practical effect of encouraging efficiencies of time and costs and of reducing the likelihood of inconsistent information regarding the same incident being considered by the two bodies. The Nurses Association pointed to the difficulty that arises in compiling information, particularly witness statements, after the passage of time due to delay which may result from the nature of the complaint-driven process. By contrast, it could be expected that the process engaged by Eastern Health would proceed without delay given that it is the incident itself that would trigger an investigation.

[43] Eastern Health submits that to permit the information and documents compiled in a quality case review to be disclosed to an investigator appointed under the *Registered Nurses Act, 2008* would have a chilling effect on the ability of Eastern Health to obtain forthright and complete information during a quality case review. I do not accept this as a valid consideration. The investigations done by both Eastern Health and the Nurses Association are “in house” in the sense that neither is public and both deal with the same incident with the focus being public safety. Both are entitled to the same information relevant to an investigation.

[44] To summarize, the effect of the *Public Inquiries Act* is to provide an exception to the evidentiary privilege referenced in section 8.1(3) of the *Evidence Act*. Accordingly, Eastern Health is required to comply with the Nurses Association’s request to provide documentation and information that was compiled for a quality case review under the *Regional Health Authorities Act*.

Supplementary Decision

[45] Upon the application of the Nurses Association, before filing the formal order, the judge issued a second decision which he described as clarification of his earlier decision. Eastern Health submits that the judge was *functus officio* and without jurisdiction to issue the supplementary decision.

[46] Rule 15.07 of the *Rules of the Supreme Court, 1986* authorizes the court to amend a decision in limited circumstances:

Clerical mistakes in decisions or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which should have but was not adjudicated upon, may at any time be corrected or granted by the Court, without appeal.

[47] In this case, the applications judge was not relying on a clerical mistake, and he specified that the “additional reasons do not qualify as an amendment to provide for a matter which should have been but was not adjudicated upon” (paragraph 24). The judge explained:

[24] ... By providing additional reasons for judgment as set out herein I am not altering the substance of my decision but I hope making it more clear. I am not adding provisions to my reasons for judgment which I had not previously considered, indeed I obviously considered them. I just did not articulate them clearly. ... The error in my decision arose from an accidental omission to provide clear instructions to the parties of the qualifications, restrictions or conditions upon the use of the evidence ordered to be released. ...

[48] One of the difficulties presented by this case is the fact that the question of imposing qualifications, restrictions or conditions upon the use of the documentation compiled by Eastern Health was not a matter that was brought by the parties and was not before the judge in the initial proceeding. He explained:

[23] ... I clearly intended to impose restrictions upon the use that could be made of the subpoenaed documentation and upon the use of written or *viva voce* evidence given at any discipline hearing conducted by [the Nurses Association] or disclosed or given during the investigatory process related to the potential disciplinary hearing. During the initial hearing neither counsel argued or emphasized that if I was to find in favour of the position of [the Nurses Association], I should nevertheless place qualifications or restrictions on the use, publication or dissemination of evidence so ordered to be disclosed. The initiative to place such restrictions or qualifications arose from my personal conclusion that there was a genuine public good which the legislature sought to protect and promote by enacting the statutory non-disclosure provisions of the *Evidence Act* related to matters before hospital assurance committees and that I should preserve those protections except to the extent that disclosure to the [Nurses Association] of the subpoenaed evidence was necessary for the investigation and possible prosecuting of a complaint against the nurse.

(Emphasis added.)

[49] If the judge wanted to impose conditions not adverted to or requested by counsel, the appropriate procedure would have been to recall counsel for

the purpose of hearing submissions before completing and releasing the first decision. If the judge was simply clarifying what he intended to say in his decision, and it was apparent from the application of the Nurses Association that this was unclear, the elaboration of what he intended could have been included in the formal order. However, to hold a hearing to clarify what the parties had not raised and what the judge intended was not a proper procedure. The submissions of the parties could not be relied upon to clarify what the judge created from whole cloth without the parties' assistance. The result would be to constrain any submissions the parties may have wished to make regarding appropriate conditions.

[50] The original decision included these statements as to conditions which the judge indicated that he intended to clarify by means of the supplementary decision:

[103] ... Nothing in these reasons for judgment opens up the material, evidence or witnesses to which s. 8.1 of the *Evidence Act* applies to a general fishing expedition by any person seeking a disclosure thereof. The protections afforded to the participants in a quality assurance review committee and to its documents stand full and unimpeded. ... The result of this is that the information to be disclosed to the [complaints authorization committee] of the [Nurses Association] pursuant to the subpoena is to be treated confidentially by the [complaints authorization committee] and any disciplinary panel appointed by the [Nurses Association]. The information provided pursuant to the subpoena and the *viva voce* or other evidence of any witnesses that may be called or interviewed with respect thereto otherwise remains subject to the non-disclosure provisions of s. 8.1 of the *Evidence Act*. Naturally, the [complaints authorization committee] and any disciplinary panel are entitled to provide the documentation received pursuant to the subpoena, including summaries of any "will say" type statements by others who will have been interviewed by the [complaints authorization committee] to the nurse member whose conduct is under investigation. That nurse member shall be entitled to provide such information to legal counsel or to any experts to be retained by him with respect to any discipline proceedings. Said legal counsel and expert(s) shall maintain complete confidentiality with respect thereto.

[51] If, in applying these comments, concern arose regarding use of the disclosed documents and information, this should have been treated as a separate application to which the parties could make submissions unconstrained by the strictures of what the judge characterized as clarification of what he intended.

[52] In the result, I conclude that rule 15.07 was not engaged and that the applications judge erred in issuing the supplementary decision.

Accordingly, the portions of the order incorporating that decision must be deleted.

SUMMARY AND DISPOSITION

[53] In summary, regarding the standard of review applied by the applications judge, in the circumstances, it is for the Court to apply the appropriate principles of statutory interpretation to determine whether the legislative provisions are, in fact, in conflict, and how they are to be construed. Deference to the decision of either the Nurses Association or Eastern Health does not arise.

[54] The effect of the *Public Inquiries Act* is to provide an exception to the evidentiary privilege referenced in section 8.1(3) of the *Evidence Act*. Accordingly, Eastern Health is required to comply with the Nurses Association's request to provide documentation and information that was compiled for a quality case review under the *Regional Health Authorities Act*.

[55] The applications judge erred in issuing the supplementary decision. Accordingly, the portions of the order incorporating that decision must be deleted.

[56] I would decline to address the issue raised by way of cross-appeal because it was not dealt with by the applications judge and lacks the necessary foundation for consideration at first instance in this Court.

[57] In the result, I would dismiss the appeal in respect of the interpretation of the legislation regarding evidentiary privilege asserted by Eastern Health. In light of the mixed success on issues raised by the parties, I would make no order as to costs.

B. G. Welsh J.A.

I Concur: _____

L. D. Barry J.A.

I Concur: _____

M. F. Harrington J.A.