

Date: 20120228
Docket: 11/39
Citation: *Oleynik v. Newfoundland and Labrador*
(*Information and Privacy Commissioner*), 2012 NLCA 13

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

BETWEEN:

ANTON OLEYNIK

APPELLANT

AND:

THE INFORMATION AND PRIVACY
COMMISSIONER OF NEWFOUNDLAND
AND LABRADOR

RESPONDENT

Coram: Rowe, Mercer and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division (General) 201001T2230

Appeal Heard: February 10, 2012

Judgment Rendered: February 28, 2012

Reasons for Judgment by the Court

Counsel for the Appellant: Self-Represented

Counsel for the Respondent: Kerry R. Hatfield

By the Court:

[1] The appellant appeals the decision of the applications judge denying his application for judicial review in relation to a report by the Office of the Information and Privacy Commissioner (Commissioner's Report). The Commissioner's Report contained findings that a reasonable search was conducted by the information access and privacy protection coordinator employed by Memorial University of Newfoundland at the request of the appellant, a professor there, regarding the status of e-mails that the appellant believes may have related to him but were deleted from the university's computer system.

[2] Rather than pursuing an appeal contesting the response of the university to the appellant's request, a remedy which is specifically provided under section 60 of the *Access to Information and Protection of Privacy Act*, SNL 2002, c.A-1.1 (the *Act*), the appellant elected to file an application for the prerogative remedy of *mandamus* directed to the Commissioner based on prejudice due to delay in the delivery of the Commissioner's Report. When the Commissioner's Report was filed before the application was heard, the appellant then sought to have the Report set aside on the basis that it was in error in its conclusion that the university's search for the allegedly deleted e-mails was reasonable. He also submitted that the Report was so seriously deficient that it could not be considered a report which complied with the reporting obligations of the Commissioner under the *Act*.

[3] The central issue on the application before the court below and on this appeal became whether the remedy of *certiorari* was available to the appellant. The applications judge noted that a remedy under section 60 of the *Act* by way of appeal to the Trial Division respecting the decision of the university to accept the Commissioner's Report had been available but was not pursued. Though a claim for *certiorari* was not formally pleaded, counsel for the Commissioner and the applications judge addressed the availability of this remedy in the particular circumstances of the application. The appellant argued that in the event his application for *mandamus* was not successful, an order in the nature of *certiorari* should be granted.

[4] The applications judge refused to grant the application for *certiorari* on the basis that the Report prepared by the Information and Privacy Commissioner was only a recommendation and had no binding effect. There is persuasive authority that would appear to suggest, however, that *certiorari* is available in such circumstances: see *Re Abel and Advisory Review Bd*.

(1979), 24 O.R. (2d) 279, 46 C.C.C. (2d) 342, 97 D.L.R. (3d) 304 (Ont. Div. Ct.), affirmed (1980), 31 O.R. (2d) 520 (Ont. C.A.). This issue need not be decided as the appeal can be disposed of on other grounds.

[5] Even if *certiorari* is, in principle, available where the report being reviewed is only a recommendation, the court nevertheless must decide whether it should exercise its discretion to entertain such an application as it is a discretionary remedy: see *Conception Bay South (Town) v. Newfoundland (Public Utilities Board)* (1991), 92 Nfld. & P.E.I.R. 163 (Nfld. C.A.) at para. 18. In that case, Goodridge C.J.N., for the Court, stated:

[22] A right to apply for leave to appeal, if one exists, does not bar such an application but would undoubtedly be a strong factor against the appellants. It cannot however be considered in isolation from the other proper considerations which the parties may put before the judge and which the judge must consider.

[6] In this case, what Mr. Oleynik is ultimately seeking is a review of the university's response to the Commissioner's Report and the manner in which it had carried out the search for documents responsive to his request. This remedy is available through subsection 60(1) of the *Act*. That subsection provides:

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.

[7] Further to this, subsection 62(1) provides:

62(1) The Trial Division shall review the decision, act or failure to act of the head of a public body that relates to a request for access or correction of personal information under this Act as a new matter and may hear evidence by affidavit.

[8] The right of appeal in this case provides for a new hearing. The Trial Division is empowered to investigate the matter and make its own findings of fact. Although the existence of a right of appeal is not always determinative of the issue of whether *certiorari* is available, in this case the parties have not pointed to any countervailing considerations.

[9] The proper avenue for Mr. Oleynik to seek redress in this case was through section 60 of the *Access to Information and Protection of Privacy Act*. He could have done so within thirty days after receiving the letter from the university, dated May 5, 2010 advising him that it had accepted the Commissioner's Report that its computer search was reasonable. Since

appeals under section 60 are subject to the practice and procedure contained in the *Rules of the Supreme Court, 1986*, a prospective appellant may have a right under rule 57.05 to apply for an extension of time for the filing of an appeal.

[10] Instead, Mr. Oleynik, on April 22, 2010, commenced an application for judicial review in the nature of *mandamus* against the Commissioner respecting delivery of the Commissioner's Report and continued to pursue the application after the Report was delivered. Mr. Oleynik did not proceed by way of appeal notwithstanding the clear wording of section 60 of the *Act* and having been reminded of his right to appeal in direct correspondence dated April 28, 2010 from the Commissioner enclosing his Report. This letter made specific reference to his right to appeal within thirty days after the response of the university.

[11] The other ground raised by the appellant relates to the failure of the Commissioner to file a record respecting the appellant's application for *certiorari*. The record would not have included the actual documents or record relating to deleted e-mails the appellant was seeking from the university. The Court is satisfied the filing of a record would not have affected the analysis by the applications judge and her ultimate decision.

[12] For the reasons of the applications judge except the reason discussed in paragraph 4 herein, the Court concludes that none of the grounds of appeal has merit and that the decision of the applications judge should not be disturbed. The appeal is dismissed with costs in favour of the respondent in the court below and in this Court under Column III of the Scale of Costs in the appendix to Rule 55.

M. Rowe, J.A.

K.J. Mercer, J.A.

M.F. Harrington, J.A.