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Docket: 11/39
Citation: *Oleynik v. Newfoundland and Labrador (Information
and Privacy Commissioner)*, 2011 NLCA 73

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

BETWEEN:

ANTON OLEYNIK

APPELLANT/APPLICANT

AND:

THE INFORMATION AND PRIVACY
COMMISSIONER OF NEWFOUNDLAND
AND LABRADOR

RESPONDENT

Coram: Green, C.J.N.L.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201001T2230

Application Heard: November 8, 2011
Judgment Rendered: November 18, 2011

Reasons for Judgment by Green, C.J.N.L.

The Appellant/Applicant appearing on his own behalf
Counsel for the Respondent: Kerry Hatfield

Green, C.J.N.L.:

[1] In this application, the appellant, Anton Oleynik, seeks an order requiring the respondent, the Information and Privacy Commissioner, to make a return to the Registrar of this Court of all those documents and exhibits that formed the basis of an investigation conducted on behalf of the Commissioner and which led to the issuance of a report in response to a request by the appellant under s.43 of the *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1 that the Commissioner review a decision of Memorial University of Newfoundland, the appellant's employer, denying the appellant access to certain records. Mr. Oleynik also seeks an order extending the time for filing an appeal book until after the documents and exhibits are returned to the Registrar.

Background

[2] To understand the circumstances that led to the current application, it is necessary to review some of the events that led to an application by Mr. Oleynik in the Trial Division for an order of *mandamus* and for other relief against the Commissioner.

[3] Mr. Oleynik sought access, pursuant to the *Act*, to certain records from his employer, Memorial University of Newfoundland (the "university"). He was particularly interested in certain email records which he believed may have been improperly deleted from the university's computer system. He was not satisfied with the response of the university. He then requested the Commissioner, under s. 43 of the *Act*, to review the university's response and the manner in which it had carried out the search for documents responsive to his request. An investigation was undertaken but a report was not filed within the time limits stipulated by the *Act*.

[4] Mr. Oleynik then commenced a proceeding in the Trial Division seeking an order for *mandamus* requiring the Commissioner to file his report as he was legislatively required to do. Although Mr. Oleynik's originating application was directed to enforcement of the Commissioner's duty to make a report and his prayer for relief simply asked for "Judicial review of the Information and Privacy Commissioner's inaction," counsel for the Commissioner appears to have interpreted the language in Mr. Oleynik's application as requesting, not only *mandamus* but also an order in the nature of *certiorari* even though there was no allegation made in his originating application relating to any decision which was sought to be quashed. Indeed, there could not have been, since the Commissioner's report had not yet been filed.

[5] Counsel for the Commissioner pointed out, however, that the word “*certiorari*” did appear in Mr. Oleynik’s application. That reference was in the title of the rules of court respecting procedure relating to the use of prerogative writs in criminal matters. Mr. Oleynik’s application contained the following words:

The applicant submits an affidavit in support of this application as per Section 12 of Supreme Court of Newfoundland, Trial Division Rules for Orders in the Nature of *Certiorari*, Habeas Corpus, Mandamus and Prohibition SI/2000-33.

[Italics added]

The reference to “Section 12” and “SI/2000-33” make it clear that Mr. Oleynik was referring to *Supreme Court of Newfoundland, Trial Division Rules for Orders in the Nature of Certiorari, Habeas Corpus, Mandamus and Prohibition*, SI/2000-33 adopted under subsection 482(1) of the *Criminal Code*. I will observe, parenthetically, that in referring to these regulations, Mr. Oleynik was in error – those rules apply only to the use of *certiorari* and the other prerogative orders in criminal proceedings; the applicable provisions for Mr. Oleynik’s civil proceeding are found in Rule 54 of the *Rules of the Supreme Court, 1986*. But that does not detract from Mr. Oleynik’s position that the reference to “*certiorari*” in the regulations he cited was not for the purpose of claiming relief by way of *certiorari* but simply for identifying the authority under which he claimed (wrongly as it turned out) to be acting.

[6] It is clear to me, therefore, that counsel for the Commissioner is in error when she asserts that Mr. Oleynik’s initial claim for relief included a claim for an order in the nature of *certiorari*.

[7] Between the time of filing and hearing of the application, the Commissioner filed his report and took the position that *mandamus* was no longer available because he had complied with the duty to file his report. Mr. Oleynik nevertheless submitted that *mandamus* was still available. A fair reading of his written submission is that he was effectively arguing that the investigation conducted by the Commissioner’s investigator was so deficient that the resulting report could not be said to be a report that complied with the legislation and that the Commissioner should therefore be required to conduct a proper investigation and make a report that did comply with the legislation.

[8] It appears that counsel for the Commissioner continued to believe and assert that the availability of *certiorari* was engaged on the pleadings. In her trial brief she addressed argument on the issue and took the position that *certiorari* was not available because the Commissioner had no final decision-making authority. I agree with Mr. Oleynik that this was the first point where the applicability of the *certiorari* remedy was substantively addressed.

[9] As a result of the Commissioner's addressing availability of *certiorari* in her trial brief, Mr. Oleynik responded in his reply briefs with an alternative argument that, if the Court were to conclude that the *mandamus* remedy was no longer available, the court should consider making an order in the nature of *certiorari* to quash the report because it was defective in that the Commissioner had failed to conduct a proper investigation. The result of that would also have been a further (and proper) investigation with a new report.

[10] No formal amendment to the original application was made to set out the details of the claim to *certiorari* nor was a new application taken out. Regarded from the point of view of a claim for *certiorari* therefore, the original proceeding would have to be regarded as irregular. In particular, no notice had been given to the Commissioner, as the author of the report which was sought to be quashed, requiring him to return to the Registrar the decision together with "the evidence and all exhibits filed, if any, and all things touching the proceeding..." as required by rule 54.07 of the *Rules of the Supreme Court, 1986*. Indeed, one would not expect such a notice to have been included because, as I have indicated, the original application did not seek *certiorari* as a remedy.

[11] No formal "return" of the record of the investigation and decision was therefore made by the Commissioner as required by rule 54.08. Instead, in response to the *mandamus* application, the Commissioner had filed an affidavit from the investigator which had attached to it a number of exhibits, including Mr. Oleynik's request for review, a request from the investigator to the university for certain information, certain letters passing between Mr. Oleynik and the investigator, and the resulting report. While these documents would likely be considered part of the "record" of the investigation, it is certainly possible that other documents would also be included within the notion of the "record". For example, there were none of the investigator's notes relating to his investigations included. (I recognize the point made by counsel for the Commissioner that some of the material generated or obtained by the investigator in the course of his work might be

considered confidential under the applicable legislation and therefore might be withheld or redacted in any event; but that is a separate issue from whether it is, in principle, part of the record. The issue of whether, notwithstanding it constituting part of the record, any privilege or obligation of confidentiality might ultimately trump the obligation of a decision maker to return to the whole record to the court for judicial review would only arise at a later stage of the process).

[12] Mr. Oleynik left the province for Russia in connection with his work shortly after he filed his original application. He was not able to return at times when interlocutory matters pertaining to the case were dealt with, nor for the hearing itself. His participation occurred by means of teleconference. He says he was hampered with respect to amending his application to include a notice in accordance with rule 54.07 requiring a return of the record to the court or with respect to making a separate application to ensure that the full record of the Commissioner's investigation was put before the court for the purpose of the *certiorari* application. He says he had difficulty getting access to someone who could arrange for the swearing of the requisite affidavits. Notwithstanding those stated difficulties, however, he was able to submit several affidavits on other issues (duly sworn in front of an official of the Canadian Embassy in Moscow) in response to the Commissioner's filings, as well as a "Reply Brief" and a "Trial Brief", in which he addressed the *certiorari* issue.

[13] At the hearing of the application, notwithstanding the irregularities in the way the issue of *certiorari* was raised and in the failure to take the proper procedural steps to ensure that the full record of the investigation was before the Court, the judge invited submissions on both the *mandamus* and *certiorari* issues, (Transcript, pp.3-4; 5-6). Counsel for the Commissioner essentially submitted that *mandamus* was not available because the duty to file a report had been complied with, albeit late. She further submitted that the manner in which the Commissioner conducted his investigation was within his discretion and not reviewable on a *mandamus* application. With respect to the *certiorari* application, she submitted (Transcript, pp. 13-15) that that remedy should also be denied because the Commissioner's report had no legally binding effect; it could only contain recommendations which the university was free to accept or reject. There was therefore no decision to quash.

[14] Mr. Oleynik also spoke to the issue of *certiorari* as well as *mandamus*. One of his points in relation to *certiorari* was that (in his words):

... the quality of the investigation is so poor that ... the report prepared on the basis of that investigation is unsustainable, is unacceptable. ... [T]he job was not done. The job was not done because the Office of the privacy Commissioner did not submit to the Court any return.

(Transcript, p. 33)

[15] I take this to mean that Mr. Oleynik was saying that the method of the investigation was so deficient that the resulting report could not be regarded as a report in accordance with the legislation (thereby justifying an order of *mandamus* to conduct a proper investigation and produce a proper report or, alternatively, justifying an order in the nature of *certiorari* quashing what was obviously a completely deficient report).

[16] It is to be noted as well that Mr. Oleynik, in the passage quoted, refers to the fact that the Commissioner “did not submit to the Court any return”. He submitted in argument in this Court that that was a reference, in the form of an objection, to the fact that the whole of the record of the Commissioner’s investigation was not before the Court and that, without that record, the Commissioner could not say that the investigation was not flawed. He referred to a further submission of his later in the hearing:

...they didn’t submit any evidence of the data collected in the process of the investigation. They didn’t, they didn’t file a return, so-called return, and this is routinely done in most other cases Whether the Office of the Privacy Commissioner wants to defend themselves and prove that the job was done properly, it means they usually submit all materials collected in the process of the investigation to prove they are right. That the job was properly [done].

(Transcript, p. 38)

And later again:

... what were [the] result of the searches?

....

... the information is available [on] that point but not completely. Why not completely? Because [the] return was not filed. And the Court has not seen the return. And this is a must in this case I believe.

(Transcript, pp. 61-62)

[17] To the extent that these references can be taken as an objection that the Commissioner had not made a return to the Court of the whole record in accordance with rule 54.08, counsel for the Commissioner does not appear to have addressed the issue in response. Nor did the applications judge during the hearing or in her decision.

[18] The applications judge ruled that the legislative time limits for filing a report were directory, not mandatory, and that any delay in filing the report was therefore cured when it was ultimately released. She further concluded that the manner of conducting a review is left by statute to the discretion of the Commissioner and that the Commissioner conducted his review and wrote his report in the manner contemplated by the *Act*. While she acknowledged that “a review conducted by the Commissioner could be so deficient that it could not properly be considered a review at all” (Judgment, para. 71), and that in such a case *mandamus* might be available, she stated that that was “not the case here”. She therefore concluded that *mandamus* should not be granted.

[19] With respect to the request for an order in the nature of *certiorari*, she held that *certiorari* was not available because the report did not constitute “a decision with legal consequences”, since it was only a series of non-binding recommendations. As a result, the application was dismissed. She did not deal with Mr. Oleynik’s submission, in the context of the *certiorari* application, that the Commissioner’s report was so defective that it could not be said to be a proper exercise of the Commissioner’s functions and therefore should be quashed. Furthermore, she did not appear to address the question as to whether the record was sufficiently complete as to allow for consideration of whether the issue with regard to *certiorari* could be determined.

The Appeal

[20] Mr. Oleynik’s appeal to this Court challenges the applications judge’s decision dismissing his application on the following grounds, as stated in his notice of appeal, which he drafted himself:

1. The standard of review is not properly established and grounded;
2. The Appellant was seriously prejudiced by the missed deadline for producing the Commissioner’s report;

3. The Respondent produced weak documented evidence;
4. The issue of the thoroughness of the investigation is not properly addressed; and
5. a number of other grounds.

[21] As an unrepresented litigant, Mr. Oleynik is entitled to a degree of leeway when it comes to determining what the scope of appeal is intended to encompass. Loosely construed, grounds 3 and 4 could be taken to raise the issues of: (i) whether it was appropriate to proceed with the *certiorari* application without first ensuring that rules 54.07 and 54.08 were complied with; and (ii) whether the applications judge properly addressed the appellant's concern expressed at the hearing that a return of the record had not been made; (iii) whether the applications judge properly addressed the appellant's arguments that the report should have been quashed on the ground that the investigation was fundamentally defective; and (iv) whether, even if the argument with respect to the defects in the investigation was addressed, it was proper to decide that issue where the procedures for ensuring a proper record is before the Court were not properly followed and Mr. Oleynik had not claimed *certiorari* at all in his pleadings.

The Current Application

[22] In the current application, Mr. Oleynik essentially wishes, at the appeal level, to rectify what he says were the deficiencies, at the original application level, with respect to the failure to have the full record of the investigation available at the time of the hearing.

[23] Mr. Oleynik asserts that he cannot be faulted for not doing more to ensure that the record was made available at the original hearing. At the time he filed his application, the Commissioner's report had not been issued and the possibility of quashing it by *certiorari* was not a live issue. By the time he received the report, he was out of the country. By the time of the hearing, in which he participated by telephone from Russia, when the issue of quashing the report had been raised by the Commissioner and responded to by Mr. Oleynik, he says he raised the defect in the record in the course of his argument but it was not addressed. He says it is understandable and excusable that he did not seek to amend his application and serve a formal notice on the Commissioner to return the record to the court because of the

difficulties of doing so when in a foreign country with little access to lawyers and facilities for swearing affidavits.

[24] He now submits that the record for the appeal should contain those documents. He stated it this way in his application:

...without access to the evidence collected by the Commissioner and all exhibits filed by the parties, as well as other papers or documents in the investigation neither the Supreme Court, Trial Division, nor this Honourable Court of Appeal are able to review the discharge of the Commissioner's investigatory functions in this particular case in a proper manner.

[25] The essence of his argument is that for the proper disposition of the appeal, this Court needs to have access to the full record of what should have been produced on the original application.

Analysis

[26] Mr. Oleynik cites the following statement of Mainville, J. in *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada and Attorney General of Canada*, 2010 FC 736 in support of his position:

[54] ... it is trite law that a judicial review proceeding is conducted on the basis of the record which was before the decision-maker whose decision is being reviewed. However, there are exceptions to this well-known principle, most notably when the affidavit and exhibits are produced as background information concerning the issues to be addressed in judicial review ...; where the evidence concerns the jurisdiction of the decision maker or of the Federal Court itself to hear and determine the matter ...; or [where] the evidence pertains to violations of natural justice or procedural fairness by the decision maker ...; or again [where] the evidence relates to a constitutional issue raised within the framework of the proceedings.

[27] This passage does not relate to the current issue in this Court. Mainville, J. is stating the general principle that judicial review at first instance must take place on the basis of the record of the decision maker whose decision is being challenged. He also notes a number of exceptions, which would allow for the admission before the reviewing court of certain limited types of additional evidence that was not in front of or considered by the original decision maker.

[28] The relief being sought in this Court is not judicial review of the Trial Division decision. It is an appeal, seeking to set aside that judicial review decision. In this Court, appeals take place on the basis of the record in the

court whose decision is being appealed (in this case, the record in the Trial Division, which does not necessarily include the full record of the investigation). The principal exception is where the principles allowing for the reception of fresh evidence on appeal apply. Those principles require the applicant to establish that: (i) the fresh evidence could not have been ascertained by reasonable diligence and presented at the original hearing; (ii) the evidence must be relevant, in the sense that it bears on a decisive issue at the original hearing; (iii) the evidence must be credible in the sense that it is reasonably capable of belief; and (iv) the evidence, if believed, when taken with the other evidence at the original hearing, can be expected to have affected the result.

[29] Even if Mr. Oleynik's current application were to be regarded as an application for fresh evidence, it does not, on the basis of the record before me, meet the criteria. In particular, the additional record information, if it exists, would have been available at the time of the original hearing. In this case, it is not a sufficient answer to say that he had "limited ability" to take the steps necessary to have the record produced because of Mr. Oleynik's absence from the province. He was able to arrange for several affidavits to be sworn, and extensive written briefs raising the arguments in support of *certiorari* to be prepared and filed while out of the country. I do not see it as being any more difficult for him to have sought an amendment of his original application to include a claim for *certiorari* and to have the requisite notice under rule 54.07 served on the Commissioner.

[30] In any event, Mr. Oleynik's application has not been presented as an application for fresh evidence. Instead, he argues that the failure to give notice to the Commissioner to return the full record of his investigation to the court for review and his failure to insist on the full record before the *certiorari* application was heard can be retroactively rectified by an application, after the decision, in the appellate court. He asserts that it is necessary to do so in order for this Court to appreciate, on the appeal, why the original investigation was defective and deserving of being quashed.

[31] It is not apparent that having the record that should have been available at the judicial review stage in this Court would be of any value on the appeal. The applications judge rejected the application for *certiorari* on the sole ground that the nature of the Commissioner's report, not being a "decision" with legal consequences, was such that *certiorari* was not available to quash it. If the notice of appeal can be interpreted as an assertion that the applications judge should not have proceeded to decide the *certiorari* issue without first resolving whether the record of the

investigation was properly before the Court or that the applications judge did not address Mr. Oleynik's "objections", if that is what they were, to the deficiencies in the record, or that the judge did not address Mr. Oleynik's submissions that the investigation was fundamentally defective, having the full record of the original investigation before the Court of Appeal will not assist in deciding those issues. If the applications judge did in fact err in respect of any of those matters, the remedy would be to set aside the judge's decision and to remit the case to the Trial Division for a proper determination on the basis of a proper record. While, as Mr. Oleynik suggests, it might be more "efficient", if this Court found error in the court below, for the Court to decide the issue of judicial review itself without remitting it, to do so in these circumstances would be for the appellate court to decide the matter as if it were a court of first instance on the basis of a record and arguments that were not dealt with in the court below. It must be remembered that the notice of appeal as presently drafted does not assert that the judge erred in deciding, in the context of dismissing the *certiorari* application, that the Commission did not conduct a proper investigation. That could not be a ground of appeal because the judge did not address that issue.

[32] It also must be remembered that the "record" of the original investigation would not include the actual records or documents that Mr. Oleynik was seeking pursuant to his original access request to the university. The record, at most, would only include those records that document the process of the investigation carried out by the investigator, so as to enable a determination to be made as to whether the investigation was a proper one or not. If the applications judge erred in not addressing the issue, in the context of *certiorari*, of whether the investigation was proper, then the matter would have to be returned to the Trial Division so that a proper record could be assembled (addressing, if raised by the Commissioner, whether parts of the record are required by the *Act* to be kept confidential). It is at that point that the record of the Commissioner's investigation might become relevant again.

[33] In these circumstances, Mr. Oleynik's application for provision of the record of the Commissioner's investigation to this Court must be dismissed. In doing so, I stress that this does not preclude the assertion on this appeal (assuming that the scope of the notice of appeal can be so interpreted) that the application should not have been dealt with before the record had been produced or that, in any event, the arguments that the investigation was fundamentally effective were not properly addressed by the trial judge.

[34] With respect to the request for an extension of time for the filing of the Appeal Book, it is not necessary to grant a lengthy extension because the application for provision of the record of the original investigation has been denied. I will simply make an order extending the time for filing the Appeal Book for 30 days from the date of this decision.

[35] Costs of this application shall be in the cause of the appeal.

J. D. Green, C.J.N.L.