



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

Citation: *Health Research Ethics Authority for
Newfoundland and Labrador v. Sequence Bioinformatics
Inc.*, 2018 NLCA 55

Date: September 20, 2018

Docket Number: 201801H0075

BETWEEN:

HEALTH RESEARCH ETHICS AUTHORITY
FOR NEWFOUNDLAND AND LABRADOR
AND HEALTH RESEARCH ETHICS BOARD

APPELLANTS

AND:

SEQUENCE BIOINFORMATICS INC.,
DR. GERALD MUGFORD AND
DR. MICHAEL PHILLIPS

RESPONDENTS/APPLICANTS

Coram: Welsh J.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G1948
(2018 NLSC 129)

Application Heard: September 11, 2018

Decision Rendered: September 20, 2018

Counsel for the Appellants: Ruth E. Trask

Counsel for the Respondents/Applicants: J. Alexander Templeton

Welsh J.A.

[1] The Health Research Ethics Board for Newfoundland and Labrador (the “board”) filed a notice of appeal in an uncompleted matter. An uncompleted matter is one in which “the issues between the parties have not been determined by a final decision or order in the court appealed from” (*Court of Appeal Rules*, NLR 38/16, rule 7(n)). Sequence Bioinformatics Inc. (“Sequence”) has applied to strike the notice of appeal on the basis that the appeal should not proceed until the matter has been completed (rule 35 of the *Court of Appeal Rules*).

[2] Rule 35 provides for a respondent to apply to have a notice of appeal in an uncompleted matter struck:

(1) Where an appeal is commenced in an uncompleted matter, a party may apply to have the notice of appeal struck on the basis that the appeal should not proceed until the matter has been completed because

(a) prejudice to a party may result if the appeal is heard before the matter is completed in the court appealed from;

(b) hearing the appeal before the matter is completed in the court appealed from would result in delay, inconvenience or an inefficient use of judicial resources; or

(c) there is good reason for delaying an appeal until the matter has been completed.

(2) Striking a notice of appeal under this rule does not prejudice the right of the appellant to include the same issues in an appeal when the matter has been completed in the court appealed from.

[3] The notice of appeal in this case sets out the subject matter of the appeal:

2. ... The appeal is focused on whether Sequence Bio ought to be permitted, at law, to seek declaratory relief from the Supreme Court in the absence of a current *lis*, and divorced from any administrative proceedings created and mandated by the *Health Research Ethics Authority Act*. The Court of Appeal will be asked to determine whether the Supreme Court should accept jurisdiction to hear and decide the Originating Application, including whether the Originating Application amounts to a collateral attack of a matter which is properly within the jurisdiction of the Board and/or the statutory appeal body created by the *Health Research Ethics Authority Act*; whether Sequence Bio has standing to bring the Originating Application; and whether the mootness of the Originating Application precludes Sequence Bio’s access to a judicial remedy before the Supreme Court.

[4] In assessing Sequence's application to strike the notice of appeal, it is helpful to begin with a review of the process that has been engaged. Section 9 of the *Health Research Ethics Authority Act*, SNL 2006, c. H-1.2, sets out the procedure for determining whether Sequence may undertake research involving human subjects, and states in relevant parts:

(1) A person shall not engage in health research involving human subjects without first obtaining approval for the research from the research ethics board

(2) A person shall submit an application for approval to engage in health research involving human subjects to the authority.

(3) The authority shall, within 2 business days of its receipt, refer an application made to it under subsection (2) to the research ethics board

(4) The research ethics board . . . shall consider the application referred to it under subsection (3) within 30 days of receiving it and may

(a) approve the application;

(b) approve the application subject to the changes the board . . . may require; or

(c) refuse to approve the application.

(Emphasis added.)

[5] Pursuant to sections 14 to 17 of the *Act*, a decision of the board may be appealed to an appeal board which may "uphold the appeal and substitute the decision it considers appropriate or may dismiss the appeal" (section 17(2)). The decision of the appeal board "shall be given in writing and include the reasons for its decision" (section 17(3)). The appeal board's decision may be appealed to the Supreme Court of Newfoundland and Labrador (section 18).

[6] In this case, the board failed to give a decision within thirty days of receiving Sequence's application, and, in fact, delayed for 203 days. On March 13, 2018, Sequence filed an application in the Supreme Court of Newfoundland and Labrador seeking an order for *mandamus* requiring the board to provide a decision. On March 14, the board notified Sequence that its application had been rejected.

[7] Upon request, the applications judge permitted Sequence to amend the remedy requested from an order for *mandamus*, requiring the board to deliver a decision, to a declaration regarding the effect of failure to comply with the

thirty-day limitation set out in section 9(4) of the *Act*. The judge dismissed the board's objections to the Court proceeding, giving reasons, and set December 17, 2018 for a one-day hearing on the merits of Sequence's application.

[8] In response, the board filed a notice in this Court appealing the applications judge's decision to proceed with Sequence's application for a declaration. Sequence responded with an application, pursuant to rule 35, to strike the notice of appeal.

[9] Regarding the first factor to be considered under rule 35, I have no basis on which to conclude that either Sequence or the board would be prejudiced if the appeal is heard before a decision is made on the merits of Sequence's application in the court appealed from.

[10] Indeed, the analysis turns on the second factor to be considered under rule 35. In my view, hearing this appeal before the matter is completed in the Supreme Court would result in inconvenience and inefficient use of judicial resources, and may result in delay. The board's appeal could not be heard in this Court until October or, more likely, November, assuming the matter could be expedited. Once the hearing was completed, the decision may be reserved. Meantime, Sequence's application, on the merits, is set to be heard on December 17th. If the appeal was not determined before December 17th, the court appealed from may decline to proceed pending a decision from this Court, which would result in delay if the board's appeal was dismissed.

[11] Viewed from another perspective, given the early date set for a short hearing in the court appealed from, there are advantages to waiting for the matter to be completed before any appeal proceeds. I begin with the principle that, when analyzing and deciding an appeal, this Court looks to and benefits from the analysis, reasons and decision of a judge of the Supreme Court that deals with all the matters at issue between the parties. Of course, there are exceptions to this general principle where an appeal in an uncompleted matter provides an efficient and convenient means of proceeding. That is not the case in these circumstances where, after a short wait, a judge of the Supreme Court would be in a position to address all the issues between the parties thereby providing a full contextual background for any appeal, and precluding the potential for two appeals.

[12] Further in respect of the potential delay resulting from awaiting completion of the matters in the Supreme Court before proceeding with an appeal, concern regarding delay is the essence of Sequence's application under

section 9(4) of the *Act*. Nonetheless, it is Sequence that seeks to strike this notice of appeal to permit the judge of the Supreme Court to complete the matter before any appeal proceeds.

[13] Finally, I note that striking the notice of appeal at this stage would not prejudice the opportunity of a party to include in a subsequent appeal the same issues as are raised in this notice of appeal after the matter has been completed in the Supreme Court (rule 35(2) of the *Court of Appeal Rules*).

[14] In the circumstances, I am satisfied that the board's appeal should not proceed until Sequence's application in the Supreme Court has been completely dealt with. Accordingly, Sequence's application to strike the board's notice of appeal is allowed. Sequence shall have its costs of this application under column 3 of the scale of costs in the *Court of Appeal Rules*.

B. G. Welsh J.A.