C.A. No. 117149

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Environment) v. Ogden Martin Systems of Nova Scotia Ltd., 1995 NSCA 209
Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:	
HONOURABLE ROBERT S. HARRISON, Minister of the Environment, and THE ATTORNEY GENERAL OF NOVA SCOTIA, representing Her Majesty the Queen in Right of the Province of Nova Scotia Appellants	Alexander M. Cameron for the Appellants
- and -	
OGDEN MARTIN SYSTEMS OF NOVA SCOTIA LIMITED, a body corporate Respondent	Bruce H. Wildsmith, Q.C. and Colleen P. Keyes for the Respondent
	Appeal Heard: November 23, 1995
	Judgment Delivered: November 28, 1995

THE COURT: The appeal is dismissed and the cross-appeal is allowed in part as per reasons for judgment of Chipman, J.A.; Freeman and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal by the Minister of Environment and the Attorney General of Nova Scotia and a cross-appeal by Ogden Martin Systems of Nova Scotia Limited

from an interlocutory decision and order in Supreme Court Chambers disposing of applications by the Minister and by Metropolitan Authority to strike out Ogden Martin's originating notice and statement of claim and/or subsequent amendments made thereto.

The facts are set out in the decision of the Chambers judge:

> The plaintiff [Ogden Martin] entered into a contract with the Metropolitan Authority on February 2nd, 1993, under which the plaintiff agreed to design, construct, sell to the Metropolitan Authority and operate a mass burn solid waste disposal waste-to-energy and electricity generating facility. Under the terms of the contract the Metropolitan Authority was to apply to the Minister for approval by the Minister of the facility pursuant to the **Environmental Assessment Act**. Appendix 5 to the contract sets out the responsibilities as between the plaintiff and the Metropolitan Authority to obtain, among other things, **Environmental Assessment Act** approvals, as follows:
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> 'APPENDIX 5
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> LEGAL ENTITLEMENTS
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> Part A
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> The Authority will obtain and maintain the following Legal Entitlements for the Facility:
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> Environmental Assessment Act Approvals
> Industrial Waste Permit
> Local Zoning Approvals
> Public Utility Commission Approvals
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> The Company shall assist the Authority, at the Company's sole cost and expense, to obtain the above listed Legal Entitlements, by supplying any necessary information regarding facility design and operation.
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> Part B
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> The Company will obtain and maintain the following Legal Entitlements for the Facility:
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> Building Permits
> Fire Marshall Approvals
> Utility Connection Permits and Approvals
> Stormwater Permits and Approvals
> Local Construction Permits'
>
> The Metropolitan Authority applied for the

Environmental Assessment Act approval of the Minister on February 13th, 1992, and engaged Jacques Whitford Environment Limited to present its case. The plaintiff provided substantial input to the Metropolitan Authority's case throughout the process leading up to the Minister's decision. The process involved, among other things the preparation of an Environmental Assessment Report and public hearings. The Environmental Assessment Report was released by the Minister November 9th, 1993. On November 25th, 1993, the Minister referred the Environmental Assessment Report to the Environmental Control Council and a panel was appointed December 8th, 1993 to conduct the public hearings, which were held from January 24th, 1994, to March 2nd, 1994. The Environmental Assessment Administrator's Report was presented to the Minister on June 29th, 1994, and the report of the Environmental Control Council was presented to the Minister on June 30th, 1994. The report and recommendations to the Minister from the Environmental Control Council, at pages 157, 162 and 201, indicates that formal submissions were made to the Council by several representatives of the plaintiff. The contract was placed on record as a public document and was the subject of specific submissions and evaluation by the Environmental Control Council. The report of the Council to the Minister refers to the plaintiff and its contractual relationship with the Metropolitan Authority at least forty times.

After receiving the report and recommendations of the Council and the Environmental Assessment Administrator, the Minister on July 15th, 1994, wrote to the Metropolitan Authority stating that the Burnside Waste-to-Energy Facility was not approved. By letter dated July 27th, 1994, the Metropolitan Authority wrote to the plaintiff stating that due to the Minister's denial of the approval required under the **Environmental Assessment Act** for the construction of the capital Waste-to-Energy Facility the Authority was terminating its contract with the plaintiff pursuant to Section 3.5(B) thereof as of July 27th, 1994.

There are several provisions in the contract providing for its termination by one party or the other, including Sections 3.5(A), (B), (C) and (D). The plaintiff has suffered loss and injury as a result of the termination of the contract.

The plaintiff sent a notice of intended action and/or application dated November 8th, 1994, to the first two defendants in this action raising the issue of certiorari and seeking a declaration. The plaintiff commenced an action against the Minister and the Attorney General by originating notice (action) and statement of claim dated January 12th, 1995. The principal relief sought by the plaintiff was by an

order in the nature of certiorari quashing the decision of the Minister made on or about July 15th, 1994, and a declaration that the decision was null and void. By interlocutory notice (application inter partes) dated January 23rd, 1995, the defendants named in the original originating notice made the first application before me and that application was scheduled to be heard in Special Chambers on May 2nd, 1995.

Prior to April 10th, 1995, the Metropolitan Authority did not participate in any court proceeding to determine whether it should be added as a defendant. On April 7th, 1995, the plaintiff filed an amended originating notice (action) and statement of claim adding as defendants the Metropolitan Authority and the City of Halifax, adding new grounds for quashing and nullifying the Minister's decision and adding new causes of action against the Minister relating to breach of contract, breach of fiduciary duty, tort and conspiracy. The claims against the Metropolitan Authority contained in the amended documents appear to be for a declaration that an "uncontrollable circumstance", within the meaning of the contract between the Metropolitan Authority and the plaintiff, does not exist and that its contract with the plaintiff has not been lawfully terminated, for damages, punitive damages and indemnification based on breach of contract, breach of fiduciary duty and tort (interference with contractual and economic relations and unlawful conspiracy). The claims against the City of Halifax contained in the amended documents appear to be the same as against the Metropolitan Authority, except the first two claims are not included.

All of the claims set out in the original and amended documents arise out of the process followed and the decision of the Minister not to approve the Burnside Waste-to-Energy Facility.

On April 13th, 1995, a second notice of intended action was served on the Attorney General by the plaintiff raising additional causes of action against the first two defendants. On April 21st, 1995, the second interlocutory notice before me was filed and on April 20th, 1995, the third interlocutory notice before me was filed.

No party has filed a defence to the action.

Neither the Metropolitan Authority nor anyone other than the plaintiff has commenced legal proceedings or taken any other action to contest the Minister's decision. Rule 56.06 of the **Civil Procedure Rules** requires that proceedings for an order in the nature of certiorari be commenced within six months and that limitation period has

now expired.

The Chambers judge then stated the four issues raised on the application before her:

> 1. Was the plaintiff entitled to amend its originating notice (action) and statement of claim, to add additional parties and causes of action, pursuant to Rule 15.01(a) without leave of the court?
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> 2. Does the plaintiff have standing to seek an order in the nature of certiorari or declaratory relief?
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> 3. Is the proceeding properly commenced and constituted as an action rather than an application inter partes?
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> 4. Should the new causes of action against the Minister that are raised in the amended statement of claim be struck since no notice of intended action with respect to these new causes of action was given to the Crown until April 13, 1995?

As to the first issue, the Chambers judge found that Rule 15.01(a) of the **Civil Procedure Rules** was broad enough to permit Ogden Martin to amend its originating notice by adding the two new defendants and adding new causes of action without leave of the court. The Chambers judge added that if her interpretation of Rule 15.01(a) was wrong, then Rule 2.01(1) was broad enough to make the amendment valid.

On the issue of standing, the Chambers judge found that Ogden Martin was a person aggrieved by the Minister's decision and hence had standing as of right to commence an action for **certiorari** and a declaration that the decision of the Minister was null and void.

As to the third issue, the Chambers judge held that the proceeding was properly commenced by an originating notice (action).

With respect to the notice requirements under the **Proceedings Against the Crown Act**, it was agreed that the matters raised in the amended pleading were not

effective as against the Crown since no notice of intended action was served on the Crown as required by s. 18 of the **Proceedings Against the Crown Act**. The Chambers judge held that with the exception of the reference in paragraph 22 of the amended statement of claim referring to "officers, members, participating bodies, employees, agents or representatives" of the Minister, all of the causes of action added by the amendment relating to the Minister alleged personal liability. Therefore they did not require notice under the **Proceedings Against the Crown Act**. The pleadings alleging his personal liability were therefore not struck, but the Chambers judge did strike the references in paragraph 22 to "officers, members, participating bodies, employees, agents or representatives" of the Minister.

The issues arising on this appeal and cross-appeal are whether the trial judge erred:

(1) in concluding that Ogden Martin had standing as of right to commence the proceedings;

(2) in concluding that the amendments to the originating notice and statement of claim were permitted by Rule 15 and/or validated by the curative provisions of Rule 2.01 of the **Civil Procedure Rules**;

(3) in concluding that the amendments raised allegations for which a new notice under the **Proceedings Against the Crown Act** was not required;

(4) in striking out the amended allegations respecting the actions of "officers, members, participating bodies, employees, agents or representatives" of the Minister;

(5) in awarding costs of the application simply in the cause and not to the respondent either forthwith or in the cause in any event.

(1) **Standing:**

During the argument we were referred to a number of authorities including

Victoria General Hospital v. Registrar of Motor Vehicles et al. (1984), 9 Admin. L.R. 225 (Man. C.A.); **Gaetz v. Palacios - Boix and Provincial Medical Board (N.S.)** (1993), 121 N.S.R. (2d) 324 (N.S.S.C.); **Western Pulp Inc. v. Roxburgh et al.** (1990), 122 N.R. 156 (F.C.A.); **Associated Respiratory Services Inc. v. British Columbia (Purchasing Commission)** (1992), 7 Admin. L.R. (2d) 104 (B.C.S.C.); **Socanav Inc. v. Northwest Territories (Commissioner)** (1993), 16 Admin. L.R. (2d) 266 (N.W.T.S.C.); **Ghuman v. Minister of Transport et al.** (1983), 2 Admin. L.R. 1 (F.T.D.); Thomas A. Cromwell, **Locus Standi: A Commentary on the Law of Standing in Canada** (Toronto: Carswell, 1986).

In reaching the conclusion that Ogden Martin had standing, the Chambers judge considered a number of these authorities and concluded:

> . . . my consideration of the comments referred to above from Cromwell's textbook has led me to the decision that given the pivotal effect that the Minister's decision had on the plaintiff's contract with the Metropolitan Authority and given the role played by the plaintiff in the process leading up to the Minister's decision, the plaintiff has a direct interest in the Minister's decision giving it the right to apply for certiorari ...

A review of these authorities indicates that the trend of the courts has been to be more generous in according private interest standing to persons to challenge the decisions of the public authorities in the courts. The approach favours granting standing wherever the relationship between the plaintiff and the challenged action is direct, substantial, immediate, real, more intense or having a nexus with such action as opposed to being a contingent or indirect connection. The review of the cases shows, however, that the line between a direct and an indirect connection is not easy to draw.

The appellants have failed to convince us that the Chambers judge erred in concluding that Ogden Martin had a sufficient personal interest in the Minister's decision to maintain **certiorari**. Ogden Martin had a contractual relationship which, as

a result of the Minister's decision, was bound to completely disappear. That is a sufficiently direct relationship having regard to the various instances dealt with in the authorities.

Particularly relevant is the following comment from **Cromwell, supra**, at p. 106:

> The various attempts to elaborate upon the term "person aggrieved" or to catalogue the types of interests or interferences therewith that qualify the applicant as "aggrieved" do not help to reconcile the cases. For example, in **R. v. Vancouver Zoning Board of Appeal; Ex parte North West Point Grey Home Owners Association**, a resident and a homeowners' association applied to quash a decision by the Zoning Board of Appeal allowing a homeowner to construct servant quarters in a basement. The majority of the British Columbia Court of Appeal held that the applicants had no standing because they lacked sufficient interest in the decision. However, in **Re Corporation of District of Surrey** a resident was permitted to attack an order of a planning board permitting a club to be constructed with fewer than the required number of parking spaces. The Court was of the view that providing three parking spaces rather than 12, as was required under the zoning, might give rise to "hardship and inconvenience to other residents" and that this constituted sufficient interest. Other examples of apparently conflicting decisions could be given. But to do so would miss the point. The cases are not decided upon verbal formulae or lists of protected interests, but on the basis of the Court's perception of the relationship between the applicant and the challenged decision, the nature of the statutory scheme out of which the decision issued, and the merits of the complaint. In addition to these factors, the courts are recognizing that who is a person aggrieved is a matter of degree rather than a test, the application of which results in clear-cut answers.

The perception of the Chambers judge of the relationship between Ogden Martin and the Minister's decision was critical here. We cannot say that it was an erroneous perception.

It is not necessary to address the respondent's argument relating to public interest standing.

(2) <u>Amendments granted under the Civil Procedure Rules</u>:

Originally Ogden Martin sued to quash the Minister's decision. Later it purported to amend its statement of claim to add Metropolitan Authority and the City as defendants, to add claims against the Minister personally and to add a new cause of action. In rejecting the application to strike out these amendments, the Chambers judge found that Ogden Martin was authorized to make these amendments by reason of Rule 15.01 in the **Civil Procedure Rules**.

> 15.01 A party may amend any document filed by him in a proceeding, other than an order,
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> > (a) once without the leave of the court, if the amendment is made at any time not later than twenty days from the date the pleadings are deemed to be closed or five days before the hearing under an originating notice;

We are satisfied that the Chambers judge did not err either in holding that the amendments were authorized by this Rule or in any event in applying the provisions of Rule 2.01(1):

> 2.01 (1) A failure in a proceeding to comply with any requirement of these Rules shall, unless the court otherwise orders, be treated as an irregularity and shall not nullify the proceeding, any step taken in the proceeding, or any document, or order therein.

(3) Necessity of Compliance with the Proceedings Against the Crown Act:

Without expressing any opinion whether the Minister can be found liable in his personal capacity with respect to his actions herein, we agree with the Chambers judge that the provisions of the **Proceedings Against the Crown Act** are intended to apply with respect to actions against the Crown and its agents or servants acting in their capacity as such. The allegations in issue purport to be with reference to things done in a personal capacity and not as an agent or servant of the Crown. These allegations are not governed by the **Act** and the requisite notice is not necessary.

(4) Paragraph 22 of the Amended Statement of Claim:

It follows from what we have said with respect to the third issue that the

claim against others acting on behalf of the Minister in his personal capacity is not governed by the **Proceedings Against the Crown Act**. The Chambers judge erred in striking this portion of paragraph 22 of the amended statement of claim and we would restore it.

(5) **Costs:**

The relevant provisions of Civil Procedure Rule 63 are:

> 63.02 (1) Notwithstanding the provisions of Rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
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> (a) award a gross sum in lieu of, or in addition to any taxed costs;
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> (b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
>
> (c) direct whether or not any costs are to be set off.
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> . . .
>
> (3) The court may deal with costs at any stage of a proceeding.
>
> 63.03 (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.
>
> . . .
>
> 63.05 (1) Unless the court otherwise orders, the costs of any interlocutory application, whether ex parte or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

Under the Rules, a very wide discretion is conferred upon a judge in fixing the costs of a motion. The respondent has not shown that there was error simply by reason of the fact that the subject matter of these applications was discrete or different from the overall issues in the proceeding. We do not accept the argument that this fact - if it was a fact - tied the hands of the Chambers judge from adopting the frequently used practice of making costs of applications in the cause.

In the result, the appeal is dismissed. The cross-appeal is allowed with respect to the allegations in paragraph 22 of the statement of claim and dismissed with respect to the award of costs.

Having heard the parties on costs of this appeal, the respondent will recover costs of the appeal in the amount of $1,000.00, plus disbursements. Success on the cross-appeal was divided, but the appellants were successful on the major issue raised thereby. The appellants will have costs on the cross-appeal of $500.00, plus disbursements, to be set off against the respondent's costs.

Chipman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.