NOVA SCOTIA COURT OF APPEAL
Citation: *Bay Ferries Limited v. Houston*, 2019 NSCA 84

Date: 20191113
Docket: CA 487339
Registry: Halifax

Between:

Bay Ferries Limited

Appellant

v.

Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia and Nova Scotia (Department of Transportation and Infrastructure Renewal)

Respondents

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	October 10, 2019, in Halifax, Nova Scotia
Subject:	*Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*FOIPOP Act"*)
Summary:	The Province and Bay Ferries contracted that Bay Ferries would provide ferry service between Yarmouth and the State of Maine. The contract stipulated the management fee to be paid to Bay Ferries. The management fee was redacted from the publicly released information. Under the *FOIPOP Act*, the Research Director of the Progressive Conservative Caucus of Nova Scotia requested information on the management fee. The *FOIPOP* Review Officer recommended that the information be provided. The Government declined disclosure. Under s. 41(1) of the *FOIPOP Act*, the "Progressive Conservative Caucus of Nova Scotia" appealed to the Supreme Court of Nova Scotia. In the Supreme Court, Bay Ferries intervened, submitted that the Caucus had no legal status and moved for summary

dismissal. The Caucus responded by moving to amend the style of cause to name the its Leader, Tim Houston, as Appellant. The motions judge allowed the amendment and dismissed Bay Ferries motion.
Bay Ferries appealed to the Court of Appeal.

Issues: Did the motions judge: (1) err by finding that the Research Director's request for information was authorized in writing, or (2) err in statutory interpretation by ruling that the style of cause could be amended to name Mr. Houston?

Result: The Court of Appeal dismissed the appeal.
The motions judge drew the inference that the Research Director was authorized in writing to request the information. The judge did not make a palpable and overriding error. Section 41(1) of the *FOIPOP Act* incorporated the process under the *Civil Procedure Rules*. The judge added Mr. Houston as aa Appellant further to the discretion under Rules 35.06, 35.08 and 83.11. The judge's interpretation did not err in law and his exercise of discretion did not lead to a patent injustice.

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Bay Ferries Limited

Appellant

Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia and Nova Scotia (Department of Transportation and Infrastructure Renewal)

Respondents

Judges:	Beveridge, Fichaud and Bryson JJ.A.
Appeal Heard:	October 10, 2019, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal dismissed without costs, per reasons for judgment of Fichaud J.A, Beveridge and Bryson, JJ.A. concurring
Counsel:	Scott R. Campbell and Jennifer L. Taylor for the Appellant Nicole LaFosse Parker for the Respondent Tim Houston The Respondent Nova Scotia (Department of Transportation and Infrastructure Renewal) watching brief

Reasons for judgment:

[1] The Province and Bay Ferries Limited contracted that Bay Ferries would provide ferry service between Yarmouth and the State of Maine. The contract prescribed Bay Ferries' management fee. Further to Nova Scotia's *Freedom of Information and Protection of Privacy Act*, the Official Opposition's Progressive Conservative Caucus requested particulars of the management fee. The Government declined disclosure. Under the *Act*, the "Progressive Conservative Caucus of Nova Scotia" appealed to the Supreme Court of Nova Scotia.

[2] Bay Ferries intervened before the Supreme Court, submitted that the Caucus had no legal status, and moved for dismissal of the appeal. The Caucus responded by moving to amend the style of cause to name its Leader, Tim Houston, as the Appellant representing the members of Caucus. The judge allowed the amendment and dismissed Bay Ferries' motion.

[3] Bay Ferries appeals to the Court of Appeal. It submits the judge erred (1) in fact, by finding that the initial request for information was properly authorized, and (2) in statutory interpretation, by permitting the amendment to the style of cause in the Supreme Court. This appeal concerns process, not whether the information should be disclosed.

Background

[4] On March 24, 2016, the Province of Nova Scotia, acting by the Department of Transportation and Infrastructure Renewal ("Department"), concluded an Agreement with the Appellant Bay Ferries Limited ("Bay Ferries"). The Agreement said Bay Ferries would provide ferry services between Yarmouth, Nova Scotia and Portland, Maine and, in return, the Province would pay Bay Ferries a management fee and subsidize any operating deficit.

[5] The Department publicly released a version of the Agreement but redacted the provisions explaining the management fee and operating subsidy.

[6] On May 3, 2016, Ms. Lisa Manninger, the Research Director for the Caucus Office of the Progressive Conservative Party, filed an application for access to information under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 ("*FOIPOP Act*"). The Party is the Official Opposition in the Legislature. The application requested "[a]ll emails, memos, contracts and

schedules regarding the payment of management fees to Bay Ferries, including the amount of fees to be paid and any criteria established around the payments".

[7] The Department did not provide the requested information.

[8] The matter proceeded to a review under ss. 33-39 of the *FOIPOP Act*. Section 39 says a review officer is to prepare a report with recommendations.

[9] Sections 17 and 21 of the *FOIPOP Act* exempt from disclosure information that can reasonably be expected to harm either the economic interests of a public body or the business interests of a third party. The Department submitted to the review officer that its refusal to disclose was justified by ss. 17 and 21.

[10] On December 17, 2018, the Province's Information and Privacy Commissioner, Ms. Catherine Tully, issued Review Report 18-11. The Report rejected the Department's submissions, saying (page 1) "the evidence offered [by the Department] falls well short of the legal standard", and recommended full disclosure of the requested information.

[11] Section 40 of the *FOIPOP Act* requires the Department's head to reply within 30 days.

[12] On January 16, 2019, the Department's Deputy Minister, Mr. Paul LaFleche, wrote to Ms. Tully, copied to the "Applicants". Mr. LaFleche said "[t]he Department does not accept your finding that the application of sections 17 or 21 was not established" and "[t]he Department does not intend to make further disclosures on this file". Mr. LaFleche's letter said "[b]y copy of this letter, the applicants are notified of their right to appeal this decision to the Nova Scotia Supreme Court, pursuant to FOIPOP s. 41".

[13] Section 41 of the *FOIPOP Act* permits an appeal to the Supreme Court of Nova Scotia:

> 41(1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the Nova Scotia *Civil Procedure Rules* or by the regulations.

[14] On February 11, 2019, under s. 41(1), the "Progressive Conservative Caucus of Nova Scotia" filed a Notice of Appeal to the Supreme Court ("*FOIPOP* Appeal"). The Notice requested that the Court order the release of the information which Commissioner Tully's Report had recommended be released.

[15] On March 14, 2019, on Bay Ferries' motion, a chambers judge of the Supreme Court ordered that Bay Ferries be added as a Respondent to the *FOIPOP* Appeal. Bay Ferries said it would challenge the legal status of the Progressive Conservative Caucus to act as an Appellant.

[16] On March 19, 2019, the Progressive Conservative Caucus filed a motion in the Supreme Court to re-style the Appellant as "Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia".

[17] On March 25, 2019, Bay Ferries filed a motion in the Supreme Court requesting that the *FOIPOP* Appeal be dismissed summarily. Bay Ferries submitted that the *FOIPOP* Appeal was a nullity because:

- The Progressive Conservative Caucus is not a legal person.
- The Applicant for the information had been Ms. Manninger, not Mr. Houston, nobody else could appeal, Ms. Manninger was not a named Appellant to the Supreme Court, and it was too late to substitute anyone for Ms. Manninger.

[18] On April 1, 2019, Supreme Court Justice Peter Rosinski heard Bay Ferries' motion to dismiss the *FOIPOP* Appeal and the Caucus's motion to amend the style of cause. On April 5, 2019, the judge issued his Decision on both matters (2019 NSSC 118). The Decision, followed by an Order dated April 30, 2019, dismissed Bay Ferries' motion and allowed the Caucus's motion. The judge reasoned:

- After acknowledging he did not have to decide the matter, "I would be inclined to find" that the Caucus could be a "person" under the *FOIPOP Act*. (paras. 34-36, and also paras. 40-44).
- In any case, "there is no reason why the leader of a caucus, who is unquestionably a 'person', could not make an application and thereafter become an appellant, when also incidentally identified in the style of cause as Leader of the Caucus". (para. 37, and also para. 39)
- "Ms. Manninger ... is the nominal Applicant. However, on the evidence and matters of which I take judicial notice, I am satisfied it is more likely than not, that Ms. Manninger requested the information *on behalf of* the Leader of the Progressive Conservative Caucus of Nova Scotia (the 'beneficial Applicant'); and … she would have done so after being in receipt of some form of written authorization to do so". (para. 30) [Justice Rosinski's italics]

- At the time of Ms. Manninger's request for the information in 2016, another individual had led the Progressive Conservative Caucus. Mr. Houston later replaced that individual, and he was the Leader at the time of the *FOIPOP* Appeal to the Supreme Court. (para. 33)

- The substitution of the new Leader for the former Leader, who had been the original beneficial applicant, would not prejudice Bay Ferries, was not time-barred and was permitted by *Civil Procedure Rules* 35.06, 35.08 and 83.11 that govern adding parties to proceedings in the Supreme Court (paras. 45-53, 56).

[19] On April 18, 2019, Bay Ferries filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) in the Court of Appeal. Bay Ferries submits this Court should overturn Justice Rosinski's Order and dismiss the *FOIPOP* Appeal summarily.

[20] On October 10, 2019, this Court heard the matter and reserved.

Issues

[21] Bay Ferries' factum, para. 19, says the motions judge made:

1. an "evidentiary error" by finding that Ms. Manninger made the *FOIPOP* request as a "nominal" applicant on behalf of the "beneficial" applicant, the Leader of the Progressive Conservative Caucus; and
2. a "statutory interpretation error" by substituting Mr. Houston as the Appellant when Mr. Houston "had no standing" and by "accepting that a caucus, which has no capacity at law, could be a 'person' under the *FOIPOP Act*".

Leave to Appeal

[22] Both parties accept that the motions judge's Order is an interlocutory ruling for which leave to appeal is required. The Respondent acknowledges that leave should be granted.

[23] The test for leave is whether the appeal raises an arguable issue. This means something more than mere academic interest. The issue must arise on the facts and could result in the appeal being allowed. *3289444 Nova Scotia Limited v. R.W. Armstrong & Associates Inc.*, 2018 NSCA 26, para. 35 and authorities there cited.

[24] The appealed issues satisfy the standard. I would grant leave.

Standards of Review

[25] The standards on an appeal from a judge's ruling are well-known.

[26] Issues of law attract correctness. Issues of fact or of mixed fact and law with no extractable legal error are reviewed for a palpable and overriding error, meaning a clear error that affected the outcome. Discretionary rulings may be overturned for legal error or when the ruling would cause a patent injustice; as it is presumed that judicial discretion should not be exercised to cause a patent injustice, this is a category of legal error. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 22-29.

First Issue – Evidentiary Error?

[27] The *FOIPOP Act* says:

> 43 Any right or power conferred on an individual by this Act may be exercised
>
> …
>
> (e) by a person with written authorization from the individual to act on the individual's behalf.

[28] To repeat, the motions judge said (para. 30) "on the evidence and matters of which I take judicial notice, I am satisfied it is more likely than not, that Ms. Manninger requested the information *on behalf of* the Leader of the Progressive Conservative Caucus of Nova Scotia (the 'beneficial Applicant'); and that she would have done so after being in receipt of some form of written authorization to do so." [Justice Rosinski's italics]

[29] Consequently, according to the judge, Ms. Manninger could request the information further to s. 43(e).

[30] On the appeal, Bay Ferries submits: (1) the legal prerequisites for judicial notice do not exist, citing *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, paras. 43, 45-52, 64-65; and (2) there was no evidence from which the judge could draw an inference that Ms. Manninger was a "nominal" applicant with written authority to make the request for information. So the *FOIPOP* request was legally flawed from the outset, and was unsalvageable in the Supreme Court.

[31] In my view, the resort to judicial notice is unnecessary. There was a sufficient basis for the judge to draw the inference. I refer to the following evidence:

- The Affidavit of Mark MacDonald, Q.C., President of Bay Ferries, says (para. 16) that Lisa Manninger is "the Director of Research and Legislative Affairs for the Progressive Conservative Caucus".
- The *FOIPOP* Application, dated May 3, 2016 and signed by Ms. Manninger, stated the Applicant's mailing address as "PC Caucus Office" at the Caucus Office's suite and street address.
- The Provincial Government's Information Access and Privacy Services ("IAP") is the governmental respondent to *FOIPOP* requests. IAP acknowledged receipt by a letter of May 13, 2016, to Ms. Manninger at the "PC Caucus Office".
- IAP's letter of May 16, 2017, addressed to another individual (not Ms. Manninger) at the "Progressive Conservative Caucus Office", attached a list of 166 *FOIPOP* requests "received from the PC Caucus Office during the period April 1, 2016 – March 31, 2017". The list included this one, described as "Bay Ferries agreement".
- The letter of May 16, 2017 also said the cost is "to be billed to your office", and requested the Caucus Office to "[p]lease approve payment".
- The affidavit of Ms. LaFosse Parker (para. 6) says "[a]ll costs associated with the *FOIPOP* request were incurred [by] the Progressive Conservative Caucus", according to IAP's letter of May 16, 2017.
- The letter of January 16, 2019, from the Deputy Minister of Transportation and Infrastructure Renewal to Commissioner Tully, rejecting the recommendation to disclose, was copied to "the Applicants" at the Caucus Office and said "the applicants are notified of their right to appeal this decision to the Nova Scotia Supreme Court, pursuant to FOIPOP s. 41". The Deputy Minister acknowledged that members of Caucus, not Ms. Manninger as a single individual, were the "Applicants" with a "right of appeal".

[32] In *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, this Court described the process of drawing an inference:

> [81] Drawing inferences is standard fare for juries. An inference is a finding deduced or induced from a premise without direct evidence of the inferred fact. It is a factual jump on the reasoning path. The judge ensures that the span is not so broad or irrational that a reasonable jury would stumble. Otherwise the system trusts the jury's common sense and agility to mind the gap and land softly. …

[33] *Johansson* involved a jury. The standard of rationality also governs a judge's inferences. It is not the appeal court's function to recalibrate the scale and overturn the fact-finder's sensible inferences from the evidence: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 22-24. The issue is not whether there is direct evidence of the inferred fact, as Bay Ferries submits. It is whether the inference is a reasonable product of the evidence we have.

[34] The motions judge found (para. 15) that "[f]rom May 2016 until that time [the Deputy's response of January 16, 2019], all parties involved treated the Progressive Conservative Caucus of Nova Scotia as the true beneficial Applicant".

[35] There was ample evidence to support that finding. Ms. Manninger did not launch her own frolic. Rather, she executed what is expected of the "Director of Research" for a political Caucus. Her request followed the travelled path for the Caucus Office's numerous *FOIPOP* requests that year. Her role was understood and accepted by the Caucus, the Commissioner, the Department and the IAP. To everyone familiar with the protocol, Ms. Manninger was the nominal applicant for the Leader and Caucus members of the Progressive Conservative Party of Nova Scotia in their role as the Official Opposition.

[36] A Caucus is directed by its "Leader". In the absence of evidence to the contrary, the motions judge could reasonably infer that the Caucus's Director of Research acted with the Leader's authorization.

[37] The Caucus paid the expenses for the *FOIPOP* application. That evidence allows the inference that the Caucus authorized Ms. Manninger's *FOIPOP* request. Whether or not the Caucus is a legal entity, it consists of identifiable individuals who have been elected to the Nova Scotia Legislature.

[38] Ms. Manninger was a nominal applicant authorized to represent the Leader and the individual members of Caucus as beneficial applicants.

[39] Then there is s. 43(e)'s requirement for a "written" authorization.

[40] The judge found "it is more likely than not" that the authorization would be written. That the course of events would include some written evidence of

authority from the Leader and Caucus – *e.g.* a job description or employment contract for the Research Director, a memo or email with instructions, a bank transfer, cheque or document confirming the Caucus's payment of the expenses for this *FOIPOP* application – is a reasonable inference. It is difficult to envisage an entirely unwritten scenario.

[41] The inference of authority is the product of practical common sense. Its rationale resembles that for the well-accepted indoor management rule with its presumption of regularity for internal corporate authority. In the absence of evidence to the contrary, it was reasonably inferable that this *FOIPOP* request on a matter of topical political interest, from the Research Director of a legislative Caucus, was properly authorized by the Leader and members of the Caucus. It is unnecessary that each such request (166 of them from April 1, 2016 to March 31, 2017) attach a signed authorization from either the Leader or a majority of the Caucus members.

[42] The motions judge did not make a palpable and overriding error of fact. I would dismiss this ground of appeal.

Second Issue – Error of Statutory Interpretation?

[43] For this issue I will assume, as discussed, that the Leader and Caucus in 2016 authorized Ms. Manninger to request the information. Later, Mr. Houston replaced the Leader.

[44] Bay Ferries says the *FOIPOP Act* does not permit the substitution of the new Leader's name in the appeal to the Supreme Court. To summarize its submission:

- Only a legal "person" may be an "applicant" for information and the "appellant" to the Supreme Court must be the same person as the "applicant". Bay Ferries cites ss. 6(1) and 41(1) of the *FOIPOP Act* and Regulation 2(c) under that *Act*:

> 6(1) A person may obtain access to a record by
>
> (a) making a request in writing to the public body that has the custody or control of the record;
>
> …
>
> 41(1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the Nova Scotia *Civil Procedure Rules* or by the regulations.

> Regulation 2(c) "applicant" means a person who makes a request pursuant to subsection 6(1) of the Act for access to a record… .

- The Caucus is not a legal person, and the "applicant" for the information was Ms. Manninger, not Mr. Houston. According to Bay Ferries, only Ms. Manninger could be the "Appellant". So the appeal to the Supreme Court was a "nullity".

[45] I respectfully disagree.

[46] Mr. Houston is a "person" who was a beneficial party at the time of the Notice of Appeal to the Supreme Court. The amendment made him a nominal party. The issue is whether that is permitted.

[47] I start with the statute's statement of purpose. The *FOIPOP Act* says:

> **Purpose of Act**
>
> 2 The purpose of this Act is:
>
> (a) **to ensure** that public bodies are fully accountable to the public by
>
> (i) giving the public a **right of access** to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
>
> (iii) specifying **limited exceptions** to the rights of access,
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the **disclosure of all government information with necessary exemptions, that are limited and specific**, in order to
>
> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.
>
> [emphasis added]

[48] In *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA 132, Justice Saunders for this Court expanded on s. 2:

> [40] Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.
>
> [41] The **FOIPOP Act** ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.
>
> …
>
> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only **Act** that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). …
>
> [56] Thus the **FOIPOP Act** in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> [57] I conclude that **the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access** to information than might otherwise be contemplated in the other provinces and territories in Canada. **Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and permit the airing and reconciliation of divergent views**. No other province or territory has gone so far in expressing such objectives.
>
> [Saunders J.A.'s italics] [bolding added]

[49] Then the process. The *FOIPOP Act*, s. 41(1), says the "applicant … may appeal … in such form and manner as may be prescribed by the Nova Scotia *Civil Procedure Rules* …". This means that whether an amendment may add Mr. Houston in the Supreme Court is to be determined by the *Civil Procedure Rules.*

[50] *Civil Procedure Rules* 35.06, 35.08 and 83.11 govern amendments in the Supreme Court to add or change a party:

> 35.06 (1) **No proceeding is defeated by reason of** a wrong person having been joined as a party or **a right person having not been joined**, **unless** an order

removing or adding a party would cause **serious prejudice** that cannot be compensated in costs **or an abrogation of an enforceable limitation period**.

(2) **A judge may make an order** removing or **adding a party to prevent the defeat of a proceeding**, **unless** doing so would cause **serious prejudice** that cannot be compensated in costs or an **abrogation of an enforceable limitation period.**

(3) No proceeding is defeated by reason of a party having been wrongly named, unless both of the following apply:

(a) because of the misnaming, the misnamed party was unaware of the proceeding;

(b) the correction will cause serious prejudice that cannot be compensated in costs, and would not have been suffered if the party had been properly named originally.

…

35.08 (1) **A judge may join a person as a party in a proceeding at any stage** of the proceeding.

…

(5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

…

83.11 (1) A judge may give permission to amend a court document at any time.

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 – Parties, including Rule 35.08(5) about the expiry of a limitation period.

[emphasis added]

[51] The motions judge (paras. 51-53) cited those Rules and concluded that the amendment was an appropriate exercise of his discretion:

[55] I am satisfied that it is appropriate to substitute "Tim Houston – Leader of the Progressive Conservative Caucus of Nova Scotia", for the presently named Appellant, "Progressive Conservative Caucus of Nova Scotia". …

[56] These changes will not "prejudice" BFL. The very same application that was made for information, and refused, which then became the subject of the appeal, in all material respects remain the same.

> [57] The Appeal was filed within the 30-day statutory limitation period. It had not expired. There is no serious prejudice to BFL, nor is there an abrogation of a limitation period. The appeal proceeding will continue as if this correction had been made immediately before the Notice of Appeal was filed.

[52] Did the judge make an appealable error?

[53] The exceptions in Rules 35.06(1) and (2) to the motions judge's discretionary power – "serious prejudice" or "abrogation of an enforceable limitation period" – do not exist:

- The addition of Mr. Houston causes no prejudice to Bay Ferries. Mr. Houston's presence will not affect the merits of the disclosure issues to be determined in the *FOIPOP* Appeal.
- No limitation period has been abrogated. The Notice of Appeal to the Supreme Court was filed on February 11, 2019, within 30 days of its receipt as required by s. 41(1) of the *FOIPOP A*ct. The beneficial parties (Caucus including Leader) and issues on appeal remain as they were when the Notice of Appeal was filed. If the motions judge had summarily dismissed the *FOIPOP* Appeal and Mr. Houston followed the next day with a new *FOIPOP* request for the same information, this time in his own name, his request would not be time-barred.

[54] Consequently, the motions judge had a discretion under Rules 35.06(2) and 35.08(1) to join Mr. Houston as a party.

[55] What criteria govern that discretion?

- Rule 35.06(1) directed that "[n]o proceeding is defeated by reason of … a right person having not been joined".
- The *FOIPOP Act*, as interpreted by *O'Connor*, *supra*, entitled the judge to consider the "generous" purposes of the *FOIPOP Act*. A *FOIPOP* request is unlike a civil claim where the pivotal elements of the cause of action are personal to the plaintiff. As discussed in *O'Connor*, para. 57, a *FOIPOP* request is "to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and permit the airing and reconciliation of divergent views". Those purposes remain intact whoever is the nominal appellant for the Caucus. Nothing of substance turns on whether the Appellant is Mr. Houston, the former Leader or Ms. Manninger.

- The judge was subject to *Civil Procedure Rule* 1.01:

> **Object of these Rules**
>
> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[56] Those factors assisted the motions judge's analysis. Justice Rosinski said:

> [40] To insist that Ms. Manninger or the 2016 Leader of the Progressive Conservative Caucus individually be identified as the Appellant would in my view give rise to empty formalism, and I find it difficult to believe the Legislature intended such a meaning in the circumstances.
>
> …
>
> [42] Presuming for a moment that BFL's arguments, that the appeal is a nullity and therefore incapable of amendment, were to be accepted, the appeal would be summarily dismissed – yet all indications are that the Progressive Conservative Caucus would file another application for access to the identical information sought-after, which would likely again be rejected by TIR, requiring another Notice of Appeal to be filed. To what end? All that would be accomplished is a delay of the appeal hearing. …
>
> [43] Recent jurisprudence abounds with courts' recognition of the importance of the need for them to facilitate and improve "access to justice", and reinforce respect for the "rule of law". This appeal is governed in part by CPR 7. CPR 1.01 [Object of these Rules] states: ["]These Rules are for the just, speedy, and inexpensive determination of every proceeding". "An appeal to the court under legislation" is a kind of "proceeding" according to CPR 3.

[57] Bay Ferries' factum says it "does not dispute the purpose, and requisite liberal interpretation, of the *FOIPOP Act*", but adds "broad statements of purpose must not outweigh or overwhelm the meaning of 'person' which tracks the common law approach to legal personhood". Bay Ferries' factum then proceeds without mentioning the judge's discretion under Rules 35.06(1) and (2), 35.08(1) and 83.11.

[58] With respect, the amendment to name Mr. Houston does not "outweigh or overwhelm" the governing legal principles. To the contrary, the amendment: (1) starts from the incorporation of the *Civil Procedure Rules* by s. 41(1) of the *FOIPOP Act*, then (2) employs the directive in Rule 35.06(1), (3) facilitates the just, speedy and inexpensive determination of the merits under Rule 1.01, and (4) supports the purposive interpretation of the *FOIPOP Act*'s generous scope described in *O'Connor*.

[59] The judge made no legal error. The exercise of his discretion does not lead to a patent injustice.

Conclusion

[60] I would dismiss the appeal. As the Respondent did not request costs, I would not award costs.

Fichaud, J.A.

Concurred:

Beveridge, J.A.

Bryson, J.A.