IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cayer v. South West Shore Development Authority, 2007 NSSC 346

Date: 2007/11/28
Docket: S. H. No. 277885A
Registry: Halifax

Between:

Adelard A. Cayer

Appellant

v.

South West Shore Development Authority

Respondent

Judge: The Honourable Justice A. David MacAdam.

Heard: September 18, 2007, in Halifax, Nova Scotia

Counsel: Brian K. Awad, for The Right to Know Coalition of Nova Scotia
Mr. Adelard A. Cayer, for the Appellant (self represented)
Gavin Giles, Q.C. for the Respondent
Edward A. Gores, Q.C. for the Department of Justice (Nova Scotia)

By the Court:

Overview

[1] The applicant, the Right-to-Know Coalition of Nova Scotia ("the Coalition") applies pursuant to Rule 8 of the Nova Scotia *Civil Procedure Rules* to intervene in an appeal under the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5 as amended, (herein "FOIPOP").

[2] In the main proceeding, the appellant, Mr. Cayer, appeals the refusal by the South West Shore Development Authority (the Development Authority) to conduct itself in accordance with Part XX of the *Municipal Government Act*, S.N.S. 1998, c. 18, as amended, which is entitled "Freedom of Information and Protection of Privacy" and imposes obligations similar to those under the FOIPOP Act. The Acting Freedom of Information Review Officer for Nova Scotia has determined that the Development Authority is a "municipal body" and therefore subject to the freedom of information provisions.

[3] Under the *Freedom of Information and Protection of Privacy Act*, as well as under the *Municipal Government Act*, the Review Officer produces a written report

setting out recommendations with respect to the matter under review (FOIPOP, s. 39; *MGA*, s. 492). Upon receipt of the report, the head of the public body, or responsible municipal officer, as the case may be, may decide to follow the recommendations (*FOIPOP*, s. 40; *MGA*, s. 493). Where the head of the public body, or the responsible officer, refuses (or is deemed to refuse) to follow the Review Officer's recommendations, as occurred in this case, an appeal of that decision lies to the Supreme Court (*FOIPOP*. S. 41; *MGA*, s. 494). Mr. Cayer has so appealed.

[4] The coalition has applied to intervene in the appeal. The appellant, Mr. Cayer, has consented to the Coalition's intervention, but the Development Authority opposes.

Law

[5] Civil Procedure Rule 8.01 provides (in part) as follows:

> 8.01. (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,

> (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise....
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> (2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
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> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

The Applicant

[6] In support of its application, the Coalition has filed an affidavit of its President, Darce Fardy, who is also a founder and director of the organization. Mr. Fardy states the Coalition is registered under the *Societies Act*, R.S.N.S. 1989, c. 435, as amended. It was established in 2006 by a group of individuals who consider the freedom of information laws “to be an important element of our democratic society.” He describes the Coalition’s mission as encouraging “the use and development of freedom-of-information legislation in order to foster a better informed and more politically active electorate in Nova Scotia and to improve the

quality of public and private decison making in the province." This is to be achieved through "advocacy and education."

[7] The Coalition members are volunteers who provide the organization with "expertise in *inter alia* website administration, communications, government relations, policy development and research, journalism, accounting and law." Members include "local educational institutions, as well as local and national media organizations and several dozen individuals." Mr. Fardy indicated the appellant, Mr. Cayer, and his wife, "are members of Right to Know but not active."

[8] Mr. Fardy's affidavit continues by stating the Coalition "seeks to intervene in this matter as part of its advocacy mission." It seeks to appear, submit evidence and make submissions only in relation to the issues of (1) whether freedom of information laws apply to the respondent, and (2) the appropriate standard of review to be applied to determinations of the Review Officer. Mr. Fardy expressed the view that the question of whether freedom of information laws apply to the Development Authority is important because of

> (I) the significance of economic development to the future of Nova Scotia, (ii) the key role the regional development authorities have assumed or been given in this

> regard, and (iii) the increasing frequency with which public projects or undertakings involve quasi-public bodies or public/private partnerships.

[9] Mr. Fardy expressed concern that without the Coalition's participation the Court would not receive "a full presentation on the issue of the applicability of FOI Laws to the Respondent", as the Attorney General is not a participant in the litigation and the appellant is self-represented and has not submitted written argument apart from his affidavit.

Law and Argument

[10] In *Solid Waste Association of Nova Scotia (SWANS) Ltd. v. Halifax (Regional Municipality)* (2005), 229 N.S.R. (2d) 386 (S.C.), Davison J., considering an intervenor application, at para. 10, said:

> The issues before the Court are whether the Society has shown evidence which would indicate an interest in the subject matter of the proceeding which is to come before the Court on February 16, 2005 and whether it has been shown that the intervention will not unduly delay or prejudice the adjudication of the application.

[11] He continued by referring to authorities supporting the view that Rule 8.01 requires a "broad or liberal" interpretation, including: *Leask Estate v. Crocetti*

(1990), 95 N.S.R. (2d) 353 (S.C.T.D.) at para. 7. It is not necessary that "proprietary rights or legal interest of the intervenor are directly affected by the proceedings": *Halifax Flying Club v. Maritime Builders Ltd.* (1973), 5 N.S.R. (2d) 364 (S.C.T.D.) at para. 13.

[12] *Solid Waste Association* involved an attempt by SWANS to quash parts of a municipal bylaw implementing a waste management strategy. The strategy involved collecting, processing and disposing of solid waste within the municipality, where there was one disposal site. SWANS represented companies that trucked solid waste to that site, where dumping fees were higher than at other locations. The Halifax Waste Resource Society applied for intervenor status. SWANS opposed the application. Davison J. held the matter "could be termed public interest litigation" (para. 16) and, in allowing the application to intervene, concluded, at paras. 28-29:

> My overall impression was the Society has a distinctive role quite apart from HRM. SWANS does not take the position intervention will cause delay. There is clearly an interest the Society has in the application and my view is its role before the Court will be more beneficial than prejudicial. It cannot be denied the issues in the application are of great public and social concern.

> Dubin, C.J.O, in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.) set out the test to be applied on motions such as this at p. 167:
>
> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

[13] It is not unprecedented for an intervenor to be permitted in an appeal of this kind: such an order was made in *Iannetti v. Cosmetology Assn. (Nova Scotia)*, S.H. No. 158875, *per* Moir J., where three interested groups were permitted to intervene on the issue of the interpretation of the term “public body” pursuant to the *Freedom of Information and Protection of Privacy Act*.

[14] The applicant submits the purpose of Nova Scotia’s freedom of information laws is to ensure that the entities to which the provisions apply are “fully accountable to the public” (as stated in ss. 462(a) of the *Municipal Government Act* and s. 2(a) of the *FOIPOP Act)*. The legislation permits any person to request information. There is authority to the effect that the Nova Scotia legislation 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...": *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)* (2001), 197 N.S.R. (2d) 154 (C.A.); at para. 57. The respondent says *O'Connor* does not deal with applications for intervenor status, nor does it deal with the central issue on the appeal. These points are of secondary importance. *O'Connor* unquestionably provides a general statement on the manner in which the legislation must be interpreted.

[15] The applicant argues that Rule 8 requires an expansive interpretation. The respondent agrees that Rule 8.01 – requiring "an interest in the subject matter" – has been "liberally interpreted", citing *L & B Electric Ltd. v. Oickle* (2006), 249 N.S.R. (2d) 346 (C.A.) at para. 9. It suggests, however, that Rule 8.01(3) – requiring the Court to consider whether a proposed intervention will cause undue delay or prejudice – "serves to temper the liberal interpretation by which applications to intervene are considered." No authority is offered for the latter proposition.

[16] The applicant sets out five factors the Court should consider in exercising its discretion pursuant to Rule 8: the subject matter of the proceeding; the interest of the applicant; the potential for delay due to the intervention; the potential for

prejudice or injustice to the parties should the applicant be permitted to intervene; and the contribution the applicant can make to the litigation. These categories overlap each other, but do provide some direction for the analysis.

[17] The applicant submits the primary subject matter of the proceeding is whether the freedom of information laws apply to the respondent. This is not a private dispute between the parties; the scope of the application of freedom of information laws is a matter of public interest. The applicant says it should be regarded as “a legitimate voice for Nova Scotians” that is “well positioned to speak responsibly for the public interest in regard to access-to-information issues in Nova Scotia.” The scope of the freedom of information laws, it says, goes to “the heart of its mission.”

[18] The applicant relies heavily on the *Solid Waste Association* decision. The respondent says *Solid Waste Association* only stands for the proposition that an “interest in the subject matter” deserved relatively wide and liberal interpretation, but was not without limits. It says *Solid Waste Association* “proceeded on the basis the applicant had been intimately involved in the formulation of the Halifax Regional Municipality’s solid waste disposal and treatment plans”, whereas the

applicant “claims no such interest – nor even any general *nexus* – as between itself and the [respondent] or between itself and the [respondent’s] general mandate for regional economic development.”

[19] The respondent says the applicant has no “direct interest” in the proceeding akin to that in *L & B Electric*, *supra*, where the proposed intervenors were shareholders in a party to the proceeding and there was potential for the litigation to “significantly impact” the value of their shares, their working conditions and possibly their employment. By comparison, the respondent says, the applicant has “no stake” in the outcome of Mr. Cayer’s appeal or in the respondent’s mandate. It should be noted the “exact” words of Bateman J.A. in *L & B Electric* were that “direct interest” had “no single meaning in its application.” This does not appear to limit the category to intervenors with interests analogous to those of the shareholders in that case.

[20] Even in the absence of a “direct interest”, *L & B Electric* confirms the Court may grant intervenor status where the proposed intervenor has a “some genuine interest in the issues between the parties” such that it will bring “a new or different perspective to the consideration of the issues” (para. 12). According to the

respondent, the applicant will simply be making the same argument as Mr. Cayer will, i.e. that the respondent is subject to the freedom of information provisions of the *Municipal Government Act* and that the documents sought should be released. According to the respondent, the applicant has no distinct role to play in the proceeding, and would merely be duplicating the position of Mr. Cayer. The applicant says it will be "an advocate purely for the public interest" of which there is none currently involved in the proceeding.

[21] In *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press et al.* (2000), 184 N.S.R. (2d) 159 (S.C.) the applicant Board sought a permanent injunction restraining the respondents, including the Canadian Press, from communicating or using any confidential or draft report concerning a marine accident. Gruchy J. denied intervenor status to Southam, a newspaper publisher, holding that its interests and perspective were no different than those of Canadian Press. He made the following comments about intervenors:

> Southam claims to have an 'interest' in this proceeding and cites as authority for the definition of the term 'interest', the following cases: *Rothmans, Benson & Hedges Inc. v. Canada (A.G.)*, [1990] 1 F.C. 74 (T.D.); wherein Justice Rouleau said:

Generally speaking, the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

> [O]ther courts, and notably the Supreme Court of Canada have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases the ability of a proposed intervener to assist the court in a unique way in making its decision will overcome the absence of a direct interest in the outcome.

and *Re Schofield and Minister of Consumer and Commercial Relations* (1980), 112 D.L.R.(3d) 132 (Ont. C.A.), wherein the Ontario Court of Appeal said:

It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sense', within the meaning of that expression ... As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the court in reaching its decision but which, for the applicant's intervention might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

[22] Gruchy J. added:

Southam has referred to *Civil Procedure Rule* 8 and says that it qualifies for consideration for intervention as: (a) it has an interest in the subject matter of the proceeding; or (b) there is a question of law or fact in common; or (c) it has a right to intervene under an enactment or a rule. It says that it qualifies under the first of these two categories. In particular, it says: ‘... Southam clearly has an interest in the subject matter of the proceeding as it would like to publish portions

> of the report if available, or obtain responses to the report.' In other words, it says that 'an order in favour of the Board would prohibit Southam from publishing information it wishes to publish'. Southam says that it has an interest in the constitutional question relating to freedom of expression and freedom of the press.
>
> It is my conclusion that those interests, while entirely legitimate, are identical to those of Canadian Press.
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> In addition, it is my conclusion that the addition of a third party which would be in a position to 'whipsaw' the Board would unquestionably complicate and delay the proceedings and may well prejudice the rights of the Board.
>
> I tend to agree that Southam's interest in this matter is virtually indistinguishable from that of Canadian Press. Southam has said that the distinction is that Canadian Press is essentially at the other end of the spectrum of the news gathering and dissemination spectrum. While that may be correct, I cannot agree that is a sufficient variation of interests to warrant intervention.

[23] Gruchy J. also concluded that Southam's participation would complicate and delay the proceedings.

[24] It cannot be said that the interests of the applicant and Mr. Cayer are "identical" or "virtually indistinguishable" as was the case in *Canadian Press*. The scope of freedom of information legislation is a matter of public interest. The applicant exists for the purpose of advancing this public interest, as it interprets it. The applicant has a legitimate interest in the issue of access to information in Nova Scotia, and the scope of the law with respect to such access.

[25] It should be noted that the proposed intervenor in *Canadian Press, supra*, Southam was acting on behalf of the Halifax *Daily News*, one of the newspapers it published; the *Daily News*, in turn, was a participant in the Canadian Press co-operative news-gathering organization. There was, as a result, a much stronger basis upon which to find that the interests of the proposed intervenor were indistinguishable from those of the respondent. In the present case, while Mr. Cayer is a member of the Coalition, it does not appear to be denied that his appeal is being advanced for purposes that are distinct from the "public-interest" mandate of the coalition. The fact Mr. Cayer and the Coalition hold the same position on the proper result of the appeal in respect to the two issues on which it wishes to make submissions, and introduce evidence, does not mean they approach it from identical perspectives. With its exclusive focus on the public interest in the scope of freedom of information laws, the applicant brings a perspective that will supplement, not merely repeat, the views of Mr. Cayer.

[26] The applicant adds that Mr. Cayer is self-represented, and therefore the only way to advance arguments with the assistance of counsel will be through the intervention. Having counsel on both sides, it is submitted, might also make the

resolution of the issue more efficient. The respondent's view is that this is an irrelevant consideration. The respondent's position has merit. Issues of entitlement are not to be determined on the basis of whether a party has legal counsel. Although the presence of counsel may be of assistance in focusing the arguments, it is not a basis upon which to found legal rights, which exist or do not exist regardless of whether counsel is retained. The existence of a right to intervene cannot depend upon whether a party has, or does not have, counsel.

[27] The applicant claims that its intervention will not delay the appeal. It does not intend to introduce any new issues and will restrict itself to the specific issues it has identified. The respondent says there has already been delay as a result of the proposed intervention, and that further delay will arise if the application is allowed.

[28] The Coalition submits no prejudice will arise to either party should it be permitted to intervene. Its interests are not the same as Mr. Cayer's interests, beyond sharing a common position on the main issue in the appeal. Further, it will be open to the Court to limit repetition of submissions. The respondent takes the

view the Coalition is not advancing an interest that is distinct from that the interest advanced by the appellant.

[29] The respondent does not offer any detail on the delay or prejudice that might be expected from allowing the applicant to intervene. There is nothing to suggest any delay that may arise, or any theoretical prejudice, outweighs the contribution the applicant's perspective would bring to the proceeding.

Conclusion

[30] The applicant has shown an interest in issues raised by this appeal and brings a perspective that is neither repetitive or necessarily analogous to that of Mr. Cayer. They will bring the perspective of a body not directly interested in the outcome of Mr. Cayer's application, although clearly sympathetic to his position, but directly interested in the public interest issues it raises. Freedom of Information legislation is a matter of significant public interest. The proposed intervenor is "an organization which is genuinely interested in issues" raised by Mr. Cayer's appeal. Apart from speculation by the respondent, there is no evidence their intervention will unduly prejudice or further delay the appeal.

[31] The application to intervene in the appeal is allowed.

J.