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CORRESPONDENCE

March 10, 2003

Mr. Peter O'Brien, Chair
FOIPOP Review Committee
c/o Nova Scotia Department of Justice
4th Floor, 5151 Terminal Road
Halifax, Nova Scotia B3J 2L6

Dear Mr. O'Brien:

RE: FOIPOP Committee

Please accept this letter as a request to make submissions to the Committee with respect to potential revisions of the Act.

I enclose herein a copy of a submission made some time ago at the request of a representative of the Supreme Court. At that time the Court was interested in preparing a practice memorandum to ensure that FOIPOP appeals were heard in a consistent manner.

I believe the Act needs revision in several respects:

The role of the Privacy Commissioner and, in particular, the status to be given to decisions made by that individual; and
2. The appeals process from decisions of the Privacy Commissioner.

I would like to make submissions on these topics to the Committee. I can appear either in person or submit written proposals via E-mail.

await your instructions.

Yours truly,

W. Dale Dunlop

WDD/kas

September 12, 2000

Re: FOIPPA Appeals to the Supreme Court

About a month ago. we talked at length on the telephone about some of the problems that are inherent within the ***Freedom of Information and Protection of Privacy Act*** with respect to appeals to the Supreme Court. I promised at that time to send you a written outline of the concerns and recommendations I have to make appeals to the Supreme Court under the Act a standardized and reasonably understandable process for all concerned. Rather belatedly. here are my submissions.

The most recent edition of the ***Freedom of Information and Protection of Privacy Act*** dates back to 1993. It is this Act that creates the office of the Privacy Commissioner currently occupied by Darce Fardy. It also creates a right of appeal to the Supreme Court for an applicant who is not satisfied with the government's response to the privacy commissioner's recommendations. As I understand it. you are most concerned with the procedure surrounding the appeal to the Supreme Court set out in s.41 of the Act.

There have been only a limited number of appeals to the Supreme Court under the new Act. I believe there are less than a dozen reported cases and in none of them is the actual procedure respecting the appeal set out in any great detail. Perhaps the most comprehensive examination of the Act takes place in ***Dickie v. Nova Scotia (Department of Health)*** (1999), 176 N.S.R. (2d) by the Appeal Court wherein Justice Cromwell determined the proper method for deciding whether or not information should be released. However. even that case touches only briefly on some of the procedural issues that underlie these appeals.

The first difficulty with the process is that unlike almost every other court process, the appellant under FOIPPA is always either the applicant or a third party and is never the government. This is despite the fact that the applicant may have, and in fact usually has, the recommendation from the Privacy Commissioner that the information be released. In other words, the applicant has won in a sense at the Privacy Commissioner level. In most cases, that would put the burden on the party that disagreed with the commissioner's findings to launch an appeal, but the FOIPPA Act is not written that way so you have the unusual position of the appellant being the person who was successful at the previous level.

2. The second difficulty has to do with the nature of the appeal itself. Section 42 states that the Appeal Court may:

a) determine the matter *de novo*; and

b) examine any record *in camera* in order to determine on the merits whether the information in a record may be withheld pursuant to this Act.

This is probably one of the most ambiguous sections on the Nova Scotia statute books.

Firstly, the use of the word "may", being permissive, suggests that the court is not bound to determine the matter *de novo*, but leaves no suggestion as to what it should do if it does not decide to determine the matter *de novo*. Secondly, the use of the word "*de novo*" implies that the court should proceed as if it's an entirely new proceeding. My review of the words, "*de novo*" and "*de novo* appeal" in various law dictionaries and administrative texts confirms this.

Section 42.1(b), which mandates an examination of the record, is phrased in such a manner that seems to imply that the judge must be satisfied that there are valid grounds for withholding the information under the Act. Since the government is the one advancing reasons for withholding information, it would naturally follow that the burden should be on the government to identify the sections upon which it is relying and put forward the case for non-disclosure. In turn, the applicant would then advance their reasons for why the information should be disclosed.

In my opinion, the most logical procedure to follow pursuant to s.42 is as follows:

a) the applicant files a Notice of Appeal if the government refuses to follow the recommendations of the Privacy Commissioner;

b) at the hearing of the appeal, the trial judge proceeds as if there were no previous proceedings and nothing that has occurred prior to this stage is of any relevance to the court hearing;

c) the Province advances reasons why the material should not be disclosed;

d) the applicant replies in response to the applicant's arguments

This procedure, as set out above, seems to be in accordance with the overall stated intentions of the Act which are in favour of disclosure and open government, and place the burden on the Province with respect to the appeal to identify both sections of the Act that permit non-disclosure and to convince the court, after examining the actual documents, that the documents fit within the parameters of the various sections.

In practice, the Province takes an entirely different view of the appeal process. The Province puts forward the position that since the applicant is the appellant that the burden falls on the applicant to establish that the material should be disclosed. Secondly, the Province advances the proposition that the hearing is not in essence a *de novo* process, but a review based on the standard of correctness as it relates to either the Privacy Commissioner's decision or the original decision to withhold the information. The Crown relies upon the case of ***Dean Jobb and Re Halifax Herald Limited v. AGNS.*** [1999] N.S.J. No. 85 and a statement from Justice Tidman, wherein he states that correctness is the standard of review.

With great respect to Justice Tidman, it appears that this statement was made without benefit of argument from either side as to the meaning of the *de novo* process. Quite simply, the statement is incorrect if intended to define a court's role in a *de novo* process. However, unfortunately, the Crown apparently has accepted Justice Tidman's comments as determinative of the process.

The Crown also takes the position that the appellant must file grounds of appeal and is limited in argument at the *de novo* process to the grounds of appeal set out in the notice. However, this ignores the appeal notice as defined by Form 10 which contains no reference to grounds of appeal and simply asks the appellant to set out the facts and identify the records to which access is sought. Part B of the form is completed by the Prothonotary and sets a date for the hearing.

The difficulty with making the applicant or appellant fill out grounds of appeal is that often when the information has been withheld, the person withholding it does little more than cite sections of the Act and does not give any background information or further detail as to why the particular sections being cited are relied upon in that particular instance. For example, in the case in which I am currently engaged, the original denial was accompanied only a citation of a number of sections of the ***Freedom of Information Act***. Only when the matter was appealed did the Province ever file any information to indicate what substantive facts they were relying upon to

support the denials under the various sections of the Act. To place a burden on an appellant to anticipate what the grounds for non-disclosure will be a bit absurd and it seems to fly in the face of the intention of the Act.

Thus, in practice, the Province is attempting to apply an interpretation to the Act which is extremely restrictive, places an undue burden on the applicant and attempts to restrict the grounds of argument for those advanced by the appellant even though the Province had not, at the time the appeal is filed, disclosed anything more than a skeletal basis for denial.

The Keating matter is scheduled to be heard before the Supreme Court on November 8th. At that time, I have asked the court to deal with the procedural issue as it is integral to any appeal launched under the Act. Hopefully, for the first time, a member of the Supreme Court will set out with clarity his or her interpretation of ss.41 and 42 of the Act.

However, the obvious solution is to either amend the legislation to make it clear or have the Supreme Court draw up rules with respect to FOIPPA appeals that are clear and understandable. I would urge the court to adopt rules that favour the liberal approach to information dissemination that is at the center of the Act. It is also my opinion that rules that place the burden on the Crown to show why disclosure is not appropriate are more in keeping with the proper statutory interpretation of s.42 than the Crown's present approach.

As matters now stand, the Province is apparently quite satisfied to attempt to defeat claims for information on the basis of technicalities and procedure. The Keating matter was originally scheduled to be heard in May, but was postponed as the result of the Crown alleging that the appellant was barred from making any arguments that were not contained in its pre-hearing brief even though when the brief was filed the applicant did not have the benefit of knowing what substantive reasons the Province would propound for non-disclosure. This clearly is an unacceptable situation.

I hope this will provide you with some input that will be of use to you in reporting to the Supreme Court.

Yours truly

W. Dale Dunlop

WDD/sdi