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IN THE SUPREME COURT OF THE YUKON TERRITORY

IN THE MATTER OF
THE DECISION OF THE INFORMATION AND PRIVACY COMMISSIONER OF THE YUKON (REVIEW #00-084A), DATED JANUARY 9, 2001, MADE UNDER THE *ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, S.Y. 1995, C.1*

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Whitehorse, Yukon on March 12 and 13, 2001.

Counsel for the Petitioner, Yukon Medical Council:	David Martin, Esq.
Counsel for Hank Moorlag, Information and Privacy Commissioner:	Deborah K. Lovett, Q.C. Susan B. Dennehy
Counsel for Allon Reddoch:	Tim Preston
Counsel for the Government of the Yukon Territory:	Penelope Gawn

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REASONS FOR JUDGMENT

[1] This is an application by the Yukon Medical Council (the "Council") for an order of *certiorari* quashing a decision dated January 9, 2001, made by the Information and Privacy Commissioner of the Yukon Territory (the "Privacy Commissioner"). The Privacy Commissioner found that the Council is a public body within the meaning of s. 3 of the *Access to Information and Protection of Privacy Act*, S.Y. 1995, c. 1 (the "*ATIPP Act*"). The Council also seeks a declaration that it is not a public body for the purpose of s. 3 of the *Act*.

Background:

[2] The Council is established by the *Medical Profession Act*, R.S.Y. 1986, c. 114 (the *"MPA"*), to regulate the practice of medicine in the Yukon.

[3] By s. 40 of the *ATIPP Act*, the Ombudsman appointed under the *Ombudsman Act,* S.Y. 1995, s. 17, is also the Information and Privacy Commissioner.

[4] Allon Reddoch, a medical doctor, applied under the *ATIPP Act* to the Council for a copy of his file maintained by the Council. The Council responded by providing some of the records from Dr. Reddoch's file but it refused him access to others. He then applied to the Privacy Commissioner under s. 48(1)(a) of the *ATIPP Act* for a review of the Council's decision to refuse him access to the records in question. Through the mediation process under the *ATIPP Act*, a settlement was reached with respect to some of the records but others remained at issue. Accordingly, the Privacy

Commissioner was required to conduct an inquiry under s. 52 of the *Act* to determine whether Dr. Reddoch should be granted access to the records at issue.

[5] The Council then advanced the position that the *ATIPP Act* does not apply to it, nor to the records in its custody or under its control, because it is not a public body as defined therein.

[6] The Privacy Commissioner decided that the Council is a public body. The inquiry into whether the records at issue should be released to Dr. Reddoch was adjourned by him pending the outcome of this application by the Council for judicial review of his decision.

[7] Argument on this application was made on behalf of the Council and the Privacy Commissioner. Counsel for Dr. Reddoch adopted the position taken by the Privacy Commissioner. Counsel for the Government of the Yukon Territory stated that the Government takes no position on the issue.

Standard of Review:

[8] Counsel agreed that the standard of review is correctness and that no deference is to be accorded the Privacy Commissioner's decision. The *ATIPP Act* applies to records in the custody or under the control of a public body and accordingly limits the Privacy Commissioner's jurisdiction to dealing with records covered by that description. Thus, the question whether the Council is a public body is a matter of jurisdiction and the standard of review for the Commissioner's decision on that question is correctness: *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

[9] The main issue on this application is therefore whether the Council is a public body within the definition in the *ATIPP Act*. Even if the Council is a public body, however, that does not mean that Dr. Reddoch will necessarily obtain access to the records he seeks; that will be for determination by the Privacy Commissioner pursuant to the *Act*.

The Statute:

[10] The *ATIPP Act* defines "public body" as follows in s. 3:

> "public body" means
>
> > (a) each department, secretariat, or other similar executive agency of the Government of the Yukon, and
> >
> > (b) each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the Government of the Yukon

[11] In this case, as found by the Privacy Commissioner, the question is whether the Yukon Medical Council falls within the s. 3(b) definition of "public body" as a "board ... established ... as an agent of the Government of the Yukon".

[12] Unlike the legislation in some jurisdictions (for example, in the Northwest Territories in its *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20), the Yukon statute does not particularize or designate by regulation entities which are public bodies.

Positions of the Parties:

[13] The Council takes the position that the Privacy Commissioner erred in law in deciding that the Council is a public body and in particular that he erred in the way he approached that issue. It submits that he ought not to have looked at the purpose and goals of the *ATIPP Act* and that in reviewing the functions and structure of the Council he considered only those which link it to the government and not those in the performance of which it has independence.

[14] The position of the Privacy Commissioner is that a purposive approach is appropriate in deciding whether the Council is a public body as that term is referred to in the *ATIPP Act* and that all relevant factors were considered in coming to the conclusion that the Council is a public body and there is no error of law.

Decision of the Privacy Commissioner:

[15] The Privacy Commissioner's decision can be summarized by reference to the findings he made after reviewing the relevant case law:

> A review of these cases well-illustrates the point made by the Law Reform Commission of B.C., i.e., in applying the established criteria for ascertaining whether

a board is or is not "an agent of the Crown", there is room for a great deal of judicial discretion. As noted, the courts have endorsed a general interpretive approach that permits legislation like the ATIPP Act to be broadly construed. Using this interpretive approach and applying the criteria used by the courts for ascertaining whether a board is or is not an agent of the Crown, in my view justifies a conclusion that the Yukon Medical Council is a "public body" for the purposes of the ATIPP Act.

In my view, there are a number of indications in the council's enabling statute that lead to a conclusion that it is an "agent of the Government of the Yukon", for purposes of the definition of a "public body" in the Act. The factors that point to this conclusion are these:

- Medical Council members are appointed by the Executive Council and perform their statutory functions on a part-time basis

- the Council does not enjoy corporate status

- Council members are paid out of the government's consolidated revenue fund and are remunerated according to the fees and expenses prescribed by the Executive Council

- the Council Registrar is also a public servant and is paid by the government; presumably the space, staff and tools that the Registrar needs to carry out her statutory functions are also provided by the government

- the day-to-day management of the information that is generated by the Council is managed by the Registrar

- staff of the Council may be employed by it but only subject to the approval of the Executive Council Member

- staff employed by the Council are paid "at the expense of the Government of the Yukon"

- fines imposed by the Council in the exercise of its decision-making powers are expressly constituted "debt(s) due ... to the Government of the Yukon"

- license and registration fees are paid to the Registrar and presumably deposited in the Yukon government's consolidated revenue fund

> •while the Council may make recommendations to the Executive Council about regulations under the Act, ultimately the authority to make those regulations resides in the Executive Council and those powers are not only extensive, but they prescribe many aspects of the Yukon Medical Council's adjudicative processes

It is my conclusion that these factors establish that the Yukon Medical Council is an agent of the Government of the Yukon for purposes of paragraph (b) of the definition of a "public body in section 3 of the ATIPP Act.

The Purposive Approach:

[16] The Council's submission is that the phrase "public body" is clear and unambiguous and therefore there is no need, and it would be legally incorrect, to look at the purpose of the *ATIPP Act* as an aid to interpretation of the phrase. The Council relies on the following passage from the judgment of Cory J. in *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.) at 523:

> The appellant urged that serious bodily harm is *ejusdem generis* with death. I cannot accept that contention. The principle of *ejusdem generis* has no application to this case. It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words "serious bodily harm" are not in any way ambiguous.

[17] The Council also relies on the following from the judgment of Lamer C.J.C. in *R. v. Multiform Mfg. Co.* (1990), 58 C.C.C. (3d) 257 (S.C.C.) at 261:

> Where the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute.

[18] In *Driedger on the Construction of Statutes,* Ruth Sullivan (3rd Edition, Butterworths Canada Ltd., 1994), pp. 1-6, the traditional approach to statutory interpretation is described as a two step process. At the first step, if the literal meaning of the text is clear or plain, that meaning governs regardless of the consequences. Only if the literal meaning is not clear or is ambiguous or doubtful should the purpose of the statute be looked to for resolution of that ambiguity. Whatever meaning is settled on

must be one that the words can reasonably bear. A strained interpretation, even to promote legislative purpose, must not govern.

[19] As pointed out in *Driedger*, the determination as to whether the literal meaning is plain really involves a judgment call. The modern approach is to combine the two steps referred to above and ask the following question: What do the words mean in the context in which they are found, both in the immediate context of the section of the statute in which they are found and in the general context of the statute, having regard to the declared intention of the statute and the obvious evil that it is designed to remedy?

[20] Under that approach, the purpose of the legislation is taken into account, not to change what the legislators have said, but in order to understand what they have said.

[21] The Council says that the phrase "public body" or, more specifically, "agent of the government" has an established meaning in the common law and the fact that the Council may or may not be held to be a public body does not make the phrase ambiguous and does not justify use of a purposive approach. The Council also says the Privacy Commissioner erred in assuming that a purposive analysis always results in an expansive interpretation. This, it is said, let him to interpret the phrase according to what entities he felt the *ATIPP Act* should cover. On the contrary, the Council submits, the *Act* calls for a narrow interpretation because s. 3 sets out what the term "public body" means, not merely what it includes.

[22] In her submissions, counsel for the Privacy Commissioner focused on the principles of statutory interpretation applied by courts in cases involving freedom of information and protection of privacy legislation. In the cases she relied on, the purpose of the legislation was considered in determining whether certain bodies or things came within various definitions in the statute. This approach conforms with the modern approach referred to in *Driedger*.

[23] For example, in *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430 (C.A.), the issue was whether the trial judge had correctly interpreted the phrase "injurious to ... the conduct of lawful investigations" in one of the exemption sections in the federal access to information legislation in holding that it referred to the general investigative process and not merely a particular investigation. In finding that the trial judge had erred, the Federal Court of Appeal held in part that he had failed to consider the stated purposes of the legislation (to provide a right of access to information in

records under the control of a government institution in accordance with the principles that government information should be available to the public and that necessary exceptions to the right of access should be limited and specific) when defining the ambit of the exemption section in question. The Court did express caution, however, about interpreting exemptions in light of the stated purposes of the legislation:

> It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations ..., then this Court must, given the presence of section 2, choose the interpretation that infringes on the public's stated right to access to information contained in section 4 of the Act the least.

[24] A similar, that is, purposive approach was taken by Dorgan J. in *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. (S.C.) in determining whether notes made by a counselor employed by a school were "records in the custody or under the control" of the school within the meaning of the provincial *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.

[25] And in *McLaughlin v. Halifax-Dartmouth Bridge Commission*, [1993] N.S.J. No. 420, in determining that the Halifax-Dartmouth Bridge Commission was a "department ..., all the members of which ... in the discharge of their duties are public officers ...", the Nova Scotia Court of Appeal referred to provisions of the *Freedom of Information Act,* S.N.S. 1990, c. 11, which indicate that the Act is to be broadly applied. The Court said it is in that context that the definition of the words at issue must be interpreted.

[26] In the *ATIPP Act*, the phrase "public body" is not clear in the sense that whether a particular entity is covered by the definition in the *Act* will not always be easily ascertained; there is no settled definition. Rather, it may, as in this case, require a balancing of various factors developed by the courts to determine whether the entity is an agent of the Crown. The context in which that determination is being made should not be ignored. If it is clear based on the applicable law that the entity in question is not an agent of the Crown, then there will likely be no need to refer to the statutory context. However, if it is not clear, then the context may assist, not to change what the legislators intended, but to give effect to their intention.

[27] In my view, to say that a purposive analysis should not be undertaken at all is a technical approach that does not conform with either the modern approach to statutory interpretation or the approach taken in those cases that have dealt with access to information legislation.

[28] However, a purposive approach will not automatically mean an expansive reading of the statutory provisions with no recognition given to the common law or other tests for whether the entity in question falls within the statutory definition. Therefore, the common law test must still be applied to determine whether the Council is a public body.

The common law test to determine whether an entity is an agent of the Crown:

[29] As indicated, whether the Council comes within the definition of public body depends on whether it can be said to be an agent of the Government of the Yukon, which I will also refer to as the Crown.

[30] The considerations most often quoted are set out in the judgment of Ritchie J. for the Court in *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre,* [1977] 2 S.C.R. 238:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. This is made plain in a paragraph in the reasons for judgment of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal for Ontario in *R. v. Ontario Labour Relations Board. Ex p. Ontario Food Terminal Board* 1963 38 D.L.R. (2d) 530 at p. 534, [1963] 2 O.R. 91, where he said:
>
> > It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. *It depends mainly upon the nature and degree of control exercisable or retained by the Crown.*

[31] At page 537 of the *Ontario Labour Relations Board* case, Laidlaw J.A. stated the following:

> It is not proper or sufficient to examine one section or part of an Act only to ascertain the degree of control exercisable or retained by the Crown in any particular case. The Act must be examined as a whole and all provisions therein touching the matter of control must be considered together. I shall proceed to examine each and all of the sections together touching that matter.

[32] Similarly, in *Northern Pipeline Agency v. Perehinec* (1983),4 D.L.R. (4th) 1 at page 5, the Supreme Court of Canada stated that, "Whether a statutory entity is an agent of the Crown, for the purpose of attracting the Crown immunity doctrine, is a question governed by the extent and degree of control exercised over that entity by the Crown, through its Ministers, or other elements in the executive branch of government, including the Governor in Council".

[33] In *Westeel-Roscoe*, the Court referred to the judgment in *Halifax v. Halifax Harbour Commissioners*, [1935] 1 D.L.R. 657 (S.C.C.), in which Duff C.J.C., in finding that the respondents were agents of the Crown, noted at p. 664:

> To state again, in more summary fashion, the nature of the powers and duties of the respondents: Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of his Majesty's Privy Council for Canada, or of the Minister of Marine and Fisheries...

[34] The Court in *Westeel-Roscoe* then commented that, "[i]n order to understand the wide difference existing between a body which is subject at every turn in executing its powers to the control of the Crown and one such as the present respondent...", it is necessary to examine the respondent's governing legislation.

[35] I do not take the excerpts quoted to mean that in order for an entity to be considered a Crown agent, it must be "subject at every turn in executing its powers to the control of the Crown". An entity that fits that description would obviously be a Crown agent. However, something less than total Crown control will also suffice, as was the case in *Re Board of Industrial Relations and Canadian Imperial Bank of Commerce* (1981), 125 D.L.R. (3d) 487 (B.C.C.A.), to which I will refer again further on.

[36] To summarize, whether an entity is a Crown agent depends on the nature and degree of control exercised by the Crown as well as the other considerations referred to by Laidlaw J.A. in *Ontario Labour Relations Board* with respect to the nature of the functions performed and the nature and extent of the powers entrusted to the entity.

The Medical Profession Act:

[37] In his decision, the Privacy Commissioner reviewed a number of the provisions of the *Medical Profession Act*, as set out above. In my opinion, those provisions were all properly taken into account and I will not repeat all of them but there are some on which comment should be made and others that were not referred to by the Commissioner.

[38] The fact that members of the Council are appointed by the Commissioner in Executive Council pursuant to s. 2 of the *MPA* may be considered, but is not determinative on the issue of Crown agency. Similarly constituted entities have been held not to be Crown agents: *Ontario Labour Relations Board; Halifax Harbour Commissioners.*

[39] Under s. 8, the Commissioner in Executive Council appoints a member of the public service as the registrar of medical practitioners in the Yukon. The affidavit material filed on this application indicates that the registrar is currently the Manager of Consumer Services for the Yukon Government. The registrar is to attend meetings of the Council but is not a member of same. She has the powers and duties set out in the *Act* (for example, the duty to keep certain registers such as the Yukon medical register under s. 9) and also such powers or duties as may be delegated to her by the Council. The Privacy Commissioner noted in his decision that "presumably the space, staff and tools that the Registrar needs to carry out her statutory functions are provided by the government". The affidavit material before me, and there was no other evidence about this, indicates that the Council uses a government postal address, telephone and fax numbers and its office is located in a government building.

[40] The main functions of the Council are the registration and discipline of medical practitioners. A person wishing to be registered must fulfil a number of requirements, including being examined by the Council and satisfying its members as to his or her general fitness and capacity to engage in the practice of medicine [s. 9(2)(f)] and providing such supporting documentation and evidence as shall satisfy the Council of various factors [s. 13(1)].

[41] The Council also conducts investigations and inquiries, prompted by complaint or on its own motion, into the competence and standards of practice of those practising medicine in the Yukon (ss. 19 to 32).

[42] Among the sanctions the Council can impose after a disciplinary proceeding is a fine. Pursuant to s. 24(3)(d) of the *Act*, any fine imposed is paid into the Yukon Consolidated Revenue Fund and, by s. 24(6), until paid, is a debt due by the individual on whom it was imposed to the Government of the Yukon.

[43] Section 30 provides that subject to the approval of the Executive Council Member, the Council or an inquiry committee established by it, may employ, at the expense of the Government of the Yukon, such legal or other assistance as it may think necessary or proper.

[44] It is clear from the statute that the Crown, the Government of the Yukon, provides the administrative framework within which the Council operates. There are no provisions in the statute governing funds or property of the Council, which suggests that it has no funds or property of its own and instead makes use of funds and property provided by the Crown. Its main staff person, the registrar, is a public servant and any other assistance it employs requires government approval and is paid for by the Crown as provided by s. 30 referred to above.

[45] On the other hand, in the performance of its duties, for example in determining whether a certain individual should be registered to practise medicine or whether and how to discipline a particular individual, the Council exercises the powers given to it at its own discretion, makes its own decisions and acts without consulting or taking direction from the Crown. This is a factor that the Privacy Commissioner did not comment on in making his decision, save to refer to the fact that the Council had raised it. It is, however, an important factor because it is mainly on the basis of the Council's control over the decisions it makes in performing its quasi-judicial function that the Council says it cannot be considered an agent of the Crown.

[46] As stated in the *Ontario Labour Relations Board* case, the nature of the functions performed by the Council and for whose benefit they are performed must be considered. Clearly in regulating the practice of medicine, the Council performs a function which benefits not only practitioners of medicine, but also the public at large. In my view, the Council's function of ensuring that those who practise medicine are

properly qualified and provide competent service can be considered a means of fulfilling a duty or responsibility of the Crown to the public, especially when one considers the publicly funded nature of health care. The nature of the services provided in this case are quite unlike those at issue in the *Ontario Labour Relations Board* case. There, the Court was dealing with the operation of a public market, which, although its functions and services could be regarded as public or semi-public in nature, could not properly be regarded as a means of fulfilling any duty or responsibility by the Crown to the public (at p. 535).

[47] In contrast, one can regard the Council as having been created as an instrument of the Crown to discharge the Crown's responsibility to ensure regulation of the practise of medicine and the provision of health services.

[48] The Crown provides the framework and administration within which the Council operates, but leaves it to the Council to make the determination in any particular case whether an individual is fit to practise medicine in the Yukon or whether he or she has failed to practise medicine in accordance with accepted standards. In the exercise of those powers, the Council makes its decisions without consulting the Crown.

[49] Although the Council acts independently in its decision making in the areas of registration and discipline of medical practitioners, that should be contrasted with the extent of the Crown's regulation-making powers. Under s. 61, the Commissioner in Executive Council may make regulations, for example, determining the relationship between the Council and the Medical Council of Canada [subsection (c)], providing for the holding of meetings of the Council and the conduct of such meetings [subsection (d)], prescribing the procedure to be followed and the rules of evidence to be observed in any proceedings upon any inquiry or hearing held under the *Act* [subsection (f)], and fixing the time and place of regular meetings of the Council, determining by whom meetings may be called, regulating the conduct of meetings, providing for emergency meetings, and regulating the notice required in respect of meetings [subsection (g)]. It is true that, pursuant to s. 7, the Council itself may, and indeed shall, make recommendations respecting regulations, but the final responsibility and say as to regulations is not the Council's.

Weighing the Various Factors:

[50] In deciding whether the Council is an agent of the Crown, the Court must weigh and balance the factors that point toward Crown agency and those which point away from it. This is what the Court did in *Royal Dressed Meats Inc. (Trustee of) v. Live Stock Financial Protection Board*, [1989] O.J. No. 706 (Ont. S.C.), where, after reviewing a number of factors, it concluded that the degree of control exercised by the Crown was outweighed by the entirely private character of the Board, the services it performed and the people it benefitted.

[51] In *Re Board of Industrial Relations and Canadian Imperial Bank of Commerce* (1981), 125 D.L.R. (3d) 487 (B.C.C.A.), a case which bears some similarities to this one, the Court found that the Board of Industrial Relations was an agent of the Crown. The Board's staff were employees of the Ministry of Labour, its chairman was an officer of the Ministry and the Board members were appointees. In his reasons for judgment, Anderson J.A. considered the powers given by statute to the Board, including the power to permit certain persons to receive less than the minimum wage fixed by statute, to exempt certain employees from the operation of the statute, to prohibit schemes which it considered were intended to defeat the purposes of the statute, to establish by regulation conditions of labour and employment, to conduct inquiries and to issue certificates of wages owing where an employer had failed to pay his employees in accordance with the statute. Any such certificate was, however, enforceable as a judgment held by the Crown (which can be compared to the way in which any fine imposed by the Council in disciplinary proceedings is a debt due to the Yukon Government).

[52] Anderson J.A. noted that while the Board was given limited discretionary powers to enforce employment standards as prescribed by various statutes, in many respects it was subject to the control of the Minister of Labour and the Lieutenant-Governor in Council. He concluded that on balance, while the Board exercised certain discretionary powers, it did not exercise that degree of independence which would enable him to say that the Board was, in any real sense, not an agent or servant of the Crown.

[53] This simply illustrates the balancing and weighing process that must be undertaken to determine whether an entity is an agent of the Crown. The fact that an entity has some discretionary powers in the functions it performs is not a conclusive factor against Crown agency. Nor is it necessarily the case that wide and varied

discretionary powers will be conclusive against Crown agency on their own. For example, in *Metropolitan Meat Industry Board v. Sheedy et al*, [1927] H.L. 899 (P.C.), the Privy Council, in holding that the Board was not an agent of the Crown, relied not only on the wide powers it possessed and which it exercised at its own discretion and without consulting the direct representatives of the Crown, but also the fact that any charges the Board levied went into its own fund and not the general revenue of the State.

[54] In *Metropolitan Meat Industry Board*, the Board had wide discretion in the powers it exercised, not only in the functions for which it was established, but also in an administrative sense. In contrast, the Yukon Medical Council functions as part of the government in an administrative sense, its registrar being a government employee (who, however, acts at the direction of the Council), its recourse to other assistance being subject to the approval of the government and any fines it levies and the fees it receives going into government revenues.

[55] On behalf of the Council, it was submitted that the case most similar to this one is *Manitoba v. Christie, MacKay & Co.*, [1992] 4 W.W.R. 151 (Man. Q.B.), where the question was whether the Land Value Appraisal Commission established under Manitoba's *Land Acquisition Act* was a Crown agent. The members of the Commission were appointed by the Lieutenant Governor in Council. The Commission had the duty of determining and certifying an amount due by way of compensation for lands acquired under the *Act*. The amount certified was binding on the government authority or utility acquiring the land, but not on the owner of the land. In the particular case, the government of Manitoba had applied for certiorari to quash a decision of the Commission and the respondent argued that the remedy was not available because the Commission was an agent of the Crown.

[56] Jewers J. held that the Commission was not an agent of the Crown, but an independent quasi-judicial body, because it acts entirely on its own and its individual decisions are not in any way controlled by the government.

[57] On appeal, [1993] 3 W.W.R. 396, the Manitoba Court of Appeal agreed that on the common law test the Commission was not an agent of the Crown, noting that the Commission was an administrative tribunal which exercised quasi-judicial functions in determining due compensation under the applicable legislation. It referred to the discretionary powers given to the Commission under the applicable legislation and that, "there is nothing in the statutes that makes the acts of the Commission subject to

any measure of control by the Crown. Nor is there any evidence before the Court that Manitoba, in fact, exercises any control whatsoever over the Commission in the exercise of the powers entrusted to it".

[58] The case report does not set out in full the statutes in question or reveal to what extent the Commission is administratively independent of the government. One might expect, however, that an entity entrusted with the duty of ascertaining a fair compensation value and therefore adjudicating as between competing interests - those of the seller and the buyer, the Crown - would not be subject to government control. In any event, I agree with the submission of counsel for the Privacy Commissioner in this case that the case does not stand for the broad proposition that a quasi-judicial tribunal can never be an agent of the Crown.

[59] Having considered the provisions of the *MPA* and the case law, it seems to me that the issue comes down to whether the administrative control the Crown has over the Council, along with its control in the making of by-laws, outweighs the discretion the Council has in the making of decisions as part of its quasi-judicial nature. I see that discretion as a limited one, in the sense that it is performed in connection with certain issues, essentially, registration or licensing and discipline. That discretion is also one that is exercised on behalf of the government for a public purpose.

[60] Counsel for the Privacy Commissioner submitted that if, after applying the common law tests, it is still not clear whether an entity is a Crown agent, the purposes and objectives of the *ATIPP Act* should tip the scale in favour of Crown agency. Counsel for the Yukon Medical Council objected to that proposition as untenable and submitted that because s. 3 of the *ATIPP Act* uses the word "means" instead of "includes", any doubt should be resolved by a finding that the Council is not a Crown agency.

[61] I prefer to approach the issue this way. The terms "public body" and "agent of the Government" should be considered in the context of the purposes of the *ATIPP Act*. The purposes of the *Act* are set out in s. 1:

> 1.(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records; and

> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves; and
>
> (c) specifying limited exceptions to the rights of access; and
>
> (d) preventing the unauthorized collection, use, or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made under this Act.

[62] It has been said in several cases that access to information legislation must be given a liberal and purposive construction: *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner),* [1999] N.W.T.J. No. 117 (N.W.T.S.C.). Section 10 of the *Interpretation Act,* R.S.Y. 1986, c. 93 requires this as well.

[63] Most of the factors I have referred to suggest that the Council operates and is operated as part of the administration of the Crown. Keeping in mind the purposes of the *Act*, is there anything in it that indicates that the legislators did not intend that it apply to an entity exercising a quasi-judicial function? Counsel for the Privacy Commissioner referred me to s. 2(1), which provides:

> 2.(1) This Act applies to all records in the custody, or under the control of a public body, including court administration records, but does not apply to the following: ...
>
> (b) a personal note, communication, or draft decision of a person who is acting in a judicial or quasi judicial capacity; ...

[64] This provision contemplates that a person acting in a judicial or quasi-judicial capacity might be a public body or part of a public body; otherwise, there would be no reason to exclude certain records of such a person from the application of the *Act.*

[65] I see nothing in the *ATIPP Act* which would exclude the Council from consideration as a public body. On the contrary, the fact that the Council operates in an administrative sense as part of the government suggests that it is appropriate to consider it as an agent of the Crown.

Conclusion:

[66] In my view, on balance, the limited sphere in which the Council makes decisions and exercises discretion is outweighed by the fact that administratively it is subject to Crown control. A consideration of the purposes of the *ATIPP Act* does not "tip the balance" because the factors which the case law says must be considered are not evenly balanced. The Crown's administrative control outweighs the rest. Consideration of the *Act* simply confirms that the conclusion is an appropriate one for purposes of this legislation.

[67] Accordingly, I find that the Privacy Commissioner was correct in concluding that the Council is a public body within the definition in the *ATIPP Act*. The application for judicial review is therefore dismissed. At the hearing, counsel advised that no costs were sought and so I need not deal with that issue.

V. A. Schuler
J.S.C.

Dated this 28th day of June, 2001.

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