Yukon Medical Council v. *Reddoch*, et al, 2001 YKCA 8

Date: 2001 09 05
Docket: CA 01-YU 466
Supreme Court File No.: 00-A0234

COURT OF APPEAL OF THE YUKON TERRITORY

IN THE MATTER OF THE DECISION OF THE INFORMATION AND PRIVACY COMMISSIONER OF THE YUKON (REVIEW #00-84A), DATED JANUARY 9, 2001, MADE UNDER THE *ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, S.Y. 1995, C.1*

BETWEEN:

YUKON MEDICAL COUNCIL

Applicant
(Appellant)

- and -

THE INFORMATION AND PRIVACY COMMISSIONER OF THE YUKON TERRITORY, ALLON REDDOCH and THE GOVERNMENT OF THE YUKON TERRITORY

Respondents
(Respondents)

DAVID MARTIN	Counsel for the Applicant
EDWARD J. HOREMBALA, Q.C.	Counsel for the Respondent Reddoch

REASONS FOR JUDGMENT OF MR. JUSTICE VERTES

[1] The applicant seeks a stay of execution of the judgment in these proceedings, and an order staying an inquiry to be undertaken by the respondent, the Information and Privacy Commissioner of the Yukon Territory, pending the determination of this appeal.

[2] An outline of the history of these proceedings is required. In 1998, the applicant Yukon Medical Council, charged with the responsibility of regulating the

medical profession in this territory by the *Medical Profession Act*, R.S.Y. 1986, c.114, found the respondent Reddoch guilty of unprofessional conduct. The respondent appealed that finding to the Supreme Court which dismissed the appeal in a judgment released in August of 1999 (reported as *Reddoch* v. *Yukon Medical Council* (1999), 17 Admin.L.R.(3d) 241). Reddoch has appealed further and this Court is expected to hear the appeal in November.

[3] In February, 2000, Reddoch filed a request pursuant to the *Access to Information and Protection of Privacy Act*, S.Y. 1995, c.1, for access to records maintained by the applicant relating to him. The applicant provided some records but refused to provide others. Reddoch then requested that the Privacy Commissioner conduct a review of the applicant's refusal to release the further documents. Under the direction of the Commissioner, the applicant and Reddoch engaged in mediation which resulted in the release of further documents but not all. The Commissioner then scheduled an inquiry into the status of the remaining records so as to determine if Reddoch has a right of access to them. At that point, in October of 2000, the applicant raised the objection that the *Access to Information and Protection of Privacy Act* does not apply to it because it is not a "public body" as defined in that Act. The Commissioner considered that argument and rejected it. The applicant Council then appealed that decision to the Supreme Court.

[4] In reasons for judgment released on June 28, 2001, and reported at [2001] Y.J. No.92 (Q.L.), Schuler J. held that the Privacy Commissioner was correct in concluding that the Council is a "public body" within the definition of the statute. Therefore the Act applied to the Council and the Council was subject to the inquiry directed by the Commissioner. It is from that decision that the Council has launched this appeal and it is within this appeal that this stay application is brought. The Privacy Commissioner wishes to continue with the inquiry originally scheduled last year.

[5] The test to be applied on this application is well-known. It is the same one whether the application is for a stay or an interlocutory injunction. The Supreme Court of Canada, in *RJR - Macdonald Inc.* v. *Canada*, [1994] 1 S.C.R. 311, set out the three-part test. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried. Second, a determination must be made as to whether the applicant would suffer irreparable harm if the application were refused. "Irreparable" in this context refers to the nature of the harm rather than its magnitude. Third, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the stay pending a decision on the merits.

[6] The only respondent on this application was Reddoch. I was informed that both of the other respondents, the Privacy Commissioner and the Government of the Yukon Territory, were not taking a position on this application.

Serious Issue to be Tried:

[7] The assessment of the merits of the case on appeal is by its nature a very limited one. There is a very low threshold to meet on this branch of the test. As noted in *RJR-Macdonald* (at 337):

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[8] The respondent did not challenge this point. As noted by the applicant's counsel, this is a case of first impression. The meaning to be assigned to the definition of "public body" in the Act is important in delineating the scope of the Privacy Commissioner's jurisdiction over entities that are not strictly governmental. The jurisdictional issue is a serious one in my opinion and therefore this part of the test is satisfied.

Irreparable Harm:

[9] This branch of the three-part test was described in *RJR - Macdonald* as follows (at 341):

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the rest of the interlocutory application.

[10] The applicant submitted that the results of the appeal, if in favour of the applicant, would be rendered nugatory if a stay is not granted. The Privacy Commissioner has set a timetable for the inquiry under the Act. That inquiry process is scheduled to proceed before this appeal is heard. The applicant Council would be forced to turn documents over to the Commissioner. So the Council is in a situation

where it would be obliged to attorn to the jurisdiction of an authority that may not have jurisdiction over it.

[11] On this point the respondent argued that any argument as to irreparable harm has to be assessed in the background of the applicant's willingness in the past to disclose some documents. If they were willing to disclose some documents then there can be no harm in the requirement to disclose some others.

[12] In my respectful opinion, respondent's counsel focuses too much on the fact that this proceeding arises in the context of the respondent's access request. The case before Schuler J. and her judgment dealt with a more general issue, that being whether the Council is a "public body" within the meaning of the statute. The answer to that question has ramifications beyond just Dr. Reddoch's access request. The fact that the Council disclosed some documents voluntarily does not derogate from the foreseeable "harm" should the Council be compelled to submit to the jurisdiction of some authority that may turn out to have no jurisdiction over it.

[13] Therefore I conclude that this aspect of the test is also satisfied.

Balance of Convenience:

[14] The third part of the test is a determination as to which of the parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits. Among the factors which must be considered are the nature of the relief sought and of the harm which the parties contend they will suffer.

[15] The applicant requests simply that proceedings be stayed until the jurisdiction question can be considered in-depth by a full panel of this Court. On the other hand, the respondent Reddoch has been trying for many months to obtain access to "his file" in the custody of the Council. He also pointed to some factors that, he claims, may have a detrimental impact on his ability to prosecute his appeal of the disciplinary rulings.

[16] Among the documents which the Council refused to disclose earlier are four letters which were apparently written by the applicant's counsel to members of the Committee of Inquiry appointed to investigate the disciplinary charges against the respondent. The Council to date has taken the position that those letters are subject to a solicitor-client privilege. Respondent's counsel, in effect, submitted that an access

request was the most direct way, if not the only way, to test the privilege claim and obtain disclosure of these records. Without the letters, it was argued, the respondent will lose the opportunity to rely on these letters at his appeal so as to advance an argument of bias in the disciplinary proceedings. It seems to me that there is nothing to prevent Dr. Reddoch from applying to the Court of Appeal for an order compelling production of those letters within the context of the appeal he has taken against the disciplinary findings. Such an application will obviously require an evidentiary foundation. Mere speculation is not enough: see *Kuntz* v. *College of Physicians & Surgeons* (1996), 21 B.C.L.R. (3d) 219 (C.A.); *Hammami* v. *College of Physicians & Surgeons* (1996), 21 B.C.L.R. (3d) 267 (C.A.). And at this point, all that has been presented is speculation. It should be noted that Dr. Reddoch's argument on this point was phrased in the context of the possibility that those letters may have created a perception of bias thereby giving rise to a new ground of appeal. This is, in my respectful opinion, a "fishing expedition" that has nothing to do with the jurisdictional issue at the core of this appeal.

[17] There is also a public interest aspect to this balancing of convenience. But, in my opinion, that public interest is not directly related to Dr. Reddoch but to the roles performed respectively by the Privacy Commissioner and the Yukon Medical Council. The Commissioner carries out a function in the interest of the public: to oversee the response of government and public bodies to requests for information. As noted in many cases, access to information legislation facilitates democracy and helps to make government more effective, responsive and accountable. The Yukon Medical Council also serves an important public function: to regulate and discipline, when necessary, the medical profession. This helps to ensure the safety of the public and maintenance of the public's confidence in the medical profession. But, as important as both of these functions are, it is equally important that the respective limits of where each entity can go and what it can do be respected. They are both creatures of statute and thus the jurisdictional boundary of each must be maintained. In my opinion, it is in the public interest that the jurisdictional issue raised by this case be resolved definitively before the process set in motion by Dr. Reddoch's access request is continued. Also, and not without some significance, a stay in this case will not disturb the work of the Privacy Commissioner in other cases before him.

[18] For these reasons, the application is granted. An order is hereby issued, pending determination of this appeal, staying the judgment of Schuler J. and staying further proceedings by the Privacy Commissioner in this matter. Costs of this application will be left to the discretion of the panel hearing the appeal.

Vertes J.A.