**SUPREME COURT OF PRINCE EDWARD ISLAND**

Citation: Eastern School v Privacy Commissioner 2009 PESC 27

Date: 20090901
Docket: S1 GS-22671
Registry: Charlottetown

Between:

Eastern School District

Applicant

And:

Prince Edward Island Information
and Privacy Commissioner

Respondent

Before: The Honourable Justice Gordon L. Campbell

Appearances:
Ronald MacLeod, for the applicant
Douglas R. Drysdale, QC, for the respondent

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| Place and Date of Hearing | Charlottetown, Prince Edward Island<br>March 31, 2009 |
| Place and Date of Judgment | Charlottetown, Prince Edward Island<br>September 1, 2009 |

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(10 pages )

**ADMINISTRATIVE LAW --- Freedom of Information --- Standard of Review — Privacy Commissioner — Statutory Interpretation** — exceeding jurisdiction

**Cases Referred to:** ***MacNeill v. Privacy Commissioner*** 2004 PESCTD 69; ***Dunsmuir v. New Brunswick***, 2008 SCC 9

**Statutes Referred to:** ***Freedom of Information and Protection of Privacy Act*** R.S.P.E.I. 1988, F-15.01

Ronald MacLeod, for the applicant
Douglas R. Drysdale, QC, for the respondent

**Campbell J.:**

[1] This judicial review application arises in connection with a complaint received by the Office of the Information and Privacy Commissioner (the "Commissioner") under the ***Freedom of Information and Protection of Privacy Act*** (the "FOIPP Act") R.S.P.E.I. 1988, F-15.01, against the Eastern School District's ("ESD") collection and disclosure of certain personal information.

[2] In October, 2005, the ESD had been advised by certain of the Complainant's fellow employees and certain union officials that there was some concern that the Complainant may "Go Postal". As a result of receiving such information, the ESD relayed its concerns to the Complainant regarding his escalating behaviors and his increasing focus on personal matters related to his employment. The ESD placed the Complainant on paid administrative leave from his position as a school bus driver pending the outcome of an evaluation into his fitness to carry out his duties.

[3] The ESD requested the Complainant undergo a driving evaluation and submit to an independent medical examination. The ESD suggested it was "incumbent" upon the Complainant to fully cooperate and participate in the requested evaluations. Before any date was set for an independent medical exam, the Complainant refused to attend for a driving evaluation. The Complainant was suspended without pay for his failure to attend that driving evaluation and his employment was eventually terminated on November 15, 2005.

[4] The complaint to the Commissioner alleged that the ESD (a "public body") failed to comply with Part II of the FOIPP Act by:

> (I) disclosing the Complainant's personal information to a third party without the Complainant's consent; and
>
> (ii) attempting to collect personal information from the Complainant without providing the purpose and authority for the collection of the personal information.

[5] The allegation with respect to disclosure of personal information was dismissed by the Commissioner while the ESD was found to have violated the FOIPP Act in respect of (ii) above, i.e., the attempted collection of personal information from the Complainant.

[6] The pertinent sections of the FOIPP Act are as follows:

> 31. No personal information may be collected by or for a public body unless ...

> (c) that information relates directly to and is necessary for an operating program or activity of the public body.
>
> 32 (1) A public body shall collect personal information directly from the individual the information is about unless ...
>
> (j) the information is collected for the purpose of managing or administering personnel of the Government of Prince Edward Island or a public body.
>
> 32 (2) A public body that collects personal information that is required by subsection (1) to be collected directly from the individual the information is about shall inform the individual of
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> a) the purpose for which the information is collected;
>
> b) the specific legal authority for the collection; and
>
> c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.
>
> (Emphasis added)

[7] Counsel for ESD conceded that his client, the applicant, considered the collection of information from a medical doctor pursuant to a request for the individual to undergo a medical evaluation to be the collection of personal information "directly" from the person to whom the information relates, as is set out in the FOIPP Act. This was contrasted with the situation where a pre-existing medical report was obtained from a doctor, which would be indirect collection.

[8] The applicant, ESD, submits that the information it sought to collect was being collected "for the purpose of managing or administering personnel of the public body" and it therefore falls into the exemption under s.32(1)(j). The ESD submits that given that the information was to be collected for the purpose of managing or administering personnel of the public body, it is not information "that is required by s-s.(1) to be collected directly" from the individual the information is about . They further submit that in order to reach the conclusion proffered by the respondent, one must ignore the words "that is required by section (1) to be collected directly" as they appear in s.32(2).

[9] The respondent acknowledges that the exemption in s.32(1)(j) permits the applicant to collect personal information indirectly, but submits that if the applicant attempts to collect personal information directly, it must comply with the provisions of s. 32(2).

[10] Counsel for the applicant submits that if the exemption contained in s. 32 (1)(j) didn't exist with respect to the direct collection of personal information from the individual the information is about, then an employer would not be able to pose a question such as, "Why were you absent from work yesterday?", without stating the purpose for which the information is collected, the specific legal authority for the collection, and the title, business address and business telephone number of an officer or employee who could answer the individual's questions about the collection. ESD submits the information is necessary to manage the organization's personnel and that a manager is entitled to make such inquiries directly to determine, for example, if the absence constituted a sick day, a vacation day, or was a matter for discipline.

[11] The applicant submits that the exemption in s. 32(1)(j) permits the public body to collect information indirectly and therefore such information is not "required by subsection (1) to be collected directly from the individual the information is about". They argue that clause exempts information collected for the purpose of managing or administering personnel from the application of s.32(2).

**Standard of Review**

[12] Both the applicant and the respondent submit that the appropriate standard of review in this case is "reasonableness".

[13] The FOIPP legislation on PEI is still relatively new. To my knowledge, there has been only one prior occasion on which the courts have assessed questions with respect to the FOIPP Act, that being ***MacNeill v. Privacy Commissioner*** 2004 PESCTD 69, which was a decision of Chief Justice Matheson, given on November 23, 2004. Matheson, C. J. conducted the following analysis with respect to the standard of review applicable to a review of decisions of the Privacy Commissioner at paras. 4-14:

> 4 The position and office of the Commissioner are recent creations under the Freedom of Information and Protection of Privacy Act. As such, there is no jurisprudence in this jurisdiction specific to the standard of review to be adopted in reviewing the Commissioner's decisions, nor on the interpretation of the Act's provisions. PEI's legislation is modeled after the Alberta legislation which came into force in 1995, for which there is jurisprudence which establishes the standard of judicial review. There is also jurisprudence from the federal jurisdiction which is informative as to the standard to be adopted and the interpretation to be given.
>
> 5 In Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, the Supreme Court ruled that in determining the standard of review a functional and pragmatic approach was required. It outlined four factors to be considered in determining the standard of review

of the Commissioner's decision.

> 1.The existence or absence of a privative clause in the tribunal's constituent legislation.
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> 2. The expertise of the tribunal about the matters at issue.
>
> 3. The purpose of the legislation as a whole and of the particular provision.
>
> 4. Whether the nature of the problem is a question of fact or law. (paras. 29-33)

6 In Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 SCC 20, the Supreme Court qualified the standards of judicial review to be used in considering a decision from an administrative body. Using the functional and pragmatic approach a court can determine the level of deference required, which in turn, determines which of the three standards are to be applied: correctness, reasonableness simplicitor or patent unreasonableness. At paras. 50 to 51 Iacobucci J. made the following distinction between a standard of reasonableness and that of correctness.

> 50. ... When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives the effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process for its own reasons ...
>
> 51. ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to the objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. ...

7 In Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 34, McLachlin C.J., considering the fourth factor of the functional and pragmatic test for determining the level of deference to be accorded, stated:

> 34. When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards a tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be

> one of general importance or great precedential value: Chieu v. Canada (Minister of Citizenship and Immigration, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

8 The legislation in question, the Freedom of Information and Protection of Privacy Act, has two general functions: (a) to protect the privacy of individual personal information through control of the collection, disclosure and use of this information by public bodies; and (b) to permit persons to have access to records controlled by or in the custody of a public body, subject to exceptions contained in the Act. The Act also provides for independent reviews of decisions made by public bodies under the Act and for resolution of complainants under the Act.

9 If a request for information is denied by the public body, and s. 15(1) requires the head of a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy, the applicant may ask the Commissioner to review any decision, act or failure to act by the public body dealing with the information request.

10 Upon receipt of the request the Commissioner, unless the matter is settled by a mediation or has been dealt with in a prior order, shall conduct an inquiry and "may decide all questions of fact and law arising during the course of the inquiry" (s. 64(1)), and shall dispose of all issues by making an order (s. 66(1)). An order made by the Commissioner under the Act is final (s. 67), but is stayed if an application for judicial review is made and is dealt with by the court (s. 68(2)).

11 Under the federal Access to Information Act, R.S. 1985, c. A-1 (as amended), the information commissioner may only report his findings and if no access is given by the public body, the Information Commissioner shall inform the applicant of his right to apply to the court for a review of the matter investigated (s. 37). The federal Information Commissioner is not empowered to make an order upon completion of his investigation nor is he empowered to determine all questions of fact and law arising from the inquiry. The Supreme Court of Canada in Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] 1 S.C.R. 66, determined that given the purpose of the federal act and the fact that information requests are not reviewed by a tribunal independent of the executive, the less deferential standard of review of correctness applied to decisions of the federal Information Commissioner.

12 Under the PEI statute, the Commissioner is appointed by the Legislative Assembly, following a resolution supported by at least two-thirds of the members present, for a period of five years. The Commissioner may

> only be removed for cause or incapacity by a resolution of the Legislative Assembly. The PEI Commissioner is a more independent entity with wider powers than her federal counterpart. However, the fact the PEI Commissioner is more independent does not necessarily mean that the standard of review will be different.
>
> 13 The Commissioner's expertise in the area is the primary issue to be considered in this case. In this province, the legislation is relatively recent as is the Commissioner's appointment. To my knowledge, this application is the first opportunity this court has had to interpret the legislation. The Prince Edward Island Information and Privacy Commissioner has not had the opportunity build up a body of experience or jurisprudence upon which she can rely to guide her in her decisions. The Alberta Court of Queen's Bench in Alberta (Attorney General) v. Kausheel, [2003] A.J. No. 358 (Bielby J.) and University of Alberta v. Pylypiuk, [2002] A.J. No. 445 (Gallant J.) found the standard of review under a statute similar to the PEI statute to be correctness on issues of law.
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> 14 The PEI statute contains a partial privative clause, but also provides for judicial review with an automatic stay of the Commissioner's decision until the judicial review has been completed. A review of the relief sought and the grounds for review reveal the issues raised are primarily questions of law, involving an interpretation of the Act. Considering all of these factors, particularly the fact the Commissioner has not yet had the opportunity to develop expertise in the area, I find the proper standard of review is correctness on the law, but reasonableness simplicitor on the facts.

[14] Since that decision, the Supreme Court of Canada released its decision in ***Dunsmuir v. New Brunswick***, 2008 SCC 9. In ***Dunsmuir***, the majority reconsidered both the number and the definition of the standards of review applicable on judicial review. They concluded there ought to be only two standards of review: correctness and reasonableness.

[15] To determine the appropriate standard of review the court must first ascertain whether the jurisprudence has already determined, in a satisfactory manner, the degree of deference to be accorded to a decision-maker with regard to a particular category of question. If a determination of the appropriate standard is not possible based on that assessment, the court must consider other factors in selecting the applicable standard. For example, the existence of a privative clause, while not determinative, provides a strong indication of review pursuant to the reasonableness standard. The Supreme Court of Canada also held that "Where the question is one of fact, discretion or policy, deference will usually apply automatically", as will be the case "in the review of questions where the legal and factual issues are intertwined and cannot be readily separated."

[16] At paragraph 54, the majority held;

> "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity... Deference may also be regarded where an administrative tribunal has developed particular expertise in the application of the general common law or civil law or rule in relation to a specific statutory context."

[17] The court stated at para 55 that;

> A question of law that is of 'central importance to the legal system ... and outside the ... specialized area of expertise' of the administrative decision-maker will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where [the existence of a privative clause and a discreet and special administrative regime in which the decision-maker has special expertise] so indicate.

[18] Pursuant to the standard of review analysis proposed by the Supreme Court of Canada, I find the jurisprudence did reasonably determine the degree of deference to be afforded with respect to questions of law and questions of fact decided by the Privacy Commissioner (***MacNeill, supra***). That standard was declared to be correctness with respect to questions of law and reasonableness simplicitor on the facts. What changes to that standard are appropriate in light of ***Dunsmuir***?

[19] Firstly, nothing has changed since ***MacNeill*** with regard to the presence of the privative clause. There continues to be a "partial privative clause" with the statute also providing for an automatic stay upon filing for judicial review, as found by Matheson, C.J. Neither has there been any change with respect to the purpose of the tribunal as determined by interpretation of its enabling legislation.

[20] The nature of the question at issue in the instant case is more purely a question of law than the question posed in the ***MacNeill*** case. Here we are dealing with a straightforward question of the alleged failure of the Commissioner to consider or give effect to a particular section of the statute. There are no facts in dispute. Nor is there anything specific to the role of the Privacy Commissioner or the purpose of the FOIPP Act that would lead me to conclude that, in failing to give effect to s.32(1)(j), the Commissioner was dealing with the interpretation of matters with which she has particular familiarity.

[21] While time has passed since the decision of Matheson, C.J., there was no evidence before the court with respect to any body of expertise being built up by the Commissioner during the interval.

[22] Considering all of these factors, I am left to conclude the appropriate standard of review in respect of decisions of the Commissioner is correctness with respect to questions of law and reasonableness with respect to questions of fact or mixed questions of fact and law.

**The Commissioner's decision**

[23] After setting out ss. 31, 32(1) and 32(2) of the Act, the Commissioner addressed only ss. 31 and 32(2) in her comments. Section 31 prohibits the collection of personal information by a public body unless it relates directly to and is necessary for an operating program or activity of the public body. Section 32(1), which was not considered by the Commissioner, requires a public body to collect personal information directly from the individual the information is about **unless** the information is collected for the purpose of managing or administering personnel of the public body. The Commissioner went directly from applying s.31 to applying s. 32(2) without mention of the exemption provided by s. 32(1). After quoting ss. 31, 32(1) and 32(2), the Commissioner, at p.12 of her decision (Order No. PP-08-001, March 3, 2008), said:

> I disagree with the Public Body's argument that its attempted collection of the Complainant's personal information via job and medical evaluations is authorized by Part II of the FOIPP Act. In order to satisfy the above-noted subsections of 31 and 32 of the FOIPP Act, the Public Body must not only show that the information collected is necessary for an operating program or activity of the Public Body, but also that it complies with subsection 32(2) of the FOIPP Act. In this case, the Public Body did not disclose in its October 17, 2005 letter to the Complainant, the explicit purpose for collecting the personal information via two evaluations, although it did describe the purpose to a limited extent in its response letter to the Complainant dated November 1, 2005. At no time did the Public Body inform the Complainant of its specific legal authority for the collection of their personal information. Further, rather than providing the Complainant with an opportunity to consent to the collection of their medical information, the letter advised that it was "incumbent" on the Complainant to fully cooperate and participate. When the Complainant did not attend one of the evaluations, they were suspended without pay. Finally, upon request by the Complainant for an explanation as to the purpose for the evaluations, no further information was provided by the Public Body, aside from a reiteration that the Complainant's employment was in jeopardy. For these reasons, I find that the Public Body violated subsection 32(2) of the FOIPP Act.

**Decision**

[24] To paraphrase ***Dunsmuir*** at para. 55, I consider the failure to apply a clearly stated section of the Act to be "a question of law that is of 'central importance to the

legal system ... and outside the ... specialized area of expertise' of the administrative decision-maker."

[25] Had the Commissioner properly taken s. 32(1)(j) into account, it would not have been possible to conclude that the information to which she referred was "required by subsection (1) to be collected directly from the individual..." as s. 32(1)(j) specifically exempts such information from that requirement. The rules of statutory interpretation simply do not permit one to ignore sections that can be given meaningful interpretation. On this question of law, I find the Commissioner was incorrect in failing to give effect to the statutory exemption contained within the body of her "home" statute.

[26] I therefore grant the applicant's request for an order setting aside that portion of Order No. PP-08-001 of the Acting Information and Privacy Commissioner, Karen A. Rose, dated March 3, 2008 that found the ESD was in contravention of Part II of the ***Freedom of Information and Protection of Privacy Act*** (the "FOIPP Act") in the collection of the Complainant's personal information.

[27] In the event the standard of review was found to be "reasonableness" instead of "correctness" with respect to the foregoing question, it is my conclusion that the Commissioner's finding that the ESD violated Part II of the FOIPP Act is based on a clear misreading and misapplication of ss. 32(1)(j) and 32(2) and that does not form a reasonable foundation upon which to base a decision. I would set the decision aside on that basis.

[28] There is a second aspect of the Commissioner's decision which is under review. At p.16 of her decision, the Commissioner stated the following as part of her order:

> In accordance with subsection 66(3)(f) of the FOIPP Act, I recommend that the head of the Public Body provide education and training to its management and employees in this regard, focusing on Part II of the FOIPP Act. In particular, all Public Body personnel should be made aware of the importance of protecting the security of employees' personal information, and consistently advising employees of the Public Body's purpose and authority for collecting employees' personal information. I asked that the head of the Public Body advised me in writing, within 90 days of the date of this order, the details of how and when this recommendation is carried out.

[29] Counsel for the respondent acknowledged that the Commissioner was in error in referring to s-s. 66(3)(f), and that there is no authority in that subsection or any other portion of s. 66 that grants the Commissioner authority to make such an order. However on behalf of the respondent, counsel submitted the Commissioner does

have such authority pursuant to s-s. 50(1)(h), which reads as follows:

> 50. (1) In addition to the Commissioner's function under Part IV, with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may
>
> > (h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

[30] I accept the submission of respondent's counsel that a mere technical error, such as referring to the wrong subsection, does not warrant overturning the Commissioner's decision.

[31] However, the ESD submits that even when reviewing s.50, the Commissioner exceeded her jurisdiction in recommending training and requiring the public body to report back within 90 days with details of how and when the recommendation is carried out.

[32] Firstly, the recommendation was given in the nature of an order. It was not simply a recommendation. The Commissioner imposed a reporting duty on the public body without having any authority for doing so. The statute allows the Commissioner to give advice and make recommendations. In my view, she has the authority to recommend the public body provide education and training to its management and employees focusing on Part II of the FOIPP Act. I find that to be the case notwithstanding that her motivation to make such a recommendation was based on a misinterpretation and misapplication of ss. 31 and 32 of the Act. And, while the Commissioner is "generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved", actions taken in furtherance of that must be specifically authorized in one of the enumerated powers set out in the Act. No such power is granted to the Commissioner in the FOIPP Act. I therefore find she exceeded her jurisdiction in imposing the requirement for "the head of the Public Body to advise [her] in writing within 90 days of the date of [her] order the details of how and when a recommendation was to be carried out", and I grant the applicant's request for an order setting aside that portion of Order No. PP-08-001 as well.

[33] By agreement of counsel at the end of the hearing, no costs will be awarded.

September 1, 2009

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Campbell J