SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: IRAC v. Privacy Commissioner & D.B.S. 2012 PESC 25

Date: 20120831
Docket: S1-GS-23775
Registry: Charlottetown

Between:

Island Regulatory and Appeal Commission

Applicant

And:

The Office of the Information and Privacy Commissioner for Prince Edward Island

And:

D.B.S.

Respondents

And:

The Prince Edward Island Human Rights Commission

Intervenor

Before: The Honourable Justice Benjamin B. Taylor

Appearances:
Paul D. Michael, Q.C., solicitor for the Applicant
Douglas R. Drysdale, Q.C., solicitor for the Respondent Information & Privacy Comm.

Gregory J. Howard, solicitor for Intervenor

Place and Date of Hearing — Charlottetown, Prince Edward Island
February 21, 2012

Place and Date of Decision Charlottetown, Prince Edward Island
August 31, 2012

ADMINISTRATIVE LAW - ***Freedom of Information and Protection of Privacy Act*** - Judicial Review - Standard of Review - Procedural Fairness - deciding on an issue not raised or addressed by the parties.

Cases referred to: ***Dunsmuir v. New Brunswick***, [2008] 1 SCR 190; ***MacNeill v. Privacy Commission***, 2004 PESCAD 69; ***Eastern School District v. Privacy Commissioner***, 2009 PESC 27; ***Edmonton (City) v. Edmonton (City) Assessment Review Board***, 2010 ABQB 634

Statutes referred to: ***Rental of Residential Property Act***, R.S.P.E.I. 1988, Cap. R-13.1***;*** ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01; ***Island Regulatory and Appeal Commission Act***, R.S.P.E.I., 1988 Cap. I-11

Text referred to: Flood and Sossin, ***Administrative Law in Context***, Toronto, 2008 Emond Montgomery Publications

Taylor J.:

[1] This decision follows the hearing of an application by the Island Regulatory and Appeals Commission ("IRAC") for judicial review of the June 4, 2010 decision of the acting Prince Edward Island Information and Privacy Commissioner ("the Commissioner").

[2] The matter began in 2009 with a dispute between a landlord and a tenant (D.B.S., the Respondent) over notice, rent, and damages. The landlord made application for a ruling under the ***Rental of Residential Property Act***, R.S.P.E.I. 1988, Cap. R-13.1, as amended, and the dispute was heard by Residential Rental Property Officer Hogan in July, 2009. In October, 2009, Officer Hogan ruled in favour of the landlord, and, in two decisions, awarded damages totalling $2,165. The tenant appealed the decisions to IRAC, which denied his appeal by decision dated January 15, 2010. In accordance with IRAC policy, the IRAC decision was published online.

[3] The tenant did not appeal IRAC's decision, but complained to the Commissioner pursuant to the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01 ("the Act"). This complaint was a request for review under s. 60(3) of the Act, which states:

> (3) A person who believes that the person's own personal information has been ...disclosed in violation of Part II may ask the Commissioner to review that matter.

The tenant's complaint stated:

> IRAC is violating my privacy by publishing my name online without my consent. I never allowed IRAC to publish my name. I DO NOT allow IRAC to publish my name. A [Google] search on my name leads to the Commission's Order appearing at the top of the search. I would like you to IMMEDIATELY remove my name from their publications.

[1] In her decision dated June 4, 2010, the Commissioner declined to take action to require IRAC to delete names of parties in its online decisions and orders, stating at pp. 6-7 and under "Findings" at p. 8:

> The Public Body notified the Complainant in various ways that the appeal hearing was open to the public. The Notice of Appeal Hearing that the Complainant received stated that "the hearing will be noticed on the Commission's public web site at ...." In addition, the Notice stated that "[U]nless otherwise indicated, all materials submitted and Orders of the Commission will be made public."
>
> I am not convinced by the Complainant's argument that he did not know that his name would be released. A cursory look at the Public Body's website shows that the names of the parties on orders are posted there. It is no longer a curiosity that a person's name on an order made at public hearing will be listed in search engine results on the Internet. As well, I cannot agree with the Complainant that the Public Body's prior assertions to him that the matter would be heard at a public hearing in any way implied that his name would be excluded from the publication of the order. If publication of an order is justified because the quasi-judicial tribunal provides substantial reasons for its hearings being open to the public, that may then lead to the publication of its orders without redaction. If publication of the names of the parties is justified, there is no automatic rule that differentiates the methods of publication. Not all quasi-judicial tribunals fit into the open hearings category, but I find that IRAC does because it decides issues of general application in a manner similar to court proceedings, under the statutes that it is responsible to administer. This does not mean that most quasi-judicial tribunals are expected to conduct open hearings; nor does it mean that I agree with publishing the names of parties to a decision or order on the Internet. It simply means that I recognize that some quasi-judicial tribunals hold public hearings similar to court proceedings and uphold public openness to the extent of publishing the proceedings or orders in order to be accessible to the public at large. The closer a quasi-judicial tribunal comes to being the

> arbiter of offences under the law, the closer it comes to falling under the rubric of the open court (tribunal) concept.
> The publication of names in orders of quasi-judicial tribunals is a matter of concern to Privacy Commissioners across the country. There are discussions and concerns that have been raised on whether the names of the parties should be considered as non-essential to the promulgation of the principles decided in a particular case. This is an evolving issue that is not yet settled. The Saskatchewan Privacy Commissioner has released guidelines on his website on publishing personal information electronically (Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals). At this time, I will not order the Public Body to remove the names of parties from its orders that are published electronically. However, I recommend that the Public Body carefully consider the guidelines released by the Saskatchewan Commissioner to determine whether removal of the names from its orders would be a reasonable action on its part. I have attached these guidelines to this order.
>
> . . .
>
> 1. I find that the Public Body is a quasi-judicial tribunal and its proceedings are open to the public. I recommend that the Public Body consider followings the guidelines issued by the Saskatchewan Information and Privacy Commissioner, as discussed above.
>
> . . .
>
> 3. I find that there is, at this time, no expectation of privacy for a person who appears as a party before this Public Body, because the issues brought for hearing before the Public Body are issues that turn on compliance with public statutes of general application. I recommend that it is desirable to remove the names of the parties from decisions or orders published online...

[1] In making the above findings, and in declining to take action, the Commissioner effectively dismissed the tenant's complaint. However, the Commissioner then went on to state at pp. 7-8 under "Findings" at p. 8 and "Conclusions" at p. 9:

> In reviewing the Public Body's orders that were published on its website, I noted that the names of non-party witnesses were published in the body of an order; eg., Order LA10-03. The publication of the names of witnesses in a case before a quasi-judicial tribunal is problematic with respect to witnesses who are not parties to the proceeding. I was surprised to find this practice and, in my opinion, there is no compelling reason to publish the names of non-party witnesses. These are public hearings, and the witnesses give evidence in public, but publishing the non-party witness names in a written order is an

> unnecessary invasion of their privacy. The names of non-party witnesses must, in future, be severed from both the title and the body of orders of the Public Body that are published by any method. Names of non-party witnesses published in any past orders of the Public Body must be severed before their online publication.
> The Public Body must contact this office and provide a reasonable estimate of how many orders would be affected and how long severance would take, for approval of the Commissioner.
>
> . . .
>
> 2. I find that the Public Body is not justified in publishing the names of non-party witnesses in its orders and that the personal information of non-party witnesses must be severed from the Public Body's orders that are published by any method.
>
> . . .
>
> Based on my findings, I order that the Public Body refrain from publishing in future, by any method, the personal information of non-party witnesses in its orders. I order that the Public Body provide this office with a reasonable estimate of how many past orders will require severance of the personal information of non-party witnesses in its orders, for further direction of the Commissioner.

[1] In its application for judicial review dated July 2, 2010, IRAC states at paras. 1-2:

> 1. The Applicant makes application for:
>
> (a) an Order pursuant to s. 3(3)(a) of the Judicial Review Act, R.S.P.E.I. 1988, Cap. J-3 (the "Act") nullifying that part of the Order of the Information and Privacy Commissioner issued on 4 June 2010 which deals with the publication of personal information of not-party witnesses;
>
> (b) alternatively, an Order pursuant to s. 3(3)(e) of the Act referring the matter back to the Information and Privacy Commissioner for further consideration in accordance with specific findings of the judge ...
>
> 2. The grounds for the application are as follows:
>
> (a) the complaint of [D.B.S.] (the "Complainant") before the Information and Privacy Commissioner was specifically whether the Island Regulatory and Appeals Commission, (the "Public Body") violated the Complainant's privacy by publishing, on its website, a case in which he was involved. The Information and Privacy Commissioner

> found no violation of the Freedom of Information and Protection of Privacy Act and dismissed the complaint.
>
> (b) without hearing any submissions from the Applicant or Respondent on the issue, the Information and Privacy Commissioner ordered that the Public Body refrain from publishing the personal information of non-party witnesses in its orders, and provide an estimate of how many past orders require the severance of personal information of non-party witnesses. The issue of publishing personal information of non-party witnesses was not before the Information and Privacy Commissioner in the complaint.
>
> (c) the Information and Privacy Commissioner erred in considering an issue that was not part of the complaint, or alternatively, erred in not requesting submissions on the issue before making a decision.
>
> (d) the Information and Privacy Commissioner's decision constitutes a denial of natural justice;
>
> (e) the Information and Privacy Commissioner failed to adhere to procedures prescribed by an enactment;
>
> (f) the Information and Privacy Commissioner committed errors of law;
>
> (g) the Information and Privacy Commissioner failed to perform her duty in respect of the exercise of authority conferred by an enactment;
>
> (h) there is insufficient evidence to support the Information and Privacy Commissioner's decision;
>
> (i) the Information and Privacy Commissioner's decision and order are incorrect, or alternatively unreasonable ...

Standard of Review

[1] As the first step in this judicial review, I must determine the appropriate standard of review to apply. In ***Dunsmuir v. New Brunswick***, [2008] 1 SCR 190, at paras. 45, 53, 55, 77, and 79, the Supreme Court of Canada stated there were two standards of review: (1) reasonableness, where reasonableness is a deferential standard applying to a tribunal's findings on issues of fact, discretion, or policy, or mixed law and fact, or, usually, but not always, where a tribunal is interpreting its own statue or has developed a particular expertise, and (2) correctness, on a question of law that is of central importance to the legal system or outside the specialized area of the tribunal, or on a question of procedural fairness.

[1] In ***MacNeill v. Privacy Commission***, 2004 PESCAD 69, Matheson C.J. upheld a decision of the Information and Privacy Commissioner denying a newspaper's request that the Workers' Compensation Board provide a list of its employees, their positions and salaries, finding such information would be an unreasonable invasion of the employees' privacy. Based on the law as it was at the time before ***Dunsmuir***, Matheson C.J. found that standard of review was correctness or the law, but reasonableness simpliciter on the facts. I note the newspaper, the Commissioner, the Attorney General for PEI, the Workers' Compensation Board, and the PEI Union of Public Sector Employees, were all represented and made submissions to the court on the issue.

[2] In ***Eastern School District v. Privacy Commissioner***, 2009 PESC 27, after ***Dunsmuir***, Campbell J. found at para. 22: "...the appropriate standard of review in respect of decisions of the [Privacy] Commissioner is correctness with respect to questions of law, and reasonableness with respect to questions of fact or mixed questions of fact and law."

[3] The issues raised by IRAC in its application for judicial review are as stated at paragraphs 13 of IRAC's factum:

> 1. Whether the Privacy Commissioner erred when she issued an Order prohibiting the publication of personal information of non-party witnesses in IRAC Orders when the issue was not raised in the Complaint of [D.B.S.] and with respect to which IRAC had no opportunity to make submissions.
>
> 2. Whether the publication of the names of non-party witnesses in IRAC Orders is an unreasonable invasion of their privacy.

[1] In ***Edmonton (City) v. Edmonton (City) Assessment Review Board***, 2010 ABQB 634, Germain J. stated at para. 16:

> [16] Recently, Binnie J. in ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12 (S.C.C.) at para. 43, [2009] 1 S.C.R. 339 (S.C.C.) explained where an administrative body "... failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe ..." then during judicial review the question is addressed on a correctness standard:

> Dunsmuir says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (Pal, at para. 9).

[1] I conclude, the first issue is one of procedural fairness on a question of law that is of central importance to the legal system, and I find the standard of review to be one of correctness.

[2] As to the second issue, for the reasons discussed below, it will not be necessary to determine the standard of review.

Procedural Fairness

[3] Flood and Sossin, ***Administrative Law in Context***, Toronto, 2008 Emond Montgomery Publications at pp. 11-12, states that on a review for procedural fairness, a court should ask itself "...the threshold question: Is this the kind of decision that should attract some kind of procedural right?" In other words, should IRAC have "...any entitlement to procedural fairness at all"?

[4] IRAC has been tasked with wide and varied responsibilities as set out in s. 5 of the ***Island Regulatory and Appeals Commission Act***, and under that Act has been given the power to determine its practice and procedure hearings. Pursuant to s. 3(5), 3(7), and 3(8) of the Act, the Executive Committee of IRAC establishes rules and regulations governing administration, general procedure and practice and procedure at hearings per s. 8(b). In addition, IRAC may decide all matters of procedure not provided for under subsection 3(7) and 3(8). As part of its practice and procedure, it holds its hearings in public, and publishes its decisions online.

[5] The Commissioner has the duty to monitoring how the ***Freedom and Information and Personal Privacy Act*** is administered, and for carrying out reviews and inquiries under Part IV of the Act.

[6] Section 64(3) provides that where the Commissioner conducts an inquiry, "...the head of the public body concerned...shall be given an opportunity to make representations to the Commissioner during the inquiry...".

[7] In the present case, IRAC made representations concerning the issue raised by the complaint of D.B.S. - online publication of parties' names - but did not and could not make representations on the issue of publication of names of non-party witnesses, because there had been no complaint and the Commissioner gave no notice she was considering the issue.

[8] Given IRAC's statutory duty to conduct hearings, its statutory power to determine its procedure, the Commissioners duty to give IRAC an opportunity to make representations, and the Commissioner's failure to give notice the issue was on the table, I find IRAC has a clear entitlement to procedural fairness.

[9] At p. 12, ***Administrative Law in Context*** states:

> **B. The Content of Procedural Fairness**
>
> If a court determines that the threshold for some form of procedural fairness has been met, the court must address what those procedures will be. The Supreme Court in ***Baker*** [***Baker v. Canada (Minister of Citizenship & Immigration***) [1999] 2 SCR 817 (SCC)] identified the following five factors as relevant in determining the general level of procedural fairness: the nature of the decisions and the process followed in making it, the nature of the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the parties and the procedure chosen by the tribunal.
>
> Having determined the general level of procedural fairness, the court will then decide from a range of possibilities what specific procedures are required. There are many possibilities:
>
> - notice that the decision is going to made,
>
> - disclosure of the information on which the tribunal will base its decision,
>
> - some opportunity to participate or make views known,
>
> - full hearing similar to that which occurs in a court,
>
> - opportunity to give evidence and cross examine,
>
> - right to counsel, and
>
> - oral or written reasons for its decision.

[1] In the present circumstances, I conclude all of the specific procedures listed above should have been required, and the only procedure which was given by

the Commissioner was written reasons for the decision. (I note that pursuant to s. 64(3) of the FOIPPA, "...no one is entitled to be present during, or have access to or to comment on representations made to the Commissioner by another person.", but since there was no complaint by any non-party witness, that restriction would not apply to this case.)

[2] In ***Edmonton v. Edmonton***, (supra), Germaine J. stated at para. 27:

> [27] I have concluded that a remedy advanced as a judicial review would have succeeded here, and so would a leave application to appeal on an error of law. They are, essentially, the same question. Putting the court's concern succinctly, the failure to grant the City an adjournment under the circumstances of this case was inappropriate even taking into account the language used by the Legislature in Regulation, s. 15(1). The City has been unable to make a full answer and reply to the evidence of the Owner, and that right to answer and defence is a basic principle of procedural fairness. The Saskatchewan Court of Appeal in Preston Crossing Properties Inc. v. Saskatoon (City), 2006 SKCA 63 (CanLII), 2006 SKCA 63 at para. 46, 279 Sask.R. 117 emphasized that while a tribunal that evaluates municipal taxes has broad authority to conduct its proceedings in a less formal manner and control its own procedures, that does not remove its obligations to adhere to the principles of natural justice:
>
> > 46 Thus, boards of revision are freed from conducting their hearings along the formal lines reserved for the courts and are given a considerable measure of comparative latitude in the interests of accessible, speedy, and efficient decision making. This is especially so in light of the fact these are lay tribunals, drawn from the community and expected to bring their intelligence, knowledge, and experience, along with their judgment and sense of fairness, to the commonplace business of municipal taxation and municipal tax disputes. <u>What is required of them, from the standpoint of procedural fairness, is to give each of the parties to the proceeding the opportunity to fairly develop and state their respective positions: To adduce their evidence and advance their arguments for and against</u>, bearing in mind that it is for the boards to say what is irrelevant or redundant in the proper exercise of their duties, as it is for them to say how best to receive the evidence. [Emphasis added.]

<u>Relief</u>

[1] At para. 69 of its factum, IRAC requests the following relief:

> a) an Order pursuant to s. 3(3)(a) of the Judicial Review Act, R.S.P.E.I. 1988, c. J-3 (the "Act") nullifying that part of the Order of the Information and Privacy Commissioner issued on 4 June 2010 which deals with the publication of personal information of not-party witnesses;
>
> b) alternatively, an Order pursuant to s. 3(3)(e) of the Act referring the matter back to the Information and Privacy Commissioner for further consideration in accordance with specific findings of the judge; and ...

[1] As noted above, the decision of the Commissioner was made in response to a complaint by a tenant who complained his name had been used in a landlord-tenant decision of IRAC, a decision which was published online. The result of publishing decisions online has been that people can come up with an entire decision, on purpose or accidentally, by Googling the name of a party or witness. I expect many people, companies, institutions or reporting publishers automatically access every online decision by IRAC, and I understand the frequency of inquiries is one of the factors which affects the priority given by Google in its search results. As a result, whenever someone Googled D.B.S.'s name, the IRAC decision came up first, before Google results which presumably showed D.B.S.'s accomplishments, or perhaps his academic qualifications, or otherwise showed him in a more flattering light than as someone on the losing side of a litigious matter.

[2] I note in passing there are ways a Board can make its decisions available online through its home site, and only searchable through its home site. That might avoid the random discovery which happens when everything is put directly online, while still making the information available to those who wish to search IRAC decisions.

[3] In the present case, there was no analysis or discussion by the Commissioner of whether naming witnesses served any purpose. A moment's consideration will bring to mind times when it might be in the public interest to know the name of a non-party witness before IRAC, which handles a gamut of functions, from small landlord tenant appeals to complicated multi million dollar utility cases affecting the future of all Islanders. For instance:

> (1) when the witness is an expert witness who gives opinion evidence. Witnesses who are found to be expert witnesses give opinion

evidence before judicial and quasi-judicial bodies throughout the country. Their testimony is tested before those bodies and may be discredited, or their opinions may even be different from one jurisdiction to the next. It is essential to the judicial and quasi-judicial system that information about what experts are qualified, or not qualified, or discredited, or give changeable evidence, be available to lawyers and to the public; and,

(2) when a case turns on who is telling the truth. In lay credibility cases, the witnesses need to know their testimony will be tested by public knowledge. The witnesses' oath or affirmation and the fact their testimony may be watched or recorded are undoubtedly factors which encourage truthfulness. People understand their statements may be reported and attributed to them and this provides a strong incentive to tell the truth.

[4] I expect there are many other possible illustrations, but the point is that issues like this need to be decided in cases where the parties have "a dog in the fight" or "a horse in the race" and have notice the issue is in play.

[5] I question whether the Commissioner can make a decision barring publication of some information where there is no complaint, no evidence anyone has been wronged or objects, indeed no evidence at all. In the present case, it is not even clear whether there were <u>any</u> non-party witnesses involved in the case. I note the IRAC appeal decision makes reference to two people with the same family name. One represented the corporate landlord, the other gave evidence, but as their family name is part of the name of the corporate landlord, the two people may be owners of the company. In any event, based on the record before me, these people were not notified of the FOIPP inquiry or review by the Commissioner and played no part in it.

[6] The Commissioner had the right to conduct investigations on her own initiative pursuant to s. 50(1)(a) of the Act, and per s. 50(1)(b) the Commissioner could make an order described in s. 66(3) whether or not a review was requested, and under section 66(3)(e) the Commissioner could require a public body to stop collecting, using or disclosing personal information in violation of Part II, but s. 66(1) states "<u>on completing an inquiry under s. 64" and per s. 64(3) the head of the public body concerned shall be given an opportunity to make representations to the Commissioner during the inquiry</u>.

[7] The Commissioner's decision to ban the naming of non-party witnesses was legislative rather than judicial or quasi-judicial, in that without notice to the parties, without hearing any evidence, and based entirely on her own non-evidentiary assessment of an unknown number of prior unnamed decisions of IRAC, the Commissioner on her own initiative issued a ruling censoring all past, present, and future decisions and publications of IRAC.

[8] The Commissioner's many failures set out above were fundamental failures to grant basic procedural rights, which void the decision of the Commissioner as it relates to publication of names of non-party witnesses.

Conclusion

[9] I find the Commissioner acted beyond her jurisdiction: (1) in failing to give notice to and receive submissions from the parties, particularly IRAC; (2) in failing to gather evidence in conducting an inquiry or review; and (3) and although the Commissioner could have proceeded with an inquiry or review without a complaint or request, in deciding an issue not before her without notice to the parties. As a result, I would nullify that part of the June 4, 2010 Order of the Commissioner which deals with the publication of names of non-party witnesses in decisions of IRAC.

[10] As to whether the Commissioner can or should order witnesses not be named in IRAC decisions, I have decided not to refer the matter back to the Commissioner for further consideration in accordance with specific findings made by me. A complicated issue like this needs a factual basis.

[11] This leaves the Commissioner with a choice of whether to embark on an inquiry or review which no non-party witness has sought, a cure where there is no disease, or, faced with the obvious and valid reasons for witnesses to give sworn or affirmed testimony in public before IRAC and other quasi-judicial tribunals, to stay away from the issue until an actual complaint is made which raises a judicial issue.

[12] The Parties will bear their own costs of this application.

August 31, 2012 _____

J.