

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**Cite as: Western Regional Health Board (Re), 1998 NSSC 99**

**IN THE MATTER OF FREEDOM OF INFORMATION AND PROTECTION OF  
PRIVACY ACT, Stats. N.S. 1993, ch. 5 as amended**

**- and -**

**IN THE MATTER OF A REQUEST FOR REVIEW of a decision of the WESTERN  
REGIONAL HEALTH BOARD to withhold a report on a Mental Health Unit of the  
Yarmouth Regional Hospital**

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**DECISION**

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**HEARD:** at Halifax, Nova Scotia before The Honourable Justice  
Walter R.E. Goodfellow on November 9th, 1998 in  
Chambers

**DECISION:** November 9th, 1998 (orally)

**WRITTEN RELEASE  
OF ORAL:** November 10th, 1998

**COUNSEL:** Michael S. Ryan, Q.C.  
Solicitor for the Plaintiff

Peter J. Driscoll  
Solicitor for the Defendant

Michael G. Forse, Q.C.  
Solicitor for Western Regional Health Board

## Decision

The applicant applies under Civil Procedure Rule 43 for an injunction restraining the Canadian Broadcasting Corporation from broadcasting any portion of a report of the Mental Health Unit at Yarmouth Regional Hospital. The board commissioned the report.

Ms. Margaret McGee, a reporter for the Canadian Broadcasting Corporation made a formal request to the board for the release of the operational review, pursuant to the *Freedom of Information and Protection of Privacy Act, SNS 1993, c.5*.

This request was denied by the board in May of 1998 and Ms. McGee launched a formal appeal. On October 29, 1998, pursuant to Section 39 of the act, the review officer, Darce Fardy released a written report recommending the board disclose the report, subject to certain severances.

Ms. McGee made a telephone request November 2, 1998 and on November 4, 1998, counsel for the board advised her in writing that pursuant to Section 41(1)(b), the board would follow the recommendations of the review officer and release the report and on the same date, a copy of the report was couriered to Ms. McGee at the CBC in Halifax. On November 5, 1998 counsel for the Administrator, advised of the intention to appeal the decision of the review officer failing CBC's concurrence in withholding any publication. An application for injunction was filed November 6th. The CBC responded that it would hold off any publication until the Injunction Application was heard, provided it was dealt with by noon on November 9th, giving an opportunity to have the issue of an injunction addressed by the court.

Counsel for the administrator points out that Section 41(1) provides the

administrator with the right of appeal and states:

### **Appeal to Supreme Court**

**41 (1) Within thirty days after receiving a decision of the head of a public body pursuant to Section 40, an applicant or a third party may appeal that decision to the Supreme Court in such form and manner as may be prescribed by the Nova Scotia *Civil Procedure Rules* or by the regulations.**

He also points out the powers of the Supreme Court on Appeal include determining the matter by a new hearing and that there is some statutory direction that the court shall take every reasonable precaution to avoid disclosure of information that could have been refused by a head of a public body. Counsel for the administrator also referred to procedural unfairness, as his initial impression was that the administrator had not had an opportunity to participate in any way, limited or otherwise, in addressing what was being considered allegations, etc. in the formulation of the report.

Counsel for the administrator also refers to his client's affidavit, which expresses very strongly the view that in the wrongful dismissal action outstanding against the Board, his right to a fair jury trial is prejudiced, and will be compromised by publication and finally that the balance of convenience, and irreparable harm to his client's reputation, etc. will follow from the publication of the report, rendering the proper course of action the issuance of an injunction for what would be a relatively short period of time until the appeal itself was heard.

Counsel for CBC takes the position that with the release of the report, Section 42(3) is unavailable because it only deals with restraining disclosure by the board before release. CBC counsel takes the view that the report could have been in the hands of CBC by any number of alternate routes. CBC raises Section 2(b) of the Charter, and refers to the leading case of **Dagenais v. Canadian Broadcasting Corporation, [1994] 120 D.L.R. (4th) 12..**

CBC's position is that an injunction amounts to a publication ban and that the court's jurisdiction under Civil Procedure Rules and the *Judicature Act* are subject to the Charter.

Dealing with the arguments advanced by the administrator's counsel, and here I should say, to the present former administrator because apparently, he has been dismissed as a result of the report and has immediately embarked upon a wrongful dismissal case against the board.

The report is lengthy and counsel for the former administrator was under the impression that his client did not have an opportunity to participate at any stage, prior to the completion of the report and it has been pointed out under **METHODOLOGY**, "the current administrative director, was offered an appointment for an interview, but declined the offer. He was on sick leave during the operational review."

There is nothing before me that indicates the extent of the sickness and specifically, whether or not this precluded him from participating, nor is there anything before me to indicate any request for an adjournment or a delay to permit participation by the then administrative director.

It is clear that a weakness exists in the *Privacy Act* to Section 41. The release of the report effectively defeats the right of appeal. I have had to deal with this application on relatively short notice and with limited time available, and therefore quite possibly, do not have a full appreciation of the entire Statute, but on the surface it certainly looks to me like Section 41 needs to be revisited.

With respect to the Right of Jury Trial, the former administrator retains that right and it would be for a Justice on any application that may be made, to address by virtue of the conduct of the trial, change of venue, etc. to deal with, what if any, prejudice may arise through the publication. It is not unusual that there is a measure of reporting of incidents, that go to trial, the objections pointed out to me to portions of the report, here initially at

least appear to be ones related to management style for which the board has determined, constitute a basis for dismissal. Whether or not that is accurate and if not, to what extent damages have occurred, including punitive damages, are all matters to be dealt in the civil trial and I am not persuaded at this stage, publication will have an adverse impact on the capacity to conduct a fair jury trial. In any event, there are two legal tests to be considered.

First, in any injunctive procedure, it is a heavy remedy and I recall Matthews J.A. in one case, indicating that in the final analysis, the granting of an injunction is a balance of convenience and secondly, there has to be some evidence of irreparable harm, that cannot be adequately addressed by an award of damages.

Separate and apart from the Charter position, I am not satisfied that a case for an injunction has been made.

With respect to the Charter, the granting of an injunction would effectively mean a publication ban and I have reviewed the **Dagenais** case.

I conclude that the overall interest to prevail, is the interest of the public, as crystallized in Section 2(b) of the Charter, which reads:

**Everyone has the following fundamental freedoms:**

**Freedom of thought, belief, opinion and expression, including freedom of the press and other medial communication.**

In *Dagenais* at page 38, Chief Justice Lamer writes as follows:

Publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonable available alternative measures will not prevent this risk; and

(b) The salutary affects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

For the foregoing reasons, the application is dismissed. I will now hear counsel with respect to the matter of costs. Having heard counsel, I direct each party bear their own costs of this application.

**Goodfellow, J.**