Date: 2006 07 06
Docket: S-0001-CV2004000090

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE CANADIAN BROADCASTING CORPORATION
and JULIE GREEN

Appellants

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by the Minister of Finance as the Chairman of the Financial Management Board Secretariat of the GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondent

Appeal pursuant to the *Access to Information and Protection of PrivacyAct*, S.N.W.T. 1994, c. 20.

Heard at Yellowknife, NT, on June 20, 2006

Reasons filed: July 6, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Appellants: Cynthia J. Levy

Counsel for the Respondent: Sheldon N. Toner

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REASONS FOR JUDGMENT

Introduction:

[1] This is an appeal pursuant to the *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c. 20 (the "Act"). The appellants sought disclosure of a severance agreement made betweenthe Governmentof the NorthwestTerritories and a former public servant. That individual (who will be simply referred to as "the third party" in these reasons) was identified by name in the original request for disclosure and in subsequent communications between the parties. The third party had served as the executive officer of a public body (as that term is defined in the Act).

[2] The government has disclosed parts of the severance agreement but claims that other parts, most notably financial information, are exempt from disclosure. The government says that to grant the access request would be an unreasonable invasionof the third party's personal privacy. It is from this decision that the appellants come to court asking that the entire agreement be disclosed.

[3] For the reasons that follow, I have concluded that the appeal must be dismissed.

Relevant Legislation:

[4] To understand the events that led to this appeal, and the pertinent issues, it is necessary to provide an overview of the legislation.

[5] The Act is similar in many respects to access to information and privacy legislation enacted in other Canadian jurisdictions. It is important, however, to have regard to the specific legislation since there are differences, sometimes subtle ones, in the legislation enacted in other places. And since this appeal raises issues of statutory interpretation it is the specific words of the Northwest Territories statute that must be analyzed.

[6] The Act combines rights of access to government records and measures to protect personal privacy. There is a presumptive right of access. The Act stipulates that "a person who makes a request . . . has a right of access to any record in the custody or control of a public body": s. 5(1). That right of access is subject to certain exceptions from disclosure outlined in the Act. However,where the informationthat is excepted from disclosure can reasonably be severed from a record, there remains a right of access to the remainder of the record: s. 5(2).

[7] An applicant who is refused access may ask for a review by the Informationand Privacy Commissioner: s. 28(1). The Commissioner is an independent public officer granted wide powers to review any decision on an access request and may examinethe record in question: s. 34. The Commissioner, after conductinga review,issues a report containing recommendations: s. 35. The head of the public body in question (usually the cabinet minister responsible for the particular department, board or agency) may then follow the Commissioner'srecommendations or make any other decisionthe head considers appropriate: s. 36.

[8] A third party, whose interests and privacy may be at stake in any access request, is entitled to be given notice of any such request: s.26(1). In this case the third party has been given notice of these proceedings and has chosen not to participate.

[9] The Act, of course, deals with access to records of all kinds held by public bodies. One of the important categories of exceptions to access, however, is personal information the disclosure of which would result in an unreasonableinvasion of a third party's personal privacy. The emphasis is on the unreasonableness of the invasion of privacy because there are exceptions to this exception. This is the legislature's way of balancing the twin purposes of the Act, as stipulated in section 1, those being to make public bodies more accountable to the public and to protect personal privacy.

[10] The Act mandates that the head of a public body shall refuse to disclosepersonal information where the disclosure would be an unreasonable invasion of privacy: s. 23(1). The term "personal information" is defined in the Act as "information about an identifiable individual" and includes such things as "information about the individual's educational, financial, criminal or employment history": s. 2.

[11] The Act also sets out certain presumptions. By s. 23(2), the disclosureof certain types of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. These include, for purposes of this appeal, information relating to "employment, occupational or educational history": s. 23(2)(d); "the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness": s. 23(2)(f); "personal recommendations or evaluations about the third party": s. 23(2)(g); and, "the third party's name where it appears with other personal information about the third party": s.23 (2)(h).

[12] In this case the respondent concedes that the third party's name appears in various documents from both parties so s. 23(2)(h) is not a factor in this analysis.

[13] The Act then goes on to specify, in s. 23(4), that the disclosure of certain types of personal information is not an unreasonable invasion of a third party's personal privacy. These include, again for purposesof this appeal,personal informationrelating to "the third party's classification, salary range, discretionary benefits or employment responsibilities": s. 23(4)(e); and, "details of a discretionary benefit of a financial nature granted to the third party by a public body": s. 23(4)(h).

[14] In between the two presumptions set out in subsections 23(2) and (4), the Act sets out, in s. 23(3), that, in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party'spersonal privacy,the head of the public body must consider all of the relevant circumstances, including, among others,

whether the disclosure is desirable for the purpose of subjecting the public body's activities to public scrutiny.

[15] The scheme of the Act, in respect of a requestfor accessto personalinformation, therefore requires, first, a determination as to whether the information requested is "personal information". If it is, then there must be a determination as to whether it is the type of information the disclosure of which is presumed to be an unreasonable invasion of privacy. If the presumption comes into play, then it may be rebutted only by one of the criteria set out in s. 23(4) deeming disclosure of certain types of information to not be an unreasonable invasion of privacy. The considerations in s. 23 (3) come into play only if the presumption in s. 23(2) does not apply. It is meant to assist the decision-maker in the situation where the requested information does not come within one of the presumptions by setting out some factors that should go into the analysis.

[16] It was apparent at the hearing of this appeal that counsel for both parties agreed with this outline of the operation of s. 23 of the Act. It accords with the views of the Information and Privacy Commissioner since, in her review of this request, she made many of the same comments. It also accords with the analysis of a similar section in the Ontario legislation in *John Doe* v. *Ontario* (1993), 13 O.R. (3d) 767 (Div. Ct.).

History of These Proceedings:

[17] On July 14, 2003, the appellant, Julie Green, a reporter for the Canadian Broadcasting Corporation, forwarded a written request to the Financial Management Board Secretariat ("FMBS") of the Government of the Northwest Territories for disclosure of what was describedas "the severance/œompensationpackage awardedto" the third party. It was public knowledge that a few months earlier the third party had left his executive position with the public body in question. On July 30, 2003, the FMBS access to information officer replied to Ms. Green stating that the information requested was exempt from disclosure pursuant to subsections 23 (2)(d) and (f) of the Act. Ms. Green then requested the Information and Privacy Commissioner to conduct a review of the FMBS refusal to disclose the information sought.

[18] The Commissioner issued her Review Recommendation (Number 04-036) on January 7, 2004. The Commissioner, as part of her review, examined the pertinent document in private. She concluded that the severance agreement should be disclosed

but that certain parts of the agreement should be severed. Those parts related to references to dates, the basis upon which the amounts payable pursuant to the agreement were calculated, the amount to be paid to the third party by way of benefits, and a document attached to the agreement as "Schedule A". The Commissioner held that a lump sum payment paid on termination was not subject to the presumption applicable to "income" whereas payments made by way of salary continuation were. The document attached as "Schedule A" was held to be exempt from disclosure pursuant to s. 23(2)(g) since it is a prototype of a letter of reference agreed to by the parties.

[19] On February 4, 2004, the government's Minister of Finance, in his role as Chairman of the Financial Administration Board, provided his written decision upon review of the Commissioner's recommendation. He advised Ms. Green that he will disclose the agreement but with more informationsevered than as recommended by the Commissioner. In particular, he disagreed with the Commissioner that there is any distinction to be drawn between lump sum payouts and salarycontinuation agreements and noted that the Commissioner failed to follow a previous review wherein she recommended all of the financial details be severed from a severance agreement. Therefore, the agreement in question was disclosed to Ms. Green but all references to the amounts payable to the third party, the basis upon which they were calculated, dates, and "Schedule A", were deleted.

[20] On March 5, 2004, the appellants launched these proceedings by filing their Notice of Appeal seeking disclosure of all of the information contained in the severance agreement. On September 25, 2005, a consent order was issued whereby the respondent agreed to provide a complete copy of the severance agreement to appellants' counsel on her undertaking to maintain the confidentiality of the document. In my opinion, this was a commendable step in these proceedings since otherwise appellants' counsel would have been severely hampered in her ability to formulate relevant submissions.

Scope of the Appeal:

[21] The Act provides that either an applicant or the affectedthird party may appeala decision made by the head of a public body to this court: s. 37(1). It is important to note that the appeal is from the head's decision, not the Commissioner's review or recommendations.

[22] The court has a wide appellate power. The Act states that the court "shall make its own determination of the matter": s. 38(1). It may examine in private any record to which the Act applies. The determination for the court, in essence, is whetherthe head is required to give access or is required to refuse access: s. 39. In this case, because this is an appeal of a decision to refuse access to all or part of a record that contains personal information, the onus is on the appellants to establish that disclosure would not be contrary to the Act: ss. 33(2) & 38(2).

[23] In *Canadian Broadcasting Corporation* v. *Northwest Territories*, [1999] N.W.T.J. No. 117 (S.C.), I had occasion to discuss the standard of review on this type of appeal. I held then that the appropriate standard to apply to the head's decision is one of correctness. The decision concerns the interpretation of the pertinentsections of the statute and, relative to a reviewing judge, the public body head has no expertise in statutory interpretation.

[24] Some may well ask why it is necessary to discuss standard of review at all considering that the Act empowers the court to make its own determination of the matter under appeal. Yet the Supreme Court of Canada has stated unequivocally that the standard of review must be determined, using the "pragmatic and functional approach", in all cases of review of the decision of a statutorydecision-maker,whether the review be by way of judicial review or by way of a statutory right of appeal: *Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 (at para. 21); *Voice Construction Ltd.* v. *Construction & General Workers' Union*, [2004] 1 S.C.R. 609 (at para. 15). That pragmatic and functional approach requires consideration of four factors: (1) the absence or presence of a privative clause or right of appeal; (2) the expertise of the decision-maker relative to that of the reviewingcourt on the issue in question; (3) the purposes of the legislation; and, (4) the nature of the question, whether it be law, fact, or mixed law and fact: *Pushpanathan* v. *Canada*, [1998] 1 S.C.R. 982. This determines the appropriate degree of deference to be accorded the statutory decision-maker and in turn the applicable standard of review.

[25] When I consider the four factors, and in particular the clear statement by the legislature of its intention to give the court an all-encompassing appeal power, I am fortified in my conclusion that the appeal is to be conductedon the basis of correctness. I note that the same conclusion was reached with respect to appeals under the federal *Access to Information Act*, R.S.C. 1985, c. A-1, and *Privacy Act*, R.S.C. 1985, s. P-21,

where the court is authorized to substitute its opinion for that of the statutory decision-maker: *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 (at para. 19).

Issues:

[26] The central issue on this appeal is the characterization of the lump sum severance payment. Counsel for the appellants conceded that salary continuation payments would be excluded from disclosure as being information describing "income" (excluded by s.23(2)(f) of the Act). She argued, however, that a lump sum payment is distinguishable since it constitutes a one-time payment conferred upon termination of employment. Alternatively, counsel submitted that the lump sum payment, and other benefits provided by the severance agreement, should be considered a "discretionary benefit", since it was a negotiatedagreement, and therefore deemed not to be an unreasonable invasion of personal privacy (as per ss. 24(4)(e) and (h) of the Act). Counsel submitted in oral argument that unless the agreement has a clear reference to some obligation created by law (either by statute or a contract) then the assumption should be that it is a discretionary benefit.

[27] Respondent's counsel submitted that a lump sum payment, just as salary continuation payments, must be considered "income" since it constitutes pay in lieu of notice. Such payments are treatedas incomefor taxationpurposes; employerswho pay them are required to make appropriate source deductions; and, they represent salary calculated over a period of time. Counsel further argued that the severance payments cannot be considered a "discretionary benefit" since they were made in accordance with the third party's contract of employment. The fact that an agreement was negotiated is not equivalent to the employer having an unfettered option as to the payment of severance. The negotiated severance agreement was premised on the existence of an employment contract with certain obligations and terms.

[28] The parties are agreed that the information sought is "personal information" relating to the third party. I think there is also agreement that some of the information contained in the severance agreement, particularly the dates of employment, is excluded from disclosure, pursuant to s. 23(2)(d), as being related to "employment history". As I said before, the real question is how to characterize the lump sum payment.

[29] The Act draws a distinction, when it comes to personal employment information, between the general and the specific. Specific information, such as the third party's employment history and income, are excepted from disclosure. General information however, such as the third party's job classification or salary range, are subject to disclosure. These are the legislature's choices in attempting to balance the public interest in disclosure of how government spends its money against the privacy rights of its officers and employees. With respect to discretionary benefits, the legislature must have concluded that those should be disclosable since they are expenditures of public money made, by definition, without any obligation to do so. The public's right to know in that instance is considered more important than the third party privacy interest.

[30] In arguing that the lump sum payment in this case should be disclosed, appellants' counsel referred me to several decisions of Information and Privacy Commissioners in other jurisdictions. These cases were of limited assistance because, as I indicated earlier, the specific words of the governing statute may differ from jurisdiction to jurisdiction. For example, counsel referred to two decisions from British Columbia, both of which held that severance payments were to be disclosed. However, the British Columbia statute specifically provided that disclosure of information concerning a third party's remuneration was not an unreasonable invasion of privacy. Under the Northwest Territories statue, disclosure of information relating to income is presumed to be unreasonable.

[31] In my opinion, a severance payment, whether in lump sum or payable over time as salary continuation, must be regarded as "income" for purposes of the Act. It is meant to replace salary that would have been paid if the employee had continued working. This is recognized, as respondent's counsel submitted, by the way such payments are treated for taxation purposes. The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), includes in income all "retiring allowances", which is defined as including any amount received in respect of a loss of employment.

[32] In this case the Information and Privacy Commissioner, in her review, also drew a distinction between a one-time lump sum payment and salary continuation payments. She relied on decisions from Ontario which dealt with legislation in almost identical wording to the Northwest Territories statute. She ruled that the specific lump sum payable is not exempt from disclosure as "income" under s. 23(2)(f) on the basis of those decisions. She quoted from one decision, Order MO-1332, [2000] O.P.I.C. No. 151, where the adjudicator wrote:

> A number of decisions of this office have considered the application of this section of the Act, or its provincial equivalent, to severance agreements entered into by former public officials or employees. In Order M-173, which dealt with severance agreements between the City of Ottawa and three former high-ranking employees, the monetary entitlements under those agreements was found not to fall under the presumption in section 14(3)(f) (finances, income etc.) of the Act, insofar as they represented "one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of retirement packages." Further in the same order, Assistant Commissioner Irwin Glasberg found that much of the information in those agreements did not pertain to the "employment history" of the individuals for the purposes of section 14(3)(d) of the Act, but could more accurately be described as relating to arrangements put in place to end the employment connection.
>
> . . .
>
> In Order P-1348, which dealt with the application of the provincial equivalent to sections 14(3)(d) and (f) to severance agreements, Inquiry Officer Laurel Cropley reviewed other decisions in this area, and concluded that the start and finish dates of a salary continuation agreement have been found to fall within the presumption in section 14(3)(d) (employment history), and references to the specific salary to be paid to an individual over that period of time, within the presumption in section 14(3)(f) (finances and income).

[33] I must admit that it is not clear to me why the distinction was drawn between a lump sum payment and salary continuation payments. The only reason I can think of is that perhaps the lump sum component was not paid in replacement of lost income but paid merely as additional compensation or consideration for accepting the severance package. I do not have the facts of the Ontario case before me. But my speculation is based on what I infer from the comment, in the extract quoted above, to "one time payments . . . that arise directly from acceptance by the former employees of retirement packages".

[34] In this case, however, the Information and Privacy Commissioner herself acknowledged that the specific amount of the lump sum payment was calculated on the basis of the third party's salary for a given period of time. Hence I fail to see the difference between a lump sum payment, representing salary, and salary continuation payments. For this reason I think the respondent was correct to conclude that

disclosure of the lump sum payment comes within the presumption relating to "income" in s. 23(2)(f).

[35] In considering whether the information is nevertheless disclosable as being related to a discretionary benefit (as that term is used in ss. 23(4)(e) and (h) of the Act), counsel provided me with several useful references. The term is not defined in the Act but the ordinary meaning of those words suggestsa benefit,gift or advantagewhich the employer may confer in his or her discretion, unfettered by any requirement to do so: see also *Sutherland* v. *Canada*, [1994] 3 F.C. 527 (T.D.), at para. 14.

[36] The case of *Van Den Bergh* v. *Canada*, [2003] F.C.J. No, 1407 (T.D.), provides a good example of a discretionary benefit. There a union representative sought disclosure of the names of employees of the National Research Council who had received performance bonuses. These bonuses were conceived by the employer as a way of rewarding hard-working and talented employees. There was no obligation by the employer to pay the bonus and the amount paid was determined by the employer. The court concluded that the information sought related to a discretionary financial benefit and was deemed disclosable by the legislation. The judge in the case, O'Reilly J., contrasted the performance bonus to a pension that was the subject-matter of a disclosure request in *Canada (Information Commissioner)* v. *Canada (Minister of Public Works)*, [1997] 1 F.C. 164 (T.D.). In that case, because the pension plan was based on precise eligibility criteria, it was held not to be a discretionary benefit.

[37] For this appeal, I have had the benefit of reviewing the entire severance agreement (as I was urged to do by both counsel). I am satisfied, based on that review, that the lump sum payment in this case was based on a precise calculation based on salary over a period of time (less required statutory deductions). Furthermore, it was not made merely as part of a negotiated termination of employment. It was made pursuant to the terms of a pre-existing contract of employment. The parts of the severance agreement already disclosed refer to an employment agreement made on a date prior to the severance agreement and to an acknowledgement that the employment relationship was terminated "in accordance with" the provisions of that agreement. The specific monetary terms of the severanceagreement make referenceto the terms of the earlier employment agreement. All of this leads me to conclude that the amount paid as a lump sum severance was pursuant to a contract and was not a discretionary benefit.

[38] Does the fact that the severance agreementwas negotiatedhave a bearingon this analysis? I think not in these circumstances.

[39] Appellants' counsel provided me with a decisionof the Informationand Privacy Commissioner of Alberta (Order 2001-020 dated August 22, 2001) which held a negotiated severance agreement to be a discretionary benefit. The Commissioner in that case wrote:

> Severance is a beneficial payment or an advantage that flows from the employment relationship to the employee, whether or not it is actually paid before the relationship formally ends, and whether or not it is required by law.
>
> A severance package is also a "discretionary" benefit because the City exercised its discretion to negotiate mutually acceptable compensation with each third party. This creates the necessary element of a degree of discretion.

[40] I am not certain how the Commissionerin that case arrivedat the conclusionthat there was discretion other than the mere fact that the agreements were negotiated. There are insufficient facts recorded in the decision to know whether the agreements were negotiated because they were purely voluntary or because the employer, without the benefit of any statutory or contractual provision, decided on its own to offer severance packages. I suspect that it was the latter because early in the decision there is a reference to the access request being for information related to "discretionary buyouts" of certain employees. This suggests to me that the severances were triggered by the employer and there were no pre-existing contractual terms respectingseverance payments.

[41] In the present case, the mere fact that the severanceagreement was the subjectof negotiation does not derogate from the essential fact that the agreement was contemplated in a pre-existing employmentcontract and that the terms negotiatedwere pursuant to the terms of that pre-existing contract. This removes the severance agreement from the discretionary category. There was a contractual obligation on the employer. Their conferral of the benefit of the lump sum payment was not an unfettered decision on their part.

[42] Hence I conclude that the Minister was correct in rejecting the Commissioner's recommendation that the terms of the agreement are related to a discretionary benefit and therefore subject to disclosure pursuant to subsections 23 (4)(e) or (h).

[43] With respect to the document attached as "Schedule A" to the severance agreement, that is, as the Commissioner described it, a prototype of a letter of reference, as agreed to by the parties, to be given out by the employer should there be any requests for a reference. As such it clearly falls within the presumptivecategory of "personal recommendations or evaluations about the third party", found in s. 23(2)(g), and thus exempt from disclosure.

Conclusion:

[44] For these reasons, I have concluded that the Minister's decision was correct. The appeal is therefore dismissed. The respondent will have its costs of the appeal in accordance with the Rules of Court.

J.Z. Vertes
J.S.C.

Dated this 6th day of July, 2006.

Counsel for the Appellants: Cynthia J. Levy

Counsel for the Respondent: Sheldon N. Toner

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