Dhont v. Minister of Education et al, 2008 NWTSC 40 Date: 2008 06 06
Docket: S-001-CV2005000082

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

EVELYN DHONT

Appellant

-and-

THE MINISTER OF THE DEPARTMENT OF EDUCATION, CULTURE AND EMPLOYMENT OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES, THE CHAIR OF THE FINANCIAL MANAGEMENT BOARD OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES, AND THE MINISTER OF THE DEPARTMENT OF JUSTICE OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES

Respondents

Appeal pursuant to the *Access to Information and Protection of Privacy Act.*
Appeal allowed in part.

Heard at Yellowknife, NT on May 20, 2008

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

Christopher Hunt appearing for the appellant
Counsel for the Respondents: Sheldon Toner

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REASONS FOR JUDGMENT

[1] This is an appeal brought pursuant to the *Access to Information and Protection of Privacy Act*, S.N.W.T. 1994, c.20.

[2] The appellant, a former employee in the Department of Education, Culture and Employment of the Government of the Northwest Territories, seeks disclosure of a workplace harassment investigation report, completed in 2004 by an independent investigator appointed by the Deputy Minister of that department. The report, which was subsequently transferred from the Department of Education, Culture and Employment ("ECE") to the Financial Management Board Secretariat ("FMBS"), has been provided to the appellant but in a heavily edited form. The appellant seeks this court's review of the justification for the editing and disclosure of the complete report.

[3] The operation of the *Access to Information and Protection of Privacy Act* (the "Act") has been reviewed in earlier decisions of this court: *Canadian Broadcasting Corp. & Selleck v. Northwest Territories*, [1999] N.W.T.J. No. 117; *Canadian Broadcasting Corp. & Green v. Northwest Territories*, [2006] N.W.T.J. No. 42.

[4] The Act combines rights of access to government records and measures to protect personal privacy. There is a presumptive right of accessbut that right is subject to specific exceptions. An applicant who is refused access may ask for a review by the Information and Privacy Commissioner. The Commissioner, after conducting a review, issues a report containing recommendations as to whether access should be granted, and how, or whether it should be denied. The head of the government department in question can then follow the Commissioner's recommendations or make any other decision the department head considers appropriate.

[5] The Act goes on to provide a right of appeal from the decision made by the department head. The court has a wide appellate power. The Act states that the court "shall make its own determination of the matter": s.38(1). The court may examine in private any record to which the Act applies. The determination for the court, in essence, is whether the Act requires the government to give access or requires the government to refuse access.

[6] Since the appeal is from the decision of the department head, it is necessary to identify the standard of review. The Supreme Court of Canada has stated that the standard of review must be determined in all cases of review of the decision of a statutory decision-maker, whether the review is by way of judicial review or by way of a statutory right of appeal: *Voice Construction Ltd. v. Construction & General Workers' Union*, [2004] 1 S.C.R. 609 (at para. 15). However, it is not necessary to perform a fresh standard of review analysis in every case if the standard of review has already been established in the jurisprudence by previous cases addressing the same type of question: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 (at paras. 57 & 62).

[7] In the two previous decisions of this court dealing with appeals under the Act, referenced earlier, I held that the appropriate standard to apply to the head's decisionis one of correctness. The wide ambit of the appeal power contained in the Act reinforces that conclusion. No one on this appeal challenged that conclusion. However, even though the standard is one of correctness, the findings of both the Commissioner and the head of the public body in question, whose decision is the

subject of the appeal, may still be relevant, considering the fact that they both work with the statute on a regular basis, and may be accorded such weight as the appeal court thinks appropriate: *Ingamo Hall Friendship Centre v. Bergeron*, [2003] N.W.T.J. No. 51 (at para.20). This is particularly the case when the court is reviewing the exercise of decisions to withhold disclosure based on discretionary exemptions found in the Act.

Background Facts:

[8] In January, 2004, the appellant, through her union, filed a grievance alleging harassment in the workplace by her supervisor. The grievance was denied by the Deputy Minister of ECE but, in order to examine the appellant's concerns more closely, the Deputy Minister commissioned a review by an outside investigator. The terms of reference outlined the goals of the review as being to determine the facts surrounding the complaint of harassment and to make recommendations regarding departmental employee processes and specifically the working relationship between the appellant and the person who was the subject of her complaint.

[9] The Deputy Minister received the investigator's report in April, 2004. On April 20, he wrote to the appellant confirming that he received the report and outlining, in point form, the recommendations contained in it. On April 29, the appellant filed a formal request to ECE for the complete investigation report. On June 2, the appellant was informed that her request had been transferred by ECE to FMBS and that body would process her request. As it turned out, the actual report was not transmitted by ECE to FMBS until June 3. ECE transferred the original report and did not keep a copy.

[10] The transfer of the report and the appellant's request from ECE to FMBS was the subject of much discussion before me. It was also the subject of a separate review by the Information and Privacy Commissioner because on June 7, 2004, the appellant formally requested the Commissioner to review the transfer. The appellant alleged that the transfer violated the provisions of the Act allowing transfer of a request for access and a record.

[11] The Commissioner eventually reported, on January 18, 2005, that the report and the request for access were improperly transferred and that the response to the request should have come from ECE. The government did not agree with the Commissioner's

review and, in a letter jointly signed by the Chairman of FMBS and the Minister of ECE, explained the rationale for the transfer (which will be discussed further below). This decision is the subject of an appeal to this court that has been consolidated with the appeal on the access request.

[12] On June 9 the Chairman of FMBS wrote to the appellant denying her request for access to the investigator's report. The reasons for this refusal were based on two exceptions contained in the Act. Those exceptions were described as follows in the Chairman's letter:

> Section 14(1)(a): the head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal advice or recommendations developed for a public body.
>
> Section 23(1): the head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[13] The appellant then, on June 16, requested the Information and Privacy Commissioner to review the decision denying her access to the report. The Commissioner concluded that the public body did not properly apply the statutory provisions relied on so as to justify non-disclosure of the entire report. She recommended that the report be disclosed but subject to editing of information that fell within exemptions provided by the Act. The Commissioner identified portions that are subject to mandatory exemptions and others that are subject to discretionary exemptions.

[14] The FMBS received the Commissioner's report on October 15, 2004. One month later the Chairman of FMBS provided the report to the appellant but in a highly edited form. The report disclosed to the appellant had not only the portions identified by the Commissioner for severance edited out but also further portions edited by FMBS on the basis of third party privacy.

[15] The appellant then launched this appeal. She wants this court to review all of the editing made to the report.

[16] It should be noted that the appellant resigned her position with ECE on March 16, 2004. It should also be noted that respondents' counsel confirmed that any third

parties implicated by this request were notified of the appeal but decided to take no part in it.

Transfer of the Record:

[17] In his written and oral submissions, the appellant's representative (her husband) characterized the decisions taken by the respondents as amountingto "contraventions" of the Act. A certain latitude with respect to terminology has to be allowed since he is not legally-trained. But in this case the attempt is made to link "contraventions" of the Act with "offences" under the Act. The appellant argued that the transfer of the record was contrary to the Act and that the refusal of the Chairman of FMBS to follow the Commissioner's recommendations amount to a wilful obstruction of the appellant's right to access. Respondents' counsel took umbrage at what he considered to be arguments by the appellants' representative that went beyond the scope of the appeal.

[18] The term "contravention" is not synonymous with "offence". The Act designates only four offences in ss.59(1) and (2):

(1) to knowingly collect, use or disclose personal information in "contravention" of the Act;
(2) to obstruct the Commissioner in the exercise of her powers and duties;
(3) the failure to comply with any lawful requirement of the Commissioner; and,
(4) to make a false statement or to mislead the Commissioner.

[19] The refusal or failure of a public body to follow the Commissioner's recommendations in itself is not a "contravention" of the Act, much less an offence. The fact that a public body misinterprets or is mistaken about their obligations under the Act is also not an "offence". That is why the statute provides an appeal mechanism. The issue concerning the transfer of the record and the access request highlights this basic point.

[20] The Commissioner, in her review of the transfer, concludedthat it was improper because it did not comply with the transfer provision found in s.12 of the Act:

> 12.(1) The head of a public body may transfer a request for access to a record and, if necessary, the record, to another public body where
>
> > (a) the record was produced by or for the other public body;

> (b) the other public body was the first to obtain the record; or
>
> (c) the record is in the custody or under the control of the other public body.

[21] The Commissioner found that on the day the access request was made to ECE, the record was in the custody of ECE. Thus ECE should have responded to the request. She held that, even if FMBS had an interest in the record since it related to personnel matters, it does not necessarily have a greater interest than the department that commissioned the report and to whose employees it related. The Commissioner, however, recognizing that the transfer could not be undone, recommended that FMBS review its policies in this regard and ECE apologize to the appellant for transferring her request.

[22] As I previously noted, the Chairman of FMBS and the Minister of ECE jointly responded to the Commissioner. They indicated that, in their opinion and in the opinion of their advisors in the Department of Justice, the government policy on transfers is consistent with s.12 of the Act. That policy is based on certain provisions of the *Public Service Act*, R.S.N.W.T. 1988, c.P-16, and several policy directives of the FMBS. The letter did not address directly the Commissioner's recommendation for an apology nor her conclusion that the transfer contravened the Act.

[23] Respondents' counsel submitted that the failure of the government to address the Commissioner's recommendations was appropriate given that, by then, the edited record had already been provided to the appellant. The implicit suggestion is that the issue is moot.

[24] The transfer, as the Commissioner put it, cannot be undone. But the reason for it, and whether it complied with the Act, can still be reviewed. Section 28(1) of the Act states that a person who makes a request for access may ask the Commissioner to review <u>any decision, act or failure to act</u> by the head of the public body in question. Section 36(1) states that the head of the public body may follow the Commissioner's recommendation or make any other decision the head considers appropriate. Pursuant to s.37(2) an applicant may appeal a decision made by a head. That is what the appellant is asking this court to do, to review the government's decision to not follow the Commissioner's recommendation to review its policies regarding transfers.

[25] Section 12(1) permits transfer of a request and a record in three circumstances. The first is where the record was produced by or for another public body. Here the report was produced by and for ECE so this does not apply. The second is where the other public body was the first to obtain the record. This does not apply because the report went directly to the deputy minister of ECE. The final circumstance is where the record is "in the custody or under the control of the other public body" (in this case, FMBS).

[26] The position of the respondents is that, even if the record was not in the physical possession of FMBS at the time of the access request, it was nevertheless under the control of FMBS since FMBS is responsible for all human resource functions within the government including all records relating to personnel matters.

[27] Respondents' counsel emphasized that, pursuant to the *Public Service Act*, the Chairman of FMBS is the Minister responsible for the management and direction of the public service. In that capacity certain directives were issued whereby personnel responsibilities were delegated to Deputy Ministers and other senior managers. But, it was submitted, since the ultimate authority remains with the Chairman of FMBS, all records relating to the public service come under the authority and "control" of the Chairman, wherever those records may be physically located throughout the government. FMBS has issued directives to all departments that requestsfor accessto personnel files or records relating to current and past employees be directed to FMBS.

[28] An example of the attempt to centralize personnel information is the government's "WorkplaceConflict ResolutionPolicy", datedNovember2000. By this policy it is the Deputy Minister of a department that has responsibility for receiving complaints of harassment and acting on them, including by the appointment of investigators to examine a complaint. The policy states that the Deputy Minister shall receive the investigation report and deal with it. However, all documentation relating to the investigation, including the investigation report, are to be kept at FMBS.

[29] There was dispute at the hearing before me as to whether the investigation initiated by the Deputy Minister of ECE was one under the "Workplace Conflict Resolution Policy". The dispute is immaterial for purposes of this appeal. I cite the policy procedures as an example of the centralization of personnel-related documents in FMBS.

[30] In my opinion, there is a distinction between "custody" and "control" as those terms are used in s.12(1)(c) of the Act. I am influenced in this regard by the conclusions of the Alberta Information and Privacy Commissioner when analyzing the Alberta legislation, which contained a transfer provision in exactly the same language as the Northwest Territories statute, in *Order 2000-021; Re Alberta Justice*, [2000] A.I.P.C.D. No. 38. The Alberta Commissioner held (in para. 30) that "custody" refers to the physical possession of the actual records, while "control" refers to the authority to manage the records, whether or not they are in the physical possession of the body claiming control. That, in my opinion, is the correct interpretation of s.12(1)(c) of the Act. It accords as well with the interpretation given to "control" in federal access to information legislation, where the term has been held to include documents under the managerial or administrative control of the public body in question or under the public body's ultimate control: see *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609 (T.D.), aff'd [2000] F.C.J. No. 617 (C.A.).

[31] Therefore, the transfer of the report sought by the appellant, and her access request, to FMBS did not contravene the Act. Furthermore, in my respectful opinion, the Commissioner erred on this issue when she stated that, since the record was in the possession of ECE on the day the request was received, ECE had the duty to respond. There is nothing in the Act to compel that conclusion. Indeed, the whole point of s.12 is to permit a public body to transfer a request, once it is received, and the record relating to it, to another public body, provided that one of the three criteria set out in the section is satisfied.

[32] For these reasons, the appeal with respect to the transfer issue is dismissed. I recognize, however, that it is not surprising that the appellant raised questions about the transfer. She was seeking access to an investigation report into complaints made by the appellant regarding her supervisor. She participated in the investigation but all she received from the deputy minister was a point form summary of the investigator's recommendations. When she sought access to the full report she was told that it, along with her request, had been transferred to another government department. I think most employees would be initially concerned about that and curious as to the reasons for it. The government's policies and procedures in this regard could have been more transparent.

[33] I also want to emphasize that I found no evidence of wilful obstruction or any other offence under the Act. I say that because the issue was raised in the appellant's

submissions. The Act contemplates that an appeal court take cognizance of any such allegations since s.38(4) empowers the court to disclose information that may relate to the commission of an offence. Here there is none.

The Response to the Access Request:

[34] The main issue on this appeal is the review of the government's editing decisions in disclosing the report. I have had the benefit of reviewing the unedited report, the report as edited by the Commissioner, and the disclosed version.

[35] The Chairman of FMBS relied on two statutory exemptions to justify editing of the record. The first is contained in s.14(1)(a) of the Act:

> 14.(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
>
> > (a) advice, proposals, recommendations, analyses or policyoptions developed by or for a public body or a member of the Executive Council;

The onus is on the Chairman to establish that the appellant has no right of access to the edited parts of the record. This onus applied on the Commissioner's review (as per s.33(1) of the Act) and applies on this appeal (as per s.38(2) of the Act).

[36] The Commissioner's review on this aspect of the disclosure request recognized that portions of the investigator's report fell under the category of advice, recommendations and analyses developed for the deputy minister of ECE. Other sections, however, did not do so. But, since the sectionsthat did come within the ambit of s.14(1)(a) were easily identified, they can be severed from the report for purposesof complying with the access request.

[37] In comparing the edited version prepared by the Commissioner and that eventually disclosed by FMBS to the appellant, it is apparent that FMBS adopted the Commissioner's recommendationswith respectto this aspect of the request and deleted those parts of the report that were deleted by the Commissioner. I see no reason to interfere.

[38] The second basis relied on by the Chairman of FMBS to refuse disclosure was that the record contained personal information which, if disclosed,would constitutean

unreasonable invasion of a third party's personal privacy. In *Canadian Broadcasting Corp. & Green v. Northwest Territories* (referred to earlier), I had occasion to review the provisions in the Act relating to third party privacy.

[39] Section 23(1) mandates that the head of a public body shall refuse to disclose personal information where "the disclosure would be an unreasonable invasion of a third party's personal privacy". The term "personal information" is defined in the Act as "information about an identifiable individual". Section 23(2) sets out certain types of personal information the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy. Three of the pertinent ones, for purposes of this appeal, are ss. 23(2)(d),(g) and (i):

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history;
>
> ...
>
> (g) the personal information consists of personal recommendations or evaluations about the third party, character references or personnel evaluations;
>
> ...
>
> (i) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation;

[40] The Act, in s. 23(4), goes on to specify certain circumstances and types of information where disclosure of personal information is not an unreasonable invasion of privacy. None of those stipulated circumstances apply in this case.

[41] In between the 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 personal information has been supplied in confidence and the disclosure may unfairly damage the reputation of any person referred to in the record. These are relevant because the allegations that were the subject of the investigation report identified a specific individual in ECE who was the appellant's supervisor. The investigator interviewed 18 people (including the appellant and the supervisor), all of whom spoke to the investigator in the expectation of confidentiality. Some of the interviewees provided documents on a confidential basis, as did the deputy ministerof ECE. Much of the report contains commentary from others regarding the appellant and the supervisor.

[42] In the *Green* case I commented on the interplay of these provisions as follows (at para. 15):

> The scheme of the Act, in respect of a request for access to personal information, 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 requestedinformation does not come within one of the presumptions by setting out some factors that should go into the analysis.

[43] In the present case the portions of the report which are said to be protected by s.23(1) come within the category of "personal information". They contain opinions about clearly identifiable persons as well as information about those persons' employment history.

[44] The information is presumptively an unreasonable invasion of personal privacy since they contain information relating to employment history, personal recommendations and evaluations, character references in the sense of other people's opinions about the character of a third party, and information revealing confidential information supplied by a third party.

[45] I previously said that the circumstances set out in s.23(4) which would presume disclosure to not constitute an unreasonable invasion of privacy do not apply to the

facts of this case. Therefore the presumption in s.23(2) has the effect of mandating non-disclosure.

[46] This, however, does not mean that the report itself should not be disclosed. The Commissioner recommended that those portions of the report that fall under s.23(1) be identified and severed. And, as the Commissioner also pointed out, the report also contains a good bit of information about the appellant herself which she is entitled to see.

[47] I agree with the editing made by the Commissioner with respect to the mandatory exemptions from disclosure. The real issue is with respect to the further editing made by FMBS.

[48] Having reviewed the editing done by FMBS, I have concluded that the bulk of them are not justified pursuant to s.23(2). The following is a list of the edits (marked in blue on the sealed document) which should not have been made:

(a) all on page 1;
(b) all on page 3;
(c) all on page 6;
(d) all on page 7;
(e) all on page 8;
(f) the second paragraph on page 9;
(g) all on page 10;
(h) all on page 12;
(i) all on page 15;

(j) all on page 16;
(k) all on page 17;
(l) all on page 18; and,
(m) all on page 19.

[49] In my opinion, these portions of the report can be properly classified as reporting of facts, and not evaluative material. I therefore order that these portions of the report be restored.

[50] The remaining portions edited by FMBS are, in my opinion, covered by one or more subsections of s.23(2). They either identify third parties who gave opinion or

evaluative information about others in confidence or they consist of the investigator's evaluation of third parties. For greater specifity I refer here to the edited portions (marked in blue on the sealed document) on pages 5, 9 (save the second paragraph), 22, 23 and 24.

[51] The appeal is therefore allowed in part. I hereby order the Chairman of FMBS to disclose a fresh copy of the edited record to the appellant with the previously edited portions (as identified in paragraph 48 of these reasons) restored.

Costs:

[52] The respondents seek costs. They contend that the appeals are frivolous and vexatious, focusing not on the merits but on unfounded allegations of wrongdoing, all in an attempt to embarrass the government.

[53] On the question of the disputed transfer of the record and the access request, I have already made my views known. As to the merits of the appeal, the appellant succeeded in part so it can hardly be said that her case was frivolous. And, as far as the allegations of wrongdoing are concerned, they were unfoundedbut much of it could be described as robust argument by the appellant's representative (who, after all, is not legally trained and may lack the subtle facility with legal language that a lawyer usually exhibits).

[54] Costs are available on these types of appealsand ordinarilythe customaryrule in civil litigation applies, i.e., costs follow the event. That rule applies equally to self-represented litigants or where, as here, a litigant is represented by a non-lawyer appearing by leave of the court. In this case, considering that success was somewhat divided, I order that each side bear their own costs.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT this
6th day of June, 2008.

Christopher Hunt, appearing for the Appellant
Counsel for the Respondents: Sheldon Toner

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