SUPREME COURT OF YUKON

Citation: *Ellwood* v. *Yukon (Government of),* 2009 YKSC 41

Date: 20090514
S.C. No. 05-A0004
Registry: Whitehorse

Between:

ELLWOOD, ROBB

And

GOVERNMENT OF YUKON

Before: Mr. Justice R.S. Veale

Appearances:

Robb Ellwood	Appearing on his own behalf
Zeb Brown	Counsel for the Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Ellwood brings a damages claim against the Government of Yukon for financial losses that he claims arise out of two contracts with the Property Management Agency (“PMA”) in 2003 and arising out of his past business relationship with PMA.

[2] Both of the contracts in 2003 were the subject of a disciplinary complaint by an employee of the Government of Yukon against Mr. Ellwood. This Court has previously dealt with Mr. Ellwood's application for judicial review of the decisions of the Association

of Professional Engineers of Yukon (“APEY”) in *Ellwood* v. *Association of Professional Engineers of Yukon*, 2006 YKSC 42.

[3] The issue to be determined is whether Mr. Ellwood is making a collateral attack on the previous disciplinary decision or whether he is raising new causes of action.

BACKGROUND

[4] Mr. Ellwood is a mechanical engineer registered under the *Engineering Profession Act* of the Yukon (R.S.Y. 2002, c. 75). He has been providing mechanical engineering services to the Government of Yukon for a number of years. As noted, the issues in this case arose in 2003 and centre around Mr. Ellwood's relationship with the PMA. The PMA administers contracts for various government departments, in this case the Department of Education for certain schools in Whitehorse.

THE CONTRACTS

[5] In the spring and fall of 2002, a number of parents at three Whitehorse schools raised air quality issues at their respective schools. Some of these parents contacted Mr. Ellwood to obtain his input and assistance to resolve the ventilation concerns. Mr. Ellwood had previous professional experience with the schools in question and became involved in a public way long before he entered into a contractual relationship with the PMA to identify the problems. He became directly involved by conducting personal inspections, contacting the principals of the schools, and ultimately writing a public letter to the PMA on September 25, 2002, with copies sent to the Minister of Education. He indicated in his correspondence with the PMA that the causes of the air quality problems were relatively simple and that the problem was the lack of action of the PMA.

[6] Ultimately, despite the rather aggressive approach taken by Mr. Ellwood, the PMA invited Mr. Ellwood to enter into a contract to address the ventilation issues. Mr. Ellwood wrote a letter dated January 15, 2003, proposing to "document the cause of the problem so that you may engage others to develop engineering solutions". The PMA ultimately accepted the proposals submitted by Mr. Ellwood and entered into a contract with Mr. Ellwood in March 2003. In April 2003, Mr. Ellwood submitted his reports to the PMA.

[7] Meanwhile, on March 3, 2003, Mr. Ellwood entered into a second contract with the PMA to prepare the mechanical plans and specifications for a school heating plant upgrade project. Mr. Ellwood prepared and submitted the mechanical plans for review by the PMA. Based upon future operations, preferences, and budgetary considerations, the project manager requested Mr. Ellwood to make six simple design and product changes to the proposed mechanical plans. Mr. Ellwood took the position that the proposed changes were technical work that was assigned to him. The PMA disagreed and made a further explanation justifying the simple changes it requested. Mr. Ellwood refused to make the changes.

THE COMPLAINT

[8] On April 16, 2003, the PMA submitted an official complaint (“the APEY complaint”) against Mr. Ellwood. In it they complained about the tactics Mr. Ellwood had used to secure the ventilation contracts, about his allegedly unsatisfactory performance of the work under the ventilation contracts, and about his refusal to take direction from the project manager on the heating plant project.

[9] The Discipline Committee found that Mr. Ellwood’s work on the ventilation contracts fell short of good engineering practice. It also concluded that Mr. Ellwood had engaged in unprofessional conduct, and determined that Mr. Ellwood's refusal to follow the directions of the PMA was a breach of the code of ethics of the profession requiring fairness to clients and devotion to high ideals of personal honour and professional integrity. This decision was appealed to the Council of the Association. The Council confirmed the decision of the Discipline Committee.

[10] In the judicial review cited above, I confirmed the finding of unprofessional conduct based on Mr. Ellwood's refusal to take direction from the PMA to make design and product changes. I overturned the finding that Mr. Ellwood's report on the ventilation contracts was not good engineering practice.

THE BASIS OF THIS COURT ACTION

[11] Mr. Ellwood has been representing himself quite capably in this court action. Although a number of legal principles were raised in his statement of claim, at the end of the trial his submissions were focussed on negligence and unfairness in the government's administration of contract regulations.

[12] Mr. Ellwood's pleadings include the following:

1) a claim that the Government of Yukon holds a special duty of care to Mr. Ellwood based on their long-standing working relationship, Mr. Ellwood's reliance on the Government of Yukon for his main source of work and the importance of his reputation and standing with the Government of Yukon to earn a livelihood in his profession.

2) a claim that the Government of Yukon owed a duty of fairness to Mr. Ellwood in the exercise of its duties.

3) a claim that the Government of Yukon pursued its professional complaint wilfully or negligently resulting in the suffering of pain, anguish, grief, distress, humiliation, loss of reputation, wounded pride and reduced opportunity to obtain work.

4) a claim that the Government of Yukon has denied Mr. Ellwood fair and reasonable access to government work during the prosecution of the complaints and thereafter.

5) Mr. Ellwood concludes with a claim of damages at the rate of $10,000 per month commencing April 2003. He also claims for legal fees in the amount of $66,420 expended in the discipline complaint process and court action.

[13] To be fair to Mr. Ellwood, his pleadings in this Court were filed before my decision in *Ellwood* v. *Association of Professional Engineers of Yukon*. Despite the similarity of his claim to an action for malicious prosecution, Mr. Ellwood specifically stated that he was not pursuing a claim of malicious prosecution. He is also not pursuing an action in defamation, although he does include a loss of reputation as part of his damage claim. In essence, his claim is expressed as a breach of the duty of fairness by a public body against a contractor operating in a small business environment, both during and after the APEY complaint process. In his final argument, Mr. Ellwood submitted that the PMA had a duty of fairness in its administration of contracts and that it breached, and continues to breach, that duty.

[14] I find as a fact that the PMA was fully justified in pursuing its discipline complaint against Mr. Ellwood. That I dismissed the complaint against him relating to the ventilation contracts does not suggest that this Court found the dismissed discipline complaint was in any way inappropriately or negligently initiated.

DISPOSITION

[15] Because Mr. Ellwood has drawn his pleadings broadly, I am going to address all the claims that he has alleged. I do so out of fairness to him as well as to make it clear what remedies are not open to him as a result of the discipline complaint and this court's decision on the APEY complaint of the PMA. I will address the law of issue estoppel and collateral attack which consider the legal challenges that are not open to Mr. Ellwood because of my previous court decision. I will then discuss the law of malicious prosecution and defamation. Finally, I will address the ongoing duty of fairness, which is the legal issue that Mr. Ellwood emphasized in his final submissions.

ISSUE ESTOPPEL

[16] I should note that the Government of Yukon submitted that Mr. Ellwood cannot pursue issues arising out of the two discipline complaints on the grounds of issue estoppel. There are three requirements to establish issue estoppel set out in *Angle* v. *M.N.R.*, [1975] 2 S.C.R. 248, at p. 254:

> ... 1. that the same question has been decided;
>
> 2. that the judicial decision which is said to create the estoppel was final; and

> 3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[17] Arguably, issue estoppel could arise from either the discipline hearing or the court action that followed.

[18] I do not find Mr. Ellwood's entire claim to be barred by issue estoppel. The issue in the discipline proceedings and subsequent court action was the professional misconduct of Mr. Ellwood. In this case, Mr. Ellwood also alleges negligence or lack of fairness by the Government of Yukon, with respect to matters both within and outside of the disciplinary process.

[19] For this reason, the principle of issue estoppel does not apply to prevent Mr. Ellwood from pursuing his claim for breach of duty of care by the Government of Yukon.

COLLATERAL ATTACK

[20] Collateral attack is a common law doctrine closely related to *res judicata*. The rule against collateral attack prevents a party from bringing a previous judicial order into question, except through a direct attack (*Toronto (City) v. C.U.P.E.*, 2003 SCC 63). In particular, there is a clear public interest in disallowing the use of tort claims as collateral attacks on decisions that should be final, for reasons relating to both the principle of finality and judicial economy. This Court's decision on Mr. Ellwood's judicial review was a final and binding order that upheld certain findings about his professional conduct. He did not appeal that decision, and he cannot now challenge my findings through a separate lawsuit. To the extent that Mr. Ellwood is relying on tort law to claim

damages flowing from the disciplinary sanctions that he says were unwarranted, he is clearly blocked.

[21] Mr. Ellwood is also seeking damages for what he claims was unfair treatment during the disciplinary process. In particular, he claims that the Government of Yukon breached terms of the 2003 contracts and that they were negligent in drafting and circulating material relating to the disciplinary complaint. On this point, the British Columbia Court of Appeal has provided guidance on relevant principles in the case of *Roeder v. Lang Michener Lawrence and Shaw,* 2007 BCCA 152. There, the Court was considering a tort claim made by Mr. Roeder against various lawyers, in respect of what he alleged was a conflict of interest for his lawyer during an earlier proceeding before the British Columbia Securities Commission. The issue had come up before the Securities Commission, but was dismissed for reasons relating to Mr. Roeder's delay in bringing his complaint. Mr. Roeder had simultaneously filed an action for damages in the Supreme Court. It was also dismissed, and the issue before the Court of Appeal was whether Mr. Roeder could claim damages with respect to an unfair process, or whether the whole suit was a collateral attack on the findings of the Securities Commission in the underlying proceeding. The Court dismissed Mr. Roeder's appeal, in the process reviewing the doctrines of collateral attack and abuse of process. In particular, Newbury J.A. found that the remedy for Mr. Roeder's "process allegations" would have been in a judicial review. She also seemed to agree with defendant's counsel, whose argument was that "the distinction between an attack on the Commission's order and an attack on the "process" which led to the order is a distinction without a difference" (para. 19).

[22] I conclude that there is no basis for Mr. Ellwood to bring this action against the Government of Yukon based upon the facts alleged in the APEY complaint letter. Mr. Ellwood already applied for judicial review of the decision of the Council and is bound by the decision of this Court. He cannot now succeed in a damages claim for his conduct that was found to be professional misconduct, or for what he now alleges was an unfair process. Even if the complaint did not result in a finding of professional misconduct, it would not necessarily lead to a damages claim based on malicious prosecution or defamation, although it was open to him to make these claims in this action.

MALICIOUS PROSECUTION

[23] In his statement of claim, Mr. Ellwood alleged that the PMA pursued their professional complaint with APEY, despite “learning that the grounds for [the] complaint were not valid” and “with knowledge of the injurious effect” that the complaint would have on him (para. 39). Although not framed as such, this allegation appears to be one of malicious prosecution. The key case about the tort of malicious prosecution is *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

[24] There are four necessary elements that the plaintiff must prove to be successful, and establishing them is “no easy task” (see paras. 42, 47):

1) the proceedings must have been initiated by the defendant;
2) the proceedings must have terminated in favour of the plaintiff;
3) the absence of reasonable and probable cause for the proceedings, and;
4) malice, or a primary purpose other than that of carrying the law into effect.

[25] Again, Mr. Ellwood has abandoned this claim and I conclude that such a claim could not succeed on the facts of this case.

DEFAMATION

[26] Mr. Ellwood asserts that various Yukon government employees damaged his "character, credit and reputation" in letters and emails sent prior to and during the disciplinary process (see paras. 62-74 of Mr. Ellwood's Statement of Claim). Again, while the claim is not legally framed, it appears to be one of defamation.

[27] As noted by the British Columbia Supreme Court in *Cimolai* v. *Hall*, 2005 BCSC 31, "[l]etters regarding a professional which leave the impression of professional incompetence and lack of judgment are a particularly serious defamation" (para. 72).

[28] While it could be arguable that the letters and emails sent by various public servants about Mr. Ellwood were defamatory, in the context of a disciplinary process these comments would almost certainly be subject to privilege. As well, it is problematic that the individuals alleged to be the tortfeasors were not included as parties to the action.

[29] I conclude that there is an insufficient factual or legal basis for me to make any findings with respect to the tort of defamation.

THE DUTY OF CARE

[30] The last element of Mr. Ellwood's claim relates to a general duty of care owed to him by Government of Yukon and damages he has suffered as a result of not receiving government contracts during and after the APEY complaint process. The facts put forward by Mr. Ellwood are that he had a history of receiving small sole source contracts from the PMA. During and after the complaint procedure and hearing, Mr. Ellwood did not receive any sole source contracts from the PMA. He did not bid on any contracts and in fact declined to bid on two contracts suggested by the PMA. I find as a fact that

the PMA did not have a policy of refusing to issue contracts to Mr. Ellwood. They simply did not issue any, although it may be that they could have refused to do so, based upon the finding of professional misconduct.

[31] Under the Yukon *Contract Regulations* (O.I.C. 1998/179) and *Contracting Directive* (the "Yukon Contract Regulations"), Mr. Ellwood has the right to access government documents related to government contracts without discrimination. He has the right to be placed on an open source list of potential contractors, which gives him the right to be contacted about contracts over $50,000. For contracts under $10,000 (price-driven) or under $25,000 (value-driven), the government can sole-source to anyone. For contracts between $10,000/$25,000 and $50,000, the government can select any three or more contractors off the open-source list and invite bids or proposals from them specifically.

[32] In a nutshell, the government has a broad discretion when awarding contracts under $50,000, just the kind of contracts which Mr. Ellwood no longer receives.

[33] The Yukon Contract Regulations permits a bidder or prospective bidder to file a complaint alleging unfairness with the bid challenge committee that investigates and adjudicates the complaint. Mr. Ellwood did not lay any complaint. This Court would defer to such a tribunal in the first instance as it provides a fast and economical way to resolve a dispute. It would normally be a requirement to exhaust this remedy before coming to this Court. However, even if Mr. Ellwood had pursued his fairness complaint before the bid challenge committee, the question remains whether he could pursue a common law duty of fairness claim in this Court.

[34] There is no contractual relationship between Mr. Ellwood and the Government of Yukon outside the ventilation contract and the contract for the heating plant upgrade. I must consider whether Mr. Ellwood is owed a common law duty of care by the PMA to act fairly.

[35] This brings us to the case of *Cooper* v. *Hobart*, 2001 SCC 79, supplied by Mr. Ellwood, which applies the two-step procedure based on the Anns test. The questions to be answered in the context of this case are:

1. Does the relationship between Mr. Ellwood and the PMA disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and
2. If so, are there any residual policy considerations which negate or limit that duty of care.

[36] In *Cooper* v. *Hobart,* the question was whether the British Columbia Superintendent of Mortgage Brokers owed a duty of care to investors. The specific negligence alleged was that the Superintendent should have acted earlier to suspend a mortgage broker's licence and notify the investors that the broker was under investigation. The Supreme Court of Canada concluded that the Registrar might have foreseen losses to investors if he was careless in carrying out his duties. However, the court found that there was insufficient proximity between the Registrar and the investors to impose such a duty on the Registrar. The Court concluded that the statute did not impose such a duty.

[37] The Court also found that on the second or policy part of the test, the duty of care would be negated, as it would effectively impose an insurance scheme for investors at the expense of the taxpayers.

[38] In applying the Anns test to Mr. Ellwood, it would be foreseeable to the PMA that if they did not give sole source contracts to Mr. Ellwood, he would suffer some loss. This foreseeability would apply to all contractors but they would not necessarily have the proximity to establish a duty of care. However, I find that Mr. Ellwood was in a special relationship in a small business environment where the PMA had a close relationship and regularly provided Mr. Ellwood with sole source contracts. In my view, there was sufficient proximity to find a *prima facie* duty of care. Having said that, I do not find that it would necessarily be concluded that there was a breach of that duty of care on the facts of this case. In effect, Mr. Ellwood was the author of his own loss and the PMA would be justified in refusing to grant him further sole source contracts.

[39] But it is also necessary to consider whether there are policy considerations that negate the duty of care in this case. There are several to consider. Firstly, the Contract Regulations provided Mr. Ellwood with a potential remedy that he did not pursue. I do not find it necessary to conclude that the regulation ousted the common law duty. Rather, it was a remedy that should have been pursued.

[40] Secondly, the law presently provides for a duty of care in the context of contract bidding and tendering. This is quite justifiable to ensure the integrity and fairness of a process that requires a great deal of time and money for the bidders in the interest of the public receiving the best bid for a project. But from a policy point of view, it is quite a different matter to suggest that an independent contractor should recover for failure of a public agency like the PMA to give him sole source contracts. In other words, as in *Cooper* v. *Hobart,* the public purse is not an insurance scheme for contractors.

[41] Thirdly, it would be an unfortunate precedent for the PMA to have a duty of care to continue providing sole source contracts to a contractor based upon a previous history of doing so. The point of having the sole source contract exception to the general public tender is that it provides a quick and cost effective process for small contracts, not a guarantee of continued sole source contracts.

[42] In summary, I dismiss Mr. Ellwood's claim against the Government of Yukon. The Government shall have its costs against Mr. Ellwood on scale B.

VEALE J.