Citation: Yukon Medical Council v. Information and Privacy Comm. 2002 YKCA 14

Date: 20020820
Docket: YU466

COURT OF APPEAL FOR YUKON TERRITORY

BETWEEN:

YUKON MEDICAL COUNCIL

RESPONDENT
(PLAINTIFF)

AND:

THE INFORMATION AND PRIVACY COMMISSIONER OF THE YUKON TERRITORY

APPELLANT
(DEFENDANT)

AND:

ALLON REDDOCH

RESPONDENT
(RESPONDENT)

AND:

THE GOVERNMENT OF THE YUKON TERRITORY

RESPONDENT
(RESPONDENT)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

D. Martin	Counsel for the Appellant Yukon Medical Council
D.K. Lovett, Q.C. S. Dennehy	Counsel for the Respondent Information and Privacy Commissioner
E.J. Horembala, Q.C.	Counsel for the Respondent Allon Reddoch
Z. Brown	Counsel for the Respondent Government of the Yukon Territory
Place and Date of Hearing:	Whitehorse, Yukon Territory June 11, 2002
Place and Date of Judgment:	Vancouver, British Columbia August 20, 2002

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

[1] The Yukon Medical Council (the "Council") appeals the decision of the Supreme Court of the Yukon Territory dismissing its petition for judicial review, and holding the Council to be a "public body" within the meaning of the ***Access to Information and Protection of Privacy Act***, S.Y. 1995, c.1 (the "***ATIPP Act***"). The court affirmed the decision of the Privacy Commissioner, in which he held that he had jurisdiction over the Council, as a public body, to conduct an inquiry into Dr. Reddoch's right to have access to records in the possession or control of the Council for which it refused access.

[2] Section 3 of the ***ATIPP Act*** provides a definition of "public body" which includes:

> … (b) each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the government of the Yukon.

[3] The issue on this appeal is whether the learned chambers judge erred in holding that the Council was "an agent of the government of the Yukon", and therefore a public body subject to the jurisdiction of the Privacy Commissioner.

II.

[4] In her analysis of whether the Council was an agent of the government, the learned chambers judge referred to ***Westeel-Roscoe Ltd. v. Board of Governors of South Saskatchewan Hospital Centre***, (1977), 69 D.L.R. (3d) 334 (S.C.C.), ***R. v. Ontario Labour Relations Board*** (1963), 38 D.L.R. (2d) 530 (Ont.C.A.), ***Northern Pipeline Agency v. Perehinec*** (1983), 4 D.L.R. (4th) 1 (S.C.C.), ***Halifax v. Halifax Harbour Commissioners***, [1935] 1 D.L.R. (657) S.C.C., ***Re Board of Industrial Relations and Canadian Imperial Bank of Commerce*** (1980), 116 D.L.R. (3d) 71 (B.C.S.C.), (1981), 125 D.L.R. (3d) 487 (B.C.C.A.). She summarized her view of the law in this way:

> [36] To summarize, whether an entity is a Crown agent depends on the nature and degree of control exercised by the Crown as well as the other considerations referred to by Laidlaw J.A. in *Ontario Labour Relations Board* with respect to the nature of the functions performed and the nature and extent of the powers entrusted to the entity.

[5] I do not disagree with that short statement of the law. I do, however, disagree with the application of that test to the facts of this case. Because the issue of Crown agency can arise in so many different circumstances, and the test can be

expressed in so many different ways, I propose to review some of the cases from which the test for Crown agency has evolved.

[6] A seminal authority is ***Metropolitan Meat Industry Board v. Sheedy and others***, [1927] A.C. 899 (P.C.). The appellant Board was established by statute to administer the provisions of the ***Meat Industry Act***. A company in liquidation (Hales) owed money to the Board. The issue was whether that debt was one due to the Crown, in which event the Board's claim would have priority over debts due to other unsecured creditors of the company. Viscount Haldane gave the judgment of the Privy Council. He said at 905-6:

> In the statute before their Lordships they think it not immaterial to observe that under the previous legislation of 1902 the local authorities entrusted with the powers which the Act of 1915 readjusts were certainly not constituted servants of the Crown under the then existing Acts. Their Lordships agree with the view taken by the learned judge in the Court below that no more are the appellant Board constituted under the Act of 1915 servants of the Crown to such an extent as to bring them within the principle of the prerogative. They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown.

> Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund. Under these circumstances their Lordships think that it ought not to be held that the appellant Board are acting mainly, if at all, as servants of the Crown acting in its service.

[7] The next important case is ***Halifax v. Halifax Harbour Commissioners***, *supra*. There the Commissioners were incorporated by statute to manage and administer Halifax Harbour, property belonging to the Harbour and facilities connected with it, and to regulate public rights of navigation within the Harbour. The Commissioners were empowered to make regulations, which were not effective until confirmed by the Governor-in-Council. The Commissioners' other powers were also subject to control of the Crown. Duff C.J.C. said at 664:

> To state again, in more summary fashion, the nature of the powers and duties of the respondents: Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada, or the Minister of Marine and Fisheries; …

[8] He referred to and distinguished ***Metropolitan Meat Industry Board v. Sheedy***, *supra*, and ***Fox v. Government of Newfoundland*** [1898] A.C. 667, and said:

> Obviously, there is little relevant analogy between such a body and the respondents, whose duties mainly consist in managing and administering property which belongs to the Crown and whose activities, and whose revenues and expenditures, are subject to the control and supervision of the Crown, as explained above.

[9] The question of Crown agency was considered by the Ontario Court of Appeal in ***R. v. Ontario Labour Relations Board***, *supra*. The ***Ontario Food Terminal Act*** established the Ontario Food Terminal Board. A Union applied under the ***Labour Relations Act*** for certification as the bargaining agent for a unit of the Board's employees. The Board argued that it was a Crown agency, not affected by the ***Labour Relations Act***. In much quoted passages, Laidlaw J.A. said at 534:

> It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.
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> . . .
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> Further, I think that the functions performed and the services rendered by the Board may be regarded

> as public or semi-public in nature. Nevertheless, and while one of the objects of the Board as declared in the legislation [s.4(1)] is "to acquire, construct, equip and operate a wholesale fruit and produce market" and that object no doubt is to serve the needs of many groups of citizens, the establishment, operation, management and maintenance of a wholesale fruit and produce market cannot properly be regarded as a means of fulfilling any duty or responsibility of the Crown to the public or any section thereof. In short, the Board was not created as an instrument, arm or agency of the Crown to discharge any duty or responsibility of the Crown.
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> . . .
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> Further, it appears to me plain that it was not intended by the *Ontario Food Terminal Act* that the exercise of the powers entrusted thereunder to the Board should be for the benefit of the Crown.
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> (my emphasis)

[10] He referred to a number of authorities including ***Re Taxation of University of Manitoba Lands*** (1940), 1 D.L.R. 579 at 595, 47 Man.R. 457, [1941] W.W.R. 145 at 240:

> It may be quite true that the Crown exercised a prerogative of naming a majority of the board of governors; that it appoints the Chancellor after nomination by the committee on nominations; that it annually makes large financial augmentations and that the main buildings are on Crown property; but nevertheless neither the appointment of authorities nor the grants of funds in aid of education are necessarily inconsistent with the independence of the University as an institution of higher learning. It is not to be imputed to the Crown that any of its acts or subsidies would be actuated by any motive of direction, let alone control, of the University's free scope in its normal sphere of action.

[11] After referring to ***Metropolitan Meat Industry Board v. Sheedy***, he concluded at 546:

> … My conclusion is that the appellant Board does not act as a Crown agency in its service but on the contrary all acts done by it in carrying out the objects for which it was constituted and incorporated by statute are its own acts as distinguished from acts of or for the Crown.
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> (my emphasis)

[12] The Supreme Court of Canada again considered an issue of Crown agency in ***Westeel-Roscoe Ltd. v. Board of Governors of South Saskatchewan Hospital Centre***, *supra*. The Board of Governors was constituted to construct and operate the Hospital on behalf of the government, using public funds. The plaintiff was a subcontractor engaged in the construction of the Hospital. It sued under the ***Mechanics Lien Act*** to recover the amount of its claim (up to the statutory holdback) from the Board. The Board took the position that the ***Mechanics Lien Act*** did not apply to the Crown, and that it was similarly protected as an agent of the Crown.

[13] The Supreme Court of Canada rejected this defence, holding that:

> Whether or not a particular body is an agent of the Crown depends upon the nature and degree of control which the Crown exercises over it. …

citing ***R. v. Ontario Labour Relations Board***, *supra*.

[14] The court distinguished ***Halifax Harbour Commissioners***, *supra*, on the basis that the ***South Saskatchewan Hospital Centre Act*** conferred "wide powers for the construction and administration of the Hospital" (p.344), "the power to make bylaws" (p.345), and "very wide discretionary powers of spending". (p.345) Ritchie J. for the court said at 346:

> In my opinion, as I have indicated, the powers with which the Board is endowed are far removed from those of the Crown agency which is subject at every turn to the control of the Crown in executing its powers as was the case with the Halifax Harbour Commissioners, and the Board's functions are, in my view, even further removed from those of the Saskatchewan Government Insurance Office which was the subject of the other case (i.e., *Saskatchewan Government Insurance Office v. Saskatoon*, [1948] 2 D.L.R. 30, [1947] 2 W.W.R. 1028) upon which Mr. Justice Hall relied in the passage which I have cited from his reasons for judgment.
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> In the latter case the insurance office in question was described by Martin, C.J.S., speaking for the Saskatchewan Court of Appeal, in the following terms [at p.32 D.L.R., p.1030 W.W.R.]:
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> > Under the provisions of this statute it is the Government or the Crown in right of the Province which is authorized to carry on the business of insurance. In order to enable the Government to carry out the intent of the Act an office is provided for with a manager in charge. This office is, in my opinion, in effect a department of the Government of the Province, and functions through a manager who is created a corporation sole.

[15] He concluded that the Board was not a Crown agent.

[16] In ***Re Board of Industrial Relations and Canadian Imperial Bank of Commerce***, *supra*, the issue was whether the Board of Industrial Relations was a Crown agency for the purposes of s.107 of the ***Bankruptcy Act***. Under the ***Payment of Wages Act***, unpaid wages certified to be owing constituted a lien in favour of the Board, payable in priority to other claims. Section 107 of the ***Bankruptcy Act*** ranked claims of the Crown after certain claims, and subject to the rights of secured creditors.

[17] The Court of Appeal held that the Board was to be treated as a Crown agency for the purposes of s.107 because it had limited independence and was organized within a government department. Anderson J.A. could not conclude that the Board exercised that degree of independence which would allow him to find that the Board was not an agent or servant of the Crown.

[18] In ***Northern Pipeline Agency v. Perehinec***, *supra*, the plaintiff sued the agency in the Alberta Court of Queen's Bench for wrongful dismissal. The agency applied to have the action struck out on the ground that it was an action against the federal Crown and was therefore within the exclusive jurisdiction of the federal court. Estey J.A. for the court said at 5:

> Whether a statutory entity is an agent of the Crown, for the purpose of attracting the Crown immunity doctrine, is a question governed by the extent and degree of control exercised over that entity by the Crown, through its Ministers, or other elements in the executive branch of government, including the Governor in Council. …

[19] He concluded:

> Applying the principle of control as enunciated in the decisions of the Privy Council and of this court (and as applied in the British Columbia Court of Appeal), to the statutory provisions establishing the appellant, it would appear that the appellant is indeed an agent of the Crown, at least in the discharge of its primary function of attending to the design, construction and installation of the pipeline. With this I respectfully concur in the conclusions reached in both courts below. …

[20] He held, however, that as the plaintiff had chosen to proceed against the agency alone, the action in provincial superior court was not barred.

[21] The theme running through these cases is that the most important consideration in determining whether a statutory body is an agent of government is the extent to which the powers conferred on the body by statute may be exercised by that body autonomously, and without consultation, supervision or control by a minister or other government official. To the extent that the powers necessary to the discharge of the body's statutory purpose or function may be exercised in its

sole discretion, its acts are to be regarded as those of the statutory body alone, not binding on the government, and not done in fulfilment of any duty the government owes to the public. Although the constitution, structure and management of the statutory body are relevant to determining the nature and scope of the body's powers, it is the extent or absence of control over the body's function that determines whether it acts in the capacity of a government agent.

III.

[22] Both the learned Privacy Commissioner and the learned chambers judge concluded that the Council was an agent of government within the meaning of "public body" as defined in s.3(b) of the ***ATIPP Act***. The Privacy Commissioner enumerated the factors that led him to that conclusion:

- Medical Council members are appointed by the Executive Council and perform their statutory functions on a part-time basis
- the Council does not enjoy corporate status
- Council members are paid out of the government's consolidated revenue fund and are remunerated according to the fees and expenses prescribed by the Executive Council
- the Council Registrar is also a public servant and is paid by the government; presumably the space, staff and tools that the Registrar needs

to carry out her statutory functions are also provided by the government

- the day-to-day management of the information that is generated by the Council is managed by the Registrar

- staff of the Council may be employed by it but only subject to the approval of the Executive Council Member

- staff employed by the Council are paid "at the expense of the Government of the Yukon"

- fines imposed by the Council in the exercise of its decision-making powers are expressly constituted "debt[s] due … to the Government of the Yukon"

- licence and registration fees are paid to the Registrar and presumably deposited in the Yukon government's consolidated revenue fund

- while the Council may make recommendations to the Executive Council about regulations under the Act, ultimately the authority to make those regulations resides in the Executive Council and those powers are not only extensive, but they prescribe many aspects of the Yukon Medical Council's adjudicative processes.

[23] Similarly, the learned chambers judge reviewed many provisions of the ***Medical Profession Act*** with a view to deciding whether the Council was so under the control of the Crown as to be its agent, or whether it possessed sufficient discretionary powers as to be regarded as an independent body.

After referring to many of the provisions indicating Crown control, she said:

> [45] On the other hand, in the performance of its duties, for example in determining whether a certain individual should be registered to practise medicine or whether and how to discipline a particular individual, the Council exercises the powers given to it at its own discretion, makes its own decisions and acts without consulting or taking direction from the Crown. This is a factor that the Privacy Commissioner did not comment on in making his decision, save to refer to the fact that the Council had raised it. It is, however, an important factor because it is mainly on the basis of the Council's control over the decisions it makes in performing its quasi-judicial function that the Council says it cannot be considered an agent of the Crown.

And further:

> [48] The Crown provides the framework and administration within which the Council operates, but leaves it to the Council to make the determination in any particular case whether an individual is fit to practise medicine in the Yukon or whether he or she has failed to practise medicine in accordance with accepted standards. In the exercise of those powers, the Council makes its decisions without consulting the Crown.
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> [49] Although the Council acts independently in its decision making in the areas of registration and discipline of medical practitioners, that should be contrasted with the extent of the Crown's regulation-making powers. Under s.61, the Commissioner in Executive Council may make regulations, for example, determining the relationship between the Council and the Medical Council of Canada [subsection (c)], providing for the holding of meetings of the Council and the conduct of such meetings [subsection (f)], and fixing the time and place of regular meetings of the

> Council, determining by whom meetings may be called, regulating the conduct of meetings, providing for emergency meetings, and regulating the notice required in respect of meetings [subsection (g)]. It is true that, pursuant to s.7, the Council itself may, and indeed shall, make recommendations respecting regulations, but the final responsibility and say as to regulations is not the Council's.

[24] She concluded:

> [59] Having considered the provisions of the *MPA* and the case law, it seems to me that the issue comes down to whether the administrative control the Crown has over the Council, along with its control in the making of by-laws, outweighs the discretion the Council has in the making of decisions as part of its quasi-judicial nature. I see that discretion as a limited one, in the sense that it is performed in connection with certain issues, essentially, registration or licensing and discipline. That discretion is also one that is exercised on behalf of the government for a public purpose.
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> . . .
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> [66] In my view, on balance, the limited sphere in which the Council makes decisions and exercises discretion is outweighed by the fact that administratively it is subject to Crown control. A consideration of the purposes of the *ATIPP Act* does not "tip the balance" because the factors which the case law says must be considered are not evenly balanced. The Crown's administrative control outweighs the rest. Consideration of the *Act* simply confirms that the conclusion is an appropriate one for purposes of this legislation.

IV.

[25] The ***Medical Profession Act***, R.S.Y. 1986, c.114 (the "***Act***") defines the nature and extent of the powers entrusted to the Council, the nature of the functions it performs, and reveals the nature and degree of control exercised by the Crown in the Council's exercise of its powers.

[26] Section 7(1) of the ***Act*** provides:

> 7(1) The council shall have such powers and perform such duties as are given or imposed by this Act with respect to the regulation of the professional activities of those persons who practise medicine in the Yukon, and, to that end, shall from time to time recommend to the Executive council member the making of such regulations as are necessary and expedient for the carrying out of the spirit and intent of this Act and as are not in conflict therewith.

[27] Sections 9 to 14 of the ***Act*** require the Council to keep a number of registers: the Yukon medical register (s.9); a temporary register (s.10); a limited register (s.11); and a corporation register (s.12). The Council is empowered to decide who may be registered in any of those registers, according to criteria set out in the ***Act***.

[28] Sections 19 to 21 of the ***Act*** give the Council a quasi-judicial function in respect of professional conduct and discipline. The language of s.19 is discretionary in nature:

> 19(1) The council may cause to be struck from the Yukon medical register, the temporary register, the limited register or the corporation register any name or other particular pertaining thereto, of any person who
>
> (a) has, in the opinion of the council, obtained by fraud, misrepresentation, or error the registration of his name or other particulars pertaining thereto, or …

[29] Section 21 gives the Council a discretionary power to strike the name of any member who has been convicted of an indictable offence from the register.

[30] Section 22 gives the Council a discretionary power to undertake investigations in respect of professional conduct, and s.23 gives the Council a discretionary power to conduct inquiries into a member's professional conduct. On the report of the inquiry committee, under s.24(3):

> If the council, … considers that a member of the medical profession practising medicine in the Yukon has been guilty of infamous or unprofessional conduct or that such member is suffering from a mental ailment, emotional disturbance or addiction to alcohol or drugs that might if such member continues to practise medicine constitute a danger to the public, the council may
>
> (a) cause the name of such member to be struck …
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> (my emphasis)

[31] In addition to the power to strike names from the registers, the Council may also impose fines. Section 26 of the ***Act*** gives the Council the power to re-enter names in the register of those who have been struck off. The Council also has the power under ss.47-48 to control the unlawful practise of medicine in the Yukon.

[32] As is evident, the Council has sole jurisdiction over the registration, licensing and discipline of the medical profession in the Yukon. The Council's powers, summarized above, give it the power to control the practise of medicine in the Yukon by scrutinizing the qualifications of those who seek to do so, by examining the conduct of all who are admitted to practise in the Yukon, and by removing from practise, or penalizing, those who do not meet the Council's standards. These powers therefore affect not only the practise of medicine in the Yukon, but also the right of individuals who seek to practise their art and to earn their livelihood by doing so.

[33] These are, in my respectful view, broad and important discretionary powers with a significant impact on the level of health care to be available to Yukon residents. The powers are exercised primarily for the benefit of Yukon residents, although there is also some benefit to members of the

profession who no doubt wish to maintain high standards of practise.

[34] In the exercise of all the powers summarized above, the Council is free of any interference or control by the Yukon government. It does not report to any minister or government official as to the manner in which it exercises its powers, or the decisions it takes. The Council does not represent the government, or any government department, in the discharge of its powers, and it cannot in any way affect the government's legal position in respect of its members, or others. Nothing in the ***Medical Profession Act*** requires the Yukon Medical Council to account to the Yukon government for any of its activities.

[35] The learned chambers judge considered the Council's powers in what she described (para.66) as a "limited sphere", and weighed them against the "administrative control the Crown has over the Council" (para.59). The chambers judge disagreed with the Council's submission that the Commissioner had erred in taking a purposive approach to the issue. She stated that the purposive approach has support in the case law, and is the modern approach to statutory interpretation. She found that the phrase "public body" was not ambiguous, but still must be construed in light of the statutory context. Despite this,

she held that the common law test of Crown agency must still be applied.

[36] She also said that the issue of whether the plaintiff is a public body depends on whether it can be said to be an agent of the Crown, which depends mainly on the nature and degree of control exercisable by the Crown. In deciding this, the chambers judge found that the Commissioner had properly reviewed a number of provisions of the ***Act***, which indicated that the Crown provides the administrative framework in which the plaintiff operates. She found that the fact that the plaintiff exercises some discretionary powers is not conclusive against Crown agency, since its discretion is a limited one exercised for public purpose. She concluded that most factors suggest the plaintiff is an agent of the Crown, and that access to information legislation should be given a liberal interpretation. For all these reasons, she dismissed the application for judicial review.

[37] With respect, I disagree with both the approach and the conclusion of the chambers judge. As to the approach, the administrative factors considered by the Privacy Commissioner and by the learned chambers judge are not irrelevant to the issue of control. The question, however, is not whether those aspects of Crown control outweigh the Council's independent

exercise of discretionary powers, but rather, whether those administrative controls limit, impair or restrict the exercise of the statutory powers conferred on the Council so as to make its acts those of the government. In my respectful view, they do not.

[38] The appointment of Council members, and their part-time status, does not restrict the Council's ability to discharge its duties free of government control. There is nothing to support a suggestion that any Council member may be influenced in the performance of his or her duties by the fact that he or she was appointed by the executive council. Nor is it evident that payment of the Council members from the consolidated revenue fund on a schedule fixed by the executive council limits the Council's independent exercise of statutory powers. The administrative support provided by the government for the Council's operations does not affect the way in which the Council performs its duties. No doubt the government has control over the Council's existence: it could cease to pay staff, or the Council members, and of course it could, by a stroke of the legislative pen, terminate the Council's very being. But so long as the Council exists, none of those factors bear on the way it exercises its powers.

[39] That the Council has no independent property, must turn over any fines collected to the government, and must turn over license and registration fees to the registrar, similarly do not indicate to me control by government on the exercise of the Council's powers. There is no suggestion of any pressure on Council to add more money to government coffers by raising license or registration fees, or by imposing more or greater fines.

[40] In asking whether the various administrative factors outweighed the Council's independence in exercising its quasi-judicial functions, I am therefore of the view that the learned chambers judge asked herself the wrong question. The correct question is whether the constating statute, the ***Medical Profession Act***, conferred powers on the Council which it was intended to exercise free from government control to such an extent that it must properly be regarded as an independent body; or whether the statute retained in government such control that the Council must properly be regarded as an arm of government, carrying out its functions under executive control in the service of the Crown.

[41] In my opinion, when viewed in that way, and having regard for the way the test of control has been applied in the cases referred to, the Council is clearly an independent body and

not an agent of the Crown. It is not therefore a "public body" within the meaning of the ***ATIPP Act***, and the Privacy Commissioner is without jurisdiction to continue his inquiry.

[42] As I consider this to be a case of applying an established common law meaning of the phrase "agent of the government" to the status of the Council as it emerges from the ***Medical Profession Act***, interpretation of the ***ATIPP Act***, purposive or otherwise, seems to me an unnecessary exercise.

[43] I would allow the appeal.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Low"