Mazhero v. Information and Privacy Commission, 2001 YKSC 42

Date: 20010502
Docket No.: S.C. 00-A0196
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

FRANCIS MAZHERO

PETITIONER

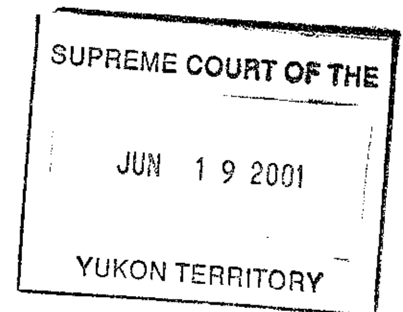
AND:

OMBUDSMAN & INFORMATION AND PRIVACY COMMISSIONER OF YUKON TERRITORY

RESPONDENT

FRANCIS MAZHERO — Appearing on his own behalf

SUSAN DENNEHY — For the respondents



MEMORANDUM OF RULING DELIVERED FROM THE BENCH

[1] MARCEAU J. (Oral): I will give my judgment with respect to number 3 of the motion, a motion for the disclosure to the petitioner of the report prepared for the Minister responsible for the *Access to Information and Protection of Privacy Act*, by the respondent ombudsman seeking a legislative amendment to the *Access to Information and Protection of Privacy Act* regarding the definition of a public body. In fact, there is a misnomer in this paragraph 3 because what, in fact, the petitioner is seeking is a copy of the report seeking a legislative amendment from the respondent privacy Commissioner. That misnomer causes

no particular difficulty and is understandable since the ombudsman is one and the same person as the Information and Privacy Commissioner.

[2] The way in which that report relates to the petition in this matter is particular to paragraph 4 of the amended petition seeking a declaration that the delay in processing the petitioner's complaints and requests for review referred to in paragraph 1 was not incurred in good faith. The basis for relevance argued by the plaintiff, and supported by affidavit evidence of the petitioner, confirmed by Exhibit 1 to the affidavit of Catherine Buckler, sworn this date, being a letter of February 7th, 2001, to Mr. Mazhero, the petitioner, by Hendrick Moorlag, Information and Privacy Commissioner, is that in some cases the Privacy Commissioner has made a ruling as to whether or not a board is a public board within the definition of the *Access to Information and Protection of Privacy Act*, which I will, in the balance of this judgment, simply refer to as the *Privacy Act*, and I'll refer to the Commissioner as the Privacy Commissioner.

[3] In some cases the Privacy Commissioner has made that decision. In other cases he has refused to make that decision at the request of the petitioner. The petitioner says the reason he has made the decision in some cases but will not rule on his particular request for review is that the Commissioner is acting in bad faith, and the delay which is being experienced, which is the declaration he seeks, is a delay, not really institutional, but rather intentional - referred in the vernacular as "stone-walling."

[4] With less than the candour which this Court expects of those who appear before it the petitioner failed to bring to my attention the letter of February 7th, 2001 - a recent event - to himself, explaining the following:

> In your letter you point out that in your case involving the Yukon Public Service Staff Relations Board and the Yukon Teachers Staff Relations Board, the Information and Privacy Commissioner determined he had no authority to decide whether these entities are public bodies under the *A.T.I.P.P. Act.* Yet, in the case of the Yukon Medical Counsel, the Commissioner determined he had authority to decide if the Yukon Medical Counsel is a public body. You conclude that these seemingly opposite determinations discriminate against you. This is not the case.
>
> As you are aware, requests for access to information are received by the Yukon archivists. It is the responsibility of the archivist to determine if the entity to whom the request for information is made as a public body, is that as defined under the *A.T.I.P.P. Act.* If the archivist determines the entity is a public body she must forward the request to that body for a response. If, however, she determines that the entity is not a public body under the *Act* she is not required to forward the request for information. The archivist will them direct the applicant to make the request directly to the specific entity. The Information and Privacy Commissioner has no involvement in these procedures and has no authority, at that point, to determine whether the entity is a public body. That is what it incurred in your case.

[5] I continue to quote:

> The reason I had authority to decide the question of whether the Yukon Medical Counsel is a public body is because when the issue arose the matter was at the inquiry stage, under the *Act.* Pursuant to s. 52(1) of the *Act*, the Commissioner's authorized to decide questions of fact or law at an inquiry. In the case of the Yukon Public Service and the Teachers Staff Relations Boards I took the only action available to me as Information and Privacy Commissioner which was to conduct an investigation under the *General Powers Provision* of s. 42 of the *Act.* As you can see, circumstances of the case were different; the Commissioner has legal authority to act was different in each case, there was no discriminatory application of the provisions of the *Act* or my responsibilities under it.

[6] I was referred by counsel to the Privacy Commissioner to the *Act* and I am completely in agreement with Mr. Moorlag's interpretation of the *Act*. While he has made it fairly clear why he could not act, I would simply add that there seems to be, actually, a problem with the *Act*, in that initially the archivist, when receiving a request for access to information, decides whether the alleged public body is a public body. There is no appeal from that decision. One would have expected that a decision that goes to the question whether the request is passed on for a response under the *Act*, when such a decision can derail the entire process, there could be an appeal of that particular determination, too, to the Commissioner. There is not. It would appear that if a complainant is met with the response of the archivist that the information is not being requested of a public body, the only way to resolve the archivist's error - if error it be - is resort to judicial review. I say that is unfortunate because, in my view, it brings the courts into the process long before one would expect any involvement of the Court.

[7] I agree with Mr. Moorlag when he says that the matters involving Yukon Medical Council and others were different. In those cases the archivist had passed on the request to the entity, such as the Yukon Medical Council. The Yukon Medical Council refused the request, on grounds *inter alia*, that it was not a public body. There is a specific appeal to the Commissioner from that ruling, and that engaged the Commissioner in the decision whether that was or was not a public body. For those reasons I agree that Mr. Moorlag correctly interpreted the *Act* as it was then constituted.

[8] That does not end the matter. Mr. Moorlag was of the view that there was a problem with the *Act*. I have indicated one of the possible solutions. There is another solution and that it is to actually name the public bodies in the Yukon specifically in the legislature so that the archivist can simply refer to the enumeration.

[9] Having been quite persuaded yesterday that on the face of it there was an inconsistency in what the Privacy Commissioner seemed to be doing and that it might afford some evidence of bad faith on his part, I was of the view that consistent with *Nechako Environmental Coalition v. British Columbia (Minister of Environment, Lands and Parks)*, the decision of Mr. Justice Drossos of the British Columbia Supreme Court, reported 1997, B.C.J., 1790, filed July 29th, 1997, paragraph 26 of that decision is relevant to the threshold that must be met by the applicants seeking discovery of documents, and I quote:

> Before the petitioner can trigger the Court's discretion to order discovery of documents the petitioner must first establish a basis, especially where on the issue of an order in counsel, everything is presumed to be rightly and dually performed until the contrary is shown. Mere allegations are not enough, a factual basis or framework is required, otherwise, to embark on a general inquiry of the exercise of a statutory authority by left-handed governing counsel in the public interest, or to order production of a document pursuant to an unsupported request allegation, or statement that the petitioner, in order to make out its case, requires documents which may or may not exist solely in the possession or control of the other party, would open the door to what is often termed "a fishing expedition." This the courts have refused to do.

[10] While I was not dealing with an order in Council, I was dealing with something which I think is akin to it, a report by the Commissioner to the Minister

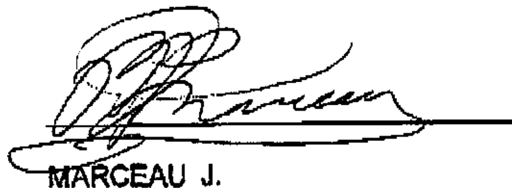
concerning concerns about the legislation, the implementation of which was the responsibility of that particular minister.

[11] I decided that while Mr. Moorlag's letter of February 7th, 2001 left very little room for a finding - that the Commissioner, in taking the view that he did, was acting in bad faith - I nevertheless ruled that the initial threshold had been met, that on the face of it there seemed to be a problem that justified inquiry. Inquiry beyond the letter of February 7th was not expected, in my mind, to lend much support to the petitioner's argument, but in the interests of balancing the right of the of the petitioner to prepare his case against the right of the Minister to have communications to him by the Commissioner concerning legislative amendments, not become public documents, I took the view that the best way of resolving this matter was for me to look at the report from the Commissioner to the Minister responsible for *Access to Information and Protection of Privacy Act* with a view to deciding whether it was a document that should be produced to the petitioner. In accordance with my ruling the report was produced to me and not to the petitioner, and although it is usual to employ the *audi alterum partem* rule and ask the petitioner to argue I could not see how I could allow him to argue upon a document which he had not seen, so I did not request that he argue that.

[12] I have read the report. The principle which has guided me is simply this; does the report contain anything which a trier of fact, applying the law, could reasonably conclude supported the allegation that the Minister, in choosing to

make that report instead of making a ruling on whether or not the Public Service Staff Relations Board was a public body, was acting in bad faith?

[13] I have concluded, without disclosing the exact nature of the report, that the report is exactly what it was purported to be; the report addresses certain problems that the Commissioner had with the definition of "public body" in the *Act* with some recommendations to remedy the situation. As such, it is a totally innocent document. It lends absolutely no support to an allegation that the report amounted to stone-walling, that the report was made in bad faith. On that basis I return the report to counsel for the Commissioner. The Clerk will do so. I dismiss the notice of motion of the petitioner in this matter in so far as paragraph 3 is concerned, I have already ruled with respect to paragraph 2 and paragraph 1, and therefore the notice of motion, in its entirety, is dismissed.



MARCEAU J.