IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Lottery Corporation v. Dyson,* 2013 BCSC 11

Date: 20130108
Docket: S114078
Registry: Vancouver

2013 BCSC 11 (CanLII)

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (as amended)

And in the Matter of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (as amended)

And in the Matter of Order No. F11-12 of the Information and Privacy Commissioner for British Columbia

Between:

British Columbia Lottery Corporation

Petitioner

And

Christopher P. Dyson and
Information and Privacy Commissioner of British Columbia

Respondents

Before: The Honourable Mr. Justice Goepel

On judicial review from Order No. F11-12 of a delegate of the Information and Privacy Commissioner for British Columbia dated May 5, 2011

Reasons for Judgment

Counsel for Petitioner:	K.M. Stephens G. van Ert
Counsel for Respondents:	D.K. Lovett, Q.C.
Place and Date of Hearing:	Vancouver, B.C. April 30, May 1, June 26-27, 2012
Place and Date of Judgment:	Vancouver, B.C. January 8, 2013

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INTRODUCTION

[1] Christopher Dyson made a request to the British Columbia Lottery Corporation ("BCLC") pursuant to the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 ("*FIPPA")* for access to BCLC's Casino Standards, Policies and Procedures Manual (the "Manual"). When BCLC refused to produce the Manual, Mr. Dyson, pursuant to s. 52 of *FIPPA*, applied to the Information and Privacy Commissioner (the "Commissioner") to review the decision.

[2] The Commissioner delegated the matter to a Senior Adjudicator. The Senior Adjudicator accepted BCLC's submission that disclosure of certain portions of the Manual could facilitate the commission of an offence or harm the security of property (ss. 15(1)(k) and (l)). She rejected however BCLC's submission that disclosure of the balance of the Manual would be harmful to BCLC's financial or economic interests (s. 17(1)). In the result the order was:

> 1. Subject to para. 2 below, I require BCLC to give the applicant access to the information it withheld under s. 17(1).
>
> 2. I confirm that BCLC is authorized by s. 15(1)(k) and (l) to withhold the information highlighted in yellow in the copy of the [Manual] it provided to me for this inquiry.
>
> 3. I require BCLC to give the applicant access to the information described in para. 2 above within 30 days of the date of this order, as *FIPPA* defines "day", that is, on or before June 17, 2011 and, concurrently, to copy on the cover letter to the applicant.

[3] BCLC now seeks to review the Senior Adjudicator's decision. Pursuant to s. 59(2) of *FIPPA,* the decision was automatically stayed as a result of BCLC's application for judicial review.

MOOTNESS

[4] A few days before the hearing of the judicial review application, Mr. Dyson's counsel advised that Mr. Dyson no longer wished access to the Manual. At the commencement of the application, Ms. Lovett, counsel for the Commissioner, sought to have the application dismissed as moot. Ms. Lovett advised that if the

matter was declared moot, the Commissioner would consent to the Senior Adjudicator's order being set aside.

[5] Mr. Stephens, for BCLC, resisted the application. He submitted that the matter is not moot because disposal of the judicial review application without an adjudication on the merits may, pursuant to the doctrines of *res judicata*, issue estoppel and/or abuse of process, expose BCLC to risk that it is prohibited from taking the same positions it has taken in the present case in response to a future request for production of the Manual: *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1998), 47 D.L.R. (4th) 431, 22 B.C.L.R. (2d) 89 (S.C.). In the alternative, he submitted that if the issue is moot, the Court should nevertheless exercise its discretion to decide the issues raised in the petition.

[6] The petition was heard together with the petition in *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 [*Skelton]*. In *Skelton,* the Commissioner had ordered BCLC to produce a collection of sales figures for Lottery products purchased through BCLC's PlayNow.com website. In his written submission, Mr. Stephens noted that the two petitions raised the same key issues:

> (a) What is the meaning and application of the reasonable expectation of harm standard annunciated in *FIPPA* s.17(1) and;
>
> (b) How should expert evidence be treated when determining whether a reasonable expectation of harm exists in a given case.

[7] The question as to whether or not the petition was moot was argued at the outset of the hearing. Because the issues in the two petitions were intertwined, I reserved on the question of mootness and allowed counsel to argue both petitions on their merits.

[8] For the reasons that follow I find this petition is moot and I decline to determine it on its merits.

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DISCUSSION

[9] The leading case on mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 [*Borowski*]. In *Borowski*, Sopinka J. at p. 353 described the doctrine and set out a two step test for determining when the Court should hear a moot matter:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[10] In *Borowski,* the court identified three criteria that are relevant in deciding whether the court should exercise its discretion and hear a matter otherwise moot:

1 the presence or absence of an adversarial context;

2. concern for judicial economy; and

3. the need to demonstrate awareness of the courts proper law making function.

[11] As Mr. Dyson no longer seeks access to the Manual, there is no adversarial context to this matter. Although Ms. Lovett, with leave of the court, did argue the merits of the application, the ordinary adversarial context is lacking as the party "adverse in interest" (in the traditional sense) is no longer interested in the document.

[12] Concern for judicial economy and the need to ration scarce judicial resources is a major factor. There exists only so much judicial time to hear and decide matters. It should be spent on live disputes. I would note that if I decide this matter on the merits against BCLC, the question of mootness would undoubtedly arise again if BCLC sought to appeal my decision.

[13] In *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2011 BCCA 334, 309 B.C.A.C. 59 [*Simon Fraser],* the Court of Appeal refused to hear as moot an appeal from this Court arising out of a disclosure order under *FIPPA*. In *Simon Fraser,* the Commissioner ordered certain documents disclosed pursuant to s. 4 and 5 of *FIPPA*. The University successfully appealed to a judge of this Court. Two appeals were taken from the judge's order but the applicant died prior to the hearing of those appeals. On return of the application, attempts were made to substitute a "live" appellant.

[14] The Court refused to allow the substitution. In the course of argument the Court was advised that the matter was of general importance and that the issues raised by the appeals would likely arise in other actions. While the Court acknowledged that the issues raised in the appeals were important, it concluded that proceeding with them would not engage the Court's core adjudicative function involving concrete disputes. The Court noted that its decision would have no practical consequences and would be "of academic interest only". In reaching its decision the Court also noted that the issues raised in the matter before it were likely to be litigated in other proceedings; the fact that some of the issues sought to be argued were not evasive of review was good reason not to proceed with the moot matter.

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[15] Those comments apply with equal force in this proceeding. While I acknowledge the importance of the issues to BCLC, a decision on the merits will have no practical consequence and will be of academic interest only. Regardless of what I might decide, the Manual is in no present danger of being disclosed. As noted by Mr. Stephens in his opening, the issues of the meaning and application of the reasonable expectation of harm standard annunciated in *FIPPA* s.17(1) and the treatment of expert evidence when determining whether a reasonable expectation of harm exists are also raised in *Skelton*.

[16] BCLC has suggested that if the case is not heard on the merits, there is a possibility that if some other party seeks access to the Manual they will be faced with arguments in the nature of *res judicata* or issue estoppel. The Commissioner responds that she is not bound by prior judgments: *Inquiry re: Liquor Distribution Branch Data on Annual Beer Sales*, [2000] B.C.I.P.C.D. No. 11 at para. 19.

[17] I find, given the structure of *FIPPA,* that the questions of *res judicata* or issue estoppel are unlikely to arise. A hearing under s. 56 of *FIPPA* only arises when the parties are unable to reach agreement on the disclosure of information. The Commissioner under s. 56 must decide all questions of fact and law that arise in the course of the enquiry. If, in the future, some other party seeks production of the Manual, the Commissioner will have to decide the matter based on the law and evidence as it then exists. The evidence on the application may differ considerably from that before the Court on this application. Further, in the course of any subsequent application, the Commissioner will have to consider the comments of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, a decision handed down subsequent to the Senior Adjudicator's decision.

[18] The petition is moot. The party seeking the documents no longer wants them. In all of the circumstance of this case, I find that the Court should not exercise its discretion to hear this matter. The outcome would be of but academic interest and would not be a wise use of the Court's limited resources.

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[19] The petition is dismissed. BCLC is not required to produce the Manual. Paragraphs 1 and 3 of the Senior Adjudicator's order are set aside.

[20] There will be no costs to either party.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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