Citation: Tromp v Privacy Commissioner etal
2000 BCSC 598

Date: 20000317
Docket No.: A971236
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STANLEY TROMP

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER OF THE PROVINCE OF BRITISH COLUMBIA, UNIVERSITY OF BRITISH COLUMBIA, COCA-COLA BOTTLING LTD., ALMA MATER SOCIETY OF UBC, SPECTRUM MARKETING CORP., INPRINT MEDIA SALES LTD., COTT BEVERAGES WEST LTD., GRAY BEVERAGES INC., AND VERSA SERVICES INC.

RESPONDENTS

ORAL REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HUTCHISON (PRONOUNCED IN CHAMBERS)

Counsel for the Petitioner: S. Berezowskyj and A. Epstein

Counsel for Respondents: R. McConchie, R. Lane, and S. Ross

Date and Place of Hearing/Trial: March 17, 2000
Vancouver, BC

[1] **THE COURT:** This matter came before me by way of petition for judicial review. The petition is that of Mr. Stanley Tromp, at all times material, a reporter with *The Ubyssey*, a student newspaper published on the campus of the respondent, University of British Columbia.

[2] Mr. Tromp sought orders from The Information and Privacy Commissioner of the province, who I will refer to throughout as "the commissioner", revealing the details and financial arrangements made between the University of British Columbia ("UBC") and Coca-Cola Bottling Ltd., which was granted an exclusive distributorship of their products on the campus of UBC, in what is called on the record, "The Cold Beverage Agreement". The commissioner's decision upheld the university's decision to withhold the records, save for the signatories to the agreement. His decision was made primarily under ss. 14 and 21 of the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165, which I will refer to throughout as "the ***Act***".

[3] UBC's decision to withhold is contained in a letter dated February 5th, 1996, found at tab 7 of the chambers record. In that letter to Mr. Tromp, Libby Nason, the Vice Provost of the university, outlines that certain documents or pages were completely severed under s. 14 (solicitor client privilege). There is really no argument about that being an appropriate withholding. Then she went on to say, "The following pages have been severed completely under s. 17," and a great variety of numbers follow and then, "the following pages have been severed completely under s. 21." Now, that decision of UBC given to Mr. Tromp points out as follows:

> Under section 52 of the ***Act***, you may ask The Information and Privacy Commissioner to review the decision not to disclose the records that you requested. You have 30 days from the date of this notice to request a review by writing to ...

And the address is given. Indeed, that is exactly what Mr. Tromp did.

[4] Now, the Commissioner's decision upholding UBC's refusal came before me and the petitioner's submissions are contained in his brief and in the introduction, under "3", it says this:

> Tromp applies to this court for the following relief:
>
> (a) An order that the decision be set aside pursuant to section 7 of the ***Judicial Review Procedure Act*** with the direction that UBC is to provide Tromp with the requested documents.
>
> (b) Alternatively, an order that the matter be remitted back to the commissioner pursuant to section 5 of the ***Judicial Review Procedure Act*** with the direction that the commissioner reconsider the matter and determine whether disclosure of the Cold Beverage Agreement is "clearly in the public interest."

Then the brief goes on to outline the facts and it perhaps is useful for the record to use those facts, which are not much in dispute. The brief says:

By letter dated December 7th, 1995, Tromp requested that the University of British Columbia (UBC) provide him with copies of all records concerning or related to the exclusive sponsorship agreement entered into between UBC and Coca-Cola Bottling Ltd., dated August 1st, 1995, the Cold Beverage Agreement.

At the time of the request, Tromp was a UBC student and also a reporter with the student newspaper, *The Ubyssey*. UBC responded by claiming that 179 of the 209 pages of the Cold Beverage Agreement were subject to severance and excepted from disclosure under ss. 14, 17 and 21 of the ***Act***.

[5] On February 10th, the petitioner wrote to the office of the commissioner requesting an inquiry under the ***Act*** into UBC's decision to not disclose portions of the Cold Beverage Agreement and thereafter, on the 19th of June, 1996, the commissioner conducted a written inquiry.

[6] On September 17th, 1997, the Commissioner released order No. 126 (1996) entitled "Inquiry Re: A Media Request for Access to All Records Concerning an Agreement Between The University of British Columbia, Coca-Cola Bottling Ltd.

and Other Third Parties", in which he confirmed the decision of UBC not to release the records sought, with the exception of that portion of the contract containing the signatories to the contract which he required UBC to produce.

[7] I think that is a fair summary of the facts as they came before me and I think the issues are fairly stated in the brief as follows:

> Tromp submits that the decision ought to be set aside on the following grounds:
>
> (a) the commissioner erred in law, or exceeded his jurisdiction, or both, in his interpretation of s. 17 in the ***Freedom of Information Protection of Privacy Act***, the ***Act***, and in his application of s. 17 of the ***Act*** to the information before him;
>
> (b) the commissioner erred in law, or exceeded his jurisdiction, or both, in his interpretation of s. 21 of the ***Act*** and in his application of s. 21 of the ***Act*** to the information before him;
>
> (c) the commissioner erred in law, or exceeded his jurisdiction, or both, in failing to consider and apply s. 25 of the ***Act*** to the information before him; or, finally,
>
> (d) Tromp was denied natural justice and procedural fairness of the inquiry before the commissioner.

And those are the issues which I have heard submissions on over the past two days.

[8] Now, in the petitioner's February 10th, 1996 letter to the commissioner headed "Appeal", which is tab C of the affidavit of Helga Driedger, the following comments appear:

> Although I have studied, used and written on the ***F.O.I. Act*** for two years, this is my first appeal for release of information which an ***F.O.I.*** director has denied me. I wish to see all records pertaining to UBC's Cold Beverage Contract with Coca-Cola.

Then there is some campaign talk but the final paragraph is as follows:

> As the final resort, we believe this would be the ideal time to apply s. 25, THE PUBLIC INTEREST OVERRIDE to release records which, as here, are clearly in the public interest.

[9] Now, that seems to me to be the purview of the decision that has to be reviewed and I turn then to the commissioner's decision. Without going into great length, I point out that the commissioner did not in any sense that I can find deal with s. 25. He said, at page 4, under "8", "Discussion: Late Submissions by the Applicant":

> UBC and Coca-Cola objected to the late submission on June 29th, 1996, of various arguments and documentary items (the additional

> material) by the applicant when they had agreed to the late filing of only two newspaper items.
>
> Since I can state that they have had no bearing on my decision under ss. 14, 17 and 21 of the ***Act*** and agree with UBC and Coca-Cola that the additional material is irrelevant, on its face, I see no reason to give UBC an opportunity to respond to these late submissions with another reply submission.

[10] Now, that would have been a place to indicate that he had thought about s. 25, but he did not and then he goes on to deal with s. 14 and then he deals at length with s. 17 culminating in this decision:

> On the basis of a detailed review of the records in dispute, I find that disclosure of the records withheld under the terms of s. 17.1(a), (b), (d) and (e) could reasonably be expected to harm the financial or economic interests of UBC.

Then he deals with s. 21 and concludes:

> I find the UBC arguments and evidence on s. 21 persuasive. Therefore, I agree with the submission of UBC and Coca-Cola that disclosure of the records in dispute would reveal commercial, financial or technical information of Coca-Cola, reveal information explicitly supplied in confidence, could reasonably be expected to harm significantly Coca-Cola's competitive position or interfere significantly with its negotiating position and could result in undue financial loss to Coca-Cola. However, I am not persuaded that either ss. 21 or 17 can be applied to the signatories to the contract.

And then he makes the following order:

> Under s. 58(2)(b) of the ***Act***, I confirm the decision of the University of British Columbia not to release the records to the applicant with the exception of the signatories to the contract.

[11] Now, that is the decision under review. As can be seen, the commissioner did not deal with Mr. McConchie's reply to Mr. Tromp's original submission on s. 25, and to be fair to the commissioner, neither did Mr. Tromp follow up on his original submission under s. 25. One, however, must keep in mind that Mr. Tromp was a lay litigant dealing with an expert in the field. I only allude to tab 5K in the brief to point out that there were submissions made about Mr. McConchie's expertise and having written on the subject matter to *The Vancouver Sun* and then the brief, at paragraph 6.10, says:

> The Vancouver Sun article does not discuss the confidentiality exceptions for harm to business interests or the application of the definition of trade secret.

In paragraph 6.11:

> More germane to his review would be Ladner Downs' submissions to the provincial government before passage of the ***Act***, namely, the

> media's submission on freedom of information and privacy legislation, April 13th, 1992.
>
> The media submission explicitly recognizes the principle that access legislation should confer protection for trade secrets, third party business information and the economic interests of public bodies.

Now, that is, I think, a little bit of self-aggrandizement in the brief about Mr. McConchie and Ladner Downs, fair enough, but I also point out that Mr. Tromp cannot be expected to be as sophisticated in his submissions as was Mr. McConchie.

[12] Now, I think I should at this point turn to the ***Act*** itself to illustrate and let counsel better understand my concerns. The ***Act*** is relatively new, although it looks to be a 1996 ***Act,*** but it takes some time for statutes of this size and dimension to become commonplace although there has been some obvious litigation about it. The ***Act*** itself identifies its purpose in s. 2, which states, in part:

> The purposes of this ***Act*** are to make public bodies more accountable to the public and protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> ...
>
> (c) specifying limited exceptions to the rights of access. ...

[13] Now, there are a number of sections relevant to the case at bar, but, as I say, I confirm the commissioner's decision under s. 14 which simply reads:

> The head of a public body may refuse to disclose an applicant information that is subject to solicitor client privilege.

Now, "public body". It took me some time to determine what a public body is, but it is defined in Schedule 1 of the ***Act*** which says:

> "public body" means:
>
> (c) a local public body.

And "local public body" means:

> (c) an educational body.

And then "educational body" is defined under (a) to mean:

> a university as defined in the ***University Act***.

That brings me to conclude UBC is a public body.

[14] Now, going on to the exceptions to be found, they are contained all in Part 2, Division 2. But s. 25 in Division 4 has this to say and, I think it is of significance: "Division 4, public interest paramount," and the heading, "Information must be disclosed if in the public interest." Section 25(1) reads:

> Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[15] Now, that was the section which Mr. Tromp put in his notice of appeal in the way that I have indicated. The section has not, to my knowledge, been construed judicially although my brother Melvin J. had an interesting issue before him in the case of ***Clubb v. Saanich (District)*** (1996), 35 Admin.L.R. (2d) 309 (B.C.S.C.). There Mr. Clubb was found in suspicious circumstances in Beaver Lake Park, frequented by children. He was a paroled pedophile and the police chief decided that he should issue a warning to the public pursuant to s. 25, and relied on s. 25. Thereupon, Mr. Clubb, through his lawyer, challenged the section under the ***Canadian Charter of Rights and Freedoms***. It was found to muster under the ***Charter*** but the police chief was admonished for failing to observe the notice provisions of s. 25, which is 25(3). In his rambling on s. 25, Justice Melvin said the following, at paragraphs 33 and 34:

> The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity. The public is, however, truly "interested" in matters that may affect the health or safety of children.
>
> Despite the apparent vagueness of s. 25(1)(b), the conduct of Chief Nixon may have been justified under s. 25(1)(a) if there was a substantial and imminent risk to the health or safety of children. Consequently, this constitutional claim fails [my emphasis].

Now, there is no help to me as to what s. 25(1)(b) means, except Mr. Justice Melvin's view of its apparent vagueness.

[16] Well, I am not much help to the commissioner either, as it is not for me to say what s. 25(1)(b) means. I think, however, that by the scheme of the ***Act,*** when an applicant asks that it be considered, it has to be considered before one can look to the exceptions under ss. 17 and 21. And after reading the commissioner's decision, I conclude that he may or may not have known about the public interest override section. He said nothing, however, that could be construed as a conclusion that none of the material could come within s. 25(1)(b). Since he does not say so, I am at a difficulty to determine that he addressed the point.

[17] I am aware that as ***R. v. Burns***, [1995] 1 S.C.R. 656, and other such cases make clear that while reasons are desirable, in the absence of a statutory or common law ruling, they are not required and their absence does not raise a question of law. An appellate court or a review court, in my case, may review the whole record to determine whether the trial judge or, in this case, the adjudicator erred in a matter that could reasonably have affected his decision. In the case at bar, a fair reading of the record and his reasons leaves me to conclude that he failed to approach s. 25 first before turning his mind to ss. 17 and 21.

[18] Now, it is not for the court, in my view, to go on and make a decision on the record as to whether it thinks the facts here dictate that the information or any part of it are, "clearly in the public interest"; that is for the commissioner. I point out, however, parenthetically, that there could be financial information, the release of which could be clearly in the public interest. One could ask, for example, as counsel alluded to, at what point in a public enterprise are taxpayers entitled to be told, clearly in the public interest, that a $100,000,000 plus budget has skyrocketed to over half a billion dollars. That is a question the head of the B.C. Ferries was perhaps compelled recently to ask himself or herself under s. 25.

[19] Now, at what point in time can, for example, the faculty and student body be entitled to know the amount of revenue from a particular enterprise, say a patent agreement regarding an esoteric technological development that the university is involved with under its research and development arm? Obviously, it seems to me that on occasion financial information may be clearly in the public interest when it relates to a publicly funded institution that is clearly a public body within the meaning of the ***Freedom of Information and Protection of Privacy Act***. Obviously, unless the question is put to the commissioner, as it was in the case at bar, he need not state in every adjudication that he has considered whether any of the requested records could be said to fall under the s. 25 exception. However, ss. 25(1)(a) and 25(1)(b) may require release of some or part of the requested information before turning to the exceptions permitted in ss. 12 through 22 in Division 2 of the ***Act***. Obviously, the ***Act*** favours public disclosure over secrecy.

[20] Now, regarding the petitioner's argument over procedural fairness and looking at documents in-camera, I do no more than point to Madam Justice Lynn Smith's judgment, found in tab 13 of the commissioner's authorities, ***Greater Vancouver Mental Health Society v. British Columbia (Information and Privacy Commissioner)*** (3 February 1999) Vancouver Registry No. A970437, A970483, A970484 (B.C.S.C.). I do not find that the petitioner, Tromp, was deprived of natural justice or procedural fairness. And while, as I observed in argument, there was evidence upon which he could find as he did under ss. 17 and 21, I quash his order because of my finding on the issue stated in his brief under "C", namely, the commissioner erred in law or exceeded his jurisdiction in failing to consider and apply s. 25 of the ***Act*** to the information before him.

[21] I sever his decision under s. 14 as authorized in law by the cases, in particular, that cited by counsel for the commissioner, ***Hobby Ranches Ltd. v. The Queen***, which is a decision of Mr. Justice Hutcheon reported at (1978), 8 B.C.L.R. 247 (S.C.), and, I might say, followed on that issue under the ***Judicial Review Procedure Act*** by Callaghan J. in ***Re MacKenzie v. MacArthur*** (1980), 57 C.C.C. (2d) 130 at 139-140 (B.C.S.C.). Thus, the solicitor client privilege asserted by UBC is upheld. The decision under ss. 17 and 21 is

quashed and the issue of "clearly in the public interest" is remitted back to the commissioner with whatever help, and I acknowledge very little, that these reasons may bring. The petitioner is entitled to his costs under Scale 3. That is all I have to say.

"R.B.McD. Hutchison"
The Honourable Mr. Justice R.B.McD. Hutchison