Date: 19970805
Docket: A962692
Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,
R.S.B.C. 1979, C. 209

AND

IN THE MATTER OF THE DECISION
OF THE INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
(ORDER NO. 108-1996) DATED MAY 30, 1996,
MADE UNDER THE
FREEDOM OF INFORMATION AND PRIVACY ACT,
S.B.C. 1992, C. 61

BETWEEN:

MINISTER OF HEALTH AND MINISTER RESPONSIBLE FOR SENIORS
AND
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

PETITIONERS

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF THE PROVINCE OF BRITISH COLUMBIA
AND
DAVID GRANT

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CURTIS

Counsel for the Petitioners: Deborah K. Lovett

Counsel for the Respondent
Information and Privacy Commissioner: Susan E. Ross

Counsel for the Respondent
David Grant: Ann H. Pollak

Place and Date of Hearing: Victoria, B.C.
April 9, 1997

[1] The Minister of Health seeks an order under the Judicial

Review Procedure Act to set aside a decision of the Information and Privacy Commissioner allowing David Grant access to certain medical records.

[2] On the 15th of August 1995 Mr. Grant, who had been held and treated in the Adult Forensic Psychiatric Institute at Riverview Hospital, applied for access to his medical records. Mr. Grant is of the view that he was treated unfairly and poorly by the staff at the Psychiatric Institute and is thinking of taking legal action. The Minister of Health refused access to the records on the grounds allowed under section 19 of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

[3] Section 19 provides:

19(1) The head of a public body may refuse to disclose to an applicant information including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health; or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[4] Mr. Grant applied to the Commissioner under section 52 of the Act for a review of the Minister's refusal.

[5] In a decision dated May 30, 1996, the Commissioner decided that where

... an applicant is seeking access to his or her own medical records, a public body must meet the test established by the Supreme Court of Canada in McInerney v. MacDonald. In order to meet its burden of proving that the applicant has no right of access to his medical records under section 19, a public body must show that there is a "significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party.

In my view, the Ministry has failed to meet this test in respect of section 19(2).

[6] The Commissioner found that the Minister had established that a portion of the record could be withheld under section 19(1). Consequently, the Commissioner ordered the Minister to release to Mr. Grant those portions of his medical records which the Minister had sought to withhold under section 19(2).

[7] The case relied upon by the Commissioner, McInerney v. MacDonald [1992] 2 S.C.R. 138, is a decision of the Supreme Court of Canada with respect to a patient's request for medical

records in New Brunswick. New Brunswick, at that time, unlike British Columbia in this case, had no legislation which applied to the disputed request for medical records. The reasoning of the court quoted in the Commissioner's decision is to be found at pp. 157 and 158 of the S.C.R. reports. The Supreme Court of Canada decision is an application of the principles of common law in the absence of legislation dealing with the matter.

[8] In British Columbia however there is specific legislation. In the case of British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995) 16 B.C.L.R. (3d) 64, Thackray J., speaking of the Freedom of Information and Privacy Act in this province, said at p. 73:
The Act is a comprehensive statutory scheme which regulates the release or protection of all information contained in a record which is held by a public body.

[9] The McInerney case propounds a threshold for non-disclosure which requires proof of
... significant likelihood of substantial adverse effect ...

While section 19(2) permits refusal to disclose
... if the disclosure could reasonably be expected to result in immediate and grave harm ...

The common law test used by the Supreme Court on its face requires a higher probability of the harm specified occurring. The common law test is a different test than the one enacted by the statute.

[10] The Freedom of Information and Privacy Act represents a delicate balancing of the conflicting interests of access to records, and the protection of other interests. It is therefore important that the test set forth by the statute by applied as precisely as possible.

[11] In this case, the Commissioner applied the wrong test to the evidence before him when he required the Minister to meet the common law test to establish a right to refuse access under section 19(2) of the Act. The section itself set out the test that is to be applied.

[12] There are no provisions for appeal from the Commissioner's decision and there is no clause removing or restricting the jurisdiction of this court to review it. The question of what is the proper standard of review in a judicial review proceeding can be a difficult issue. In this case however it is common ground among the parties that this court may intervene if it finds that the Commissioner's decision was unreasonable. I find that it was. It was unreasonable to add a materially different test to the requirements of the statute. This goes beyond interpreting the statute and amounts to changing its operation. In the case of Workers' Compensation Board v. Tom Mitchinson, Assistant Information and Privacy

Commissioner (Ontario) (1995) 32 A.L.R. (2d) 76, the Ontario Court of Justice held that the application of a too stringent test in a case under Ontario's Freedom of Information and Privacy Act resulted in a patently unreasonable answer. It is unnecessary to decide whether the decision of the Commissioner in this case is unreasonable or patently unreasonable in order to decide this petition.

[13] I find the Commissioner's application of the common law test in respect of the Minister's withholding of Mr. Grant's records under section 19(2) of the Act was incorrect and unreasonable.

[14] I allow the petition and remit the matter to the Commissioner to decide the issue between Mr. Grant and the Minister upon the test set out in section 19(2). It is unnecessary to reconsider the records to which section 19(1) applies, as no issue has been taken with that part of the decision.

"V.R. Curtis, J."