Court File No. 111/94

ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT

IN THE MATTER OF the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

AND IN THE MATTER OF the Mental Health Act, R.S.O. 1990, c. M.7

AND IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1990, c. J.1

B E T W E E N:

THE MINISTER OF HEALTH and
RONALD G. BALLANTYNE

Applicants

- and -

HOLLY BIG CANOE, JOHN/JANE ROE
and JOHN DOE

Respondents

E N D O R S E M E N T

BY THE COURT:

The Ministry of Health received a request from a citizen who had been previously assaulted by the patient with a knife seeking access to information with respect to the patient's detention and release from a psychiatric hospital in which the patient was detained having been found not guilty by reason of insanity on 2 counts of attempt murder. The Ministry denied the request pursuant to s. 65(2)(a) and (b) of the Freedom of Information and Protection of Privacy Act (the Act). An appeal to the Commissioner was taken by the requester from this decision.

The Commissioner ordered production of the pertinent records pursuant to the Commissioner's powers to order production under s. 52(4) of the Act in order to determine the preliminary issues of the inquiry officer's jurisdiction to entertain the appeal in view of s. 65(2) of the Act which renders

the Act inapplicable in respect of "clinical records" under s. 1 of the Mental Health Act. The Ministry seeks judicial review of this order which is designated Order P-623.

The relevant sections of the Act are set out as follows:

> 65.(1) This Act does not apply to records placed in the Archives of Ontario by or on behalf of a person or organization other than an institution.
>
> (2) This Act does not apply to a record In respect of a patient in a psychiatric facility as defined by section 1 of the Mental Health Act, where the record,
>
> > (a) is a clinical record as defined by subsection 35(1) of the Mental Health Act; or
> >
> > (b) contains information in respect of the history, assessment, diagnosis, observation, examination, care or treatment of the patient.
>
> 52.(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that Is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

The Inquiry Officer held that s. 65(2) did not bar the Commissioner or the Inquiry Officer from determining its own jurisdiction by in turn determining whether the records requested fell within the definition of medical records under s. 35(1) of the Mental Health Act.

At pp. 2-3, the Inquiry Officer stated the following:

> The appeal provisions of the Act provide that any decision of the head of an Institution relating to access to records can be appealed by the requester to the Commissioner. The Commissioner (or his delegate) has the statutory duty to dispose of the issues raised in an appeal, and makes decisions in respect of an appeal by issuing an order pursuant to section 54(1) of the Act, which states:
>
> > After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.
>
> In my view, section 65(2) can apply only to the records which fall within the scope of that section. While the Legislature clearly intended that these records should fall

> outside the purview of the Act, I do not believe that the Legislature intended to have the threshold issue of whether or not records fall within the scope of this provision determined by a non-independent body, such as the Ministry, whose decision would not be reviewable.
>
> In my view, notwithstanding a claim by the Ministry that the records in question fall within the scope of section 65(2), the Commissioner (or his delegate) does have the power to compel the production of records claimed to be covered by section 65(2).
>
> This power to compel initially would be exercised for the limited purpose of determining whether or not the records fall within the scope of section 65(2) of the Act. If, having reviewed the records, I determine that the Ministry's claim is correctly made, pursuant to section 65(2) the records would be returned to the Ministry and the appeal would be closed, since I would not have the jurisdiction to conduct a further inquiry. However, if I determine that the Ministry's claim is not validly made with respect to some or all of the records (i.e., that section 65(2) does not apply to some or all of the records), then I will be required to proceed with the inquiry and determine the application of the Act to the records.

We are in agreement with the assessment by the Inquiry Officer that s. 65(2) does not prohibit the Inquiry Officer from determining whether she had jurisdiction to entertain the appeal and also with her approach to that issue. We would only add that any preliminary determination that the Inquiry Officer either did or did not have jurisdiction to entertain the appeal based on whether the record was a "clinical record" within s. 65(2) of the Act would be subject to judicial review on a standard of correctness.

Further, we are of the view that s. 52(4) explicitly authorizes the Commissioner in an inquiry to have produced any document and more specifically the pertinent records in this case. We do not accept the submission of counsel for the Ministry of Health that the phrase, "despite Parts II and III of this Act" in s. 52(4) confines the application of s. 52(4) to those parts of the Act. If that result had been intended the Legislature could have readily conveyed that intention in clear arid unambiguous terms. We are all of the view that s. 52(4) applIes to all parts of the Act. In our view, the Commissioner must have the procedural mechanism necessary to decide matters of substance.

In accepting the approach taken by the Commissioner to ss. 65(2) and 52(4) of the Act, we take comfort in the decision of this court in Re Morgan et al. and Windsor R.C.S.S. Board (1979), 112 D.L.R. (3d) 163 (Ont. Div. Ct.) where at p. 168 is found the following:

Finally, I wish to turn to Re Ontario Labour Relations Board: Bradley et al. v. Canadian General Electric Co. Ltd., [1957] O.R. 316, 8 D.L.R. (2d) 65, and particularly at pp. 334-5 O.R., p. 81 D.L.R., where in dealing with the jurisdiction of an inferior tribunal, Roach, J.A., for the Court says:

> When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide it only on evidence. If there is no evidence then the existence of the facts on which the tribunal's jurisdiction to proceed further depends, has not been established and the tribunal is without jurisdiction to proceed further. If there is evidence then the tribunal weighs it and concludes that the facts on which its further jurisdiction depends either have or have not been proven to exist.

This passage makes it clear that an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction. [emphasis added]

See also: Langlois v. Minister of Justice of Quebec (1984), 9 D.L.R. (4th) 321 at 330 S.C.C.); Jacmain v. A.G. Canada (1977), 81 D.L.R. (3d) 1 at 6 (S.C.C.).

Finally, we do not accept the Ministry's submission that ss. 8 and 35 of the Mental Health Act preclude the Commissioner from determining jurisdiction under s. 65(2) of the Act by requiring production of the records pertinent to that determination pursuant to s. 52(4) of the Act.

For these reasons the application for judicial review is dismissed. We accede to the request of the Ministry to stay the order of this court pursuant to Rule 63.02(1)(a)(i). This is not a matter for costs.

Carruthers J.
Then J.
Adams J.

Released: June 29, 1994