Court File No. 220/95

ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT

O'BRIEN, McRAE, CORBETT JJ.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

- and -

ANITA FINEBERG, INQUIRY OFFICER et al.

HEARD DECEMBER 20/95 – RELEASED DECEMBER 21/95

E N D O R S E M E N T

We all agree with the following. The issues raised by the applicant may be summarized as follows:

Issue 1: The inquiry officer erred in her interpretation of the following exemption sections of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. F.31: s. 12(1)(d) and 12(1)(e) [Cabinet records], s. 13(1) [advice to government], s. 19 [solicitor-client privilege]

In this court there is some uncertainty as to the correct standard of review of decisions of a Commissioner or Inquiry Officer under the Act.

Two decisions suggest the test is that of patent unreasonability [see Ontario (Attorney General) v. Hale (18 April, 1995), Toronto Doc. 462/94 at p. 5; and Toronto (City) v. Hale (25 October 1994), Toronto Doc. 665/93].

Three decisions suggest the test should be that of according a high degree of curial deference [see John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 at783; Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 at 201; and Toronto (City) v. Ontario (Information and Privacy Commissioner) (30 October 1995), Toronto Doc. 410/94].

Regardless of which test is applied we are satisfied that the applicant has failed on either standard of review and there is no reason to interfere with the interpretation given by the Inquiry Officer nor the results reached in connection with the records relating to the sections outlined above.

Issue 2: There was a denial of natural justice as the Inquiry Officer failed to consider other relevant exemptions even though such were not raised on behalf of the Ministry.

We reject submissions made on behalf of the Ministry in this respect. In connection with one of the documents [record 17] the submission related to a claim for solicitor-client privilege which was not raised until the matter reached this court. In our view there is a necessary implication that the head chose to exercise discretion against claiming an exemption when it was not claimed earlier in the proceedings.

We find no denial of natural justice in this regard.

Issue 3: There was a denial of natural justice in the manner in which the Inquiry Officer applied the "35- day time limit" policy within which the Ministry could claim discretionary exemptions.

Prior to 1993, the Privacy Commissioner became concerned with delay in providing information to requesters caused by government departments or institutions claiming discretionary exemptions after the appeal procedure was underway.

In January 1993 an information circular was distributed to all government departments advising that the Commission would permit new discretionary exemptions to be claimed only within a 35 day period after the appeal process commenced.

When the Confirmation of Appeal was issued in this matter on June 23, 1994 the Ministry involved in this matter was again advised that any discretionary exemptions could only be raised before July 29, 1994.

The Ministry provided its representations in response to the Notice of Inquiry on December 21,1994 and claimed additional discretionary exemptions for the first time.

On behalf of the Ministry it is now argued that the Inquiry Officer failed to consider the relative prejudice to the Ministry or to the requester which would be caused by the late claim and the Officer failed to hear submissions from the Ministry relating to the delay.

We do not accept that submission.

It is clear the Commission gave ample notice to the various Ministries that it would impose a time limit in connection with these matters. The Ministry in this case was clearly advised of the time limit in this specific case.

In her reasons the Inquiry Officer notes that the Ministry provided no explanation as to why it raised the additional exemptions. There was a suggestion from the Ministry that there had been a typographical error in connection with one of the records. The Officer rejected that suggestion for reasons which appear sound. The Officer also noted the Ministry having been involved in the appeal for 6 months provided no explanation as to why it failed to notice certain errors or omissions.

It appears from the reasons of the Officer that she considered the matter of delay and exercised some discretion in that regard. She did not blindly follow the 35 day limitation period.

We are satisfied the Ministry knew of the limitation period. There was an opportunity available to the Ministry to make submissions as to why late exemptions should be considered. It did not do so in any satisfactory manner.

We reject submissions there was an obligation on the Commission to again draw the limitation period to the Ministry's attention, ask the Ministry to make submissions on that point, and then consider whether it was appropriate to proceed without further submissions from other parties, or to start the whole procedure anew.

The Inquiry Officer correctly noted the purpose of the policy was to provide a "window of opportunity" to raise new discretionary exemptions without compromising the integrity of the process.

It was conceded by counsel for the Ministry that it is desirable for the Commission to issue guidelines and to control its own process in this matter. Guidelines relating to procedure are especially important in these proceedings. (see R. v. Port of London Authority, [1919] 1 K.B. 176 at 184 (U.K. C.A.)].

We do not accept submissions that there was any denial of natural justice in the manner in which the Inquiry Officer proceeded on this issue.

The Application is therefore dismissed.

Costs to the respondent Lakeport Brewing Corporation to be paid by the Ministry of Consumer and Commercial Relations fixed at $2500.

December 21, 1995 "J.W. O'BRIEN J."