Court of Queen's Bench of Alberta

Citation: University of Alberta v. Alberta (Information and Privacy Commissioner), 2011 ABQB 699

Date: 20111116
Docket: 1003 05907;1003 08133
Registry: Edmonton

In the Matter of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, as amended

And In the Matter of Order F2009-023 Issued by the Officer of the Information and Privacy Commissioner, Dated February 26, 2010

Between: Action No: 1003 05907

The Governors of the University of Alberta

Applicant

- and -

Information and Privacy Commissioner and Dr. Anton Oleynik

Respondents

- and -

Association of Academic Staff of the University of Alberta

Intervenor (proposed)

And Between: Action No: 1003 08133

Association of the Academic Staff of the University of Alberta

Applicant

- and -

Information and Privacy Commissions, The Governors of the University of Alberta and Dr. Anton Oleynik

Respondents

Memorandum of Decision of the Honourable Mr. Justice Donald Lee

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[1] Dr. Oleynik applies to admit two documents attached to a newly filed affidavit, and further applies to object to two case law authorities submitted in Supplemental Submissions by the University of Alberta.

[2] In regards to the second submission, the Authorities that Dr. Oleynik objects to are decisions by our Court of Appeal (2011 ABCA 281) and a decision by the Federal Court (2011 FC 499), both of which involved Dr. Oleynik. Unlike evidence, parties can submit whatever case law authority they choose. The University of Alberta will address in its oral arguments how it submits the Court should apply or consider this case law. The other parties can then address whether the cases in question are relevant or distinguishable. I will not pre-judge the relevance or application of these cases.

[3] In regards to the newly filed affidavit, I note that under R. 3.15(5) an affidavit may be filed to support the judicial review. First, Dr. Oleinik is a respondent in this application, and therefore his affidavit is not intended "to support the originating application for judicial review", as required by the rule. More importantly, my opinion is that the additional documents are neither relevant nor admissible in judicial review. In particular, R. 3.22 of the Alberta Rules of Court and Alberta jurisprudence limits the ability of parties to file affidavits in a judicial review.

[4] In his application, Dr. Oleynik argues that the introduction of the new documented evidence would not undermine core principles of a judicial review process in this particular case. While acknowledging that it is trite law that a judicial review proceeding is conducted on the basis of the record before the decision maker, he notes that the Federal Court has recently established that "there are exceptions, most notably when the affidavit and exhibits are produced as background information concerning the issues to be addressed in judicial review". He submits that the document under consideration provides the Court with necessary background information concerning the issues to be addressed in judicial review.

[5] One of the documents Dr. Oleynik wishes to rely on deals with SSERC funding for a conference and the alleged threat by the Minister of State for Science and Technology to withhold federal funding. This is clearly irrelevant to the issue of whether the Commissioner's decision (to find that the records Dr. Oleynik sought were within the care and control of the University of Alberta) was reasonable.

[6] The second document consists of a series to email exchanges between the SSHRC program officer and a SSHRC Adjudication committee member. He asserts that this committee member adjudicated his application for a SSHRC Standard Research grant. Some of these emails, he suggests, are highly relevant to the topics of how work in SSHRC committees is accounted by the university administration. Again, there is no relevance to this document. It was not before the Adjudicator, and therefore cannot be relevant to whether the decision was reasonable.

[7] Dr. Oleynik relies on: ***State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada***, 2010 FC 736 (CanLII) at paragraph 54, is a Federal Court decision citing another Federal Court decision (***Chopra v Canada (Treasury Board)***, 168 FTR 273) that relies on the *Federal Rules of Court*, not applicable here. Rule 312 of the *Federal Court Rules* provides:–

> 312. With leave of the Court, a party may
>
> (a) file affidavits additional to those provided for in rules 306 and 307;
>
> (b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or
>
> (c) file a supplementary record.

[8] The *Alberta Rules* do not have a similar provision. Rule 3.22 of the *Alberta Rules of Court* provides:–

> 3.22 When making a decision about an originating application for judicial review, the Court may consider the following evidence **only**:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

(Emphasis added)

[9] The Federal Court in ***State Farm Mutual Automobile Insurance Co v Canada (Privacy Commissioner)*** set out the situations in which affidavits and exhibits may be produced:–

1. Where the evidence concerns the **jurisdiction** of the decision maker or of the Federal Court itself to hear and determine the matter: In ***Re McEwen***, [1941] SCR 542 at 561-62; ***Kenbrent Holdings Ltd v Atkey*** (1995), 94 FTR 103 at para 7; or

2. Where the evidence pertains to **violations of natural justice or procedural fairness** by the decision maker: ***Abbot Laboratories Ltd v Canada (Attorney General)***, 2008 FCA 354, [2009] 3 FCR 547, [2008] FCJ No. 1580 at para. 38; ***Liidlii Kue First Nation v Canada (Attorney General)***, (2000) 187 FTR 161, [2000] FCJ No 1176 at paras 31-32; or

3. Where the evidence relates to **a constitutional issue** raised within the framework of the proceedings.

[10] There is no issue of this Court's jurisdiction, there is no allegation of procedural unfairness, and there is no constitutional issue.

[11] The test set out in ***Chopra v. Canada (Treasury Board)***, is broader than that set out in ***State Farm***. At para. 12, the Court says: –

> **Rule 312(a) of the Federal Court Rules, 1998 allows this Court to grant to a party leave to file affidavits additional to those authorized under Rules 306 and 307.** The tests for determining whether leave should be granted is whether it would serve the interest of justice, will assist the Court and will not cause serious or substantial prejudice to other parties. This Court has granted leave to file a reply affidavit where the other party could not have anticipated that the opposing party would introduce fresh evidence. In this case, the judicial review presiding judge, with the assistance of the reply affidavit and the cross-examinations, will be in a better position to determine whether or not the Associate Deputy Minister **made the right decision.**

[12] I note a number of things in regards to this decision. First, as noted the *Federal Rules of Court* are different than the *Alberta Rules of Court*. Secondly, in ***Chopra*** the decision under review was a decision by an Associate Deputy Minister. While the contents of the contested affidavit were not before the Associate Deputy Minister when he made his decision, the Court inferred that the information was already known by him when he made the decision. The affidavit, therefore, provided this information to the Court as context of what the Associate Deputy Minister would have been aware of a the time of the decision. These documents submitted by Dr. Oleynik were not before the Adjudicator, and the Adjudicator would not have been aware of this information at the time the decision was made.

[13] Further, the Federal Court decision has no binding authority on a Provincial Superior Court.

[14] Finally, Alberta jurisprudence has clearly set out a more restrictive approach to admitting new documents and evidence in a judicial review. Alberta case law clearly establishes that additional evidence is only admissible in judicial review in limited situations. Slatter J, as he then was, noted in ***Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904 at para. 40:–

> The general rule is that judicial review is conducted based on the Return filed by the tribunal. Neither Rule 406 nor Rule 753.08 require an affidavit in support. The record before the tribunal is generally the record before the Court, and additional affidavits and evidence are exceptional: ***White v. Alberta (Workers' Compensation Board Appeals Commission)***, 2006 ABQB 359, 57 Alta. L.R. (4th) 282, 41 Admin. L.R. (4th) 141, at para. 35.

[15] Slatter J then went on to note the limited instances where supplementary evidence may be allowed:–

> a. to show bias, or a reasonable apprehension of bias, if the facts in support of the allegation do not appear on the record.
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> b. to demonstrate a breach of the rules of natural justice not apparent from the record,
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> c. to address issues like standing;
>
> d. where the tribunal makes no, or an inadequate, record of its proceedings, affidavits are permissible to show what evidence was actually placed before the tribunal;

[16] Slatter J. then quoted S. Blake in *Administrative Law in Canada*, (4th ed.), at pg. 198:–

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review. It is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. **If the issue to be decided on the application involves a question of law**, **or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence**. **Evidence challenging the wisdom of the decision is not admissible**. **The tribunal's findings of fact may not be challenged with evidence that was not put before the tribunal**. **Fresh**

> **evidence, discovered since the tribunal made its decision, is not admissible on judicial review**. ... (footnotes omitted).
>
> (Emphasis added)

[17] Slatter J concluded (at para. 42) that: –

> Attempting to introduce fresh evidence respecting the merits of the challenged decision on an application for judicial review misapprehends the nature of judicial review.

[18] This general rule is necessary given the nature of judicial review. In judicial review, the tribunal's decision is not subject to appeal, but to a determination of whether the decision meets the requisite standard of review. The judge on review is looking at the tribunal's reasons to determine whether, based on the evidence before the tribunal, it reached a rational decision (reasonableness standard) or a correct decision (correctness standard). Slatter J addressed this point (at para. 43):–

> Whatever the standard of review, the review must be conducted on the record that the tribunal had...
>
> Whether there is a rational basis for the decision can only be determined by examining the evidence the tribunal had to work with: ***Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)***, *supra*, at paras 32-33; ***Alberta Union of Provincial Employees v. Alberta (Provincial Health Authorities)***, [2006] A.J. No. 1480, 2006 ABCA 356, at para. 18; ***Memorial University of Newfoundland v. Canadian Union of Public Employees, Local 1615*** (2000), 194 Nfld. & P.E.I.R. 190, at para. 9, 29 Admin. L.R. (3d) 100 at para. 63; ***CAIMAW, Local 14 v. Paccar of Canada Ltd.***, [1989] 2 S.C.R. 983, at para. 43 (Sopinka J. concurring.) ... Whether a decision is reasonable is not a search for some sort of universal truth: ***Ryan***, *supra*, at para. 51. Any tribunal or court can only work with the evidence before it, and a decision may well prove to be reasonable, even though it can arguably be shown to be factually flawed. **It follows that new evidence relating to the merits of the decision will seldom be admissible, as it is irrelevant to the issues before the court on judicial review**.
>
> (Emphasis added)

[19] Slatter J also rejected the submission that the test for new evidence in judicial review was that set out in ***R v Palmer***, [1980] 1 SCR 759. ***Palmer*** concerned fresh evidence in an appeal. He noted (at para. 44):–

> ... the analogy between the two types of proceedings [judicial review and appeal] is inapt. When an application for judicial review is brought, all of the evidence is "fresh", in the sense that there is no evidence on the record of the Court prior to

> the commencement of the application, and there is no prior record to "refresh"... It, however, confuses the entire concept of judicial review to suggest that evidence that was not before the tribunal can be brought forward on judicial review simply because it is "fresh" within the ***Palmer*** rule. Such evidence can never be "decisive" of the application, because the issues are different. The Board had to decide whether to grant a retail liquor license. The Court has to decide whether the granting of the license meets the appropriate standard of review, and complies with the rules of natural justice. The Court does not decide whether the license should have been granted, and it is not helpful to say that the new evidence will be "decisive" in this context. On the other hand, evidence might be admitted on judicial review even if it is not "decisive" of anything previously decided. For example, if subsequently obtained evidence shows a reasonable apprehension of bias, it might well be admitted on judicial review. Such evidence is not decisive of any issue that the Board has previously decided, but it is a valid ground for judicial review. I therefore conclude (contrary to my earlier assumption in ***White v. Alberta (Workers' Compensation Board)***, *supra*, at para. 34) that the Palmer test for fresh evidence on appeal has no application in this context.

[20] Similarly here, the Court is **not** to decide whether documents sought were within the custody and control of the University of Alberta; the Court's role is to determine whether the Adjudicator's decision met the requisite standard of review and complies with the principles of natural justice and the duty to be fair.

[21] Perhaps most importantly, Slatter J noted (at para 46):–

> Whenever it may be appropriate to file affidavits on judicial review applications one thing is clear: **the applicants are not entitled to turn the judicial review application in a trial *de novo* on the merits of the issue before the tribunal.** Here, the Applicants are entitled to show that the Board was incorrect, unreasonable, or patently unreasonable, depending on the ultimate standard of review that is selected. They are not however entitled to ask the Court to usurp the jurisdiction of the Board, and decide *de novo*...
>
> (Emphasis added)

[22] These issues were also considered in ***Dodd v Alberta (Registrar of Motor Vehicle Services)***, 2010 ABQB 184 where the Court noted at paras. 16 - 17:–

> The relevance of evidence on a judicial review application depends on the grounds for review that have been alleged: ***Dechant v. Law Society of Alberta***, at para. 17. For example, **where the grounds are bias or reasonable apprehension of bias, or breach of natural justice, the relevant circumstances may not appear on the record** and evidence relating to these issues will be admitted...

> Evidence is also admissible on a judicial review application **where the record of proceedings is inadequate**, in which case evidence may be admitted to **"show what evidence was actually placed before the tribunal"**:..

[23] See also ***979899 Alberta Ltd. v. Alberta***, 2008 ABQB 57 at para. 5; ***1254582 Alberta Ltd. (c.o.b. Airport Taxi Service) v. Miscellaneous Employees Teamsters, Local Union 987 of Alberta***, 2009 ABQB 127 at paras. 26 and 27; ***McClary v. Geophysical Services Inc.***, 2011 ABQB 112 at paras. 23 to 26; ***O'Malley v. Calgary Separate School District No. 1***, 2006 ABQB 126 at para. 9; and ***Czerwinski v. Mulaner***, 2007 ABQB 536 at paras. 21 and 22.

Conclusion

[24] Dr. Oleynik's application to file another affidavit with exhibits containing additional new documents is refused. The new documents do not come within the limited exceptions for the admission of additional evidence in a judicial review and are irrelevant to the issue on judicial review.

[25] While it is not necessary to decide this issue, I also question whether Dr. Oleynik, as a Respondent in the judicial review, would be entitled to file an affidavit, except in response to an admissible affidavit by the Applicant given the wording of R. 3.15(5).

Heard the 16th day of November, 2011.
Dated at the City of Edmonton, Alberta this 16th day of November, 2011.

Donald Lee
J.C.Q.B.A.

Appearances:

J. Cameron Prowse, Q.C. and Noël Papadopoulos
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for the Respondent, The Governors of the University of Alberta

Dr. Anton Oleynik
On His Own Behalf