Court of Queen's Bench of Alberta

Citation: Ingram v Alberta (Chief Medical Officer of Health), 2022 ABQB 311

Date: 20220426
Docket: 2001 14300
Registry: Calgary

Between:

Rebecca Marie Ingram, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Torry Tanner

Applicants

\- and -

Her Majesty the Queen in Right of the Province of Alberta and The Chief Medical Officer of Health

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] In the course of the cross-examination of Dr. Deena Hinshaw, Alberta's Chief Medical Officer, during the hearing of a constitutional challenge to certain orders made by Dr. Hinshaw under the *Public Health Act* with respect to the COVID-19 pandemic (the "impugned Orders"), Dr. Hinshaw was asked "can you tell us what recommendations you made to Cabinet that were either ignored or where you were given instructions opposite to your recommendations?"

[2] Counsel for the Defendants Her Majesty the Queen in right of the Province of Alberta and Dr. Hinshaw objected to the question, citing public interest immunity. Counsel for the Defendants also produced a Certificate of a Member of the Executive Council issued pursuant to section 34(4)-(5) of the *Alberta Evidence Act*, which states that Dr. Hinshaw's discussions with

Cabinet involve Cabinet's considerations in making decisions on how to respond to the COVID-19 pandemic, which involve ongoing important and significant public policy issues.

[3] Sonya Savage as Acting Minister of Justice and Solicitor Justice of Alberta therefore certified that any information that Dr. Hinshaw has on what was said by or to Cabinet members in relation to the COVID-19 pandemic and Alberta's actual or potential responses to it must be kept confidential and not disclosed.

[4] The Certificate states that:

> Disclosure of this information would be both (a) not in the public interest, and (b) prejudicial to those not involved in this litigation, as the precedential impact of being compelled to disclose confidential Cabinet discussions in this context could impede the free flow of future Cabinet discussions, thereby negatively impacting the democratic governance of the Province of Alberta.

[5] The Plaintiffs submit that public interest immunity does not apply in this instance or with respect to this question, and that the Defendants in claiming public interest immunity are attempting to use this form of privilege to shield the Alberta government from allegations of political interference with respect to decisions made under the *Public Health Act*.

[6] After hearing submissions on the issue, I proposed to counsel that I would ask Dr. Hinshaw three specific questions in a private hearing, which would enable me to address the factors relevant to balancing the public interests in confidentiality and disclosure concerning public decision-making referred to by the Supreme Court in ***British Columbia (Attorney General) v Provincial Court Judges Association of British Columbia***, 2020 SCC 20 at para 101 ("***BC Judges***").

[7] Counsel for both parties agreed to this process. Counsel for the Defendants asked that if I decide that public interest immunity did not apply, and intend to disclose the answers to the questions, I would advise them in advance so that they could consider applying for a stay from the Court of Appeal.

[8] The questions that I asked Dr. Hinshaw are as follows:

1. Did the Premier and Cabinet, including the PICC and the EMCC (the "Cabinet") ever direct you, Dr. Hinshaw, to impose more severe restrictions in your CMOH orders than you had recommended to them?

2. Did Cabinet ever direct you to impose more severe restrictions on particular groups such as churches, gyms, schools, and small businesses than you had recommended to them?

3. Did you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?

II. Analysis

1. Effect of the Certificate under Section 34(4)-(5) of the *Alberta Evidence Act*

[9] Section 34(4)-(5) of the *Alberta Evidence Act* states:

34(4) An employee shall not disclose or be compelled to disclose information obtained by the employee in the employee's official capacity if a member of the Executive Council certifies that in the member's opinion

a) it is not in the public interest to disclose that information, or

b) the information cannot be disclosed without prejudice to the interests of persons not concerned in the litigation

(5) The information certified under subsection (4) is privileged.

[10] While the Supreme Court in ***Babcock v Canada (Attorney General)***, 2002 SCC 57 at paras 19-20 stated that the common law on public interest immunity could be varied by statute, and that section 39 of the *Canada Evidence Act* did in fact modify the common law, the Defendants concede that the wording of the *Alberta Evidence Act* is different from the *Canada Evidence Act*, and that it likely does not oust the common law: ***Alberta (Environment) v Mannix***, 1981 ABCA 189. In ***Mannix***, a decision that pre-dated ***Babcock***, the Alberta Court of Appeal stated that section 34(4) merely furnished a statutory format for the taking of an objection by an employee. Thus, the Defendants take the position that section 34(4)-(5) provides a procedural mechanism for raising an objection. This decision thus proceeds on the basis on that assumption. The Court in ***Mannix*** also confirmed that the privilege bestowed by s.34(4) applied to information, not only documents: para 6.

2. Does the privilege bestowed by public interest immunity apply to the challenged question?

A. Relevance

[11] The Court at para 73 of ***BC Judges*** describes a two-stage process to determine whether a claim to public interest immunity will succeed.

[12] First, a "threshold showing" of relevance is required. Before a reviewing court can, in a case like this, question a witness with respect to a claim of public interest immunity, the party seeking an answer to the question on which such a claim has been made must first establish that there is some basis to believe the answer to the question may contain evidence that is relevant to an issue in the proceeding, evidence "that has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence": para 57, citing ***R v White***, 2011 SCC 13 at para 36.

[13] The relevance of such evidence must be tested in relation to the issues this Court must determine in the litigation before it: ***BC Judges*** at para 59.

[14] It is clear that one of the issues in this case is, if the impugned Orders are found to have violated the rights of the Plaintiffs under the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, are they nevertheless justified under section 1 of the *Charter* as being "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Important to that analysis is the question of whether the impugned Orders impaired an established right as little as reasonably possible: ***R v Oakes***, [1986[1 S.C.R. 103, as amended and expanded in subsequent decisions.

[15] The Plaintiffs also seek a declaration that the impugned Orders are *ultra vires* section 29 of the *Public Health Act*. It is an open question at this point of the proceedings whether the Plaintiffs' pleadings extend to this issue in terms of the process followed by the Chief Medical

Officer before she issued the impugned Orders, but the potential exists that evidence may be admissible and relevant on this question.

[16] While the answer to the question as posed by the Plaintiffs' counsel is too broad to pass this threshold showing of relevance, the answer to narrower and more focused questions of whether Cabinet ever directed Dr. Hinshaw to impose more severe restrictions in her Orders than she recommended, whether Cabinet had directed her to impose more severe restrictions on particular groups than she had recommended, and whether Dr. Hinshaw had ever recommended that restrictions be lifted or loosened and had that recommendation refused or ignored would be relevant to the issues before this Court. In narrowing the questions, I was cognizant of the Court's caution that judicial inspection is only appropriate where it is strictly necessary: para 72.

[17] As ***Babcock*** notes, however, something more than relevance is necessary to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of the proceeding: paras 70 and 81.

3. Exception to a Claim of Public Interest Immunity

[18] The next part of the analysis set out in ***BC Judges*** is whether the answers given by Dr. Hinshaw to the Court's questions are inadmissible in the proceeding because of a claim of public interest immunity.

[19] As noted in ***BC Judges***, public interest immunity is rooted in the principle that there is a strong public interest in maintaining the confidentiality of deliberations among ministries of the Crown: para 95, citing ***Carey v Ontario***, [1986] 2 S.C.R. 637 and ***Babcock*** at para 60. Ministers of the Crown must be free to express their views in Cabinet deliberations, free from the risk of having their public defence of the policies of the government criticized if such policies are inconsistent with their private views.

[20] The Court in ***Babcock*** noted at para 18

> If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the view of Lord Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs*, January 1976, at p. 13:
>
>> A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fullness which belong to private conversations – members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future...The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardize" another – ever compare his present contribution to the common fund of counsel with a previously expressed opinion.

> The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.

[21] However, the Supreme Court has rejected absolute Crown privilege and instead recognized a qualified public interest immunity: ***BC Judges*** at para 99, citing ***Smallwood v Sparling*** [1982] 2 S.C.R. 686 and ***Carey***. As the Court in ***BC Judges*** states, "[p]ublic interest immunity prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure:" paras 99-100.

[22] The Defendants bear the burden of establishing that the evidence should not be disclosed because of public interest immunity: ***BC Judges*** at para 102.

[23] While most of the authorities on public interest immunity arise in the context of objections to production of documents, the Supreme Court in ***Smallwood v Sparling*** [1982] 2 SCR 686 at pages 704-706 confirmed that the rule with respect to oral testimony is the same as the rule with respect to documents.

[24] The analysis of whether public interest immunity applies requires a careful balancing of the competing interests of the public interests in confidentiality and disclosure, with reference to the specific evidence in the context of the specific proceeding.

[25] ***Carey*** sets out six factors relevant to this balancing, as described at para 101 of ***BC Judges***:

(1) the level of decision-making process;
(2) the nature of the policy concerned;
(3) the particular contents of the documents;
(4) the timing of disclosure
(5) the importance of producing the documents in the interests of the administration of justice; and
(6) whether the party seeking the production of the documents alleges unconscionable behaviour on the part of the government.

[26] In this case, the first two factors weigh in favour of keeping the evidence confidential. The Alberta Cabinet decision-making process is the highest level of decision-making within the provincial executive, and the COVID-19 pandemic is an important, significant, and politically sensitive public policy issue.

[27] However, the questions posed to Dr. Hinshaw and the answers she gave do not reveal disagreements among ministers or the views of individual ministers. They do not directly reveal considerations put before Cabinet, other than to reveal whether or not Cabinet directed Dr. Hinshaw to impose limitations in the impugned Orders that were more restrictive than she had recommended. They do not reveal the specifics of her recommendations. The content of her answers thus weighs in favour of disclosure.

[28] The timing of disclosure is neutral. While measures to address the COVID-19 pandemic are ongoing, the impugned Orders have been replaced with subsequent Orders or are spent. The reasonableness of the limits imposed by these Orders is the issue before this Court, not government policy in general with respect to COVID-19. As I have noted previously, this is not a

public inquiry into the decisions or behaviours of the Alberta government during the pandemic. The questions before me are narrower.

[29] The first four factors set out in ***Carey*** relate primarily to the public interest in keeping the information confidential, while the last two relate to the public interest in disclosure. The most relevant of these in this case is the importance to the administration of justice of producing the information, the fifth factor.

[30] While the Plaintiffs submit that Cabinet is guilty of unconscionable behaviour (the sixth factor), their allegations relate to litigation strategy, and not conduct that would rise to the serious level that would justify disclosure as described in the authorities with respect to this factor.

[31] With respect to the fifth factor, a strong countervailing public interest in disclosure will usually be necessary to justify the disclosure of evidence concerning Cabinet deliberations: ***BC Judges*** at para 112.

[32] In this case, such a strong countervailing public interest exists. This is an important case involving the constitutionality of CMOH Orders that the Plaintiffs allege infringed their Charter rights. A determination of whether or not Cabinet directed Dr. Hinshaw to impose restrictions more rigorous than her recommendations or targeted more specifically on specific groups of citizens is necessary to ensure that the case can be adequately and fairly presented to ensure that this Court is able to conduct a meaningful analysis of potential Charter breaches and of the limit on rights set out in section 1 of the *Charter*.

[33] Therefore, it is not necessary for me to decide whether public interest immunity applies to protect the process of democratic governance by allowing Cabinet members to be free and candid among themselves during their deliberations. The limited nature of the questions and the fact that the answers would not disclosure “deliberations” of Cabinet or information that would offend the underlying purpose of public interest immunity – to protect the process of democratic governance are not issues that this Court is required to address in the circumstances.

[34] I find that, whether or not the evidence falls within the scope of public interest immunity, it is admissible as both relevant and necessary to fairly dispose of this case and to assist the Court in determining the facts upon which the decision in the case will depend. In the context of this specific evidence and this specific case, the public interest in disclosing Dr. Hinshaw’s answers to the questions posed by the Court outweighs the public interest in keeping the evidence confidential.

[35] The answers to the questions will therefore become part of the hearing record.

Dated at the City of Calgary, Alberta this 26th day of April, 2022.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Jeffrey R. W. Rath & Katherine Newton
for the Applicant, Rebecca Marie Ingram

Leighton Grey, QC
for the Applicants, Heights Baptist Church, Northside Baptist Church, Erin Blacklaws and Tony Tanner

Nicholas Parker, Nicholas Trofimuk & Brooklyn LeClair
for the Respondents