Citation: Dalhuisen v. Maxim's Bakery Ltd.
2002 BCSC 1146

Date: 20020802
Docket: SO12584
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CHRISTOPHER DALHUISEN BY HIS GUARDIAN AD LITEM COR DALHUISEN AS REPRESENTATIVE PLAINTIFF

PLAINTIFF

AND:

MAXIM'S BAKERY LTD.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BURNYEAT
(IN CHAMBERS)

Counsel for the Plaintiff:	D.A. Klein
Counsel for the Defendant:	L.C. Boulton
Counsel for the Provincial Health Officer:	K.L. Johnston
Date and Place of Hearing:	July 18, 2002 Vancouver, BC

[1] This is an application by the representative Plaintiff for an order directing the B.C. Centre for Disease Control (“Centre”) to provide the names and the last known addresses of those 48 people who suffered from Salmonella enteritidis infection in August and September, 2001 after eating baked products purchased from the Defendant. The action was certified as a class proceeding on April 11, 2002. On June 10, 2002, a settlement of the class proceeding was approved.

[2] Section 19 of the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 requires that notice be given to all potential class members after a proceeding has been certified. The purpose of the notice is to advise class members of their legal rights, including the right to opt out of the class proceeding or to participate in the settlement of the class action. Because a settlement has already been approved, the purpose of the notice in this case will be to provide the 48 persons with notice of the funds that will be available to them if they decide not to opt out of the class proceeding. While the names of several of those affected by the baked products produced by the Defendant are known, the remaining names and last known addresses of the potential class members are not known. The Centre has a unique knowledge of the names and last known addresses of all 48 persons and the Centre has

access to the records maintained in the Ministry of Health Client Registry database so it can also ascertain the most recent addresses of those affected. The representative Plaintiff seeks the names and addresses from the Centre so he can fulfill his obligations under s. 19 of the **Class Proceedings Act**.

[3] The application is resisted by the Provincial Health Officer ("Officer") in view of the confidentiality provisions of the ***Health Act***, R.S.B.C. 1996 c. 179 and the Health Act Communicable Disease Regulation, B.C. Reg. 4/83 and in view of the potential for erosion of public confidence in the assumed confidentiality when an individual seeks treatment for what has been defined as a communicable disease.

APPLICABLE STATUTORY PROVISIONS

[4] Salmonella is listed as a "reportable communicable disease" as defined in the Regulations. Physicians are obliged to report "reportable" communicable diseases such as salmonella to the medical health officer in their jurisdiction and that medical health officer must convey this information to the Officer and the Centre for further analysis and investigation. Section 5 of the ***Health Act*** states that the Officer must not: "...give or be compelled to give evidence in a court or proceedings of a judicial nature concerning

knowledge gained in the exercise of a power or duty under this Act."

[5] Section 6.1 of the Regulations states that information provided to a medical health officer is confidential and that: "...no person shall disclose or permit to be disclosed to any person other than the medical health officer information contained in the report or the results of an examination or test, without the written consent of the person who so volunteered."

[6] The Officer is not authorized to breach the confidentiality provisions in the Regulations and any person who contravenes the ***Act*** or the Regulations: "...commits an offence...and may be subject to a fine of not more than $200,000.00 or imprisonment for not longer than 12 months" (s. 104 of the ***Health Act***). Disclosure of confidential information gathered under the ***Act*** and the Regulations can authorize a person "who considers himself or herself aggrieved" by a violation of the ***Act*** to lay an information and commence a prosecution in respect of that violation (s. 110 of the ***Health Act***).

[7] However, the Officer can make disclosure of information otherwise protected from disclosure to the public or to an affected group of people. This arises out of s. 25(1) of the

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 ("***F.I.P.P.A.***"):

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[8] Section 33(e) of the ***F.I.P.P.A***. states:

> 33. A public body may disclose personal information only
>
> (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure,...
>
> (d) in accordance with an enactment of British Columbia or Canada that authorizes or requires its disclosure,...
>
> (e) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information ...

[9] The Officer is clearly "the head of a public body" so that the Officer is subject to the provisions of F.I.P.P.A. In this regard, the Officer has published "Guidelines on the Application of Section 6.1 of the Communicable Disease

Regulation" and makes specific reference to s. 25(1) of the ***F.I.P.P.A.***

[10] Despite ss. 25(1)(b) and 33(e) of the ***F.I.P.P.A.***, the Officer submits that the release of the information to the representative Plaintiff would be contrary to the provisions of s. 22 of the ***F.I.P.P.A.***:

> 22(1) The head of a public body must refuse to disclosure personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether...
>
> > (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,...
> >
> > (f) the personal information has been supplied in confidence,...
> >
> > (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> > (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,...

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> > (a) the third party has, in writing, consented to or requested the disclosure,
> >
> > (b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,...

[11] As no application has been made under the ***F.I.P.P.A.***, the Officer does not submit that those provisions are directly applicable to the application of the representative Plaintiff, but only that the provisions of s. 22 of the ***F.I.P.P.A.*** provide guidance relating to the public policy issues where privacy concerns are involved.

[12] In ***Dagg v. Canada*** **(Minister of Finance)**, [1997] 2 S.C.R. 403, LaForest, J. commented that the relevant provisions of the *Access to Information Act* and the *Privacy Act*:

> ...have equal status, and the courts must have regard to the purposes of both statutes in considering whether a government record constitutes "personal information".
>
> The overreaching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. (At paras. 55 and 61).

[13] I am satisfied that the requirements set out under the ***Class Proceeding Act***, the ***Health Act*** and ***F.I.P.P.A.*** must be given equal status. The clear purpose of the **Health Act** is to protect the confidence in the public that information that an individual provides to his or her physician will remain confidential. However, this assumption is always subject to the requirement that the physician must forward certain information to the local medical health officer and he or she must then convey this information to the Officer and the Centre. The **Health Act** reinforces the confidentiality of the information received by the medical health officer, the Officer and the Centre by requiring the medical health officer to keep confidential the information received (s. 6.1 of the Regulations), making the Officer non-compellable in court proceedings (s. 5 of the **Health Act**), and providing for heavy fines and potential imprisonment if the confidentiality provisions in the Regulations or the **Health Act** are contravened. However, all of those provisions are subject to the provisions under the ***F.I.P.P.A.*** and the ***Class Proceeding Act*** and equal status must be given to all three pieces of legislation. The purpose of the ***F.I.P.P.A.*** is not only to "facilitate democracy" but also to facilitate the litigation contemplated under the ***Class Proceeding Act***.

[14] I am satisfied that disclosure of the information would have been available under the ***F.I.P.P.A.*** as I am satisfied that the disclosure of the requested information is disclosure: "...for any other reason, clearly in the public interest." (s. 25(1)(b) of the ***F.I.P.P.A.***). It is in the public interest that all reasonable steps be taken to ascertain the names and last known addresses of those people who have claims available to them under the provisions of the **Class Proceeding Act**. The ***Class Proceeding Act*** promotes the consolidation of litigation so that it is not necessary for the 48 persons involved to commence separate actions. The ***Class Proceeding Act*** also enables potential plaintiffs to band together in one action where the cost of separate actions may be prohibitive and effectively unavailable to any one of the 48 persons who were affected.

[15] I am also satisfied that disclosure of the names and addresses would not be an "...unreasonable invasion of a third party's personable privacy" (s. 22(1) of the ***F.I.P.P.A.***) or that the provision of the information by the Officer would "...unfairly damage the reputation of the person referred to" (s. 22(2)(h) of the ***F.I.P.P.A.***). The settlement which has been reached sees the Defendant paying: (a) a lump sum of $3,750.00 and reimbursement for all reasonable and documented

special expenses to those who were infected with salmonella but who were not admitted to hospital; (b) the payment of the greater of $6,500.00 plus $600.00 for each day or part day spent in hospital or $10,000.00 to those members of the class who were admitted to hospital for a period of less than 30 days; or (c) the payment of a mediated amount to those not falling within the previous categories and who can provide medically supported evidence of continuing symptoms relating to the salmonella infection.

[16] In those circumstances, it can hardly be said that disclosure would be an unreasonable invasion of the third party's personal privacy. The representative Plaintiff only desires the information in order to educate the 48 people involved as to the funds that are waiting for them providing they do not opt out of the proceeding.

[17] As well, it can hardly be said that there would be a risk of unfairly damaging the reputation of the 48 persons referred to. There is no social stigma attached to having been infected by salmonella and it is not a medical condition which can be passed on by those who were infected by it.

[18] In the circumstances, I am satisfied that the provisions of s. 33(e) of the ***F.I.P.P.A.*** would apply so that the Officer

and the Centre would be subject to any Order made by this Court.

[19] As well, the order that is sought by the representative Plaintiff is consistent with orders of a similar nature granted in other class proceedings. In ***Bisignano v. La Corporation Instrumentarium Inc.***, November 19, 1996, Ontario 22404 (Ont. Gen. Div.), Winkler J. made an order requiring that various Ontario hospitals provide counsel for the representative Plaintiff with the names and last known addresses of class members. That Order states:

> ON CONSIDERING THAT the public and private interest in the confidentiality of patient information is well recognized by statute and common law; however, having heard full submissions, on the facts of this case, there is an overwhelming reason to order that the institutions obtain and provide the information requested, which information is limited to the patient's names and last known addresses and is being provided to further the patients' interests.

[20] In parallel proceedings commenced in British Columbia, Brenner J., as he then was, granted a May 21, 1997 Order in ***Sawatzky v. Societe Chirurgicale Instrumentarium Inc.***, Supreme Court of British Columbia Action Number C954740 (Vancouver Registry), directing several physicians to provide counsel for the representative Plaintiff with the names and last known

addresses of potential class members. The eleven doctors were subject to this Order:

> THIS COURT ORDERS that the following British Columbia surgeons known to have been involved in the purchase, implantation or removal of Vitek TMJ Implants provide to counsel for the plaintiff the names and last known addresses of all persons surgically implanted with one or more Vitek TMJ Implant...

[21] The learned authors of Privacy Law in Canada (Ontario: Butterworths, 2001) state:

> Of course, it would not make sense for the confidentiality of personal health information to be universally protected. In some situations, the interest of the individual may actually favour limited disclosure of personal health information...Establishing the appropriate exceptions to an obligation of confidentiality for personal health information usually involves balancing the privacy interests of the individual, which favour protection of the information, against other legitimate interests that favour some form of disclosure. The balancing process is the function of the legislature when it gives confidentiality a statutory basis, or of the courts when the limits of confidentiality are left to be developed by the judiciary.

[22] In **People First of Ontario v. Porter Regional Coroner Niagara** (1992) 5 O.R. (3d) 609 (Ont. G.D.), reversed, (1992) 6 O.R. (3d) 289 (Ont. C.A.), the Divisional Court reviewed a coroner’s decision to refuse access to confidential medical files to an interest group which had been granted standing at

an inquest dealing with the deaths of 15 children at an institution providing nursing and programs for children who were developmentally handicapped. In upholding the decision of the coroner to refuse disclosure, the Court noted that:

> The disclosure of medical records must be examined in the context of the strong public and individual interest in the privacy of personal medical information. It is hardly necessary, to quote legal authority, to establish that privacy and confidentiality of personal health information is a fundamental social and legal value in our community, a value of the highest level that deserves to be recognized and protected. (at p. 631). The privacy of those medical records should only be violated to the extent that it is essential to fulfill the public function of the inquest. (at p. 632). The law is designed to afford protection against the personal anguish and loss of dignity that may result from having the intimate details of one's private life publicly disclosed. The information contained in the medical records was compiled in circumstances giving rise to the highest expectation of confidentiality which deserves to be zealously guarded in the interest not only of the persons who are the subject of the information but also in the interest of promoting trust and confidence of the public in the administration of medical facilities. (at p. 632). It is a matter of individual judgment in each case, and in respect of each part of each private health record, whether the relevance of that information and the public interest in its disclosure outweighs the general public and individual interest in privacy. (at p. 632).

[23] The decision was overturned by the Court of Appeal who held that proper participation at the coroner's inquest was not possible without disclosure of the records: "The failure of the coroner to give the medical records to the applicants

prevented them from participating as they were entitled to in the inquest and the coroner lost jurisdiction in so doing." (at p. 292). While the General Division makes a strong statement about the policy considerations concerning the disclosure of confidential medical records, the Ontario Court of Appeal held that the records should be disclosed by the coroner. I have reached a similar conclusion here.

[24] I am satisfied that the trust and confidence of the public in the administration of the health system will not be eroded in any way by the provision of this information by the Officer. It is in the interests of the 48 individuals that the information be forthcoming. It is also in the public interest that the information should be disclosed as it is in the public interest that the efficiencies and economies encouraged by the **Class Proceeding Act** be fully and effectively available.

[25] I order that the Officer provide the names of the 48 individuals and access the records maintained in the Ministry of Health Client Registry database to also provide the most recent addresses of those affected by the purchase of the baked products of the Defendant. The Officer will be entitled to his reasonable expenses associated with providing this information subject to those expenses being no greater than

$250.00. The parties will bear their own costs relating to this application.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat