IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *H.M.* v. *Porter Creek Secondary School,* 2007 YKSC 50

Date: 20071001
S.C. No. 07-A0071
Registry: Whitehorse

Between:

H.M., Guardian Ad Litem of S.M.

Petitioner

And

**PORTER CREEK SECONDARY SCHOOL
PORTER CREEK SECONDARY SCHOOL COUNCIL and
YUKON HUMAN RIGHTS COMMISSION**

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Sharleen Dumont	Counsel for the petitioner
Penelope Gawn	Counsel for the respondent Porter Creek Secondary School
Richard Buchan	Counsel for the respondent Porter Creek Secondary School Council

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by a high school student and her mother for an interim injunction prohibiting Porter Creek Secondary School from introducing a drug detection dog into the school on a daily basis. The student has a serious allergy to animals and dogs. The high school wanted to introduce the dog in the 2006 – 2007 school year. The school voluntarily delayed the introduction of the dog when the student's mother filed a

Human Rights complaint with the Yukon Human Rights Commission on August 17, 2006. The Commission dismissed the complaint on August 24, 2007, with written reasons dated September 7, 2007. The student and her mother have applied for judicial review of the decision and seek an interim injunction prohibiting the introduction of the drug detection dog until the judicial review and possible hearing by a Board of Adjudication are concluded.

BACKGROUND

[2] The Porter Creek Secondary School Council has been concerned about drug and alcohol abuse for several years. The student population is approximately 750, covering Grades 8 to 12. There is not a great dispute about the seriousness of the drug problem and the need of a drug awareness and counselling program. An Unscientific Substance Abuse Survey conducted in 2006 indicated that of the 450 students surveyed, almost half have tried or used cannabis and the use increases in each grade until it plateaus in Grades 11 and 12. Concerns range from students being stoned in class to drug abuse and trafficking in and around school premises.

[3] The School Council has not found drug awareness and drug counselling programs to be effective. The school principal confirms that the school has been battling the use and sale of drugs on its property for several years without success. He expressed concern that student use of drugs leads to severe addictions, interferes with learning and subjects other students to undue peer pressure to take up drug use. The School Council is particularly concerned with the impact of drug use on the 100 to 150 new Grade 8 students that enter the school each September.

[4] The School Council became interested in the Canines for Safer Schools program that has apparently had some success in Alberta. A drug education coordinator was brought to Yukon in April 2006 to introduce the program to the School Council, parents, teachers and the Department of Education. A second community presentation was made on November 16, 2006. The School Council, parents and the principal were impressed with the use of a drug detection dog as part of the educational component of the program and the potential deterrent effect on the presence of drugs and drug trafficking on the school premises. I note that the applicant was advised in advance of the presence of the dog for these presentations and she chose to stay home to avoid the dog.

[5] The drug detector dog is not an aggressive search dog. It is not trained to search people. Contact between the dog and a student is only initiated by the student. The dog signals the location of drugs by sitting down. The dog's role is two fold. It serves as a deterrent to students through demonstrations of its drug detection capability. It also provides high visibility to the drug awareness program and a contact point as the dog accompanies the counsellor around the school and its grounds. Previous experience indicates that the program significantly reduces drug suspensions.

[6] The School Council has obtained funding from the Government of Yukon to introduce the program. It has entered into a three-year contract with a drug awareness counsellor which includes having a drug detection dog on the school premises on a daily basis. The School Council postponed the introduction of the drug detection dog in the 2006 – 2007 school year because of the Human Rights Act complaint by the student's mother on August 17, 2006. The School Council and administration planned to

introduce the dog for the 2007 – 2008 school year. The drug education coordinator has been hired and moved to Whitehorse with his dog.

[7] The Human Rights Commission hired an investigator who conducted a very thorough investigation. The Investigation Report was completed on June 15, 2007. Written responses were received from the lawyer for the School and the lawyer for the complainant. On August 24, 2007, four Commissioners decided that there was no reasonable basis to take the complaint forward and dismissed the complaint. Written reasons were provided on September 7, 2007. The school principal gave notice to the student and her mother that the dog would not be brought into the school until October 1, 2007, to accommodate the hearing of this application on September 28, 2007.

[8] The applicant student has a serious allergy to animals including dogs. Her reactions on exposure range from itchy skin to facial swelling. She has developed hives and throat swelling. Her most recent experience of a puppy brushing against her leg caused hives and swelling of her tongue and lips.

[9] Three local doctors have been consulted. Dr. Bousquet, her family doctor confirms her allergies to cats and dogs for many years. He has prescribed an EpiPen kit which she carries at all times. He confirms that avoidance is the mainstay of management. Dr. Reddoch, on referral from Dr. Bousquet, reported in 1998 that she has a strong clinical history of animal allergy to cats and dogs. He did not feel it necessary to perform skin testing at that time, as it would not change the recommended therapy of avoidance.

[10] The Human Rights Commission requested a report from Dr. Grueger. She reviewed the medical records and consulted medical literature. Although there was no documented acute allergic reaction after her exposure to dogs, Dr. Grueger stated it was impossible “to predict the likelihood of a severe allergic reaction.” She agreed with the treating doctors that the only effective way to eliminate an allergic reaction is complete avoidance. However, she advised that allergic triggers can be present in an environment where people who interact with animals carry the allergen on their person or clothing.

[11] The School Council and administration are very aware of the applicant’s allergy and will take all necessary steps to avoid the applicant having any direct contact with the dog. They have made the following accommodation:

- Reducing exposure to allergens;
- Select a short haired, low allergen breed;
- Rigorous dog grooming schedule including weekly bathing, preferably Sunday evening;
- Daily cleaning of school floors, halls, etc. note that very few areas of school are carpeted and a high degree of cleanliness can be maintained;
- Keep dog on leash at all times and manage its movement within the school;
- Avoid direct contact with students with allergy concerns by keeping dog away from the classrooms or section of the school where allergic students are studying;
- Kennel the dog in one, known and avoidable location in the school;

- Maintain highest standards of cleanliness in kennel area;
- Allergy intervention;
- The school will continue to maintain a file of up to date allergy interventions, eg. Epi-pens, emergency medical and family contacts, etc, as provided by their care givers, in the front office;
- The school and Department of Education will ensure an adequate number and level of training for first aid responders;
- The appropriate staff will be well versed in the recognition of the signs and the treatment of any reactions;
- An emergency response protocol for medical emergencies will be implemented and specifically address allergy response.

[12] Dr. Grueger confirms that these steps will decrease the risk of a reaction to canine allergens. However, she is clear that they will not eliminate the risk as that can only be achieved by complete avoidance. She also adds that high-efficiency particulate air filters could further decrease the risk of exposure.

[13] In her complaint to the Human Rights Commission, the mother proposed bringing the dog in for occasional searches as opposed to being on site on a daily basis, thereby permitting her daughter to stay away from school on those occasions.

[14] If the dog is permitted to be at the school on a daily basis, the applicant will leave the school as she is not prepared to take any risk of an acute allergic reaction either from inadvertent contact with the dog or contact with other students who handle the

dog. She has been in the school since Grade 8 and does not wish to leave. The school does not wish her to leave.

THE INTERIM INJUNCTION

[15] The three-stage test for interim injunction relief is well established in the *RJR – Macdonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, which I will refer to as the *RJR – Macdonald* case. It is set out at para. 43:

1. there must be a serious question to be tried;
2. the applicant must suffer irreparable harm if the application were refused;
3. the balance of convenience must be considered. This involves an assessment of which of the parties suffer greater harm from the granting or refusal of the remedy pending a decision on the merits of the case.

[16] I will briefly discuss the law as it relates to each test and apply the law to the facts of this case.

The Strength of the Petitioner's Case

[17] The *RJR – Macdonald* case (para. 44) states that the applicant does not have to establish a strong *prima facie* case but rather that the claim is not a frivolous or vexatious one. There must be a serious question to decide.

[18] The Supreme Court of Canada states that the threshold to meet the "serious question" test is a low one (*RJR – Macdonald* para. 49) and a prolonged examination of the merits is neither necessary nor desirable (para. 50).

[19] The Supreme Court also rejected the view that once there was a decision on the merits, the burden on the applicant increases. Thus, there is not a heavier burden on the applicant because the Human Rights Commission has dismissed her complaint.

[20] Although the case before me is not a statutory appeal but rather a judicial review of the decision of the Commission, I am satisfied that it is not frivolous. The Investigation Report gives a thorough review of the evidence and the issues. The decision of the Commissioners repeats the issues and evidence but gives no explicit reasons for the dismissal of the complaint except to say “there is not a reasonable basis in the evidence to take the complaint forward”.

[21] As stated earlier, the threshold is a low one and I am satisfied that the first stage has been met.

Irreparable Harm

[22] The second test is whether the applicant will suffer irreparable harm if the injunction is not granted and the dog is allowed to enter the school. Much has been written on the subject of irreparable harm and yet it remains as a somewhat elusive concept that is difficult to apply to the myriad of factual situations that arise.

[23] It is most often applied in private law disputes between two parties. The Supreme Court in *RJR – Macdonald* (para. 59) gave this helpful statement:

> “Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …”

[24] The *RJR – Macdonald* case was an application by a tobacco company to not have tobacco advertising regulations apply until the Supreme Court of Canada

determined that the regulations were constitutionally valid. The Supreme Court ultimately dismissed the stay application on the ground that the public interest in health overwhelmingly outweighed the irreparable harm to the tobacco company.

[25] The Court stated at para. 60:

> "The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases."

[26] Similarly, the issue in this case is not so much an issue of financial damage as the question of the rights of a person with a disability and the accommodation that should be made.

[27] Counsel for the applicant does not characterize the issue of irreparable harm based on the negative health consequences that might flow from an allergic reaction to the presence of the drug detection dog in the school. Rather, the claim is based upon the fact that she will have no choice but to leave the high school and pursue her education elsewhere.

[28] Arguably, the case is not one of irreparable harm in the sense that she is being denied a right to an education. However, because it is both the loss of her choice of school and potentially the denial of accommodation of a disability, in my view it meets the test for irreparable harm.

[29] There is no obligation on the school to show irreparable harm at this stage (see *RJR – Macdonald,* para. 57).

The Balance of Convenience

[30] The third test is where most interlocutory proceedings are determined. The following factors set out in *Canadian Broadcasting Corporation* v. *CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96, at para. 23, are often cited for consideration:

> "… the adequacy of damages as a remedy for the applicants if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience."

[31] There are numerous factors that may be considered in assessing the balance of convenience and they will vary with each case (*RJR – Macdonald,* para. 63).

[32] There are some cases where the strength of the applicant's case is so overwhelming or strong that it favours the granting of the injunction. I do not find this to be such a case as there was very little in the record or submissions before me to reach such a conclusion.

[33] Conversely, there is no question that the status quo is being changed by the School Council. Arguably, educators are always changing the status quo as the methods of delivering education are constantly changing and hopefully improving. However, the introduction of a drug detection dog is a dramatic change in comparison to the expected changes in program delivery.

[34] The overriding issue in this case is the public interest and that is not a simple matter of numbers such that one person must always give way to the majority. There

are appropriate cases where the majority must accommodate the individual or smaller groups. That is the very essence of the *Yukon Human Rights Act*, whose object is to prevent the unfair treatment of any individual or group.

[35] The Supreme Court put it this way in *RJR – Macdonald* (para. 66):

> "… Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant of the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups."

[36] But there is a difference in the onus on a private applicant as opposed to a public authority such as a school or school council. The private applicant must convince the court of the public benefits that will flow from granting the injunction (*RJR – Macdonald,* para. 68).

[37] The onus is different for the school as set out in para. 71 of *RJR – Macdonald*:

> "… In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

[38] Thus, the applicant must show the public interest benefit of granting the injunction but the school is not required to demonstrate that actual irreparable harm would result if the injunction were granted.

[39] In this case, the status quo has been voluntarily preserved for one year by the school refraining from introducing the drug detection dog. This has allowed the Human Rights Commission to investigate and decide to dismiss the complaint. This application for an interim injunction is open-ended in the sense that the judicial review proceeding must be concluded as well as any resulting human rights adjudication. That process could go on indefinitely.

CONCLUSION

[40] I have no doubt that introducing the dog will result in considerable inconvenience to the applicant. I do not fault the applicant for choosing to leave the school as that is ultimately the safest course of action agreed upon by all the doctors. The case also raises human rights issues that transcend the private interests of the applicant. On the other hand, the School Council and the school administration have been working for years to effectively address the drug problem at the Porter Creek Secondary School. Their motives have not been challenged in any way. They are seeking to introduce a program that will address the social and educational environment of the school in a positive way and in the best interests of the students and the community. The program is funded and supported by the Department of Education.

[41] The remarks of Cory J., in *R.* v. *M.R.M.*, [1998] 3 S.C.R. 393, at para. 1, are worth repeating:

> "Teachers and those in charge of our schools are entrusted with the care and education of our children. It is difficult to imagine a more important trust or duty. To ensure the safety of the students and to provide them with the orderly environment so necessary to encourage learning, reasonable rules of conduct must be in place and enforced at schools. …"

[42] There is no need to demonstrate that it is an emergency or provide actual evidence of irreparable harm. It is a program for the improvement of drug education and the education environment of the Porter Creek Secondary School.

[43] I conclude that the balance of convenience weighs in favour of the School Council and Porter Creek Secondary School proceeding to introduce the drug detection dog pending the resolution of this dispute. The public interest in pursuing an effective drug counselling program and a drug-free environment for an educational institution should prevail in this interim injunction application.

[44] I dismiss the application to restrain the introduction of the drug detection dog. The Court will assist the petitioner to have a timely hearing on the merits.

VEALE J.