

Finding of the Review Board

Number: 902573-A
Date: January 7, 1992
Panel: Clinton W. Foote, Guy W. Downie, Kevin G. Johnson
Subject: Media Application for Access to Review Board Hearings

Pacific Press Ltd. applied for itself as a media component on behalf of the public to have access to a particular proceeding of the Review Board. The application was also intended to approve access to Review Board proceedings in general. The proceeding in which the application was made involves an appeal by a worker from a decision of the Workers' Compensation Board denying the worker suffered personal injury, including post-traumatic stress disorder, arising out of and in the course of his employment as a prison guard for the Province of British Columbia. The worker supported the application of Pacific Press. The employer opposed media or public access to the Review Board proceeding. At the time of the application the Review Board had a policy against its proceedings being open to the media or public, on the basis that Section 95 of the *Workers Compensation Act* requires confidentiality for the parties to the appeal. Pacific Press Ltd. alleged a *right* to access under the *Canadian Charter of Rights and Freedoms* or in the alternative a right that may be restricted only with justification in a particular case.

Background

Fundamentally courts of law must conduct their proceedings openly. The court may hear matters in camera in certain narrowly defined instances where it appears justice cannot be administered otherwise. The Review Board is not a court [*Levey v. Friedman* (1983) 63 B.C.L.R. 229]. It is a quasijudicial body exercising a judicial function. The Review Board is an administrative tribunal deriving its authority from the *Workers Compensation Act* and must carry out its mandate in accordance with that *Act* and the general law.

At common law, tribunals such as the Review Board are generally regarded as masters of their own procedure, in the absence of statutory provision limiting this authority. The principle is embodied in Section 89(6) of the *Workers Compensation Act* stating:

Subject to any regulations made under subsection (5), the review board may conduct an appeal in the manner it considers necessary, and it is not required to hold an oral hearing.

Implicit in this principle is the right of the tribunal to determine whether its proceedings will be open or closed (Re *Millward* [(1974) 49 D.L.R. (3d) 295]; Re *Penner* [(1974) 46 D.L.R. (3d) 222]; Re *Legal Professions Act* (B.C.) [[1945] 4 D.L.R. 702]. There is no statutory or regulatory provision limiting the Review Board authority to be master of its own procedure.

Review Board policy is only guidance to the panels hearing individual appeals. It is desirable for the Review Board to have policies and publish them for reasonable consistency, but the policies do not have the force of regulation or law and cannot fetter the discretion and responsibility of the panels to decide cases in accordance with law.

Section 95 of the *Workers Compensation Act* does not apply to prevent access of the media or public to Review Board proceedings.

Upon application, Review Board panels should in each case reasonably, honestly and fairly consider whether and if so to what extent the media or public may have access to the proceeding.

Anyone having an interest in the proceeding, including Pacific Press in this case, may apply to the panel for access in general or in particular.

Factors for the panel to consider on the issue of access include the interests of the worker for privacy, the interests of the employer for secrecy, the interests of third parties such as witnesses for privacy and the interests of the public for the attainment of justice.

The panel in exercising its authority must act in accordance with the general law, including the considerations of any legal principles and rights that may flow from the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

Section 2(b) of the *Charter* states:

Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Most of the court cases interpreting the *Charter* provision guaranteeing the right of freedom of the press and media deal with legislative provision limiting access to court proceedings and find these provisions unlawful as unconstitutional. Such cases resolve that:

- a) freedom of the press is included in the pre-existing right of the public to have access to the courts;

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- b) the right of the press to have access to the courts is not independent of, or greater than, the right of the public on which it is based;
 - c) the *Charter* reference to freedom of the press does not confer any right on the public to access to proceedings that it did not otherwise have.

These cases, dealing with statutory provisions limiting access of the press or public to the court, do not directly apply to the proceedings of the Review Board which is not a court and has no legislative provision providing or limiting access. In respect of the Review Board, there is no law to be struck down for contravention of the *Charter*.

In *Southam Inc. et al. v. Ministry of Employment and Immigration* [[1987] 3 F.C. 329] Justice Rouleau in the Federal Court ruled that an order of the chief of adjudicators under the *Canada Immigration Act*, forbidding media access to detention review hearings unless its migrant consented, offended the *Charter* freedoms of the media and was unlawful. Without referring to the contrary comment in the *Edmonton Journal* case [(1989) 64 D.L.R. (4th) 577], Justice Rouleau assumed that the rule of openness applicable to the courts should apply to administrative tribunals exercising judicial or quasijudicial function.

The panel chose not to follow Rouleau's reasoning. Before the *Charter* the law did not require for administrative tribunals the same openness as applied to courts, even though the administrative tribunal may exercise a judicial or quasijudicial function. The *Charter* does not afford the media or public any greater right than existed before the *Charter*. Therefore the right of the media or public to attend a Review Board hearing is at the discretion of the panel after weighing the relevant factors. The panel finds the evidence to date in this appeal does not warrant the proceedings being closed to Pacific Press Ltd. The panel finds nothing in the interests of the worker, the employer, third parties and the public to require the proceedings be closed to the media or public. It is in the interests of the public that the proceeding be open. As the proceeding progresses a case for closure in whole or in part may be made. When and if this arises, the panel will consider the matter again.

THE PANEL WILL ADMIT PACIFIC PRESS LTD. TO THE PROCEEDING.

