

Re
Doctors Hospital and Minister of Health et al.

[1976] O.J. No. 2098

12 O.R. (2d) 164

68 D.L.R. (3d) 220

1 C.P.C. 232 p

Ontario
High Court of Justice
Divisional Court
Keith, Cory

and Donnelly, JJ.

May 17, 1976

D.J. Wright, Q.C., and W.S. Seyffert, for Doctors Hospital.

J.E. Sexton and J. Rook, for Durham Memorial Hospital.

P.A. Sigurdson and A.E. Golden, for Clinton Public Hospital.

P.T. Fallis, for Chesley and District Memorial Hospital.

Douglas K. Laidlaw, Q.C., and J.A. Keefe, for Drs. Markus, Soremenkun and Wise.

Julian Polika, for all respondents.

The following judgments were delivered orally:

1 KEITH, J.:-- In the matter of the applications of Doctors Hospital, Durham Memorial Hospital, Clinton Public Hospital, Chesley & District Memorial Hospital and Dr. Markus and others, Mr. Justice Cory will deliver his judgment in which my brother Donnelly and I concur without modification.

2 CORY, J.:-- At the outset, we would like to express our thanks to all counsel. They could not have been more helpful in this important and difficult matter.

3 In the light of the obvious urgency of the situation, we are giving oral reasons that may not be as complete as we would otherwise desire.

4 There are five applications before us, four on behalf of hospitals, Doctors Hospital, Durham Memorial Hospital, Clinton Public Hospital, Chesley and District Memorial Hospital, and one on behalf of Drs. Markus, Soremenkun and Wise, who are on the staff of Doctors Hospital. We will have more to say later with regard to the locus standi or status of the doctors to bring their application. Although the relief sought by the doctors is somewhat different from that sought by the hospitals, it is sufficient to say for our present purposes, that their application stands or falls with that of Doctors Hospital.

5 The hospitals, in varying forms, seek a declaratory order that the decisions of the Minister of Health and the Lieutenant-Governor in Council to revoke the approval of the hospitals as public hospitals, were made without jurisdiction, are invalid and should be revoked.

6 Although each of the hospitals has a different history, all are public hospitals under the Public Hospitals Act, R.S.O. 1970, c. 378, and all are corporations without share capital. None of the hospitals is in breach of any of its obligations under the Public Hospitals Act, nor do they fall below any requisite standards. In fact, the material before us indicates that they have operated in an efficient and competent manner. There has been no criticism by the Ministry of Health of the quality of care provided by the applicant hospitals.

7 In the fall of 1975, the Government of the Province of Ontario determined that in order to reduce the funds expended for hospital care, it would close certain hospitals. The difficult and agonizing decision as to which hospitals were to be closed fell to the Minister of Health who selected the applicant hospitals, among others. With commendable courage, the Minister personally attended at the hospitals to advise them of the decision and told them quite candidly, that the decision was based upon the need to reduce expenditures, that is to say, it was for financial reasons that the hospitals must close.

8 In each case, the attendance of the Minister was followed by correspondence, and culminated in an Order in Council. There are, of course, variations in the dates of attendance upon and correspondence to the hospitals, but there are as well similarities in both the contents and dates of some of the correspondence. Further, for our purposes, the Orders in Council revoking approval as public hospitals and the concomitant Orders in Council flowing from that first order, are identical. Perhaps reference to the correspondence with the Doctors Hospital and Durham Memorial Hospital will be sufficiently illustrative.

[...]

42 Would it make any difference if in the Multi-Malls case, instead of the words "Minister may" the words were the "Lieutenant-Governor in Council may" or if, in our case, instead of the words "Lieutenant-Governor in Council may" the words were "Minister may". We think not. The issue to be determined is whether the Minister or Lieutenant-Governor in Council is exercising a royal prerogative which is not, per se, subject to Court review, or whether the act or acts are done pursuant to the exercise of a statutory power and thus subject to Court review. In *Border Cities Press Club v. A.-G. Ont.*, [1955] O.R. 14 at p. 19, [1955] 1 D.L.R. 404 at p. 412, Chief Justice Pickup said:

In exercising the power referred to, the Lieutenant-Governor in council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by

statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

43 It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute pursuant to which it acts is objectionable and subject to review by the Courts.

44 In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689 at p. 705, Mr. Justice Rand said:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

45 In the absence of clear words in the statute, the discretion granted to the Lieutenant-Governor in Council could only be used to pursue the policy and objects of the act, which are to be determined according to the standard canons of construction and to that extent, at least, reviewable by the Courts. That we take to be the view of Mr. Justice Lacourciere expressed in *Multi-Malls* at p. 18 of his reasons, where he in turn was relying upon and to a certain extent interpreting the speech of Lord Reid in *Padfield et al. v. Minister of Agriculture, Fisheries & Food et al.*, [1968] A.C. 997. At p. 1030, Lord Reid stated:

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision -- either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act: the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

46 We have then determined from a review of the Public Hospitals Act and its history that it is regulatory in nature. Section 4(5) was not designed or intended to be used as a means of closing hospitals for financial or budgetary considerations.

47 It was apparent from the material before us, that the decision of the Lieutenant-Governor in Council to revoke the approval of the hospitals was based upon financial consideration. The Lieutenant-Governor in Council was acting, not pursuant to royal prerogative, but by the statutory authority contained in s. 4(5) of the Public Hospitals Act.

48 We repeat and emphasize that the Court would not and could not, per se, review a decision made pursuant to royal prerogative. However, in the absence of clear words to the contrary in the Act in question, the Court can review the decision of the Lieutenant-Governor in Council to ensure that the discretion to revoke had only been exercised in pursuance of the objects and policy of the Act.

49 Since the Lieutenant-Governor in Council in its decision took into account financial considerations, it considered extraneous matters that were beyond the objects and policy of the Public Hospitals Act.

50 As a result of the foregoing conclusions, it is not necessary for us to deal with the issue as to whether there is a right to a hearing or whether the request by the Minister that the hospitals submit briefs satisfied that requirement, nor do we need to express any opinion as to any of the other grounds of attack raised by the applicants.

[...]

59 The reasoning in that case is, we believe, appropriate and applicable in this matter.

60 There will, therefore, be a declaration that the Orders in Council revoking the approval of the applicant hospitals and all Orders in Council resulting from and concomitant to such Orders in Council revoking approval, are invalid.

61 The costs of all parties including those of the doctors, will be paid by the respondent Attorney-General.

Application granted.