COURT FILE NO.: 485/04
DATE: 20061030

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Rita Reynolds Applicant

- and -

Robert Binstock, Registrar
Information and Privacy Commissioner/Ontario
Respondent

HEARD: October 27, 28; December 19; 2005; January 12; March 27; 2006

BEFORE: Lane, Greer and Epstein JJ.

COUNSEL: Applicant in person.

William S. Challis, for the Respondent.

REASONS FOR JUDGMENT

LANE J.:

[1] The applicant seeks to quash two decisions of the Information and Privacy Commissioner ("Commissioner") in which the Commissioner dismissed the applicant's complaints that her privacy had been unlawfully invaded by the publication of personal information about her in the report of the Hon. Coulter Osborne entitled Union Station Review, published May 22, 2003, contrary to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*[1] ("MFIPPA"). The applicant contends that the Commissioner has a statutory duty to investigate and report on complaints by citizens of breaches of privacy rights under MFIPPA and acted unreasonably and with bias in refusing to do so in her case. She asks that the decisions be quashed and the Commissioner be directed to investigate and make her findings public.

[1] R.S.O 1990, c. M.56.

[2] The respondent contends that the Commissioner has no statutory duty to investigate complaints of breaches of the privacy provisions of MFIPPA, in contrast to the Commissioner's adjudicative role in dealing with appeals from denial to access to records. This is so, it is said, because the role of the Commissioner in privacy matters is not adjudicative but advisory. She receives complaints as to the privacy provisions of MFIPPA as part of her function of advising the Legislature on the functioning of the privacy provisions of that Act. Because the Commissioner is carrying out her legislative advisory duties and not adjudicative ones, the respondent contends that these decisions are not subject to judicial review. In the alternative, the Commissioner contends that she made no error in reaching these decisions.

[3] This application was heard with two others arising out of the same background[2], the act of the City in engaging Mr. Osborne in February 2003 to inquire into the process the City adopted to develop the Request for Proposals, evaluate the submissions and select the preferred proponent to carry forward the redevelopment of the Union Station. He was to report directly to Council. As part of his mandate, he was to consult, and did consult, with the applicant on the specific issue of the disclosure of the evaluation scoring spreadsheets. On May 23, 2003, his report was presented to Council and published by it on the City website. Each of the applicants complained of personal references in the report and Mr. David sought to obtain Mr. Osborne's notes and records. Each application is the subject of its own reasons, but they are clearly related.

[4] In February 2003, the present applicant was the Director of Corporate Access and Privacy for the City, a position she had held for some dozen years. She had almost nothing to do with the Union Station matter until a request was received for disclosure of the scoring sheets used by the team evaluating the two proposals. She obtained the file and found some documents were missing; only a single spreadsheet was there. It showed that one evaluator had given three scores of zero to one of the proponents. She and the City Solicitor disagreed on whether to disclose the one spreadsheet. This disagreement was unresolved when Mr. Osborne was appointed and he was asked to resolve the issue.

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[2] The others are Div. Ct. file 494/04, Lawrence David v. Robert Binstock (Registrar I.P.C.O.), and Div. Ct. file 24/05, Lawrence David v. Donald Hale, Adjudicator, I.P.C.O., City of Toronto and Coulter A. Osborne

[5] The applicant met twice with Mr. Osborne, primarily as to the question of disclosure of the individual scoring spreadsheets used in the evaluation process, but other matters were discussed. On reading the report, the applicant saw that it contained what she regarded as highly sensitive personal information about her, contrary to the provisions of MFIPPA. She wrote to the City and to Mr. Osborne requesting that the report be removed from the internet for this reason. She gave a detailed critique of the report and what she regarded as errors in it. Of great importance was the suggestion in the report that she, as Director, had suggested that the Manager in her department who had discarded the evaluation worksheets had done so to avoid disclosure of them pursuant to Mr. Lawrence David's request for them under MFIPPA. The applicant denied the allegation and stated that no such contact had taken place. A few days after sending this letter, the applicant's employment with the City was abruptly terminated.

[6] The applicant wrote to the Commissioner on June 28, 2003, complaining that the City had contravened the privacy sections of MFIPPA. She stated in her letter that Council did not authorize Mr. Osborne to evaluate her performance as Director, her emotional state, her fairness and efficiency in handling decisions as to access to City documents or her professionalism. She cited specific breaches of section 28(2), unauthorized collection of personal information; section 29(2), failure to give notice of collection; section 32, improper disclosure, and more. The commission assigned the complaint file number MC-030029-1 (hereinafter "complaint 29-1").

[7] The Commissioner assigned the handling of complaint 29-1 to the respondent Binstock. He drew the applicant's attention to section 52(3) of MFIPPA and invited her submissions as to that section, which he received on July 15, 2003. In them, the applicant submitted that section 52(3) had no bearing on her case. Section 52(3) provides that MFIPPA does not apply to "records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following: [1 and 2 omitted]

> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest."

[8] The applicant submitted that the By-law appointing Mr. Osborne did not contemplate any employment-related activity regarding her. She had not been involved in the matter that Mr. Osborne was commissioned to explore, the evaluation of the competitive bid process for the Union Station. She made the decision to disclose that the original Union Station evaluation records had been destroyed and was consulted by Mr. Osborne on that subject. His report expanded from that to other matters relating to her without any authorization to do so. The meetings which she attended were not "employment-related" and the information collected and disclosed was also not "employment-related" and therefore was not within section 52(3)3.

[9] The respondent did not accept the applicant's point of view. He stated that in the Introduction to his report, Mr. Osborne noted that he had been asked to review whether the evaluation scoring should be publicly disclosed and if so, when. Although the publication of the scores in the Toronto Star had overtaken this issue in part, the substantive issue about disclosure remained and Mr. Osborne dealt with this in the Freedom of Information section of his report.

[10] The respondent then analyzed the section and concluded that the report was prepared by Mr. Osborne on behalf of the City; that the records he collected were prepared in relation to meetings, consultations or communications; and that these meetings etc. were in relation to employment:

> Having reviewed the contents of the Review prepared by Justice Osborne, in my view portions of it clearly deal directly with aspects of your employment with the City. Based on his interviews, Justice Osborne included a section in the Review entitled: "Council's Access to Relevant Information and Freedom of information Issues". This section ... includes Justice Osborne's observations, statements and conclusions that specifically relate to your work as the Director of the City's Corporate Access and Privacy Office as well as other employees of the City.
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> * * * * * * * * * *
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> I find that the meetings, consultations, discussions and/or communications undertaken by Justice Osborne as they relate to the operation of the office of the Director of Corporate Access and Privacy and your role as Director are substantially connected to an employment-related matter involving you personally.

[11] The respondent then discussed whether the City had "an interest" in the matters discussed between the applicant and Mr. Osborne and found that it did, exemplified by the termination of the

applicant's employment after the Review was submitted to Council and her subsequent lawsuit against the City for wrongful dismissal. Accordingly, the terms of section 52(3)3 had been met and the records at issue were excluded from the scope of MFIPPA. Privacy complaint 29-1 was therefore dismissed.

[12] In November or December, 2003, the applicant received a copy of a letter from the City to Mr. Lawrence David dated November 12, 2003, advising Mr. David that his request for access to the notes and records created by Mr. Osborne in the course of his review would be denied because the documents were not in the custody or control of the City. Any such notes were in Mr. Osborne's custody and the City had no contractual or statutory right to possess them.

[13] The applicant wrote to the Commissioner on December 8, 2003, lodging a privacy complaint based on the City's alleged failure to perform its statutory duty to retain custody and control of the documents requested by Mr. David. Since her personal information was included in those documents, her privacy had been invaded by the City's failure to maintain control of them, which she described as the City having "abandoned custody and control" and as having "alienated control".

[14] The Commissioner gave this complaint the file number MC-030029-2, (hereinafter "complaint 29-2") and it was also assigned to the respondent Registrar. He took the preliminary view that the issue had already been decided adversely to the applicant and wrote to her for any submissions. Her submissions focused on her rejection of the respondent's reasons for dismissing complaint 29-1 as failing to deal with her legal arguments and the section 52(3) issue, while mentioning the City Clerk's duty to maintain custody and control of City documents. On January 9, 2004, complaint 29-2 was dismissed for reasons similar to those delivered as to complaint 29-1.

[15] The applicant now seeks to quash the respondent's decisions in both complaint 29-1 and complaint 29-2 and also seeks an order in the nature of mandamus directing the Commissioner to investigate complaints 29-1 and 29-2 and to make her findings available to the public.

[16] In the related case of *David v. Hale, Toronto and Osborne*,[3] this court holds that Mr. Osborne's notes and records are not, and never have been, in the custody or control of the City and are not subject to MFIPPA. Therefore Mr. Lawrence David cannot have access to them. The same reasoning applies to Ms. Reynold's complaint 29-2 and the application regarding it will also be dismissed. The remainder of these reasons will deal with complaint 29-1.

The Statutory Framework

[17] The applicant submits that the Commissioner's powers and duties include the power and the duty to adjudicate privacy complaints. She argues that the Commissioner's powers must be "commensurate with her duty to supervise performance of institutions' fiduciary responsibilities", and that "the scope of the duty and ambit of her power are determined by the duty concerned and the person to whom it is owed". She submits that the duty is set out in section 1(b) of the Act, which describes the second purpose of the Act: "to protect the privacy of individuals with respect to personal information about themselves held by institutions." The applicant submits in effect, in paragraphs 37 and 39 of her factum, that all the powers given to the Commissioner in any section of MFIPPA are available to her in connection with privacy complaints.

[18] The applicant refers to section 43 of MFIPPA as supporting a general power to hold an inquiry and make an order disposing of the issues. However, that section is part of a group of sections in Part III of the Act: "Appeal", beginning with section 39 which authorizes appeals by persons seeking access to records or personal information, correction of personal information or who have received a notice of an access request. Section 40 provides for the Commissioner to authorize a mediator to investigate the circumstances of "any appeal", and section 41 authorizes the Commissioner to conduct an inquiry "to review the head's decision" if no mediator has been appointed under section 40, or the mediator has not achieved a settlement. Section 43 reads;

> 43(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. [emphasis added]

[3] Divisional Court file 24/05 released concurrently with this decision.

[19] The language of sections 43(2) and 43(4) is also consistent only with the section referring to appeals under section 39. This section does not support the applicant's submission that there exists a general right of the Commissioner to hold an inquiry on complaints.

[20] The applicant also relies on section 10 of the *Interpretation Act*, (R.S.O. 1990 c. I.11) which provides that every Act is deemed remedial; and on section 28 that the granting of a power to do or enforce the doing of an act implies that all powers are given that are necessary for the person to do that thing. She concludes that the Commissioner has the statutory power to compel production of records, to require submissions, to conduct an inquiry, to adjudicate and resolve privacy complaints. She bolsters this submission by reference to the importance of the right to privacy, a "constitutionally protected right". If MFIPPA granted the Commissioner the power to hold an inquiry into privacy complaints from the public, these submissions would lead to a generous reading of those powers, but there is no such grant in the Act.

[21] The respondent analyzes the statute very differently. The powers relied on by the applicant are not universally available to the Commissioner in every MFIPPA issue. The Commissioner's appellate function is confined to appeals from the decisions of heads as to access to records. The inquiry function referred to in section 41 applies only where an appeal is filed. There is no explicit grant to the Commissioner of power in respect of privacy complaints to investigate and issue findings, or to compel records or require submissions or to adjudicate and resolve privacy complaints. Apart from prosecution in the courts for wilful breach, there is no statutory mechanism in the Act to enforce on behalf of individuals the obligations imposed on institutions by sections 28 to 33 of MFIPPA regarding the collection, use and disclosure of personal information. The statute empowers the Commissioner to receive representations from the public concerning the operation of the statutes. She receives and considers representations, including complaints of violations, pursuant to her duty to report annually to the Legislature on the operation of the Acts. She makes such inquiries as she thinks necessary and often succeeds in mediating the problem, but she has no authority to impose a solution. She has no duty to investigate every complaint made to her because her duty is to report on the operations of the Acts and not to resolve the issues raised by a complaint.

[22] In a decision answering a challenge to her authority to investigate privacy complaints and report on issues of compliance, the Commissioner explained the nature of her authority as follows[4]:

> Section 58(1) requires that I make an annual report to the Speaker of the Legislative Assembly to be laid before the Assembly when it is in session. The contents of my annual report are set out at section 58(2) of the *Act*. This requires that I provide a comprehensive review of the effectiveness of the provincial and municipal *Acts* in providing access to information and protection of personal privacy, including my assessment of the extent to which institutions are complying with the legislation and my recommendations with respect to the practices of particular institutions. Apart from imposing this general duty to report, the Legislature has left it to my Office to determine and adopt the administrative processes deemed necessary or advisable to fulfil my statutory obligations in this regard. In order to make my report to the Legislature, I require information concerning questions of compliance which arise, as well as an adequate understanding of the institution's position on compliance necessary to make this a meaningful exercise. Accordingly, my Office has developed an investigation process by which information concerning complaints of noncompliance with the legislation is provided by institutions and members of the public on a voluntary and responsible basis. Therefore, the effectiveness of my supervisory role and the usefulness of my annual reports in matters of compliance depend largely on the co-operation I receive from institutions when I am conducting compliance investigations.
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> ... Where I am of the opinion that an institution is not in compliance, my report will usually make recommendations on how the institution should endeavour to comply with its obligations in the future. My recommendations do not bind the institution to take specific steps, but are designed to assist it in fulfilling its duties under the legislation in order to remain in compliance.
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> My privacy complaint investigations and reports form the principal basis for making my annual reports to the Legislative Assembly on the effectiveness of the *Acts* in protecting personal privacy. My annual reports summarize the facts and circumstances of selected investigations, including my findings on compliance, my recommendations to institutions, and their responses on the implementation of my recommendations, and provide other information concerning my activities in monitoring the compliance of institutions with the legislation.

[23] Thus in the Commissioner's view, the complaint investigation process is not directed to the resolution of the issues raised by the complaint, but to assisting her in identifying ways in which the Act or the compliance practices of an institution may not be effective so that she may make her report to the Legislature. The Commissioner submits that this is a legislative and not an adjudicative function, and is not subject to judicial review.

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[4] Investigation Report I98-018P, *Ministry of Health*, December 15, 1998, pp. 3-4

Analysis of the Statutes

[24] The office of Information and Privacy Commissioner ("IPC") is created by section 4 of the *Freedom of Information and Protection of Privacy Act*[5] ("FIPPA"). MFIPPA provides that in it "Commissioner" means the IPC. Accordingly, we first examine FIPPA to determine the nature of this office. Under section 4, the IPC is an officer of the Legislature. Under section 58 of FIPPA the IPC is required to make an annual report to the Speaker of the House, providing a comprehensive review of the effectiveness of FIPPA and MFIPPA in providing access to information and protection of personal privacy. The report is to include a summary of the nature and resolution of appeals under section 50(1) of FIPPA and section 39(1) of MFIPPA, i.e. access appeals. The IPC must also report on the extent to which institutions are complying with FIPPA and with MFIPPA and make recommendations with respect to the practices of particular institutions and proposed revisions to the Acts.

[25] The Commissioner is empowered to receive representations from the public as to the operation of the Acts, but the appeal scheme is confined to the access side of her authority; there is no tribunal role for her in connection with the privacy provisions. Section 39(1) of MFIPPA provides for an appeal from any decision of a head under the Act, if the appellant has made a request for access to a record or to personal information or to correct personal information or has been given notice of a pending access request. None of these categories includes a person who complains that her privacy rights have been breached. Such a person may bring a prosecution under section 61 of FIPPA for a wilful breach. There is thus a striking difference between the handling of access disputes and the assignment of privacy breaches to the courts. If the Legislature had intended to have the latter dealt with by the Commissioner, nothing would have been easier than to enlarge the tribunal jurisdiction. When, in section 46(b) of MFIPPA, the Legislature did intend the Commissioner to act by order to remedy a privacy problem it spoke clearly:

> 46. The Commissioner may,
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> (b) after hearing the head, order an institution to,

[5] R.S.O. 1990, c. F.31

(i) cease a collection practice that contravenes this Act, and

(ii) destroy collections of personal information that contravene this Act;

[26] The applicant relied upon this section as evidence of a legislative basis for the Commissioner's practice of hearing and deciding privacy complaints. The specificity of this section belies any legislative intention to create a broad remedial power in the Commissioner to rectify breaches of privacy rights generally. The Commissioner herself recognized the difficulty of operating without statutory support in her Annual Report for the year 2000 when she wrote:

> Unlike most other jurisdictions in Canada, Ontario has no clear statutory framework for investigating privacy complaints. Without this framework, my office is forced to rely on the co-operation and goodwill of the government in investigating and resolving alleged privacy breaches.

[27] I conclude that the Act does not contemplate that the Commissioner will act as a tribunal empowered and required to resolve privacy disputes brought to it by the public. As that is not her statutory duty, it follows that she cannot be compelled to do so.

[28] The Commissioner does in fact receive many complaints from the public that privacy rights have been infringed. In view of her mandate from the Legislature to report to it on the effectiveness of these Acts in protecting personal privacy and on the extent of compliance by institutions, the Commissioner has established a procedure to review complaints received, make an investigation where justified and make recommendations to government organizations. In the 2004 annual report of the Commissioner, it is reported that 128 privacy complaints were opened in the year and 126 were closed. In the intake stage, 101 complaints were closed. Of these, 22% were screened out, 2% abandoned, 14% withdrawn and 62% resolved informally. Eighteen formal reports were issued in 2004, containing a total of 36 recommendations to governmental organizations. While attempts are made to reach resolutions of the complaints that are not screened out, there is no imposed solution, no tribunal and no binding order; there is a report to the Legislature and recommendations to governmental organizations. The collection of privacy complaint reports in the material before us

bears a strong resemblance to reasons for judgment and it may be that the Commissioner has created some false expectations by the manner in which she collects her information.

[29] The applicant submitted that her reasonable expectation was that her complaint would be dealt with by a hearing and a published decision. This was apparently based upon her own practice at the City, where she had handled thousands of access appeals. She may well have had such an expectation, but a reasonable expectation does not create a jurisdiction that has not been granted by the Legislature. In the light of the Commissioner's published statements on the screening policy of her office, there can be no reasonable expectation that any particular complaint will be accepted for full investigation.

[30] In my view, the language of this statute does not require the Commissioner to do more than receive representations from the public concerning the operation of the Act. She is given no statutory power of decision with respect to such complaints as she receives, nor any requirement to do anything about them beyond using them as evidence for her annual report.

[31] Heretofore I have focused on the actual language and scheme of MFIPPA and FIPPA, but there are other legal issues involved.

Scope of Certiorari: The Review of Non-Statutory Tribunals

[32] Even though the Commissioner has no statutory duty to do more than receive communications from the public and report to the Legislature, she is in fact doing more than that. In order to report to the Legislature, she investigates and attempts to mediate complaints and exercises a discretion as to which complaints will be followed up. She publishes reports on the cases investigated. These activities closely resemble those which would be carried on by her if she had been given the statutory power to investigate and determine complaints as to breaches of the right of privacy. Is this process subject to judicial review? Certainly the prerogative writs such as certiorari

are not confined to the supervision of statutory bodies; they are available as a general remedy for supervision of the machinery of government[6]:

> [c]ertiorari is available as a general remedy for supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges, or liberty of any person. The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.[7]

[33] The court's jurisdiction to review bodies that fulfill a public function was a central issue in *R. v. Panel on Take-overs and Mergers; Ex Parte Datafin plc*.[8] In this case, the applicant sought to quash a decision of the Panel on Take-overs and Mergers, an unincorporated association that had no statutory, prerogative or common law powers but which nevertheless enforced a non-statutory code on take-overs and mergers. The English Court of Appeal held that the Panel operated as an integral part of a system that performed public law duties and was therefore amenable to judicial review. Lloyd L.J. rejected the argument "that the sole test whether a body is subject to judicial review is the source of its power". To so hold would "impose an artificial limit on the developing law of judicial review."[9] Rather, he held that the courts must look at the nature of the body. If the body is fulfilling a public law function, then the body in question is subject to public law:

> I do not agree that the source of the power is the sole test whether a body is subject to judicial review ... Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: [citations omitted]

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[6] *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, *per* Dickson J.; *Masters v. Ontario* (1993), 16 O.R. (3d) 439 (Div. Ct.); *Scheerer v. Waldbillig*, [2006] O.J. No. 744 (Div. Ct.); see generally M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997).

[7] *Martineau v. Matsqui Institution*, *supra*, at 628, *per* Dickson J.

[8] [1987] Q.B. 815 (C.A.) Recently affirmed in *Regina (Beer (trading as Hammer Trout Farm)) v. Hampshire Farmer's Markets Ltd*, [2004] 1 W.L.R. 233 at 240 (C.A.), *per* Dyson L.J.: "the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law."

[9] *R. v. Panel on Take-overs & Mergers*, *supra*, at 849.

> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may.. be sufficient to bring the body within the reach of judicial review. It may be said that to refer to "public law" in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.[10]

[34] The principles in *R. v. Panel on Take-overs and Mergers*, *supra* have been applied in Canada in *Volker Stevin N.W.T. ('92) Ltd. v. Northwest Territories (Commissioner)*[11], in *Masters v. Ontario*[12] and recently in *Scheerer v. Waldbillig*.[13]

[35] In *Masters v. Ontario*, *supra*, Saunders J. had before him an application of a senior civil servant to quash, on grounds of lack of procedural fairness, investigative reports made into his conduct following a complaint of sexual harassment. The investigation was conducted pursuant to a policy directive dealing with workplace discrimination and harassment prevention. The directive had no statutory basis. Saunders J. found that the applicant was entitled to procedural fairness and refused to quash the application for certiorari. While not bound by any statutory duty, the investigators making the report were part of the machinery of government and owed a duty of fairness:

> Thus, in my view, in determining whether a body is subject to judicial review, the court must look, not only at the source of the power, but the nature of body's functions. Even where the body is not constituted under statute, or prerogative power, if the body is fulfilling a governmental function, then the body is part of the machinery of government and is subject to public law. However, the court must be cautious to distinguish between domestic tribunals - private autonomous bodies such as consensual arbitrators and voluntary associations - on the one hand, and the machinery of government, on the other.

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[10] *R. v. Panel on Take-overs & Mergers*, *supra*, at 847, *per* Lloyd L.J.; quoted with approval in *Vander Zalm v. British Columbia (Acting Commissioner of Conflict of Interest)*, [1991] B.C.J. No. 2019; *Masters v. Ontario*, *supra*.

[11] (1994), 22 Admin. L.R. (2d) 251 (N.W.T.C.A.)

[12] (1993), 16 O.R. (3d) 439 (Div. Ct.).

[13] [2006] O.J. No. 744 at para. 19 (Div. Ct.); see also *McDonald v. Anishinabek Police Service et al.*, Ont. Div. Ct. 34/02, released October 13, 2006.

[36] There is thus an argument to be made that the Commissioner is functioning, albeit without express statutory authority to do so, as part of the machinery of government in investigating privacy complaints and her activities ought to be under the supervision of the court, particularly when she exercises discretion, to ensure fairness in the administration of her assumed function.

[37] One difficulty in applying these principles to the Commissioner is that the cases emphasize the performance of a public duty as part of the reasoning and the Commissioner has no duty to do the investigation, and in particular the mediation which she does, nor does she have any obligation to choose to report any particular case to the public or in her reports to the Legislature. It may well be that she is *de facto* acting as a part of the machinery of government in the broadest sense and would be subject to judicial review, at least on fairness issues. However, in the light of our decision on the Legislative privilege point, to be discussed next, it is not necessary to come to a decision on the point and it is preferable to leave it to another day.

Parliamentary privilege

[38] The respondent asserts that the activities of the Commissioner in gathering information for her report to the Legislature are privileged. She is an officer of the Legislature and directly responsible to it for preparing the report called for by section 58 containing her assessments of the degree of compliance with the Acts and her recommendations as to the practices of institutions and proposed amendments. Her opinions and recommendations are not binding; it is the Legislature that decides what will be done. In this respect, her role differs entirely from her decision-maker role in respect of access requests.

[39] Parliamentary privilege in Canada was discussed in the Supreme Court decision in *New Brunswick Broadcasting Co. v. Nova Scotia*[14], where McLachlin J. said:

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege,

[14] *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319 at 379, 384-385

> though part of the law of the land, is to a certain extent an exemption from the general law. (at 379)
> ....
> ... Canadian legislative bodies possess such inherent privileges as may be necessary to their proper functioning ... The courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege. (at 384)
> ....

[40] McLachlin J. observed that the concept of "parliamentary necessity" applies the privilege to broad spheres of legislative activity and does not separately examine each component of the activity. The role of the court is to determine whether the broad sphere of activity falls within the exclusive jurisdiction of the legislature and is privileged for that reason. If it does, the court is precluded from reviewing each of its subsidiary components:

> The test of necessity is not applied as a standard for judging the content of a claimed privilege, but for the purpose of determining the necessary sphere of exclusive or absolute "parliamentary" or "legislative" jurisdiction. If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body.
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> ... the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges. Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory.

[41] In a case[15] involving Ontario's Legislative Assembly, the Court of Appeal has adopted and applied the test of necessity described in *New Brunswick Broadcasting*. The Court stated:

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[15] *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 at para. 25 (C.A.)

> Therefore, while it is true to say in the abstract that parliamentary privilege covers those matters which are necessary to the functioning of the House, "necessity" in this context applies to categories of matters, and each particular exercise of privilege within a category is not scrutinized against a standard of necessity. As noted by McLachlin J., once a court has decided that a category of matters is necessary to the independent functioning of the House, it does not then go on to decide whether each individual exercise of privilege is necessary, but, rather, only has to ask whether the particular exercise in question falls within the recognized category of privilege. If it does, it is not subject to outside review.

[42] In *Tafler* [16] the British Columbia Court of Appeal relied on legislative privilege in holding that judicial review did not lie against a decision of the B.C. Conflict of Interest Commissioner. The Commissioner was empowered to conduct an inquiry into and make a report on a complaint lodged against a member of the Assembly and, to this end, had powers of subpoena and contempt. However, he had no power to make a binding decision, only to express his opinion and make a recommendation. The Court held that "the privileges of the Legislative Assembly extend to the Commissioner" and that "decisions made by the Commissioner in the carrying out of the Commissioner's powers under the *Act* are decisions made within, and with respect to, the privileges of the Legislative Assembly and are not reviewable in the courts." In arriving at its decision, the Court relied upon four factors, each of which also exists in the case at bar:

> (i) the Commissioner is an officer of the Assembly;
>
> (ii) the Commissioner's obligation is to report his opinion to the Assembly and to make a recommendation, but not himself to reach an enforceable decision;
>
> (iii) the actual decision on any question submitted is made by the Assembly itself; and
>
> (iv) no action of any kind lies against the Commissioner for anything he or she does under the *Act*.

[43] It appears from these cases that the courts have no role to play in supervising the process by which the Commissioner collects information for her annual report. As the respondent puts it[17]:

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[16] *Tafler v. British Columbia (Commissioner of Conflict of Interest)*, (1998) 161 D.L.R. (4th) 511 at paras. 13-19; see also *Al Fayed v. Parliamentary Commissioner for Standards* [1997] E.W.J. No 2462 at 21-22.

[17] Factum of the respondent paragraph 50.

> Judicial intervention in the Commissioner's investigations, whether by requiring her to investigate, precluding her from doing so or telling her how to conduct an investigation or what to include in a report, would undermine the Legislature's confidence in her ability to prioritize cases that warrant investigation, allocate resources and provide it with the independent assessment and recommendations contemplated by section 58. In the words of McLachlin J., it "would trump the exclusive jurisdiction of the legislative body" if the courts were to review the process by which the Commissioner gathers information for the purposes of her annual report.

[44] The applicant pressed the argument that the Commissioner had chosen to put forward to the public a procedure for privacy complaint inquiries and, having done so, must act with fairness in the making of the decision not to investigate her complaint. The respondent denied that the Commissioner, in this "non-tribunal" capacity, owed any duty of fairness to complainants; she is entitled to make her decisions on grounds of policy as to whether an investigation will help her in preparing the report, a discretion which the court is not entitled to review.

[45] The Privacy Complaint Process bulletin published by the Commissioner in November 2000 expressly warns that complaints will be screened in the intake process and may be "screened out" where the Commissioner has no jurisdiction or "where it has determined that the type of file should not proceed ...". Part of any duty of fairness is making known the process to be followed and this Bulletin clearly warns that not all complaints will be investigated. There is no inherent unfairness in a screening policy and full opportunity was given to make representations in the intake screening process. That process was not unfair.

[46] In my view, the Commissioner is acting within the legislative sphere in collecting the information about privacy issues that she obtains from accepting, investigating and reporting on the complaints she receives from the public. That she expends resources on the further step of mediating those complaints and that she rejects some at the outset are matters for the House to deal with.

[47] The Commissioner may or may not be "pushing the envelope" of her Office in mediating privacy complaints, but the scope and supervision of the activities of the Commissioner in gathering information to fulfill her duty as an Officer of the Legislature to report to it on the operation of these

Acts is a matter for the House and not for the courts. It follows that we cannot intervene as the applicant asks us to do. However, in deference to the extensive arguments made to us by all parties, I will deal with the main points.

Lack of Fairness

[48] The Commissioner submitted that any duty of fairness arising in the circumstances of this case would be minimal and had been met.

[49] The lack of fairness put forward by the applicant was based on the criteria for identifying the content of the duty of fairness as set out in *Baker*[18]. These are the nature of the decision, the statutory scheme, the importance of the decision to those affected; the legitimate expectations of the applicant and respect for the agency's choice of procedure. I have already noted the absence of a statutory scheme of decision-making as to privacy complaints.

[50] The nature of the decision appears at first glance to be both jurisdictional and discretionary: to decline to inquire into the complaint. It was treated in the reasons as jurisdictional, but it was not jurisdictional in the normal sense of being outside of the powers of the agency. The Commissioner had established a policy of what kind of complaint would be followed up and the real nature of the decision is thus discretionary. The applicant contended that it was unfair that the Commissioner had dismissed her complaint without making the City demonstrate compliance with the mandatory provisions of MFIPPA especially as the City had the burden of proof; and that the process was similar to a court and demanded a high degree of fairness. In this submission, the applicant intermingled the jurisdiction over access appeals and the legalities of privacy law with the very different approach to representations from the public. The respondent reiterated that the Commissioner has no duty to conduct any investigation at all; the process adopted is administrative and not statutory and does not resemble judicial decision-making. Rather it is a "discretionary public policy choice" to assist her in her report to the Legislature which has left it to her discretion to

[18] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

determine how she will gather information for her report. It appears to me that the respondent is correct: the decision is a discretionary one informed by the policy of the Commissioner.

[51] As to the importance of the decision not to investigate the complaint, the parties are miles apart. The respondent focuses on the Commissioner's lack of any power to rectify any non-compliance with the statute; the end result is a non-binding opinion. The applicant focuses on two matters: the disastrous consequences for her of the Review leading to her need for a fair adjudication; and the reasons for screening her out: section 52(3); and declares that this precedent makes Ontario Public Service employees second class citizens in terms of privacy rights because their personal information has been excluded from privacy protection.

[52] In my view, the importance to the applicant is not as great as she maintains. Her analysis of the importance issue is based on her "reasonable expectation" that there would be a hearing, which is predicated upon a duty on the Commissioner to inquire, to make findings and to publish her decision. The Commissioner has none of these duties and the privacy complaint does not provide the opportunity for vindication which the applicant seeks. As to the OPS it is not a party before us, nor was it before the Commissioner and the impact on it cannot assist the applicant.

[53] Finally, the applicant's position does not respect the agency's own choice of procedure but seeks to force the Commissioner to approach privacy complaints as a tribunal would and not as she chooses to do. On the whole, the *Baker* criteria for the imposition of a duty of fairness have not been met. Nevertheless, the process was actually a fair one: the applicant's position was heard and considered.

Bias of Mr. Osborne and the Commissioner

[54] The applicant raises a further issue. She says that there is a reasonable apprehension that Mr. Osborne was biased because he told her in an interview that he intended to speak to the Commissioner. Subsequently, in June 2003 the Commissioner published a decision involving statements made based upon records caught under section 52(3) in which she ruled that the privacy rights did not apply. The applicant submitted that this was a departure from previous jurisprudence

on the point and gave rise to a suspicion that the Commissioner had altered her stance to enable Mr. Osborne to reveal the personal information of the applicant in his Review. However, at paragraph 72 of his factum, Mr. Challis points out that the section 52(3) issue had arisen long before and quotes from the 1996 decision in complaint I95-056M:

> The Commissioner's recent orders interpreting these exclusions have now determined that the Acts do not apply to investigation reports and related records collected, prepared, maintained or used by an institution in relation to an investigation by the institution into allegations of improper employee conduct.

[55] Thus, it would appear that not only did the Commissioner not alter the previous state of the law in 2003 at all, never mind to assist Mr. Osborne, but that the respondent's decision not to investigate the applicant's complaint was in accord with the long-standing policy of not accepting privacy complaints relating to the institution's investigation of allegations of improper employee conduct. While the terms of reference to Mr. Osborne for his review do not expressly refer to improper conduct, they clearly involve the possibility that it might have existed. City personnel were deeply involved in the matters he was to investigate, as he observed:

> These issues included the process followed in developing the terms of the Union Station Request for Proposal ("RFP") and the manner in which the proposals were evaluated. The purpose of this part of the Review was to determine whether the RFP was fair, that is not slanted toward the interests of one or the other of the two proponents.[19]

[56] There is simply no evidence to give any substance to the allegation of reasonable apprehension of bias. An informed person, viewing the matter realistically and practically, and having thought the matter through, could not conclude that the applicant's allegations made it likely that either Mr. Osborne or the Commissioner would not decide matters relating to her fairly.

Merits of the Application

[57] If there is a judicial review possible of the decision not to investigate the applicant's complaint, what is the standard of review? The applicant submitted that the Commissioner founded

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[19] Union Station Review: Hon. Coulter A. Osborne, May 22, 2003; Introduction: page 7.

her dismissal of the applicant's complaint on a lack of jurisdiction based on section 52(3) and relied on *Solicitor General*[20] for the proposition that in interpreting the meaning of this section the Commissioner had no advantage over the court as her particular expertise was not engaged in the exercise. Hence the standard of review was correctness. The respondent submitted that notwithstanding the references to section 52(3), the Commissioner was exercising her discretion not to investigate the complaint, which is based on the public policy choice available to her under her mandate from the Legislature to report on compliance. Even if the legal analysis is wrong, the Commissioner would still retain the discretion not to investigate the complaint because she has no duty to do so. The issue is not entirely one of law, but engages the Commissioner's expertise in the privacy provisions of the Act and the Commissioner's views of what is necessary in order to advise the Legislature, both areas in which, if they are reviewable at all, the Commissioner's expertise and policy functions should attract the highest level of judicial deference, that of patent unreasonableness.

[58] While the respondent's argument is an attractive one, in the light of *Solicitor General*, I should consider the matter from the correctness standpoint. The applicant submits that the Commissioner erred in interpreting section 52(3) by:

(i) ignoring its purpose "to ensure the confidentiality of labour relations information";

(ii) interpreting it in a way that discriminates against public sector employees;

(iii) holding that the exclusion of "records" encompasses "personal information";

(iv) holding that the information in the report was collected, prepared, maintained or used for an "employment-related" purpose; and

(v) holding that the City "has an interest in the Report for the purposes of s.52(3)," given that it claimed no "control" over Justice Osborne's notes.[21]

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[20] *Ontario (Solicitor General) v. Ontario (Information and Privacy Commission)*, (2001) 55 O.R. (3d) 355 pars. 30, 38, 39 (C.A.); leave to appeal refused [2001] S.C.C.A. No. 509.

[21] I have adopted the summary in the respondent's factum at paragraph 77.

[59] Dealing with items (i) and (ii) above, one of the purposes of section 52(3), according to the Minister who introduced it in 1995,[22] is to protect the confidentiality of labour relations information. While this is a guide to the meaning of the section, it cannot narrow the meaning of the words used, which are "... labour relations or employment-related matters in which the institution has an interest". In *Solicitor General*[23] the Court of Appeal, analyzing the section said at paragraph 35:

> [T]he words "in which an institution has an interest" in sub-clause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the emphasis has shifted from employment of a person to employment-related matters ...

[60] It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce. It has the effect of curtailing the employees' privacy rights by excluding those same records from the *Act*'s privacy protections. In so doing, section 52(3) must necessarily adversely affect public sector employees, for they are the persons who work for the institutions and who would have the most interest in the class of documents in question, either to have access to them or to have them protected from access by others. The latter interest is actually enhanced by the amendment, but other privacy interests are removed. However, they are not the only people affected; no one who wishes such information can obtain it through the MFIPPA regime, for that regime, the creature of the Act, does not apply to it.

[61] The applicant invited us to find that the amendment of 1995, which introduced the section into the Act, violated public sector employees' rights to equal treatment before, and the equal benefit of, the law. But the Act applies only to the collection and protection of information gathered and maintained by or on behalf of institutions, which are invariably public sector bodies. There is no equivalent protection for employees in the private sector so that the amendment brought the public sector employees somewhat closer to the position of private sector employees. In those circumstances it is hard to see the violation of equality interests.

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[22] Hon. David Johnson, Chair of Management Board of Cabinet, *Official Record of Debates*, October 4, 1995

[23] *Supra*, paragraph 35

[62] Turning to item (iii), section 52(3) provides: "this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution" in relation to the circumstances described in the three subsections. The applicant contends that this language does not refer to personal information and the word "record" does not include personal information as the two concepts are defined differently in section 2 of MFIPPA. The respondent contends that this exclusion encompasses both the access and privacy provisions of the statute.

[63] "Personal information" is defined in MFIPPA as meaning "recorded information about an identifiable individual, including ..." [balance of definition omitted]. "Record" is defined as "any record of information however recorded ..." [balance of definition omitted]. There is nothing in this language to exclude personal information from the definition of record. Section 4 of MFIPPA provides that every person has the "right of access to a record or a part of a record in the custody or control of an institution" unless "the record ... falls within one of the exemptions under sections 6 to 15; ...". Section 14 is an exemption for personal information. Finally, had the Legislature intended the exclusion to apply only to records subject to access requests, as the applicant suggests, it would have been a simple matter to say so. In my view the word 'record' as it is used in section 53 MFIPPA includes records containing personal information.

[64] I turn now to item (iv) above, whether the information was collected, etc. for an employment-related matter. The applicant submitted that there was no employment-related matter so far as she was concerned. But I do not read the section as requiring that the matter under discussion be related to the employment of one or more of the persons present at the meeting or from whom the information is collected. It must be an employment-related matter in which the City has an interest, not the person interviewed.

[65] At paragraph 38 of *Solicitor General*[24] the court held that the Act does not apply if any of the criteria in subsections 1 to 3 are present when the relevant act of collection, preparation, maintenance

[24] ... [T]he time sensitive element of subsection 6 is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of sub clauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded.
Ontario (Solicitor General), *supra* at para. 38

or use takes place, and they remain excluded thereafter. Mr. Osborne collected the information prior to the publication of his Review and that period of collection is the critical time. In his reasons, the Commissioner's delegate focused on the contents of the Review, which only indirectly disclose the timing and purpose for the collection of the information, and dwelt in particular on the references to the applicant. He might better have focused on the terms of reference, which were what primarily indicated the purpose for the collection of the information. This would have avoided irrelevancies[25] such as the references to the applicant's subsequent loss of employment.

[66] However, the result would have been the same for two reasons. First, the terms of reference are clearly asking Mr. Osborne to examine the conduct of the City personnel in the preparation of the RFP, the evaluation of the responses and the selection of the preferred proponent. This is beyond doubt an employment-related exercise. The interviews with the applicant were part of this exercise, even if she had not personally been involved in the functions being investigated, and accordingly were meetings about employment-related matters. The meetings that are protected are not confined to those about the employment of the persons attending; the language is too broad for that. Secondly, the terms of reference specifically ask that Mr. Osborne meet with the applicant to discuss an aspect of her employment with the City: the issue of the release of the scoring information. Further, there is no doubt that Mr. Osborne used the information collected, including that from the applicant, in his report. While I do so for different reasons, I conclude that the Commissioner's delegate answered the question correctly: the applicant's meetings with Mr. Osborne were about employment-related matters.

[67] I turn now to item (v) above: the applicant's criticism of the decision that the City had an interest in the meetings despite the fact that it did not control Mr. Osborne's notes. The applicant calls this "alienation" of the records and submits that the City effectively disclaimed any interest in Mr. Osborne's records when it permitted the destruction of the electronic records and did not take possession of the source records. In our decision in the companion case of *David v. Hale, Toronto and Osborne*, we hold that Mr. Osborne was not part of the operations of the City, but was engaged

[25] Not irrelevant to the applicant, of course, but irrelevant to whether the meetings involved employment-related matters.

to study one facet of the City's operations as an independent investigator. His records were never in the City's custody or control. They were not subject to MFIPPA. For the reasons expressed in that case, we hold that the City did not alienate Mr. Osborne's records; it never had them in the first place and was not entitled to them. But that does not "negate the interest found by the Commission in response to the complaints", as the applicant submits. The "interest" required by section 52(3) is an interest in the "labour relations or employment-related matters" that are the subject of the meetings, consultations, etc. at which the records were collected or prepared etc. I conclude that the decision correctly found that the City had the necessary interest.

[68] Accordingly, I conclude that if a judicial review of the decision not to proceed with the applicant's complaints were to be possible, it would fail.

Summary and Conclusion

[69] As I have already observed, the Commissioner's activity as to the privacy portion of the Act generally falls into the sphere of the Legislature and on the case law discussed above, that determination carries with it the absence of jurisdiction in the court to govern the manner in which she performs her tasks for the Legislature.

[70] As the accepting of a privacy complaint for investigation is not part of her statutory mandate, there is no basis for any order compelling the Commissioner to accept a particular case to look at for the purposes of her report. That is a matter of her discretion, which she cannot be compelled to exercise in a particular way. If there is a requirement for procedural fairness at the intake, I agree with the respondent that it has been met. The applicant submitted her request and after it had been looked at, the Commissioner's delegate invited her to make submissions on why it should be accepted despite section 52(3). He then considered her submissions and wrote detailed reasons for rejecting them and deciding not to proceed. The applicant disagrees with the reasons, but that does not make the procedure unfair.

[71] For these reasons, I would dismiss the application. Costs, if demanded, may be the subject of written submissions, those of the Commissioner within 30 days and those of the applicant within a further thirty.

Lane J.
I agree. – Greer J.
I agree. – Epstein J.

DATE: October 30, 2006