

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

STEELE J.

B E T W E E N:)
)
N.E.I. CANADA LIMITED) David W. Kent, for N.E.I. Canada Limited,
Applicant) Applicant
)
- and -)
)
INFORMATION AND PRIVACY) Donald J.M. Brown, Q.C., and Tom A.
COMMISSIONER/ONTARIO) Wright, for the Respondent
Respondent)
)
- and -)
)
MARY ANNE MCKELLER and JOHN) Mark Zigler, for the interveners
MORROW, on his own behalf and on)
behalf of all the Members of the)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL 353)
Interveners)
) HEARD: April 23, 1990

STEELE J.:

[1] This is a motion brought by the Information and Privacy Commissioner/Ontario (the Commissioner) for an order settling the record of the Commissioner, and for an order that portions of the court file be treated as confidential, sealed and not form part of the public record. At the hearing, all counsel consented to a form of order attached as Appendix "A". Notwithstanding this consent, I heard argument and reserved decision. I had no concern about sealing the file. My concern was that the parties would be represented by counsel whom they could not properly instruct because counsel would not be able to fully inform them of the issues and evidence.

[2] An application was made under the Freedom of Information and Protection of Privacy Act, 1987, S.O., c. 25 for access to certain records in the custody of the Ministry of the Environment. Access to the specific reports that are the subject of the application to this court was refused. On an appeal to the Commissioner, he ordered that the reports be released to the original applicant. N.E.I.

Canada Limited (N.E.I.) has applied to this court for judicial review of that decision on the grounds that the Commissioner erred in law in determining that the records in issue were not subject to mandatory exemption from release pursuant to s. 17 of the Act. Section 17 of the Act provides as follows:

17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

N.E.I. apparently supplied the reports in question to the Ministry of the Environment and objects to their release.

[3] At least some of the issues that are disputed in the application to this court will be what test must be applied to fall within the s. 17 exemption, and upon whom falls the onus of satisfying the test. In order to argue this properly, all parties should be aware of what the reports contain. A party without such knowledge could not properly argue whether the records reveal the types of information exempted. The difficulty is that if the documents are disclosed to assist argument, without some restriction, the purpose of the application will be nugatory.

[4] This problem has been considered by the federal court in relation to the Access of Information Act, R.S.C. 1985, c. A-1 in several cases, such as *Maislin Industries Limited v. Minister for Industry, Trade and Commerce*, [1984] 1 C.F. 939; *Robertson v. Minister of Employment and Immigration*, 13 F.T.R. 120; and *Bland v. National Capital Commission et al.*, 20 F.T.R. 236. In all cases, the production of the documents was ordered with the counsel being prohibited from disclosing the contents to their clients.

[5] In Ontario, Anderson J. in *Reichmann et al. v. Toronto Life Publishing Co. et al.* (unreported, April 4, 1990) referred to the English Court of Appeal decision in *Warner-Lambert Co. v. Glaxo Laboratories Limited*, [1975] R.P.C. 354, and stated as follows, at p. 3:

... But those authorities demonstrate that in a proper case a court may exercise a discretion to attach conditions to production and discovery when the circumstances establish that such protection is warranted ...

[6] I agree with the practice in the federal court and also the statement made by Anderson J.

[7] The attached draft order would be appropriate with one exception. On the wording of clauses 1 and 2 of the undertaking, provision is made that no disclosure or disposal will be made without the authorization or consent of the Commissioner or the court. In the present case, the Commissioner has said that the information should be made public. It is therefore inappropriate that the undertaking provide that he may give such authority or consent. This authority should be restricted to the court.

[8] For these reasons the draft order will issue when the under taking is amended to delete any reference to the Commissioner have authority to release a party from the disclosure obligation and to consent to the disposal of documents.

[9] This being a novel matter, there will be no costs.

STEELE J.

APPENDIX "A"

Court File No. 772/89

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

B E T W E E N:

N.E.I. CANADA LIMITED

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO, MARY ANNE MCKELLAR
and JOHN MORROW, on his own behalf and on behalf of all the Members of the
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353
Respondents

ORDER

THIS MOTION made by the Respondent Information and Privacy Commissioner/Ontario ("the Commissioner") for an Order settling the Record of the Commissioner and for an Order that a portion of the court file herein be treated as confidential, sealed and not form part of the public record, was heard this day at 130 Queen Street West, Toronto, Ontario.

ON READING the Notice of Motion and proceedings herein, and on hearing submissions of counsel for the Applicant and those of counsel for the Respondents;

1. THIS COURT ORDERS that the court file herein be treated as confidential, sealed, and not form part of the public record;
2. THIS COURT ORDERS that the hearing of the Application for Judicial Review herein be conducted in camera in the Presence of none other than counsel to the parties; and
3. THIS COURT ORDERS that upon the filing by counsel for the Applicant and for the Intervener of an Undertaking in the attached form, the Commissioner will provide such counsel with the Record of the Commissioner.

SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

B E T W E E N:

N.E.I. CANADA LIMITED

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO, MARY ANNE MCKELLAR
and JOHN MORROW, on his own behalf and on behalf of all the Members of the
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353

Respondents

UNDERTAKING

The undersigned undertakes, as a condition of access to the Record of the Information and Privacy Commissioner/Ontario ("the Commissioner"), to preserve the confidentiality of the contents of that Record, and in particular that:

1. All contents of the Record not in the possession of the undersigned as of the date of this Undertaking shall be maintained in strict confidence throughout the proceeding, and the physical security of such materials shall be ensured. It is expressly understood that no disclosure of the Record's contents shall be made by the solicitor to his or her client, unless such disclosure is authorized by the Commissioner or the Court; and
2. That upon the expiry of the time period provided for under the Ontario Rules of Civil Procedure for any appeal from disposition of this Application, that all copies of the Record, as well as all materials referring to any contents of the Record which are subject to this Undertaking, be returned to the Commissioner or otherwise disposed of with the Commissioner's consent, or by Order of the Court.

Date: _____

Witness: _____