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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CUNNINGHAM A.C.J., THEN R.S.J. AND CARNWATH JJ.

B E T W E E N:	
MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES Applicant	Sara Blake and Chris Diana, for the Applicant
- and -	
INFORMATION AND PRIVACY COMMISSIONER, and JOHN DOE, Requester Respondents	Stephen McCammon and Allison Knight, for the Respondents
	HEARD at Toronto: March 4, 2009

THEN R.S.J.:

[1] The applicant, the Ministry of Community Safety and Correctional Services (the "Ministry"), seeks an order quashing or setting aside an order made by the Adjudicator, acting on behalf of the Information and Privacy Commissioner (the "Commissioner"), requiring the disclosure to John Doe ("the requester"), of certain records under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 ("*FIPPA*").

Background

[2] Section 47(1) of *FIPPA* gives individuals a general right of access to their own personal information held by an institution. On August 5, 2004, the requester sought access under this provision to his institutional and medical records from two correctional facilities in which he had spent time on remand awaiting trial.

[3] Initially, the Ministry wanted the requester full access to his medical file but withheld parts of the institutional file pursuant to exceptions under s. 49 of *FIPPA*, which provides a number of specific exemptions from the right of access under s. 47.

[4] The requester then appealed the Ministry's decision to the Adjudicator. In the course of the appeal, the Ministry abandoned its contention with respect to the applicability of some s. 49 exceptions but maintained that the exceptions under ss. 49(b) (for records containing personal information of third parties) and (e) (for certain "correctional records") prevented disclosure. The Adjudicator upheld the applicability of the s. 49(b) exception with respect to certain parts of twelve different pages, but found that the exception under s. 49(e) did not apply.

[5] The Ministry brings this application for judicial review of the Adjudicator's decision. It challenges the Adjudicator's finding that the s. 49(e) exception relating to "correctional records" does not apply to the 20 pages still in issue which can generally be described as correctional service occurrence reports, a handwritten note on a remand warrant, records of arrest and supplementary records of arrest including Canadian Police information reports and Prisoner Transportation forms.

The Exemption under s. 49(e) of *FIPPA*

[6] This application turns on the interpretation of s. 49(e) which provides as follows:

> 49. A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence.

[7] To fall under this exception, then, records must meet two requirements:

1. They must be "correctional records"; and

2. Their disclosure must reasonably be expected to reveal information "supplied in confidence."

The terms "correctional record" and "supplied in confidence" are not defined in *FIPPA*.

The Adjudicator's Interpretation

[8] The Adjudicator ruled that the exemption in s. 49(e) does not apply to any of the requester's records as they should not properly be considered "correctional records". The Adjudicator held that correctional records are those pertaining to sentenced inmates, not those concerning remanded inmates.

[9] In interpreting the term, the Adjudicator relied inter alia on dictionary definitions of the terms "correct" and "correction" that referred to punishment and rehabilitation, finding:

> These definitions have in common that they relate to punishment or rehabilitation after a person has been found guilty of or otherwise responsible for an offence or wrong-doing. These dictionaries contain other definitions of "correct" and "correction", but none that suggest that the term encompasses steps in the justice system prior to any finding of wrong-doing, such as investigation, prosecution, court proceedings, or pre-trial or pre-sentence detention [those steps applicable to the requester in this case].

[10] The Adjudicator added that even if the records in question could appropriately be considered "correctional records", the Ministry did not establish that the information they contained was "supplied in confidence" as required by s. 49(e).

Standard of Review

[11] The issues raised on this application and my conclusions with respect to these issues are the following:

(i) What is the appropriate standard of review of the Adjudicator's interpretation of s. 49(e) of FIPPA?

In my view, the standard of review is reasonableness.

(ii) If the standard of review is reasonableness, is the Adjudicator's interpretation of s. 49(e) of FIPPA reasonable?

In my view, this question should be answered affirmatively.

[12] In *Dunsmuir v. New Brunswick* 2008 SCC 9, the Supreme Court has set out the steps to be taken by a reviewing court in determining the standard of review as follows:

> [62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[13] As to the first step, the court stated:

> [54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function with which it will have particular familiarity ...
>
> . . .
>
> [57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[14] In *Ontario (A.G.) v. Fineberg* (1994), 116 D.L.R. (4th) 498, the Divisional Court held that in interpreting the exemptions under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, (*FIPPA*), in that case s. 14(1), the decision of the Commissioner should be reviewed on a reasonableness standard. At pp. 500-501 the Court stated:

> The interpretation of s. 14 of the Act lies at the heart of the specialized expertise of the Information and Privacy Commissioner and those who act on the Commissioner's behalf. As this court stated in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 106 D.L.R. (4th) 140 at p. 156, 13 O.R. (3d) 767, 64 O.A.C. 248:
>
> The Commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.
>
> Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the Commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task and at the heart of its specialized expertise, is the Commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.
>
> We therefore conclude the Commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause.
>
> . . .
>
> Accordingly, curial deference in reviewing the instant decision is appropriate. This court will not intervene where the Commissioner or Officer has accorded interpretations to the exemptions in s. 14(1) which they can reasonably bear.

[15] This conclusion and the reasoning supporting it has recently been adopted by the more recent decision of the Divisional Court in *Ontario (Minister of Community Safety and Correctional Services) v. Ontario (Privacy Commissioner)* (2007), 231 O.A.C. 230 (Div. Ct.) at paras. 31-34.

[16] In *Ontario (Ministry of Health and Long Term Care) v. Ontario*, [2004] O.J. No. 4813, the Court of Appeal employing the pragmatic and functional analysis test determined that the standard

of review for decisions by the Adjudicator in respect of an exemption under *FIPPA* is reasonableness. At para. 38, Goudge J.A. stated:

> In my view, this goes precisely to the core of his expertise. It is the essence of his mandate, both in deciding individual appeals and providing general advice. Hence even though the nature of the problem before the Commissioner involves a pure question of law, that does not dictate strict scrutiny by the court.

[17] While no court has specifically considered the standard of review for s. 49(e) of *FIPPA*, I am satisfied that the jurisprudence has appropriately determined that standard of review for the Adjudicator's interpretation of exemptions in *FIPPA*, which involve pure questions of law, is reasonableness. If as the Divisional Court stated in *Fineberg*, *supra*, the interpretation of s. 14 of *FIPPA* involving a pure question of law lies at the heart of the special expertise of the Adjudicator requiring deference by the reviewing court, there can be no different standard with respect to s. 49(e). Section 49 deals with exemptions to the disclosure of personal information. Section 49(a) deals with situations where s. 14 would apply. In other words, if exemptions under s. 49(a) are to be reviewed on a standard of reasonableness there is no principled reason that I can discern to review exemptions under s. 49(e) on any other basis except reasonableness. In my view this approach is further supported by the decision of the Court of Appeal in *Ontario (Ministry of Health and Long Term Care) v. Ontario, supra*.

[18] I therefore conclude that the standard of review in this case is reasonableness and accordingly turn to the consideration of the next issue which is whether the interpretation given to s. 49(e) of *FIPPA* is reasonable.

Analysis

[19] At the outset it is necessary to clearly articulate the approach that a reviewing court must take in inquiring whether a decision is reasonable. In *Dunsmuir, supra*, the court stated the following at para. 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[20] The Nova Scotia Court of Appeal has provided some guidance as to how the *Dunsmuir* standard should be applied in *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520*, 278 N.S.R. (2d) 381 (C.A.) as follows:

> 23 In Casino Nova Scotia, [2009] N.S.J. No. 21, this court elaborated on Dunsmuir's reasonableness test:
>
> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by Dunsmuir to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and 'justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (Dunsmuir, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. Nova Scotia (Director of Assessment) v. Wolfson, 2008 NSCA 120, para. 36.
>
> [31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislator's decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. Dunsmuir, para. 47-49; Lake, [2008] 1 S.C.R. 761, para. 41; PANS Pension Plan [Police Association of Nova Scotia Pension Plan v. Amherst (Town), [2008] S.C.C.A. No. 442 para. 63; Nova Scotia v. Wolfson, para. 34.
>
> 24 The reviewing judge assessing reasonableness does not plot his own itinerary, but tracks the tribunal's reasoning path. Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247 at para. 47-55; Granite Environmental Inc. v. Nova Scotia (Labour Relations Board), 2005 NSCA 141 at para. 42-44; CBRM v. CUPE, [2006]

> N.S.J. No. 259, at para. 71-72. So the reviewing judge's first task is to chart the tribunal's reasoning. Here, the arbitrator's reasoning was: ...

[21] In *Petro Canada v. British Columbia (Workers Compensation Board)* 2009 BCCA 396, the British Columbia Court of Appeal reiterated the need to assess the requirement that it is the task of the reviewing court to assess the reasoning path of the tribunal rather than to provide a rationale for the conclusion or result reached by the tribunal as follows:

> 55 The correct approach to the matter was articulated by the Supreme Court of Canada in Law Society of New Brunswick v. Ryan, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:
>
> [The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> 56 A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have carte blanche to reformulate a tribunal's decision in a way that casts aside for unreasonable chain of analysis in favour of the court's own rationale for the result.

[22] To these observations as to how the reviewing court is to approach its task in assessing reasonableness may be added the observations of the Supreme Court in *Ryan, supra*, at para. 55:

> 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this

> explanation is not one that the reviewing court fins compelling (see Southam, at para. 79).

The Reasons of the Adjudicator

[23] In concluding that records of the requester in custody under remand were not "correctional records" within s. 49(e) of *FIPPA* the Adjudicator stated:

> Therefore, in my view, taking into account both the Ministry's explanation of its organization and functions and dictionary definitions as well as the purpose of the *Act*, I conclude that the word "correctional" in section 49(e) refers to the punishment and rehabilitation of offenders after a finding of wrong-doing, through programs such as imprisonment, parole and probation, and not to matters such as investigation, prosecution, court proceedings, and pre-trial and pre-sentence detention. The Ministry carries out some functions that fit within the usual meaning of "correctional", and in my view, for records to be "correctional records", they must relate to those functions.

[24] It is now necessary to determine whether his reasons for that conclusion are reasonable within the test outlined in *Dunsmuir, supra*.

[25] The Adjudicator commenced his reasons by noting that the term "correctional record" in s. 49(e) of *FIPPA* was not defined in the *Act*.

[26] After consulting three dictionaries he concluded:

> These definitions have in common that they relate to punishment or rehabilitation after a person has been found guilty of or otherwise responsible for an offence or wrong-doing. These dictionaries contain other definitions of "correct" and "correction", but none that suggest that the term encompasses steps in the justice system prior to any finding of wrong-doing, such as investigation, prosecution, court proceedings, or pre-trial or pre-sentence detention.

[27] As to the usefulness of dictionaries, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis Canada Inc. 2008) states:

> Despite their shortcomings, dictionaries do have a role in statutory interpretation. They provide a useful starting point by indicating a range of meanings that a word is capable of bearing within a particular linguistic community. If the meaning an interpreter wishes to rely on is mentioned or included in a dictionary entry, it shows that the proposed meaning is at least plausible. If it is mentioned in numerous standard dictionaries, the evidence of plausibility is that much stronger.

[28] The Commissioner's position before this court is that the Ontario Court of Appeal has found decisions of the Adjudicator reasonable that have referred to dictionary definitions to determine the ordinary usage of the words contained in *FIPPA*. (See: *Ontario Workers' Compensation Board*, [1998] O.J. No. 3485, *supra* at para. 26; *Ontario (Ministry of Transport)*, [2005] O.J. No. 4047, *supra* at paras. 23-29).

[29] The Commissioner submits that the Adjudicator's interpretation complies with the ordinary meaning of "correctional". He relies upon the ordinary meaning rule as formulated by *Sullivan on the Construction of Statutes, supra*, at page 24:

> As understood and applied by modem courts the ordinary meaning rule consists of the following propositions:
>
> 1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> 2. Even if the ordinary meaning is plain, courts must consider the purpose and scheme of the legislation; they must consider the entire context.
>
> 3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.
>
> This formulation of the ordinary meaning rule is closely related to Driedger's modern principle. It emphasizes that interpretation properly begins with ordinary meaning -- with reading words in their grammatical and ordinary sense -- but it does not stop there. Interpreters are obliged to consider the total context of the words to be interpreted in every case, no matter how plain those words may seem upon initial reading.

[30] The Commissioner submits that there is a presumption that the ordinary meaning of a legislative text is the meaning intended by the legislature and further that the ordinary meaning is plausible in the context of the purpose of *FIPPA* generally and the scheme of s. 49 of *FIPPA* specifically and that in the absence of a reason to reject it, the ordinary meaning prevails.

[31] The Ministry submits that the interpretation placed upon the word "correctional" in s. 49(e) is unduly narrow. The Ministry contends that the Adjudicator should have based his interpretation of "correctional record" in s. 49(e) on the language of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M. 22 ss.l, 5(a), (b) ("*MCSA*") given the absence of a definition of "correctional record" in s. 49(e) of *FIPPA*.

[32] The Ministry submits that while the *MCSA* also does not define "correctional records" it does define "correctional services" as a "service provided for the purpose of carrying out the function or objects of the Ministry, including the operation and maintenance of correctional institutions". The functions of the Ministry in respect of the *MCSA* are set out in s. 5 of that *Act* and include the responsibility to provide for the custody of persons awaiting trial or convicted of offences and to establish, maintain and operate correctional institutions. It is the position of the Ministry that since all of its functions are included in its mandate to provide "correctional services" the records generated in the course of discharging those functions are "correctional records" within s. 49(e) of *FIPPA*.

[33] The Adjudicator in his reasons was alive to the interpretation urged by the Ministry but rejected the interpretation proffered as follows:

> The Ministry describes this "correctional services component" as follows:
>
> > The correctional services component of the Ministry provides treatment and rehabilitation programmes for adult offenders, 18 years of age and over, who are convicted by the courts and sentenced to terms of imprisonment of up to two years less one day. Additionally, the Ministry is also responsible for the supervision of individuals awaiting trial, sentencing, transfer, deportation or other judicial proceedings. This Ministry is also responsible for the supervision of adults in Ontario who have been convicted of an offence and subsequently placed on probation.

In my view, careful analysis of the Ministry's description of its "correctional services component" reveals that only parts of it should be viewed as "correctional". In the first sentence, the Ministry describes this mandate as relating to treatment and rehabilitation of offenders who have been convicted and sentenced. Because this aspect of the Ministry's mandate relates to events after conviction and sentencing, it clearly relates to the Ministry's "correctional" mandate. The third sentence also relates to matters arising from the individual's conviction and sentence and also qualifies as "correctional". But the phraseology and subject matter of the second sentence, "Additionally, the Ministry is also responsible for the supervision of individuals awaiting trial ..." is different. The Ministry does not overtly describe this area of its mandate as "correctional", and it is difficult to see how supervision prior to a finding of wrong-doing qualifies as "correctional."

The Ministry's use of the word "correctional" in relation to its mandate, if it includes the second sentence of the passage reproduced above, is broader than the ordinary dictionary meanings of the word. While the term usually refers to punishment and rehabilitation of offenders through incarceration, parole and probation, the Ministry's description of its "correctional service" mandate also includes detention before trial and sentencing, before a court has determined whether any form of correction is warranted. I do not accept this view.

It could be argued that the Ministry's interpretation of "correctional" as including events prior to conviction and sentencing finds support in the use of the phrases "correctional service" and "correctional institution" in the *Ministry of Correctional Services Act* (the *MCSA*). That Act defines "correctional service" as "a service provided for the purpose of carrying out the function or objects of the Ministry, including the operation and maintenance of correctional institutions".

Section 5 of that *MCSA* states:

It is the function of the Ministry to supervise the detention and release of inmates, parolees, probationers and young persons and to create for them a social environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,

> (a) provide for the custody of persons awaiting trial or convicted of offences;
>
> (b) establish, maintain and operate correctional institutions;
>
> (c) provide for the open custody, secure custody and temporary detention of young persons awaiting trial, found guilty or convicted of offences

> (d) establish, maintain and operate places of open custody, secure custody and temporary detention;
>
> (e) provide programs and facilities designed to assist in the rehabilitation of inmates and young persons;
>
> (f) establish and operate a system of parole;
>
> (g) provide probation services;
>
> (h) provide supervision of non-custodial dispositions, where appropriate; and
>
> (i) provide programs for prevention of crime.
>
> In my view, this does not mean that everything the Ministry does in carrying out its function is necessarily a "correctional service". However, even if section 5 of the *MCSA* is taken to give "correctional service" an expanded meaning for the purpose of that Act, the question is still whether "correctional" in section 49(e) of the *Freedom of Information and Protection of Privacy Act* should be given its ordinary meaning or given an expanded meaning consistent with the phrase "correctional service" in the *Ministry of Correctional Services Act*.
>
> In my view, the correct or most reasonable approach is to interpret "correctional" according to its usual meaning, for the following reasons: ...

[34] It is evident that the essential difference between the interpretation of the term "correctional" in s. 49(e) of *FIPPA* between the Adjudicator and the Ministry is that the Commissioner maintains that in ordinary usage "correctional" refers to the functions of the Ministry that are specifically correctional in nature namely post-sentence functions such as rehabilitation treatment, probation parole and temporary absence rather than to custodial functions involving the supervision of inmates in a safe environment which are not correctional in nature. Accordingly, only those records kept in respect of specific correctional functions are the subject of the exemption under s. 49(e) of *FIPPA*. The Ministry on the other hand contends that all of its functions, including the custodial supervision of inmates are part of its mandate to provide "correctional services" under the *MCSA*. Accordingly, the term "correctional" in s. 49(e) properly interpreted refers to records kept with respect to all of those functions.

[35] It is not the function of the reviewing court to determine which of two plausible interpretations is correct or more reasonable as the Adjudicator purported to do but merely to determine whether the interpretation proffered by the Adjudicator is reasonable within the test outlined by *Dunsmuir, supra*, at para. 47 by giving respectful attention to the reasons offered in support of the decision to determine the "existence of justification, transparency and intelligibility with the decision-making process" and by determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[36] The Adjudicator purported to offer several reasons for his interpretation of s. 49(e) of *FIPPA* and it is to those reasons to which I now turn.

[37] The first reason advanced is that while giving the term "correctional" the meaning given to it by the phrase "correctional service" in *MCSA* might be appropriate in the context of records created and maintained by the Ministry, s. 49(e) applies to many institutions with different functions. With respect, at issue on this application are the records of the Ministry and not those of another institution. Moreover, neither the Adjudicator's decision nor the Commissioner's submissions before the court refer to any institution not subject to the authority of the Ministry (or indeed the *MCSA*) to which the provision might apply. In my view, this reason does not support the Adjudicator's position in the determination of the reasonableness issue.

[38] The second reason advanced by the Adjudicator is that if the Legislature had wanted "correctional" in s. 49(e) to have the same meaning as "correctional service" in the *MCSA* it could have said so, and has done so explicitly (for example, the definition of "correctional institution" in the *Health Protection and Promotion Act*).

[39] The second reason given by the Adjudicator can usefully be read in conjunction with the third reason advanced by the Adjudicator to the effect that when the Legislature has intended in the *Act* that exemptions involving records relevant to the supervision of inmates in correctional institutions encompassing such matters as investigation, enforcement, court proceedings or pretrial detention,

it has made this clear through language used in s. 140) and (2). In my view, these reasons of the Adjudicator support the reasonableness of the interpretation of s. 49(e) advanced by the Adjudicator.

[40] First, the Divisional Court in *Medical Protective Assoc. v. John Doe*, [2008] O.J. No. 3475 at para. 31 has held that in respect of words found in *FIPPA* the definition of a term in another statute is not determinative of the same term in *FIPPA* and further, that the context in which the term found in *FIPPA* is important.

[41] Section 47 of *FIPPA* invites any individual the right of access to any personal information in the custody or under the control of an institution. Section 49 forms a complete code for the granting of exemptions to the disclosure of personal information.

[42] Section 49(a) grants exemption:

> a) where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Some of the relevant provisions of s. 14 are as follows:

> 14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (d) disclose the identify of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
>
> (j) facilitate the escape from custody of a person who is under lawful detention;
>
> (k) jeopardize the security of a centre for lawful detention; or

[43] Section 14(2)(d) states:

> (2) a head may refuse to disclose a record,
>
> (d) that contains information about the history, supervision or release of a person under the control or supervision of a correction authority.

[44] The Ministry has argued forcefully that the narrow interpretation of s. 49(e) advanced by the Adjudicator would hamper the ability of the correctional staff to carry out any necessary future supervisory responsibilities in relation to the applicant as well as its ability to fulfill its mandate to provide a safe and secure custodial environment for inmates and staff. In my view however, there is much force in the argument advanced by the Commissioner that when the Legislature intended to enact an exemption from access applicable to future supervision, law enforcement, safety or security in the broad array of circumstance under which an inmate may be lawfully supervised or detained, it did so clearly, particularly under the range of law enforcement exemptions in s. 49(a) by means of the inclusion of s. 14 and in particular s. 14(2)(d).

[45] I agree with the Commissioner's submissions that the Ministry's broad interpretation of s. 49(e) appears manifestly, clearly and unambiguously to deal with exemptions for words pertaining to the supervision of inmates and the security and safety of inmates and staff but does not deal specifically with records which pertain to specific correctional matters such as rehabilitation and treatment and the granting and supervision of probation, parole or temporary absence. On the other hand, the narrow interpretation advanced by the Adjudicator can reasonably be seen to fill the gap to provide exemption in respect of records which are strictly correctional in nature. In my view, there is much force to the Commissioner's argument that if the Ministry's interpretation of s. 49(e) were to prevail the exemptions provided by s. 14 in s. 49(a) would be rendered largely redundant.

[46] In the context of the interplay between s. 49(a) and 49(e), the Commissioner submits that the legislative history supports the reasonableness of the Adjudicator's interpretation of s. 49(e). In his submission, s. 49(a) in conjunction with s. 14 makes exemptions available to a custodial institution having a valid basis for refusing disclosure of records in order to address concerns relating to continued supervision, safety, law enforcement processes and a variety of custodial circumstances. However, the Report of the Commission on Freedom of Information and Individual Privacy 1980, Vol. 3 (Queen's Printer) henceforth the "Williams Report" at pages 560-562 expressed a concern that

protection be afforded to psychological reports and parole reports because of a fear of retribution or a possible chilling effect regarding voluntary opinions by friends and family.

[47] The Commissioner submits that it is reasonable to infer that s. 49(e) was enacted to obtain protection for confidential sources of probation and parole reports because s. 49(a) was enacted for different purposes. In my view, these submissions support the reasonableness of the Adjudicator's interpretation of s. 49(e) and in particular whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The fourth reason advanced by the Adjudicator is that his interpretation is consistent with a comparable provision in the *Federal Privacy Act*, R.S.C. 1985, c. P. 21. Section 24(1) of the *Privacy Act* permits non-disclosure of information obtained respecting an individual "under sentence". However, as the Ministry has pointed out, there is a very logical reason for the limited nature of the federal exception and one which distinguishes the federal scheme from the one in this case: federal penitentiaries house only sentenced inmates. By contrast, the majority of inmates in provincial correctional institutions are accused persons on remand who have not been convicted or sentenced. I find this aspect of the reasons advanced by the Adjudicator of no assistance in determining the reasonableness of his interpretation of s. 49(e).

[49] The fifth reason advanced by the Adjudicator is that to give "correctional" the meaning given to it by the Ministry in the phrase "correctional service" in the *MCSA* would broaden the exemption and narrow rights of access contrary to the purposes of *FIPPA* as outlined in s. 1(a) are principles of statutory constitution which hold that statutory exemptions are to be strictly construed and the right to an exemption must be clearly established (see: *Sullivan, supra*, at 3967, 399-400, 483-485).

[50] In *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, at paras. 25, 30-31, I take Gontier J. to have observed that exceptions from the rights should be interpreted narrowly, in light of their underlying rationale and should not be used to undermine the broad purpose of the legislation. Strict construction in the context means that the statutory objective ought not to be frustrated except on clearest grounds, with any doubt resolved in favour of preserving the

right and that the burden of persuasion should rest on the party asserting the exception. I agree with the submission of the Commissioner that the Adjudicator properly approached the interpretation of s. 49(e) as both the statute and the principles of statutory interpretation require and that these factors should be taken into account in assessing the reasonableness of his interpretation. This does not mean that a strict interpretation by itself with respect to exemptions in privacy statutes endows the interpretation with reasonableness. However, it is, in my view, a factor to consider in circumstances where there is wording to suggest an interpretation in terms of ordinary usage which is plausible coupled with a consideration of the interplay between s. 49(a) and 49(e) in the context of exemptions provided by s. 49 to the disclosure of personal information to individuals.

[51] Finally, reference was made by the Adjudicator to previous orders of other adjudicators who found "in their entirety, records created and maintained by the Ministry's probation and parole staff which relate to the supervision of the applicant's parole "to be" correctional records within s. 49(e). The position of the Ministry is not that such records do not come within s. 49(e) but rather that records generated prior to sentence that bear on issues of future supervision and safety and security of inmates and staff also are the subject of exemption. The orders referred to by the Adjudicator do not address the later issue. Accordingly, the orders do not in my view advance my consideration of the reasonableness of the Adjudicator's interpretation of s. 49(e). Similarly, the reference by the Ministry to order P0-1042 of Adjudicator Hale does not advert to the nature of the documents exempted under s. 49(e) and accordingly is irrelevant to my consideration of the reasonableness of the Adjudicator's interpretation of s. 49(e).

[52] Finally, s. 49(e) requires that "correctional records" must be "supplied in confidence" before the exemption can be granted. The Adjudicator having found that the proffered records were not "correctional records" considered it unnecessary to consider this requirement, but nevertheless found that the Ministry had not demonstrated that disclosure of the information could reasonably be expected to reveal information that had been "supplied in confidence". I agree with the Commissioner's submission that the Ministry did not provide sufficient reasoning or evidence with respect to specific information actually supplied in confidence but merely related its rationale for relying on s. 49(e) as follows:

> The information remaining at issue includes confidential information concerning the history and supervision of the appellant, an individual who has been incarcerated at a Ministry correctional facility. Release of the information remaining at issue would hamper the ability of correctional staff to carry out any necessary future supervision responsibilities in relation to the appellant. The Ministry also took into consideration the fact that confidentiality of information in some instances is necessary for community safety and protection of the public. The security of correctional institutions and the safety of staff, offenders and members of the public is of primary importance to the Ministry.

[53] This Court has stated that in discharging its burden of proof under the *Act*, an institution must do more than just baldly state its position on the issue but must provide "sufficient information and reasoning" on the issue in order that an informed assessment may be made. The observations of this court in *Fineberg, supra*, at pp. 502-503 are apposite to the situation in the present case:

> Clearly, sufficient information and reasoning has to be provided to the Officer in order that he or she may make an informed assessment of the reasonableness of the expectations required by s. 14. In this case, the Ministry proceeded before the Officer and this court as if the concerns detailed in s. 14 were self-evident from the record, or the request of such material during an active criminal investigation constituted a *per se* fulfillment of the relevant exemptions. These positions are inconsistent with the purpose and scheme of the statute.
>
> It is our view that the findings by the Officer with respect to the application of s. 14(1)(a), (b), (d), and (f) were reasonable in light of the material before her, including the representations and the records themselves.

(See also: *Town of Maidstone v. Kathleen Starzacher* (10 Jan. 1994) London 233/93 (Ont. Div. Ct.)

[54] I agree with the Commissioner's submissions that based on the Ministry's submissions which amount to a bald assertion of its position, and the relatively innocuous nature of the documents themselves, the Adjudicator's ruling that the Ministry had not discharged its burden under the *Act* is reasonable.

Conclusion

[55] Having examined the Adjudicator's reasons for decision as a whole in order to identify a justifiable, intelligible and transparent reasoning path, I conclude that the decision is reasonable.

[56] The Adjudicator was entitled to assess the wording of s. 49(e) of *FIPPA* and to assign to the word "correctional" its plain ordinary meaning. The meaning assigned is at least plausible. Moreover, as a matter of statutory interpretation, an interpretation based on ordinary meaning enjoys a presumption that the Legislature intended that meaning unless displaced by a consideration of the entire context of the legislation taking into account the purpose and scheme of the legislation.

[57] The Adjudicator was alive to the interpretation proffered by the Ministry, found it to be plausible, but nevertheless rejected it for several reasons. The Adjudicator reasoned that if the Legislature had intended an interpretation of s. 49(e) of *FIPPA* based on the definition of "correctional services" in another statute, i.e. the *MCSA*, it could easily have done so. Secondly, the Adjudicator reasoned that the Legislature could not have intended the interpretation of the exemption put on s. 49(e) by the Ministry because the Legislature in enacting s. 14(1) and (2) contained in s. 49(a) has already thoroughly and unambiguously covered the subject matter. There is accordingly room for the Adjudicator's interpretation based on the ordinary meaning of the words of the statute. Finally, he reasoned that the narrower interpretation placed on s. 49(e) supports the general purposes of privacy statutes in providing access to requesters. In my view, the reasons taken as a whole demonstrate a line of analysis which could reasonably lead the Adjudicator to the conclusion at which he arrived. There is in my view a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, notwithstanding other conclusions are possible or even more compelling.

[58] It must be conceded that the Adjudicator also advanced reasons which are irrelevant or unhelpful but it is the task of the reviewing court to assess the reasons as a whole and not to focus on mistakes or the weakest link of the reasoning in isolation from the whole of the reasons. I am satisfied that notwithstanding shortcomings in the reasons the reasons, as a whole, are tenable to support the decision.

[59] I am also satisfied that the Adjudicator's conclusion lies within the range of acceptable outcomes. First, as the Commissioner has pointed out the interpretation of s. 49(e) advanced by the Adjudicator is consonant with the legislative history as it offers protection to contributors to

psychological reports and parole reports who may have a fear of retribution or experience a chilling effect in offering candid voluntary opinions.

[60] Moreover, as I have sought to illustrate, the interpretation of the exemptions of s. 49(e) advanced by the Ministry would render the exemptions under s. 49(a) of the *Act* largely redundant if as the Ministry contends the exemption in s. 49(e) is concerned with the supervision of inmates and the security of inmates and staff in circumstances where these matters are thoroughly covered by the exemption i.e. s. 49(a). In my view, it is within the range of acceptable outcomes that the exemption in s. 49(e) of the *Act* stand as a distinct enactment that pertains to confidential records generated and kept for the purposes of post conviction or correctional functions of the Ministry, namely, parole probation and temporary absences in circumstances where exemptions pertaining to the custodial functions of the Ministry i.e. to the supervision of inmates and safety concerns are covered by s. 49(a) of the *Act*.

[61] For these reasons I would dismiss the application.

THEN J.

CUNNINGHAM A.C.J.

Justice Carnwath has retired and did not participate in the judgment.

Released: December 8, 2009

COURT FILE NO.: 163/06
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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J., THEN R.S.J. AND CARNWATH JJ.

B E T W E E N:

MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER, and JOHN DOE, Requester

Respondents

REASONS FOR JUDGMENT

THEN R.S.J.

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