# COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Finance) v. Ontario (Information and Privacy Commissioner), 2012 ONCA 125
DATE: 20120224
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Rosenberg, Feldman JJ.A. and Swinton J. (*ad hoc*)

BETWEEN

Minister of Finance for the Province of Ontario

Applicant (Appellant)

and

Diane Smith, Adjudicator, Information and Privacy Commission/Ontario
and John Doe, Requester

Respondents (Respondents in Appeal)

Sara Blake and Andrea Cole, for the appellant

William S. Challis, for the respondent Diane Smith, Adjudicator, Information and Privacy Commission of Ontario

Alex Cameron and Kevin Yip, for the respondent Requester, John Doe

Heard: January 18, 2012

On appeal from the order of the Divisional Court (Aston, Linhares de Sousa and Lederer JJ.), dated April 1, 2011.

**Rosenberg J.A.:**

[1] The Minister of Finance for Ontario appeals from the decision of the Divisional Court (Aston, Linhares de Sousa and Lederer JJ.) upholding, except in one respect, the decision of an Adjudicator under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [the Act] to release the requested records to the respondent Requester. The records relate to

advice to the Minister leading up to a decision by the Minister about the effective date of certain amendments to s. 2 of the *Corporations Tax Act*, R.S.O. 1990, c. C.40. While the Minister's privacy decision originally relied upon several sections of the Act, the case now turns on s. 13(1) of the Act which gives the Minister, as head of the institution, the discretion to refuse to disclose a record "where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by the institution." In holding that the documents must be disclosed the Adjudicator relied upon this court's decisions in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* (2005), 202 O.A.C. 379 (C.A.) [*MOT*] and *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 203 O.A.C. 30 (C.A.) [*MNDM*].

[2] In my view, in deciding to release the requested records, the Adjudicator misinterpreted and misapplied the decisions of this court with the result that she arrived at an unreasonable decision. I would allow the appeal and remit the matter to the Information and Privacy Commission.

**THE FACTS**

[3] The Ministry of Finance received a request under the Act for all records or parts of records in the Ministry that consider the issue of retroactivity and the effective date of amendments to s. 2 of the *Corporations Tax Act*, which was effective May 11, 2005. Although the Requester is referred to in the materials as John Doe, there seems to be no dispute that the Requester seeks the records as part of a dispute with the Ministry over tax liability. The Ministry

believes that certain corporations had entered into a tax avoidance scheme and amended the Corporations Tax Act to prevent “tax leakage”.

[4] The Ministry located six records that respond to the request. The records are all brief, consisting of one or two pages and may be described as follows. Records I to IV are all titled “Tax Haven Corporations—Timing of Implementation”. They are slightly different versions of what the adjudicator described as draft option papers. Record I has three sections titled option 1, 2 or 3. The record contains a note of a possible fourth option which was considered. Options 1 and 2 and the possible fourth option set out arguments for and against adopting the various options. Option 3 also has arguments for and against, but carries an explicit recommendation from the author(s) of the document. The possible fourth option also carries an express recommendation. Records II and III are similar to Record I, with more or less detail. Record IV is similar to Records I to III, except that reference to the possible fourth option has been dropped, as has the express recommendation in Option 3.

[5] Record V is titled “Tax Avoidance Strategy”. It very briefly identifies the possible options that are dealt with in more detail in Records I to IV. It also includes a statement from which one could infer what the civil servants viewed as the preferred option.

[6] Record VI is titled “Legislating an End to Tax Haven Loophole”. Like Record V it identifies the civil servants’ preferred option, but also includes information about what became the fourth option. It includes factual information about the federal government criteria for retroactive application of tax changes. The Ministry agreed to disclose the factual information but sought redaction of the two parts of the document that discuss recommendations.

[7] Following the original decision of the Adjudicator, the Minister applied for reconsideration of the decision. In this application, the Minister filed an affidavit from Ann Langleben the Acting Assistant Deputy Minister of the Tax Policy Division. At the relevant time Ms. Langleben was Director of the Corporate and Commodity Tax Branch, Office of the Budget, Taxation and Pensions. She deposed that she was involved in reviewing and advising on the tax policy option papers that are Records I to IV. To the best of her recollection, the records formed part of the Budget brief process and involved briefings of the Assistant Deputy Minister, Office of the Budget and Taxation, the Deputy Minister of Finance, and the Minister of Finance. She attached to her affidavit an excerpt from an Agenda of a meeting with the Minister on April 11, 2005 with the item "Corporate Minimum Tax and Tax Haven Corporations (OBT)". She deposed that this agenda is evidence that the options referred to in the documents went to the Minister and were included for explanation and decision by the Minister. She states: "To the best of my knowledge, all the options were presented as advice and recommendations, with relevant considerations."

**THE DECISIONS OF THE ADJUDICATOR**

[8] The Adjudicator held that to qualify as advice or recommendations within the meaning of s. 13 of the Act, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. She held that there was no clear evidence of communication of the information in Records I to V from one person to another. She characterized the records as draft records and it was not apparent that the information in the records was communicated to the person being advised and therefore used in the Ministry's deliberative process.

[9] The Adjudicator also held that even if Records I to V were draft versions of the final document and there was evidence that the information was communicated to the person being advised, she would have found that "only the recommendation portion in Option 3 of Records I to III and Record V consisted of information which suggests a course of action that will ultimately be accepted or rejected by the person being advised". As "a preferred option" is not expressly identified and cannot be inferred in the remainder of the information in these records, "there is no suggested course of action and [therefore] no 'advice or recommendations'".

[10] As to Record VI, as indicated, the Ministry had agreed to disclose most of the document. The remainder was also not exempt since it did not suggest a course of action that would ultimately be accepted or rejected by the person being advised.

[11] The Adjudicator refused to reconsider her decision. She held that the Ministry had not established a fundamental defect in the adjudication process. In any event if she were to reconsider her decision, she would not reach a different conclusion. As to Records I to V, she still found there was no clear evidence of communication of the information in the records from one person to another. As to Record VI, the Ministry had still not provided any substantive information to demonstrate that the information suggests a course of action that will ultimately be accepted or rejected by the person being advised.

**THE DECISION OF THE DIVISIONAL COURT**

[12] In a brief endorsement, the Divisional Court held that the standard of review is reasonableness. The Court summarized the finding of the Adjudicator respecting Records I to V as "that there was no recommended course of action demonstrated in these documents". This decision fell within the range of possible acceptable outcomes, and thus, is reasonable. Further,

her finding that it was not demonstrated that the information in those records had been communicated to the decision-maker was also within the range of possible acceptable outcomes, and thus, reasonable.

[13] The Court disagreed with the Adjudicator about Record VI. It held that, on its face, the document makes a recommendation. The redacted matters contain further advice as to how the issue should be dealt with. There was no dispute that there was communication of the advice or recommendation found in the document, within the deliberative process. Accordingly, the redactions were covered by the exemption in s. 13(1) of the Act and were to be withheld.

**ANALYSIS**

**(a) Standard of Review**

[14] There is no dispute that the standard of review is reasonableness. See *MOT*, at paras. 9-12.

**(b) Interpretation of s. 13 of the *Freedom of Information and Protection of Privacy Act.***

[15] The parties to this appeal are the Minister as appellant, and the Adjudicator and the Requestor as respondents. All parties relied upon this court's decisions in *MOT* and *MNDM*. However, they have very different interpretations of the holdings in those cases. The Minister submits that there need not be a preferred option identified in the documents to come within s. 13(1). Ms. Blake, counsel for the Minister, submits that imposing such a requirement fundamentally misconceives the role of the civil service in a Parliamentary democracy. Where, as here, the Minister is the decision maker, it is the role of the civil service to present the various options. It is not for the civil service to make the decision. Further, there is no requirement that the advice or recommendations in the documents be communicated to the decision maker. The s.

13(1) exemption envisages a deliberative process in which there may be a series of drafts. What is required is that the records relate to a decision which will ultimately be made.

[16] Mr. Challis on behalf of the Adjudicator takes a much different view of the holdings in *MOT* and *MNDM*. He submits that this court's decisions in those cases must be read with the decisions of the Divisional Court and the decisions of the Adjudicators. That package of decisions demonstrates that to qualify as advice or recommendations within s. 13, the information must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. Where a preferred option cannot be identified or inferred and a suggested course of action is not otherwise revealed, the exemption does not apply. Mr. Challis gives the analogy of a solicitor acting for a client. The information conveyed to the client could hardly be considered advice if the solicitor did not give an opinion as to the preferred course of action the client should take. Further, the Minister must show that the information has been communicated to the person being advised in the deliberative process.

[17] For the following reasons, I agree with the approach of the Minister. In my view, that approach is consistent with the holdings in *MOT* and *MNDM*; the approach of the Adjudicator is not. In particular, Mr. Challis' analogy to a solicitor advising a client fundamentally misconceives the role of the civil service in our democratic process.

[18] In *MOT*, the court considered the meaning of the phrase "advice and recommendations" in s. 13(1), and in particular, the government's argument that the two words had to be given different meanings. Thus, the government argued that "advice" did not require a deliberative process and would include information or analysis conveyed without a view to influencing a decision or the adoption of a course of action. Speaking for the court, Juriansz J.A. rejected the

government's position. He held that the appropriate rule of interpretation was the associated words rule, where the reader looks for a common feature among the terms. The term "advice" also had to be interpreted in a manner consistent with the purpose of the Act as outlined in s. 1. Juriansz J.A. was satisfied that the Adjudicator had properly interpreted the phrase "advice and recommendations". He adopted this part of the Adjudicator's reasons:

> [A]dvice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act (Orders P-1054, P-1619 and MO-1264).

[19] He also noted, at para. 29, that the Adjudicator's interpretation left room for advice and recommendations to have distinct meanings:

> A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.

[20] In *MNDM*, Juriansz J.A., again writing for the court, considered that the interpretation adopted by the Adjudicator in the two orders was reasonable and indistinguishable from the interpretation of the Adjudicator in *MOT*. At paras. 9 and 10, Juriansz J.A. referred to portions of the two orders (PO-2028 and PO-2084) in *MNDM*:

> **PO-2028**
>
> In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that

> will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making …. In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given ….
>
> **PO-2084**
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> A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process ….

[21] There is a slight distinction in the way the adjudicators in *MOT* and *MNDM* interpreted "advice and recommendations". In *MOT* and PO-2084, the adjudicators refer to information that must "relate" to a suggested course of action. In PO-2028, the adjudicator suggested that the information must "reveal" a suggested course of action. He went on to describe two ways that advice or recommendations may be revealed: "(i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given". Section 13 itself, speaks of the discretion to refuse to disclose a record where the disclosure would "reveal advice or recommendations".

[22] Justice Juriansz went on to hold that the adjudicator in *MNDM* could reasonably hold that the mere fact that a document refers to "options" or "pros and cons" did not determine that the document revealed advice or recommendations. Rather, it depends on the circumstances of each case. He held, at para. 16, that the following was a reasonable approach:

> The [Adjudicator] proceeded on the basis that whether records that set out "options" and "pros and cons" reveal advice or recommendations depends on the circumstances of each case. He assessed the context in which the records at issue were created and communicated and

> determined they contained no information that could be said to "advise" the Board in making its decision on funding, nor did they allow one to accurately infer any advice given. He found that the records consisted of "mere information" broken down into various pre-determined categories.

[23] Bearing in mind that the standard of review applied by the court in *MOT* and *MNDM* was reasonableness, not correctness, the following conclusions may be drawn about the meaning of s. 13(1). Advice and recommendations, within the meaning of s. 13, must contain more than mere information. If it were enough that the record contained information, s. 13(1) would, as was observed by Juriansz J.A. in *MOT*, at para. 28, severely diminish the public's right to information. The information contained in the records must relate to a suggested course of action that will be ultimately accepted or rejected by its recipient. It is implicit in the various meanings of "advice" and "recommendations" considered in *MOT* and *MNDM* that s. 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.

[24] Whether the material in the document expressly makes a recommendation or simply presents advice on different courses of action, it will be unlikely that the document relates to or reveals only one course of action. Especially where the document is to go to the Minister, it will be unlikely that there is only one possible course of action that the Minister could take in dealing with difficult issues. The civil servants may have a preferred option and this may be obvious from the way in which the document is drafted, but the Minister, as the decision maker, is entitled to advice on a range of possible courses of action. Even where the decision-maker is not a Minister but a senior civil servant, those decision makers are also entitled to confidential policy

advice, which may or may not include explicit recommendations as to what the persons reporting to them believe is the preferred course of action.

[25] The reasonableness standard requires courts to give deference to the tribunal "with regard to both the facts and the law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 48). In my view, the Adjudicator made two fundamental errors in her interpretation of s. 13(1) which led to an unreasonable decision; a decision that was not within "the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47). The first error was in holding that there must be evidence that the information in the records actually went to the final decision maker. The second error was in holding that s. 13 only applies to the suggestion of a single course of action ultimately adopted or rejected by the decision maker. I will deal with each error in turn.

[26] There is no requirement under s. 13(1) that the Ministry be able to demonstrate that the document went to the ultimate decision maker. What s. 13 protects is the deliberative process. During that process the position of the civil service will undoubtedly evolve and this evolution will be reflected in the advice and recommendations in the particular document. I agree with the description of that process by Evans J. in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D.), 53 D.T.C. 5337, at para. 31:

> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.

[27] Advice and recommendations in drafts of policy papers that are part of the deliberative process leading to a decision are protected by s. 13(1). There need not be direct evidence that any particular paper made its way to the ultimate decision maker. The circumstantial evidence in this case is overwhelming that all six records were part of the deliberative process that led to a decision by the Minister, based on the advice and recommendations in these policy papers.

[28] The unreasonableness of the approach of the Adjudicator is demonstrated by a simple example. Assume Record IV could be shown to unequivocally have been given to the Minister. Assume that Records I to III are earlier drafts of Record IV but, as here, very similar in content. If only Record IV were protected, because it could not be shown who received and acted upon Records I to III, the protection afforded Record IV would be illusory and meaningless. This would be an absurd and unreasonable interpretation and application of s. 13(1), yet it is the inevitable result of the Adjudicator's decision.

[29] The second fundamental error made by the Adjudicator in this case was to interpret *MOT* and *MNDM*, and hence s. 13(1), as protecting only information that identified the single course of action recommended to the decision maker. Such an interpretation would all but denude s. 13(1) of any real meaning and is unreasonable. It is inconsistent with the context in which the *Freedom of Information and Protection of Privacy Act* operates, which is to protect a properly functioning democratic process in which the civil service provides advice on a range of options, but is not itself always the decision maker.

[30] Section 13(1) protects advice and recommendations. One of the most important functions performed by a civil service in a properly functioning Parliamentary democracy is to provide advice to Ministers of the Crown. Advice comes in different forms and one form is advice as to

the range of possible actions. This permits the decision-maker to make the best and most informed decision. It would be counter-productive and inconsistent with the policy behind s. 13(1) to strip away this form of advice and protect only advice which is entirely directory. Yet this is the effect of the decision of the Adjudicator and the Divisional Court. To obtain the protection of s. 13(1), the advice would have to be presented to the decision-maker without advice as to the advantages or disadvantages of a particular option and by presenting the advice in a form that supported only one option.

**DISPOSITION**

[31] Accordingly, I would allow the appeal, set aside the decision of the Divisional Court and the Adjudicator and remit the matter to the Information and Privacy Commissioner to reconsider the Requester's application in light of these reasons. There will be no order for costs.

"M. Rosenberg J.A."
"I agree. K. Feldman J.A."
" I agree. K. Swinton J. (ad hoc)

RELEASED: FEBRUARY 24, 2012