COURT FILE NO.: 461/06
COURT FILE NO.: 252/08
DATE: 20080909

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LEDERMAN, KITELEY and SWINTON JJ.

B E T W E E N:	)	
	)	
THE CANADIAN MEDICAL PROTECTIVE ASSOCIATION	)	*Domenic A. Crolla & Maureen L. Murphy*, for the Applicant, The Canadian Medical Protective Association
Applicant	)	
	)	
- and -	)	*Robert L. Lee & Jennifer L. Gold*, for the Applicant, The Ontario Medical Association
DAPHNE LOUKIDELIS, Adjudicator, JOHN DOE, Requester, MINISTRY OF HEALTH AND LONG-TERM CARE, THE ONTARIO MEDICAL ASSOCIATION and THE ATTORNEY GENERAL OF ONTARIO	)	*Christopher D. Bredt & Katherine J. Menear*, for the Respondent, Daphne Loukidelis, Adjudicator
Respondents	)	
	)	*Lise G. Favreau*, for the Respondent, Ministry of Health and Long-Term Care
- And Between -	)	
	)	
THE ONTARIO MEDICAL ASSOCIATION	)	
Applicant	)	
	)	
- and -	)	
DAPHNE LOUKIDELIS, Adjudicator, JOHN DOE, Requester, MINISTRY OF HEALTH AND LONG-TERM CARE and THE ATTORNEY GENERAL OF ONTARIO	)	
Respondents	)	**Heard at Toronto:** June 16 & 17, 2008

LEDERMAN & SWINTON JJ.:

Nature of the Proceeding

[1] This proceeding consists of two applications for judicial review: one brought by the Canadian Medical Protective Association (the "CMPA") and the other brought by the Ontario Medical Association (the "OMA") in which both seek to set aside part of Order No. PO-2497 (the "Order") of Adjudicator Daphne Loukidelis (the "Adjudicator") to release a 2004 Memorandum of Understanding (the "2004 MOU") between the CMPA, the Ministry of Health and Long-Term Care (the "Ministry") and the OMA to a Requester identified as John Doe.

[2] The Applicants dispute the Adjudicator's finding that the OMA is a "trade union" within the meaning of s. 65(7)1 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA"). As a result, they submit that the 2004 MOU does not qualify for disclosure under FIPPA because it is excluded by s. 65(6)3.

[3] In addition, the Applicants submit that the Adjudicator erred in law or adopted on unreasonable interpretation of s. 17 of FIPPA, which protects third party information. As such, the CMPA requests that the portion of the Order requiring the Ministry to disclose the 2004 MOU be set aside.

[4] The Ministry supports the applications and requests an order to reverse the Adjudicator's Order requiring the disclosure of the 2004 MOU.

Background

[5] The CMPA is a non-profit medical mutual defence organization whose role is to protect physicians' professional integrity by providing services such as legal defence, indemnification, risk management, educational programs and general advice. It is funded and operated on a non-profit basis for physicians, by physicians, and its membership comprises about 95% of doctors licensed to practise in Canada. The OMA is a non-profit organization that exists to represent the political, clinical and economic interests of the Province's medical profession.

[6] CMPA membership fees are set though a comprehensive actuarial process involving an annual review of experience with claims and costs, actuarial estimates of liabilities for the year, projected estimates for income from investment over the period in which liabilities must be met, and a projection of future liabilities. The CMPA differentiates its actuarial data and fees regionally and by medical specialty and practice area.

[7] Most physicians in Ontario derive the vast majority of their income by billing the Ontario Health Insurance Plan for covered services provided to patients. Physicians bargain with the Ministry through their representative, the OMA, which is statutorily recognized as the sole representative for Ontario physicians in negotiations with the Ontario government.

[8] Since 1987, the Ontario government has reimbursed Ontario physicians for a portion of their CMPA membership fees as part of physician compensation negotiated between the Ministry and the OMA.

[9] In 2000, for the first time, the CMPA became a party to a Memorandum of Understanding among the OMA, the Ministry and the CMPA (the "2000 MOU"). The impetus for the 2000 MOU was, in large part, the CMPA's determination to set membership fees based on regional instead of national experience, which was predicted to lead to increased membership fees for Ontario members. The CMPA supplied the other parties to the 2000 MOU with the confidential actuarial information it had developed and that it was then using to assist in setting its membership fees. That information was incorporated into the 2000 MOU and in an appendix thereto.

[10] The parties entered into a second agreement in February 2003 to run for a term extending from January 1, 2004 until December 31, 2008, unless terminated earlier (the "2004 MOU"). It consisted of an agreement, two appendices and one table.

[11] The Requester made a request under FIPPA for access to records held by the Ministry about the Ministry's relationship with the CMPA and the OMA. The Requester was specifically interested in records describing formal arrangements between the parties for government reimbursement of professional liability insurance premiums paid by physicians. Among the records identified as responsive to the request was the 2004 MOU signed by the Ministry, the OMA and the CMPA.

[12] The CMPA opposed disclosure on the basis that the 2004 MOU contains confidential commercial and financial information - in the form of actuarial assumptions and principles developed and used by the CMPA - and that disclosure would cause the CMPA commercial and competitive harm. The CMPA characterizes the 2004 MOU as an information sharing agreement to assist the Ministry concerning partial reimbursement to physicians for professional liability fees.

[13] The Ministry declined to disclose the 2004 MOU to the Requester on the basis of the third party information exemption under the authority of s. 17(1) of FIPPA.

[14] The Requester appealed to the Information and Privacy Commissioner ("IPC") submitting that the 2004 MOU does not qualify under the s. 17(1) exemption of FIPPA.

The Adjudicator's Findings

[15] The Adjudicator reversed the Ministry's decision. The Adjudicator found that the OMA was a "trade union" for the purpose of s. 65(7)1 of FIPPA and because the 2004 MOU was an agreement "between an institution and a trade union", FIPPA applied to the 2004 MOU and, therefore, the Adjudicator had jurisdiction.

[16] In addition, although the 2004 MOU contained commercial and financial information within the purview of s. 17(1) of FIPPA, the Adjudicator found that the main body of the 2004 MOU was not "supplied" to the Ministry, as it was the product of a negotiation process. The Adjudicator did find that the Table within Appendix 2, however, was not the product or subject of negotiations and

was, therefore, "supplied" by the CMPA to the Ministry but concluded that the Table, although supplied, had not been supplied "in confidence". Although it was not necessary to do so, given her findings, the Adjudicator went on to consider whether the disclosure of the 2004 MOU could reasonably be expected to cause any of the harms enumerated in paragraphs (a), (b) and (c) of s. 17(1) of FIPPA. The Adjudicator found that the CMPA failed to meet the onus of providing detailed and convincing evidence to establish a reasonable expectation of harm and that the CMPA's submissions were merely speculations of possible harm and did not constitute the significant prejudice or undue loss required to trigger protection under s. 17(1) of FIPPA.

The Trade Union Issue

[17] The Adjudicator held that the records in issue before her - the Ministry's meeting schedule, minutes, interim report, two OMA/Ministry agreements and the 2004 MOU between the CMPA, the OMA and the Ministry - are about labour relations matters in which the Ministry has an interest and thereby qualify for exclusion under s. 65(6)3.

[18] That provision states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> ...
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[19] This subsection must be read with s. 65(7)1, which states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.

[20] In reaching the conclusion that s. 65(6)3 applied to the records, the Adjudicator applied a 2003 decision of the Ontario Court of Appeal, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123. At issue in that case was the application of s. 65(6)3 to records used in negotiations between the Ministry and the OMA. The Court of Appeal held that the phrase "labour relations" in s. 65(6)3 went beyond traditional collective bargaining in an employer-employee relationship. It concluded that the negotiations between the OMA and the Ministry fell within the term "labour relations", stating (at para. 2):

> The relationship between the government and physicians, and the work of the Physicians Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, fall within the phrase "labour

> relations", and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3.

The Court of Appeal did not deal with s. 65(7) in the 2003 decision.

[21] The Adjudicator went on to determine whether any of the records fell within any of the exceptions to s. 65(6) set out in s. 65(7) - specifically, whether the records were excluded pursuant to s. 65(7)1, being an agreement between an institution and a trade union. She found that the 2004 MOU, which is the only record still in issue in these applications for judicial review, is an agreement within s. 65(7)1. She also found that the OMA was a "trade union" for purposes of that provision. That conclusion is challenged by the OMA and the Ministry in these applications for judicial review.

[22] The standard of review with respect to the interpretation of s. 65(6) of the Act has been held to be correctness (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) at para. 31). The same standard should apply to the review of the Adjudicator's decision with respect to s. 65(7), as it involves an issue of statutory interpretation going to the Adjudicator's jurisdiction.

[23] In a number of cases, the Supreme Court of Canada has adopted the modern approach to statutory interpretation, as formulated by Elmer Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (quoted in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26)

[24] Professor Ruth Sullivan has described the modern approach to statutory interpretation in *Sullivan & Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at p. 3:

> At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

[25] The OMA submits that it is not a trade union within the usual understanding of that term, since there is no employer-employee relationship between physicians and the government of Ontario. Moreover, the interpretation of s. 65(7)1 should be consistent with the meaning of "trade union" in the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A ("LRA"), and the OMA would not qualify as a trade union under that Act. Section 1 of the LRA defines "trade union" to mean

> an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

[26] The first task in interpreting the legislation is to consider the ordinary and grammatical sense of the term "trade union". To assist, counsel for the Adjudicator put forward a number of dictionary definitions of the term "trade union", arguing that they contemplated associations not strictly limited to the employer-employee relationship. For example, the *Shorter Oxford English Dictionary* defines a trade union as "an association of the workers in any trade or in allied trades for the protection and furtherance of their interest in regards to wages, hours and conditions of labour ...", while the *Concise Oxford Dictionary* uses the definition "an organized association of workers in a trade, groups of trades, or a profession, formed to protect and further their rights or interests". Counsel for the Adjudicator submitted that the OMA is a trade union because it negotiates compensation for physicians with the government.

[27] We do not find these dictionary definitions helpful. If anything, the first definition suggests a narrower definition of trade union than the one adopted by the Adjudicator.

[28] Counsel for the Adjudicator also relied on the French language version of FIPPA, which uses the term "syndicat" for trade union. He argued that "syndicat" has a broader meaning than trade union normally has, because it is defined in the *Petit Robert: Dictionnaire de la langue française* as

> association qui a pour objet la défense d'intérêts professionnels (amélioration des conditions de production, d'exploitation, d'achat, de vente; relations entre employeurs et salariés; salaires, conditions de travail, etc.; représentation auprès des pouvoirs publics).

[29] It appears that the French version may have a somewhat broader meaning than the English term trade union, in that it includes associations broader than the traditional trade union made up of those in an employment relationship.

[30] Nevertheless, the LRA translates the term "trade union" as "syndicat". The OMA submits that the word trade union should have the same meaning in both the LRA and FIPPA, relying on the presumption of consistent expression (Sullivan, *supra*, p. 162).

[31] We do not find the definition of "trade union" in the LRA determinative of the meaning of the term in FIPPA. As the Supreme Court of Canada observed in *Bell ExpressVu*, *supra*, context plays an important role in the interpretation of the words of a statute (at para. 27). "Trade union" has been defined in the LRA for a specific purpose. That Act has among its purposes the facilitation of collective bargaining between employers and trade unions that are the freely-designated representatives of employees (s. 2). Therefore, the LRA deals with labour relations between employers and employees (and s. 1(3) expressly excludes members of the medical profession entitled to practise in Ontario and employed in a professional capacity).

[32] In contrast, s. 65(6) of FIPPA deals with labour relations going beyond the employer-employee relationship. Therefore, "trade union" may well have a different meaning in FIPPA from that in the LRA, given the different context.

[33] In this case, the presumption of coherence is of assistance in determining the meaning of "trade union" in s. 65(7)1. Sullivan describes the presumption of coherence as follows (supra, p. 262):

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

[34] To adopt a narrow interpretation of "trade union" in s. 65(7)1 would lead to a result that makes no logical sense and that undermines the overall purpose of FIPPA. The Court of Appeal in *Ontario (Minister of Health and Long-Term Care)*, *supra*, gave a broad interpretation to "labour relations" so as to prevent disclosure of records pertaining to negotiations between the OMA and the government. The Court noted that the purpose of s. 65(6) was to "ensure the confidentiality of labour relations information" (*Ontario (Solicitor General)*, *supra* at p. 369, footnote 11, quoting the *Official Report of Debates* for the Ontario Legislature).

[35] The Legislature has made it clear in s. 65(7) that while documents relating to labour relations negotiations are excluded from FIPPA, the product of such negotiations is not to be excluded. Clearly, a collective agreement between a trade union and the government is subject to the Act. There is no rational explanation as to why an agreement on compensation or benefits between the OMA and a governmental institution should be excluded from the Act, even if the negotiations between the OMA and the institution are excluded from disclosure.

[36] A broad interpretation of "trade union" to include the OMA is consistent with the purpose of FIPPA in general and s. 65(7)1 in particular. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, LaForest J. described the importance of access to information legislation:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. (at para. 61; the majority concurring in this respect at para. 1)

[37] Section 1 of FIPPA sets out the purposes of the Act as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public

> (ii) necessary exemptions from the right to access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[38] The broad interpretation of "trade union" given by the Adjudicator in this case was correct, given the language of s. 65(6)3 and 65(7)1, when read together and in light of the overall purpose of FIPPA. Therefore, the Adjudicator was correct in concluding that the 2004 MOU was not excluded from FIPPA.

The Exemption in s. 17(1) of FIPPA

[39] The appropriate standard of review of the Adjudicator's decision on the applicability of the exemption in s. 17(1) of FIPPA is reasonableness: *Workers' Compensation Board v. Mitchinson, Assistant Information and Privacy Commissioner, Ontario* (1998), 41 O.R. 3(d) 464 (C.A.).

[40] In common with the 2000 MOU, the 2004 MOU contains confidential actuarial assumptions and principles developed and used by the CMPA. The CMPA supplied this information to the Ministry to assist it in managing and predicting the cost of its plan to reimburse physicians for a portion of the CMPA membership fees. Those assumptions and principles are referred to throughout the 2004 MOU and are reproduced at Appendix 2 to the 2004 MOU in precisely the form supplied to the Ministry.

[41] Both MOUs provided for confidentiality. However, the 2004 MOU expressly contemplated that the Ministry may be compelled to disclose information in the agreement due to the operation of FIPPA.

[42] In addition, subsequent to signing the 2004 MOU, the parties entered into a separate confidentiality agreement on August 14, 2003, confirming and reflecting their intention to safeguard the confidential information from disclosure.

[43] Section 17(1) of FIPPA, which deals with third party information, reads 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 supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[44] The Adjudicator stated that in order for the s. 17(1) exemption to apply, the parties to the 2004 MOU had the onus of providing evidence to satisfy each part of the following 3-part test for exemption:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur.

[45] The Adjudicator found that the first part of the 3-part test for exemption had been met since the information qualified as "commercial" and/or "financial" information.

[46] With respect to the second part of the test, the Adjudicator stated that, as a general rule, information in a contract will be considered "mutually generated" as opposed to "supplied" unless it can be shown that the information would reveal information actually supplied by the third party.

[47] The Adjudicator held that the parties had failed to meet their onus of proving that the information (except for Table 1) in the 2004 MOU was "supplied" under s. 17(1) for the following reasons:

a) the 2004 MOU was an end product of a negotiation process, and sets out mutually agreed upon terms;

b) disclosure of the 2004 MOU would not reveal, or permit the drawing of accurate inferences with respect to, any information actually supplied to the Ministry;

c) Appendices 1 and 2 relate to and expand upon, the provisions of the main agreement, as they are not distinguishable from the main agreement for the purpose of the "supplied" issue;

d) although the information in Appendix 2 may have been originally provided by the CMPA, the methodology has come to represent the negotiated intention of all the parties;

e) Table 1, relating to a previous year (2002), was attached for the purpose of illustrating the format of future Tables, and the data within Table 1 was to be used for future calculations; therefore, it was supplied and not negotiated.

[48] The Applicants submit that the Adjudicator erred in placing excessive emphasis on the word "supplied" in s. 17(1) and in not considering that the French language version of the statute has no equivalent to "supplied". They submit that the Adjudicator's interpretation was unreasonable and failed to have regard to such considerations as the character of the agreement, the character of the information, the nature of the negotiations leading up to that agreement, and whether the information is contained in the negotiated operative terms of the agreement or in Appendices or Exhibits (see *Boeing Company v. Ontario (Ministry of Economic Development & Trade)*, [2005] O.J. No. 2851 (Div. Court), leave to appeal refused, November 7, 2005).

[49] In particular, the Applicants submit that the Adjudicator made an unreasonable error in failing to distinguish between the kinds of agreements which are the subject of most of the "supplied" jurisprudence in IPC matters and the kind of agreement in question on this application.

[50] They submit that the jurisprudence demonstrates that with conventional supply contracts or with documents submitted during a bidding process for a supply contract, the information can be reasonably treated as "mutually generated" given that the terms of supply to government are at the heart of a supply contract even where the terms are standard terms. The Applicants submit that both the 2000 and 2004 MOUs, however, are fundamentally different in this respect in that there is no sense in which the CMPA's actuarial assumptions and principles relate to the supply of goods or services to government. Rather, they relate instead to the CMPA's business of supplying services to its members and the 2004 MOU does not contemplate the CMPA providing any services to the Ministry, or any payments being made to the CMPA by the Ministry.

[51] The Applicants submit that the 2000 and 2004 MOUs are, in essence, information sharing agreements and they are not conventional supply agreements. Rather, they set out the terms upon which the CMPA will share confidential information with the government.

"Supplied"

[52] The CMPA's submission regarding the French language version of a statute was not put before the Adjudicator and, therefore, the CMPA should not be permitted to raise a new interpretive argument at this stage. In any event, the French version of s. 17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s. 17(1) incorporates the idea that the

exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied". Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.

[53] We see no merit in the distinction made by the Applicants between conventional supply contracts and the agreement in question here. It should be noted that in *Boeing* none of the contracts were, in fact, conventional supply contracts. They consisted of an asset purchase agreement, a shareholders agreement and a share purchase agreement.

[54] Although the CMPA would like to characterize the 2000 and 2004 MOUs as being "in essence information sharing agreements", the evidence before the Adjudicator indicated that it provided for much more. The CMPA expressly agreed to provide various services, including malpractice coverage. Provisions of the 2004 MOU itself provide that the CMPA agrees "to continue to work together" with the other two parties and to take certain steps and provide certain services.

[55] Moreover, there was nothing immutable about the information provided by the CMPA. The language of Appendix 2 clearly contemplates that the information is subject to change. It should also be pointed out that the issue of immutability was not raised before the Adjudicator. In any event, immutability is just one factor, and the onus is on those resisting disclosure to show immutability and they have not done so.

[56] The Adjudicator explained that while the information in Appendix 2 may have been originally provided by the CMPA, the methodology had come to represent the negotiated intention of all the parties. In so concluding, the Adjudicator appropriately considered the entirety of the evidence, the relevant jurisprudence with respect to the interpretation and application of s. 17(1) of FIPPA and expressed a reasonable line of analysis to reach this conclusion. Therefore, there is no basis to interfere with her decision.

[57] In contrast, the Adjudicator found that Table 1 relating to a previous year (2002), was attached for the purpose of illustrating the format of future Tables and that the data within Table 1 was to be used for future calculations. The Adjudicator reasonably concluded that the information in Table 1, unlike the information in Appendix 2, was not capable of being negotiated and, therefore, was "supplied".

"In Confidence"

[58] Given her finding with respect to Table 1, the Adjudicator went on to consider whether the information in Table 1 had been supplied "in confidence".

[59] She held that the CMPA did not establish an objectively reasonable expectation of confidentiality at the time the information in the agreement was provided.

[60] The Applicants have argued that in so doing, she acted in error or unreasonably in finding a lack of confidence, because the parties had turned their minds towards the possibility of disclosure

and expressly built confidentiality provisions into both MOUs and also entered into a specific agreement subsequent to the signing of the 2004 MOU to undertake confidentiality.

[61] The Adjudicator did take these matters into account, but concluded that the terms of the 2004 MOU expressly contemplated that confidential information may be required to be disclosed under FIPPA. More significantly, there had been a previous disclosure by the publication of the 2000 MOU in the Ontario Medical Review wherein the actuarial information contained therein was publicly disclosed and no additional steps were taken by the parties to safeguard that information. Furthermore, the Adjudicator found that the confidentiality and non-disclosure agreement signed by the parties in months subsequent to the 2004 MOU was irrelevant, as she restricted her analysis to the reasonableness of the expectation of confidentiality held by the parties at the time the 2004 MOU was signed.

[62] We find that the Adjudicator properly considered the evidence weighing both in favour of and against a reasonable expectation of confidentiality and reasonably concluded that the parties did not have a reasonable expectation of confidentiality, particularly in view of the earlier publication of the 2000 MOU.

[63] In view of our findings that the Adjudicator was reasonable in her conclusions that the 2004 MOU including Appendix 2 and Table 1 were not "supplied in confidence" and failed to meet the second part of the 3-part test, and her ruling that the 2004 MOU did not qualify for exemption under s. 17(1) of FIPPA, it becomes unnecessary to review the reasonableness of the Adjudicator's decision that the parties had failed to establish a reasonable expectation of one of the harms under s. 17(1) and their submissions amounted to no more than speculation of possible harm.

Conclusion

[64] The Adjudicator was correct in her interpretation of "trade union" in s. 65(7)1 and was reasonable in concluding that none of the information in the 2004 MOU qualified for exemption under s. 17(1). Accordingly, the applications for judicial review are dismissed.

[65] If the parties are unable to agree as to costs, they may make submissions in writing within 30 days, addressed to the Registrar of the Divisional Court.

[66] Prior to the hearing of these applications, the parties obtained an order sealing the confidential facta of the applicant CMPA. In our view, these facta do not contain confidential information that should be protected by a sealing order. Therefore, the order of Molloy J. dated April 1, 2008 is set aside.

LEDERMAN J.
SWINTON J.
I agree. – KITELEY J.

Released: September 9, 2008

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LEDERMAN, KITELEY and SWINTON JJ.

B E T W E E N:

THE CANADIAN MEDICAL PROTECTIVE ASSOCIATION

Applicant

- and -

DAPHNE LOUKIDELIS, Adjudicator, JOHN DOE, Requester, MINISTRY OF HEALTH AND LONG-TERM CARE, THE ONTARIO MEDICAL ASSOCIATION and THE ATTORNEY GENERAL OF ONTARIO

Respondents

- And Between -

THE ONTARIO MEDICAL ASSOCIATION

Applicant

- and -

DAPHNE LOUKIDELIS, Adjudicator, JOHN DOE, Requester, MINISTRY OF HEALTH AND LONG-TERM CARE and THE ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR JUDGMENT

LEDERMAN J.
SWINTON J.

Released: September 9, 2008