COURT FILE NOS.: 381/01 and 14/04
DATE: 20080129

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, KITELEY and SWINTON JJ.

B E T W E E N:	
MINISTRY OF CORRECTIONAL SERVICES Applicant	*Sara Blake*, for the Applicant
- and -	
DAVID GOODIS, Senior Adjudicator, and JANE DOE, Requester Respondents	*William S. Challis*, for the Respondent David Goodis
	Christine L. Lonsdale, for the Respondent Jane Doe
AND BETWEEN:	
JANE DOE, Requester Applicant	*Christine L. Lonsdale*, for the Applicant
- and -	
MINISTRY OF CORRECTIONAL SERVICES and DONALD HALE, Adjudicator Respondents	*Sara Blake*, for the Respondent Ministry
	William S. Challis, for the Respondent Donald Hale
	HEARD at Toronto: October 24 and 25, 2007

SWINTON J.:

[1] The Ministry of Correctional Services (the "Ministry") and Jane Doe, Requester, have both brought applications for judicial review of decisions of the Information and Privacy Commissioner (the "IPC") relating to the release of certain records. This case raises issues of the scope of the

employment-related exclusion in s. 65(6) of the *Freedom of Information and Privacy Act*, R.S.O. 1990, c. F.31, as amended ("the Act"), as well as the exemptions for privileged records and personal information.

Background

[2] In 1999, the Requester, Jane Doe, a journalist, made four access requests to the Ministry for "any and all records related to any and all allegations of misconduct or sexual, physical or other abuse between 1975 and 1995 by [certain individuals] in your Cornwall, Ontario office".

[3] At the time of the request, there was past, ongoing and anticipated litigation against the Crown and some of its employees and former employees respecting these allegations. One civil action against the Crown and two deceased employees had recently been settled, and two other actions had commenced. In each case, it was alleged that the Crown was vicariously liable for torts committed by employees in the course of their employment. Therefore, the Ministry claimed that the requested records fell outside the scope of the Act pursuant to s. 65(6), which excludes certain employment-related records.

[4] The Requester appealed this decision to the IPC, which resulted in Order PO-1905, made by Senior Adjudicator Goodis on May 10, 2001.

[5] The records at issue, consisting of 459 pages, are described in a subsequent order PO-1999 as follows (Application Record, p. 25):

> ... notes, correspondence, newspaper articles, pleadings, investigation reports, facsimiles, e-mails and various other documents. The records have been grouped by the Ministry on the basis of their place of origin in its record-holdings. Record Groups A and B, consisting of 50 and 28 pages of documents respectively, were located in the Ministry's Community and Young Offender Services Division. Record Group C, consisting of 381 pages of documents originated in a litigation file compiled by the Ministry's Legal Services Branch.

The IPC determined that the records were not excluded from the Act by s. 65(6) and ordered the Ministry to make a decision on the access request.

[6] Although the Ministry applied for judicial review, it made the decision, as ordered, and refused to disclose the records on two grounds. First, the Ministry concluded that the records were subject to solicitor-client privilege or were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation and, therefore, exempt pursuant to s. 19 of the Act. Second, the records were exempt under s. 21 of the Act, as disclosure would constitute an unjustified invasion of the personal privacy of employees and clients.

[7] The Requester appealed, resulting in a decision by Senior Adjudicator Hale on March 13, 2002 in Order PO-1999. This decision ordered the disclosure of a limited number of records: a letter from plaintiff's counsel in a civil action enclosing a list of undertakings, advisements and refusals

given at the examination for discovery of a representative of the Crown, and employer's notes, memoranda and fax cover pages concerning a public complaint received by the employer that alleged sexual assault against a particular probation officer.

[8] In the meantime, the Court of Appeal had issued a decision on August 8, 2001, which overturned three other orders of the IPC concerning the interpretation of s. 65(6) of the Act (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.)). The IPC advised the parties that it would reconsider its decision in Order PO-1905, given this decision of the Court of Appeal.

[9] On January 20, 2003, Senior Adjudicator Hale issued Reconsideration Order PO-2102-R, in which he declined to reconsider those records in Orders PO-1905 that had not been ordered disclosed in Order PO-1999. He found that certain of the remaining records should not be disclosed for reasons other than s. 65(6). However, he concluded that the remaining records that were to be disclosed did not fall within the exclusion in s. 65(6), as they did not arise in an employment or labour relations context (Application Record, p. 57). As a result of this decision, 19 pages of the 459 pages of records were ordered disclosed in whole or in part.

The Issues

[10] Three issues arise in the Ministry's application for judicial review:

1. Did the IPC err in its interpretation and application of the exclusion provision in s. 65(6) of the Act?

2. Did the IPC err in failing to find that the letter from opposing counsel was privileged?

3. Was the IPC's decision unreasonable in ordering disclosure of personal information protected by s. 21 of the Act?

[11] Three issues are raised in the application for judicial review brought by the Requester:

1. Did the IPC improperly apply principles of litigation privilege as if they were principles of solicitor-client privilege?

2. Did the IPC err in its application of the principles of litigation privilege?

3. Did the IPC err by failing to apply s. 23, the public interest override, to all the records at issue?

Did the IPC err in its interpretation and application of the exclusion provision in s. 65(6) of the Act?

[12] Subsection 65(6) of the Act reads as follows:

> 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:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[13] In this case, the Ministry relied on subclauses 1 and 3 of s. 65(6) in asserting that all the records are excluded from the Act. It took the position that allegations of misconduct committed by an employee in the course of his employment are "employment-related matters" within subclause 3 of s. 65(6). As well, a civil action against the Crown alleging vicarious liability for employee misconduct is a proceeding before a court relating to the employment of a person by the institution within paragraph 1 of the subsection.

[14] In Order PO-1905, the IPC held that the records at issue were created and/or compiled in the context of continuing and anticipated proceedings between the Ministry and individuals who alleged that they were harmed by the tortious conduct of Ministry employees. As well, the IPC held that the records were being maintained in relation to meetings, consultation and/or discussions that have been or may be required in the context of the current or anticipated civil proceedings (Application Record, p. 16).

[15] However, the IPC rejected the Ministry's argument that the records were employment-related because they were collected for litigation in which the Crown might be held vicariously liable, stating (Application Record, p. 19):

> In short, the fact that the records may have been collected, maintained, used and/or disclosed in relation to current and anticipated litigation in which the Ministry may be held vicariously liable for actions of its employees is not alone sufficient to qualify the records as arising in an employment or labour relations context.

[16] The IPC went on to hold that certain records, which might once have been considered to be employment-related, were no longer so because of the passage of time. In other words, the exclusion ceased to apply when the institution no longer had a current legal interest in an employment-related matter, or when the proceedings related to employment had concluded. The balance of the records, created or compiled in the course of continuing or anticipated litigation, did not arise in an

employment or labour relations context, and, therefore, the Ministry failed to establish the requisite legal interest (Application Record, p. 20).

[17] This decision was reconsidered in Order PO-2102-R because of the decision of the Court of Appeal in *Ontario (Solicitor General)*, *supra*. The Court in that case had found two errors in the IPC's approach to the interpretation of s. 65(6): the "time sensitive" element and the requirement for a "legal" interest, rather than an interest.

[18] On reconsideration, the IPC held that it was necessary to reconsider its earlier decision only in light of the records that had been ordered disclosed in Order P0-1999, as no useful purpose would be served by revisiting decisions related to records that were not to be disclosed. Once again, the IPC held that the records ordered disclosed did not arise in an employment or labour relations context (Application Record, p. 57).

[19] All parties are agreed that the standard of review of an IPC decision interpreting and applying s. 65(6) of the Act is correctness (*Ontario (Solicitor General)*, *supra*, at para. 31).

[20] In my view, the interpretation suggested by the Ministry is not in accordance with the language of s. 65(6) when the provision is read in context and in light of its legislative history and the purpose of the Act. The exclusion in s. 65(6) does not exclude all records concerning the actions or inactions of an employee simply because this conduct may give rise to a civil action in which the Crown may be held vicariously liable for torts caused by its employees.

[21] In determining the proper interpretation of s. 65(6), it is useful to bear in mind the modern approach to statutory interpretation described by Iacobucci J. in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, where he quoted Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), p. 87:

> 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.

[22] In my view, the language used in s. 65(6) does not reach so far as the Ministry argues. Subclause 1 of s. 65(6) deals with records collected, prepared, maintained or used by the institution in proceedings or anticipated proceedings "relating to labour relations or to the employment of a person by the institution". The proceedings to which the paragraph appears to refer are proceedings related to employment or labour relations *per se* – that is, to litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings. In other words, it excludes records relating to matters in which the institution has an interest as an employer. It does not exclude records where the Ministry is sued by a third party in relation to actions taken by government employees.

[23] Moreover, the words of subclause 3 of s. 65(6) make it clear that the records collected, prepared, maintained or used by the Ministry in relation to meetings, consultations or communications are excluded only if those meetings, consultations, discussions or communications

are about labour relations or "employment-related" matters in which the institution has an interest. Employment-related matters are separate and distinct from matters related to employees' actions.

[24] The scope of s. 65(6) is made clearer when one looks at the relationship between it and s. 65(7), as well as the legislative history of the provision. Subsection 65(6) is subject to s. 65(7), which states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The fact that the Act applies to the documents in subclauses 1 through 3 of s. 65(7) suggests that the type of records excluded from the Act by s. 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

[25] This conclusion is reinforced by the legislative history of these provisions. Subsection 65(6) was added to the Act by the *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1995, c. 1, s. 82. In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations" (Legislative Assembly of Ontario, Official Report of Debates (*Hansard*), October 4, 1995). The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information" (*ibid*.).

[26] Moreover, s. 65(6) should be interpreted in light of the purpose of the Act, which is found in s. 1. It states:

> The purposes of this Act are:
>
> (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 of 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.

The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government. If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the Act (*Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.) at para. 28).

[27] Two decisions of the Court of Appeal dealing with the interpretation of s. 65(6) reinforce the conclusion that the provision protects the confidentiality of records pertaining to terms of employment or conditions of work in an employer-employee or collective bargaining relationship or a quasi-collective bargaining relationship. In *Ontario (Solicitor General)*, *supra*, the Court stated (at para. 35):

> Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings ... relating to labour relations or to the employment of a person *by the institution*" (emphasis added). Subclause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution* ..." (emphasis added). Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, [See Note 11 at end of document] and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended.

The endnote reference in that passage is to the bill which introduced s. 65(6) and includes the quotation from the Hon. David Johnson found at paragraph 25 of these reasons.

[28] The Ministry submitted that the Court of Appeal approved a broad interpretation of the exclusion, as it quashed the decisions of the IPC and restored the decisions of the heads of the respective Ministries involved in the case (at para. 42). One of the records at issue in the case was a copy of a public complaint file of the Police Complaints Commission. The Ministry of the Solicitor General and Correctional Services had taken the position that the file was excluded under s. 65(6). The IPC agreed that the investigation of a complaint of police misconduct was an employment-related matter. However, it had ordered the file disclosed because there were no existing or anticipated proceedings before a court, tribunal or other entity (*Ministry of the Solicitor General and Correctional Services*, Order PO-1618 at pp. 4 and 6).

[29] Thus, there was no dispute in that case that the file documenting the investigation of the complaint was employment-related – not surprisingly because of the potential for disciplinary action against a police officer. However, the case does not stand for the proposition that all records pertaining to employee conduct are excluded from the Act, even if they are in files pertaining to civil litigation or complaints brought by a third party. Whether or not a particular record is "employment-related" will turn on an examination of the particular document.

[30] The Court of Appeal also dealt with s. 65(6) in *Ontario (Ministry of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123, where it held that the provision excluded records pertaining to negotiations between the government and physicians concerning the remuneration of physicians. The Court held that "labour relations" in s. 65(6)3 extended to relations and conditions of work beyond those arising in collective bargaining and employer-employee relationships. It held that the term "labour relations" included the relationship between the government and physicians and the work of the Physician Services Committee. In my view, this case further supports the interpretation that s. 65(6) excludes records related to collective bargaining, broadly interpreted, and employment-related matters.

[31] In *Reynolds v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4356, this Court applied the equivalent to s. 65(6) found in municipal freedom of information legislation to documents compiled by the Honourable Coulter Osborne while inquiring into the conduct of the City of Toronto in selecting a proposal to develop Union Station. The records he compiled in interviewing Ms. Reynolds, a former employee, were excluded from the Act, as Mr. Osborne was carrying out a kind of performance review, which was an employment-related exercise that led to her dismissal (at para. 66). At para. 60, Lane J. stated,

> It seems probable that the intention of the amendment was to protect the interests of institutions by removing public rights of access to certain records relating to their relations with their own workforce.

[32] Therefore, the IPC did not err in rejecting the suggested interpretation of s. 65(6) that would exclude any records in which the action of an employee might lead to vicarious liability of the Crown. However, there is no question that the IPC did err in its interpretation of s. 65(6) in Order PO-1905, by using a time sensitive approach and requiring a legal interest. Nevertheless, the IPC in Order PO-2102R applied the correct interpretation of the provision to the records that were ordered disclosed. I agree with the Senior Adjudicator that despite the error in the original decision,

no purpose would be served in referring all the records back for examination under s. 65(6), given the few records ordered disclosed. As judicial review is a discretionary remedy, I would not interfere with the original decision, despite the error in interpretation, as the reconsideration decision applied the correct interpretation to the records in issue.

The Privilege Issues

[33] Both the Ministry and the Requester have raised issues concerning the interpretation and application of s. 19 of the Act. It reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[34] The parties are agreed that the standard of review in the interpretation and application of s. 19 is correctness (*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) at para. 4).

[35] Section 19 has two branches. Branch 1 incorporates common law solicitor-client privilege, while Branch 2 contains a further statutory privilege for a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. It is a form of work product or litigation privilege, but unlike litigation privilege at common law, the privilege in s. 19 is permanent and does not end with the litigation (*Ontario (Attorney General)*, *supra*, at paras. 12-13). In the latter case, the privilege covered photographs and a video gathered in preparation for litigation.

[36] The Requester suggested that the Supreme Court of Canada called the holding in the *Attorney General* case into question in *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31, when Rothstein J. stated that s. 19 recognizes two common law privileges: solicitor-client privilege and litigation privilege (at para. 12). However, there is no suggestion in the reasons in *Goodis* that the Supreme Court intended to overrule the earlier decision of the Court of Appeal. Indeed, the Supreme Court went on to state that the parties had restricted their arguments to solicitor-client privilege and had not addressed litigation privilege (at para. 13).

[37] Nor does the decision of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 call into question the Court of Appeal's holding in the *Attorney General* case. In *Blank*, the Supreme Court was addressing the scope of solicitor-client privilege in s. 23 of the federal *Access to Information Act*, R.S.C. 1985, c. A-1. Despite the absence of any express reference to litigation privilege in s. 23, the Court held that solicitor-client privilege included litigation privilege (at para. 4). The latter, it was noted, is of temporary duration (at para. 8). Again, this case does not address the interpretation of s. 19 of the Ontario Act, which is differently worded, nor does it expressly call into question the decision of the Court of Appeal in *Attorney General*, *supra*.

[38] Therefore, given the *Attorney General* case, there are two branches to s. 19: Branch 1, solicitor-client privilege, and Branch 2, a form of statutory privilege that protects a lawyer's work product and communications between counsel and third parties in the course of preparing for litigation (*Attorney General* (C.A.), *supra*, at para. 12). Branch 2 is not simply synonymous with common law litigation privilege, as it does not terminate when the litigation terminates (*Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) at paras. 27-28).

[39] No issue is taken with the IPC's findings with respect to solicitor-client privilege, except to the extent that the Requester submits that the IPC erroneously applied principles of litigation privilege as if they were solicitor-client principles. The major issue in these applications for judicial review is the application of Branch 2.

[40] The purpose of litigation privilege is to protect the adversary process by protecting the lawyer's work product (*Attorney General*, *supra*, paras. 10-11). As stated by the Supreme Court in *Blank*, *supra* (at para. 27):

> Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

Further on in the reasons, the Court stated that the purpose of litigation privilege "is to create a `zone of privacy' in relation to pending or apprehended litigation" (at para. 34).

Did the IPC err in failing to find that the letter from opposing counsel was privileged?

[41] Among the documents ordered disclosed is a letter prepared by plaintiff's counsel in the course of civil litigation, listing undertakings, advisements and refusals given on behalf of the Crown in a discovery. This document was found in the operational files of the Ministry and is apparently also contained in the litigation file.

[42] The Ministry suggests that there is an inconsistency in the IPC's decision. Records 13 to 17 of Group B were held not to be privileged, because they are a communication between Ministry counsel and counsel for the opposing party. However, the IPC went on to include Records 12-17 in Group B on a list with a large number of other documents that were exempted from disclosure because of solicitor-client privilege (Application Record, p. 30).

[43] It is apparent to me that there must have been a typographical error when the IPC included Records 13 through 17 in the solicitor-client privilege list, as the IPC stated that each of the records listed were confidential communications between a solicitor and a client, a Ministry lawyer or an employee. Each was found to contain legal advice or a request for legal advice. Having examined Records 13 to 17, I am satisfied that they do not fall within this description, and they should not have been included in the list of records subject to solicitor-client privilege. Only Record 12 from Group B should have been on this list.

[44] I see no basis to conclude that the IPC erred in holding that the letter from plaintiff's counsel and the list of undertakings (Records 13-17) were not exempt from disclosure. These records were prepared by opposing counsel. At common law, communications between opposing parties are not considered privileged (*Flack v. Pacific Press Ltd.* (1971), 14 D.L.R. (3d) 334 (B.C.C.A.) at 358). Nor are these records part of the work product of Crown counsel, prepared by it or for it by third parties, in order to assist Crown counsel in the litigation. Therefore, they are not privileged under Branch 2 of s. 19.

[45] This conclusion is consistent with the decision of this Court in *Ontario (Attorney General) v. Big Canoe*, *supra*, which held that letters from defence counsel to Crown counsel in the course of a prosecution were not "prepared ... for Crown counsel ... for use in litigation" (at para. 45).

[46] The Ministry submitted that the records should be exempt because of the deemed undertaking rule. That rule of civil procedure prohibits parties engaged in litigation from using information obtained on discovery for a collateral purpose (*Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.) at pp. 363-64). Here, the deemed undertaking rule is said to apply because the records at issue are informed by and reveal information learned on discovery.

[47] I see no basis to read the implied undertaking rule into s. 19 of the Act. As Lane J. observed in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (unreported, Ont. Ct. (Gen. Div.), June 3, 1997), the *Rules of Civil Procedure* and the disclosure mechanisms under the Act operate independently of one another.

[48] The Ministry relies on *Andersen Consulting v. Canada*, [2001] 2 F.C. 324 (T.D.) in support of the proposition that s. 19 in effect incorporates the deemed undertaking rule. However, this case does not assist in determining whether records provided by opposing counsel to government counsel are privileged. *Andersen* dealt with a motion brought by a plaintiff for return or destruction of documents that were copied by the plaintiff and provided to the government as part of the discovery process. Following settlement of the proceedings, government officials refused to return or destroy the documents on the basis that they were required to turn the documents over to the National Archives pursuant to the *National Archives Act*, R.S.C. 1985 (3rd Supp.), c. 1. The Court held that the documents were not under the control of the Department of Justice because of the implied undertaking.

[49] Similarly, the case of *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.* (2001), 204 D.L.R.(4th) 331 (S.C.C.) does not assist. That case dealt with the existence of the implied undertaking rule in Quebec, not access to information legislation.

[50] In any event, the implied undertaking rule does not apply to these records. To the extent that these records reveal information provided on discovery, the information originates with the Ministry and is not subject to an implied undertaking in its hands.

[51] Therefore, I would give no effect to this ground for judicial review.

Did the IPC improperly apply principles of litigation privilege as if they were principles of solicitor-client privilege?

[52] The IPC found that two categories of documents were covered by solicitor-client privilege: documents that were direct communications of a confidential nature between a solicitor and client and the legal advisor's working papers directly related to the seeking, formulating and giving of legal advice. In doing so, the IPC relied on *Susan Hosiery Ltd. v. the Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[53] In that case, the Court stated at p. 33:

> It seems to me, there are really two quite different principles usually referred to as solicitor and client privilege, *viz*:
>
> (a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance, (including the legal adviser's working papers, directly related thereto) are privileged; and
>
> (b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated are privileged.

I note that the second category described would today be understood as litigation privilege, rather than solicitor-client privilege.

[54] The IPC found as a fact that a number of documents, including newspaper articles and Ministry Issue notes, were directly related to seeking, formulating or giving legal advice. The IPC went on to say that these and other documents were compiled by the Ministry solicitors to assist in the formulation and giving of legal advice. Branch 2 of s. 19 exempts a record prepared by or for Crown counsel for use in giving legal advice. Therefore, given the Adjudicator's findings of fact, I see no error in his classification of these documents as privileged.

Did the IPC err in its application of the principles of litigation privilege?

[55] The Supreme Court of Canada set out the test for litigation privilege in *Blank* (at paras. 35-37 and 58-60): the document must have been created for the dominant purpose of existing or reasonably contemplated litigation, and the litigation for which the document was created must still be in existence.

[56] The Requester submits that the IPC erred in applying Branch 2 of s. 19 to exempt documents that were not made for the dominant purpose of litigation and by failing to consider that litigation privilege ends with the litigation to which it is related, or with very closely related litigation.

[57] The Ministry argued that the IPC erred in failing to exempt the documents relating to the complaint under Branch 2, since the copies at issue were contained in Crown counsel's litigation files. As such, the copies were prepared for Crown counsel's use in litigation.

[58] I do not accept the Requester's submission that the IPC erred in failing to consider that litigation privilege ends with the litigation to which it is related. Earlier in these reasons, I concluded that the Supreme Court of Canada in *Blank* and *Goodis* has not overruled the Ontario Court of Appeal's holding in *Attorney General*, *supra* that the statutory privilege found in Branch 2 of s. 19 of the Act is permanent.

[59] Nor do I accept the argument of the Requester that if s. 19 extends a statutory privilege to the Crown distinct from litigation privilege, the statutory privilege is limited to the Crown acting in a criminal capacity. The section does not extend the statutory privilege only to Crown attorneys, but to Crown counsel. Thus, it applies both in a civil and criminal context.

[60] The major area of dispute is the treatment of some of the documents found in the litigation file, such as copies of newspaper articles and copies of documents made prior to the commencement of litigation. In the *Blank* case, the Supreme Court of Canada observed that there were conflicting decisions of the Courts of Appeal in British Columbia and Ontario on the application of litigation privilege to documents gathered or copied, but not created, for the purpose of litigation and found in a lawyer's litigation file. However, the Court did not find it necessary to resolve the issue whether litigation privilege attaches to such documents (at paras. 62-63).

[61] In *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C.C.A.), McEachern C.J.B.C. held that copies of public documents gathered by a solicitor are privileged. The majority reasons in *Blank* state that a majority of the Ontario Court of Appeal rejected this position in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321. However, there are, in fact, three sets of reasons in *Chrusz*, and only Carthy J.A. expressly rejects the approach in *Hodgkinson* (at p. 335). Doherty J.A. preferred the approach of Wood J. in *Nickmar Pty Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.), which held that copies of non-privileged documents might be privileged, if they were the result of selective copying or the result of research or the exercise of skill and knowledge on the part of the solicitor. However, Doherty J.A. left open the question "when, if ever, copies of non-privileged documents can be protected by litigation privilege" (at p. 361). Rosenberg J.A., like Doherty J.A., preferred the approach in *Nickmar*, but also left open the question of privilege with respect to copies of non-privileged documents (at p. 370).

[62] The Supreme Court of Canada in *Blank* suggested a preference for the approach in *Hodgkinson* (at para. 64):

> The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything

> that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

[63] The documents at issue include copies of newspaper articles, as well as copies of documents made by Ministry employees before litigation was anticipated. The Ministry takes the position that all the copied material is subject to Branch 2 of s. 19, as it was prepared by or for Crown counsel for use in litigation. The Requester submits the IPC erred in not applying the dominant purpose test.

[64] The IPC found that a number of the documents were created many years before the litigation and were assembled and put into the litigation brief. Therefore, they did not qualify under the dominant purpose test for litigation privilege. However, the Adjudicator determined that a number of the records were gathered by the solicitor for inclusion in the litigation brief. He concluded:

> These records related to the fact-finding and investigation process undertaken by counsel in formulating the Ministry's response to the actions brought against it. The inclusion of these records in the litigation brief served to inform the solicitor of the Ministry's evidence in order to assist in the preparation of its defence. Accordingly, I find that these records qualify under the litigation component of section 19 using the criteria described in *Nickmar* and reiterated in Assistant Commissioner Mitchinson's reasoning in Order MO-1337-I. (Application Record, p. 31)

[65] I need not determine whether the Ministry is correct in the submission that Branch 2 protects any document simply copied for inclusion in the Crown brief. The Adjudicator appropriately applied the test in *Nickmar* and concluded that the records related to the fact-finding and investigation process of counsel to assist in defending the Ministry in the civil actions. I see no basis to interfere with his conclusions.

[66] The Adjudicator did not expressly state why the Group C records which he ordered disclosed were not subject to privilege. However, on examination of those documents, I am satisfied that he did not err in ordering disclosure. The documents originate from the Ministry, and there is nothing to indicate any research or exercise of skill by the Crown counsel in obtaining them for the litigation brief.

Was the IPC's decision unreasonable in ordering disclosure of personal information protected by s. 21?

[67] The parties are agreed that the standard of reasonableness applies to a decision of the IPC interpreting and applying the privacy exemption in s. 21 of the Act, including the definition of "personal information" in s. 2(1) (*Ontario (Minister of Health and Long Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 73 O.R. (3d) 321 (C.A.) at para. 39).

[68] Section 21(1) requires a head to refuse disclosure of "personal information" to any person other than the individual to whom it relates except in the circumstances set out in paragraphs (a) through (f). Paragraph (f) permits disclosure "if the disclosure does not constitute an unjustified invasion of personal privacy". Subsection 21(2) then sets out criteria to be considered in determining

whether there is an unjustified invasion of personal privacy, while subsection 21(3) sets out circumstances where there is a presumed invasion of personal privacy.

[69] "Personal information" is defined in s. 2(1) as "recorded information about an identifiable individual" and includes the types of information listed under that definition. The test for personal information is as follows:

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

(*Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.) at paras. 2 and 7).

[70] The Ministry submitted to the IPC that the records revealed personal information about Ministry employees, offenders and other identifiable individuals. The IPC found that certain records contained personal information about former Ministry employees and clients, while other documents did not contain personal information. While some of those documents identified Ministry employees, they were identified in their professional capacities regarding appropriate government action.

[71] The IPC then went on to apply s. 21, finding that six pages of records in Group C were exempt because they fell within the presumptions in s. 21(3)(a) and (d), as information relating to the medical, psychiatric, psychological or employment history of former Ministry clients. The IPC found that none of the presumptions in 21(3)(b), (f) or (g) applied to the remaining records.

[72] The IPC then applied the factors under s. 21(2) and held that certain records were exempt. The Adjudicator ordered disclosure of Group B records 13-17 and Group C records 105 and 111, but concluded that disclosure of the names of Ministry clients would constitute an unjustified invasion of their personal privacy. Therefore, the Adjudicator held that their names and other identifying information, as well as the name of any person who was accused of abuse, would be exempt from disclosure under s. 21(1) and should be severed from the material ordered disclosed. However, disclosure of the remainder of the records, with personal identifiers severed, would not constitute an unjustified invasion of personal privacy.

[73] The IPC then considered the public interest override in s. 23, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

This section requires a balancing of the compelling public interest in disclosure of the records against the purpose of any exemption that applies (*Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.) at para. 3). In this case, while the IPC found that there was a compelling public interest in disclosure of the information as a whole, the

privacy interests must prevail, given that the documents are highly sensitive and identify both victims and alleged perpetrators of sexual abuse (Application Record, pp. 39-40).

[74] The IPC then ordered the disclosure of certain records "which are not highlighted". It appears that there is an inconsistency between this order and the earlier part of the reasons, as the names of the alleged perpetrators were not highlighted.

[75] It is clear from the IPC's reasons in Order PO-1999 that the Adjudicator found that there should be no disclosure of the names of victims and Ministry employees who are alleged to have committed abuse. Therefore, I shall proceed on the basis that the highlighting in the documents to be disclosed must be corrected so that the names of the alleged perpetrators are severed.

[76] Nevertheless, the Ministry submits that a comparison of the information in the records ordered disclosed with other information available to the press will make it easy to identify the complainants and an employee. The Ministry asserts that the Adjudicator erred in failing to compare the information in the records to information available in the press to determine whether the records, in combination with other information, would identify an individual.

[77] The Ministry's submissions to the IPC do not make reference to specific newspaper articles that would make the individuals in the particular records identifiable, and it is not obvious from reading the contested document that a particular individual would be identified. In applying these provisions, the IPC used its expertise, and its decision is entitled to deference. It cannot be said that the decision to order disclosure was unreasonable, provided the highlighting is corrected to reflect the decision that the names of the alleged perpetrators should be severed.

Did the IPC err by failing to apply s. 23, the public interest override, to all the records at issue?

[78] The Requester relies upon the decision of the Court of Appeal in *Criminal Lawyers' Association v. Ontario (Public Safety and Security)*, [2007] O.J. No. 2038 for the proposition that the public interest override in s. 23 of the Act applies to the records that the IPC held were exempted under s. 19.

[79] In the *Criminal Lawyers* case, a majority of the Court of Appeal held that s. 23 is a violation of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and unconstitutional to the extent that ss. 10, 14, 19 and 23 operate to unjustifiably deny access to records (at para. 97). Leave to appeal has been sought from the Supreme Court of Canada, [2007] S.C.C.A. No. 382.

[80] The IPC agreed with the Requester that there was a compelling public interest in the disclosure of the information contained in the records, when those records were taken as a whole. However, the Adjudicator did not apply the public interest override to records exempt under s. 19.

[81] In light of the *Criminal Lawyers* decision, the IPC erred in not applying the public interest override to all the records at issue. However, it is not appropriate for this Court, on an application for judicial review, to apply that section to the records, as requested by the Requester. Given the IPC's expertise in applying this section, the matter must be referred back to it.

Conclusion

[82] The Ministry's application for judicial review is allowed only to the extent that the highlighting of employee names must be corrected in the records that are to be disclosed. Otherwise, the application is dismissed.

[83] The Requester's application is granted in part, and the matter is referred back to the IPC to apply the public interest override in s. 23 to the records exempted pursuant to s. 19. If the IPC concludes that the public interest override applies to any of these records, the IPC shall consider whether such records are excluded pursuant to s. 65(6) or exempt pursuant to s. 21.

[84] The IPC does not seek costs and asks that no costs be awarded against it. However, the Ministry and the Requester have indicated that they seek costs. If they cannot agree, they may make written submissions, submitted to the Divisional Court office, within 30 days of the release of this decision.

SWINTON J.
LANE J.
KITELEY J.

Released: January 29, 2008

COURT FILE NOS.: 381/01 and 14/04
DATE: 20080129

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, KITELEY and SWINTON JJ.

B E T W E E N:

MINISTRY OF CORRECTIONAL SERVICES

Applicant

- and -

DAVID GOODIS, Senior Adjudicator, and
JANE DOE, Requester

Respondents

AND BETWEEN:

JANE DOE, Requester

Applicant

- and -

MINISTRY OF CORRECTIONAL SERVICES
and DONALD HALE, Adjudicator

Respondents

REASONS FOR JUDGMENT

Swinton J.

Released: January 29, 2008