COURT FILE NO.: 545/01
COURT FILE NO.: 677/01
DATE: April 14, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, CARNWATH & SOMERS JJ.

B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	*Sara Blake & Tom Lees*, for the Ministry of the Attorney General
- and -	
TOM MITCHINSON, Assistant Information and Privacy Commissioner, JANE DOE, Requester Respondents	*Chris D. Bredt, William S. Challis & Shirley Senoff*, for T. Mitchinson, Assistant Information and Privacy Commissioner *Stephen Leach*, for John Doe
AND B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	
- and -	
TOM MITCHINSON, Assistant Information and Privacy Commissioner, JOHN DOE, Requester Respondents	**HEARD:** May 30, 2003

CARNWATH J.:

[1] This application was heard on Friday, May 30, 2003. Following counsels' submissions, the court and counsel agreed that a reserved decision of the Divisional Court might have a bearing on

one of the submissions made by the applicant. The court told counsel they could make further submissions when that decision issued, if they so notified the court. The decision in *Children's Lawyer for Ontario v. David Goodis, Senior Adjudicator, Information and Privacy Commissioner and Jane Doe* was released August 14, 2003. Both parties made further submissions.

[2] While awaiting these further submissions, the Supreme Court of Canada issued its decision in *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67, on November 14, 2003. The case has particular significance for this matter; counsel were invited to make further written submissions in the light of *Maranda*. Both sides did so. These reasons now issue.

[3] The Ministry of the Attorney General (the "Ministry") applies for judicial review of Orders PO-1922 and PO-1952 made by the Assistant Information and Privacy Commissioner (the "Commissioner") under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "*Act*"). In these orders, the Commissioner found that two one-page documents setting out amounts paid by the Ministry, pursuant to court-ordered legal representation of individuals in criminal proceedings, did not qualify under exemptions from disclosure for either solicitor-client privilege or personal information. The Commissioner ordered the records be disclosed to the respondents Jane Doe ("Requester I") and John Doe ("Requester II") respectively.

The issues to be decided are:

(a) What is the standing of the Commissioner on this application for judicial review?

(b) What is the standard of review of the Commissioner's decision?

(c) Was the Commissioner correct in finding that the amounts paid by the Ministry were not exempt from disclosure by virtue of solicitor-client privilege? and,

(d) Was it reasonable for the Commissioner to decide that the amounts paid by the Ministry did not qualify under the exemption from disclosure of personal information?

BACKGROUND

A. ORDER PO-1922

[4] On April 10, 2000, the Ministry of the Attorney General received a request from a journalist for access to: "All records or documents relating to the legal costs for Paul Bernardo's representation -- through-out Ken Murray's preliminary hearing on charges of obstruction of justice. ([lawyer -- name blanked out] was granted intervenor status at the hearing to protect Bernardo's solicitor-client privilege)." The court had ordered the Ministry to pay the legal costs of two intervenors, Paul Bernardo and Carolyn MacDonald, in the criminal proceeding against Ken Murray, a barrister and

solicitor. At the time of the request, the criminal proceeding respecting Ken Murray was ongoing. The final decision acquitting Ken Murray was delivered on June 13, 2000.

[5] The Ministry found 210 pages of responsive records. The access request was denied on the grounds, among others, that the records were subject to solicitor-client privilege and disclosure would constitute an unjustified invasion of the personal privacy of individuals.

[6] Requester I appealed to the Commissioner. In her appeal, she expanded the scope of her request to cover the legal costs paid in respect of both intervenors. In addition, she requested the total amount paid for the legal costs of the two intervenors. She no longer wanted the solicitor's bills of account or other documents.

[7] In mediation, the Ministry created a record which states the total dollar figure paid for the legal costs of the two clients. This record was created by Crown counsel from information contained in 182 pages of records which included the solicitors' statements of account which had been submitted to the Ministry for payment in accordance with the court orders.

[8] Counsel for the two clients advised the Commissioner of their clients' objections to the disclosure of this information on the grounds of solicitor-client privilege and unjustified invasion of their clients' personal privacy. In addition, counsel for one client cited the fact that her retainer related to testimony given by her client at an *in camera* hearing in the preliminary inquiry and was covered by the court-ordered denial of public access to the *in camera* hearing.

[9] The Commissioner ordered the Ministry to disclose to the Requester the total dollar amount paid to the two clients' lawyers. His reasons for decision are summarized as follows:

a. The Commissioner acknowledged that the clients had not waived solicitor-client privilege.

b. The Commissioner found that the "record reflects the total amount paid by the Ministry, in aggregate form, to two lawyers representing two different clients over a significant period of time in two separate proceedings". The clients were represented both at Mr. Murray's preliminary inquiry and at his subsequent trial. The preliminary inquiry began in September 1997, and the accused was acquitted on June 13, 2000. A significant portion of this time was spent dealing with the issues for which the intervenors were represented by counsel whose fees were to be paid by the Ministry.

c. The Commissioner found that the two lawyers were appointed pursuant to the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27. Although little turns on it, the lawyers were retained by their clients; the court ordered the Ministry to pay their legal bills.

d. The Commissioner held that the total amount of the lawyers' fees was not solicitor-client privileged because it was a statement of fact or act of counsel

as reflected in a trust ledger. He rejected the argument that it is not appropriate to distinguish the lawyers' actual statements of account from the record at issue which contains information gleaned from those statements of account.

e. The Commissioner held that disclosure would not violate the rights of the clients to protection of privacy. The Commissioner held that the information was not personal information of the clients because the record did not identify the clients. I note that the record created was in direct response to a request which identified the clients. The Commissioner further held that since the dollar figure was an aggregate amount of two accounts, there was no breakdown of fees paid in relation to legal services provided to each of the two individual clients.

f. The Commissioner also held that disclosure would not violate the rights of the lawyers to protection of privacy. He rejected the argument that the amounts billed and paid were personal information of the individual lawyers to whom those amounts were paid. The Commissioner held that the dollar aggregate was an aggregate of payments made to two different lawyers and there was no other information contained in the record that would permit the aggregate figures to be broken out between those two lawyers or to identify the amount any individual lawyer was paid.

B. ORDER PO-1952

[10] On April 4, 2000, a journalist requested access to "The total cost of legal aid of lawyers retained by Paul Bernardo in his appeal of his 1995 convictions for first degree murder. I would also appreciate a breakdown of the fees paid to each attorney retained by Mr. Bernardo." The Court of Appeal had appointed counsel to represent Paul Bernardo pursuant to s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46, which required the Ministry to pay the fees and disbursements of counsel appointed by the court.

[11] The Ministry found 610 pages of responsive records. The access request was denied on the grounds that the records were subject to solicitor-client privilege and that disclosure would constitute an unjustified invasion of the privacy of individuals.

[12] Requester II appealed. In his appeal, he revised the scope of his request, "I requested the total dollar amount, nothing else." He submitted, "I firmly believe Ontario taxpayers have the right to know how much public money was spent on an appeal that took four years to get to the appeal court and was subsequently dismissed from the bench."

[13] During mediation, the number of records at issue were reduced to a single page which contains a summary of invoices paid to counsel who represented Paul Bernardo. The record includes the date and amount of the invoices, as well as the total amount paid between May 26, 1997 and February 8, 2000. The record was created by Crown counsel from information contained in the

solicitors' statements of account which had been submitted to the Ministry for payment in accordance with the court order.

[14] Counsel for Mr. Bernardo made submissions to the Commissioner objecting to disclosure on the grounds of solicitor-client privilege, which had not been waived, and on the grounds of the client's fundamental right of privacy, as well as the lawyers' right to privacy. The submissions note that the information was supplied to the Ministry in confidence pursuant to special arrangements to preserve confidentiality, since the Ministry was adverse to the litigant on appeal. The lawyers' work product was disclosed in confidence for the limited purpose of allowing the amount and value of legal work to be verified so the accounts would be paid.

[15] The Commissioner ordered the Ministry to disclose to the Requester the dollar amounts and dates of every payment, together with the total amount paid to Paul Bernardo's appeal lawyers. His reasons for decision are summarized as follows:

a. The Commissioner accepted that the client had not waived solicitor-client privilege.

b. The Commissioner held that the record did not fall within the scope of solicitor-client privilege:

    i. He held the record fit within the "statement of fact" exception to solicitor-client privilege. "Specifically, the record is a factual statement of the amount of public funds paid by the Ministry to four lawyers in consideration for legal services provided to the affected person in the appeal of certain criminal convictions["].

    ii. He rejected the argument that it was not appropriate to distinguish the lawyers' actual statements of account from the record created which latter contains information gleaned from those statements of account.

    iii. He also rejected the argument that disclosure would create an unfair disparity between clients paying privately for legal services and those accessing legal services through Legal Aid or court-appointed lawyers.

c. The Commissioner held that disclosure would not violate the rights of the client to protection of privacy:

    i. The Commissioner accepted that the information was the client's personal information but held that the record did not relate to a financial transaction involving the client. He held

that disclosure would not constitute an unjustified invasion of the client's privacy.

ii. The Commissioner held that none of the presumptions against disclosure applied. Specifically, he held that the record did not describe the client's financial history or activities, nor did it relate to the client's eligibility for social service or welfare benefits or to the determination of benefit levels.

iii. The Commissioner held there were no other factors weighing against disclosure. "In my view, having applied to the Court for representation under section 684(1) of the *Criminal Code*, it is not reasonable for the affected person to then assume that the amount paid by the Ministry for these services would be treated confidentially, or that this information would be characterized as 'highly sensitive'. . . . Finally, given the notoriety of the affected person's case and the fact that he is presently serving a sentence for first degree murder, it is not reasonable to conclude that disclosing the aggregate amounts paid to or billed by his lawyers for representing him on his appeal would expose him unfairly to pecuniary or other harm, or would damage his reputation".

iv. The Commissioner noted the affected person was convicted of first degree murder after a notorious and controversial trial, that his application for court-appointed counsel and his appeal were subject to significant media and public attention and that the level of public interest in criminal matters involving this particular affected person was virtually without parallel in the province. He held that, in those circumstances, the disclosure of the aggregate amounts paid to his lawyers for the appeal was desirable for the purpose of subjecting the Ministry to public scrutiny.

d. The Commissioner further held that disclosure would not violate the rights of the four lawyers to protection of privacy because it was not personal information of those lawyers. He rejected the argument that the information relates to an "identifiable individual" because the dollar amount was an aggregate of the payments made to four different lawyers. There was no information contained in the record that would permit the aggregate figure to be broken out between those four lawyers or identify the amount paid to any individual lawyer.

(a) What is the standing of the Commissioner on this application for judicial review?

[16] The issue of the Commissioner's standing was first raised by the Ministry in its "Reply Factum", a creature unknown to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 except in motions for leave to appeal to the Court of Appeal (rule [61.03.1(11)]). Apparently, the "Reply Factum" was prompted by, among other things, the submission in paras. 47 and 48 of the Commissioner's factum that the Commissioner had standing on the review to make submissions on the correctness of the Commissioner's decision.

[17] The Commissioner quite properly points out that if the Ministry wanted to attack the Commissioner's standing, the proper method was to move on notice. In view of my conclusion on the issue of standing, I find it unnecessary to follow this thread other than to say the practice of filing a "Reply Factum" in the Divisional Court should be discouraged.

[18] The Divisional Court recently dealt with the issue of the Commissioner's standing in the *Children's Lawyer* case noted above. In that case, counsel for the Ministry, without notice to the court, objected to the Commissioner's standing on the review in question. Following the necessary adjournment, counsel made extensive submissions on the issue. On August 14, 2003, the Divisional Court released its decision.

[19] The court made a detailed review of the orders of the Commissioner in Ontario and her counterparts in British Columbia and Alberta. The court found that in the 65 judicial review applications heard by the Divisional Court since the *Act* came into force, counsel for the Commissioner had actively participated in them all, with no limit on the role of the Commissioner.

[20] The court further found the Commissioner had appeared as both appellant and respondent in the Ontario Court of Appeal on ten occasions in appeals from the Divisional Court on matters of judicial review. In none of those cases was the Commissioner's role in making submissions limited.

[21] The court further found that the Privacy Commissioners in Alberta and British Columbia have never been denied standing to file a factum, appear and make oral argument. No limits were placed on counsel for the respective Commissioners.

[22] Following an extensive review of the office of the Commissioner and its unique role in the protection of privacy, the court concluded that the Commissioner's standing should be decided on the pragmatic and functional approach designed by the Supreme Court of Canada in determining the proper standard of review.

[23] Applying the pragmatic and functional approach, the court reached the following conclusions:

> (a) by reason of s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, the Commissioner has the right, not the obligation, to be "a party on any judicial review application regarding a decision or order of the Commissioner" [para. 44];

(b) by being a party to the judicial review, the Commissioner and her counsel have the same scope as any other party, save as to any limitations imposed by a rule of court;

(c) that the Commissioner's participation and right to make submissions on a judicial review application are best left to judicial discretion rather than to a set of hard and fast rules;

(d) that a panel of the Divisional Court cannot foretell [at paras. 50-51]:

> [50] ...what issues will be presented to the court in the next judicial review application, nor who will enter an appearance, nor who will file a factum, nor who will appear at the hearing of the judicial review. If, during a particular hearing, the members of this court conclude that certain submissions by the Commissioner on particular issues would "produce a spectacle not ordinarily contemplated in our judicial tradition", we feel safe in saying that the court will have no hesitation in immediately limiting or halting such submissions.
>
> [51] If the order sought by counsel for the CLO/AG Ontario, were made, the court would, in this case and in many cases to come, deny itself legitimate, helpful submissions from counsel for the Commissioner, the office appointed by the legislature to arbiter access to information disputes between the head and the requester.

[24] Applying the ratio of *Children's Lawyer* to the facts of this case, I conclude the Commissioner has standing in this case. To do otherwise would deny this panel "legitimate helpful submissions from counsel for the Commissioner", particularly where the Requesters' role in the proceedings was minimal.

[25] I conclude further that the submissions by the Commissioner as we have received them do not "produce a spectacle not ordinarily contemplated in our judicial tradition". Indeed, the Commissioner's participation is preferable where it would be unreasonable to expect the Ministry to advocate on behalf of the public interest when it represents the party (the Ministry itself) withholding the information.

[26] In the result, the motion for an order denying the Commissioner standing is dismissed.

(b) <u>What is the standard of review of the Commissioner's decision?</u>

[27] When the Commissioner considers solicitor-client privilege, the standard of review is correctness. Solicitor-client privilege does not fall within the special expertise of the Commissioner, but rather is within the expertise of the court. *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167, [2002] O.J. No. 4596 (C.A.), leave to appeal to the Supreme Court of Canada dismissed May 15, 2003, docket 29572.

[28] The standard of review of the interpretation by the Commissioner of the protection of privacy provisions in the Act is reasonableness simpliciter. *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2002), 166 O.A.C. 88 (Ont. C.A.).

(c) Was the Commissioner correct in finding that the amounts paid by the Ministry were not exempt from disclosure by virtue of solicitor-client privilege?

[29] As noted above, the Supreme Court of Canada issued its decision in *Maranda v. Richer* on November 14, 2003. Briefly stated, the facts in *Maranda* are as follows. The R.C.M.P. suspected one Charron of involvement in money-laundering and drug trafficking. They obtained authorization to search the offices of Mr. Maranda, counsel for Charron, for any documents relating to fees and disbursements billed to Charron or relating to the ownership of an automobile that Charron had allegedly transferred to Maranda in payment for professional services. No notice was given to Maranda, but a representative of the Quebec bar went with the police when they conducted the search, which lasted 131/2 hours. Maranda brought an application for *certiorari* in the Quebec Superior Court to have the warrant quashed and the search declared to be unlawful and unreasonable. An application was also filed under s. 488.1 of the *Criminal Code*. At the hearing, although the Crown conceded the search was void, the trial judge decided to continue hearing the case, given the importance of the issues. He allowed the application for *certiorari* and quashed the search warrant and the procedures that had been carried out under it, declaring them to have been unlawful and unreasonable. The Quebec Court of Appeal reversed that decision. In the time since the Court of Appeal's judgment, the Supreme Court had declared s. 488.1 to be unconstitutional.

[30] LeBel J. wrote for the majority with Deschamps J. agreeing in the result. The search and seizure were held to be unreasonable and abusive within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms* because of the breach of the duty to minimize and the failure to get in touch with Mr. Maranda.

[31] More important for purposes of this judicial review, LeBel J. went on to consider the common law solicitor-client privilege as it might apply to lawyers' accounts for fees and disbursements. It is important to note the context in which the Supreme Court of Canada dealt with solicitor-client privilege and lawyers' fees and disbursements.

[32] Consistently throughout the judgment, LeBel J. places the judgment in the context of a duty to minimize impairment of solicitor-client privilege when a search in a lawyers' office is authorized and executed.

[33] In para. 12 of the judgment:

> The decisions of this court have consistently strengthened solicitor-client privilege, which it now refuses to regard as merely an evidentiary or procedural rule, and considers rather to be a general principle of substantive law (see: *Lavallee, Rackel & Heintz*, at para. 49). The only exceptions to the principle of confidentiality established by that privilege that will be tolerated, in the criminal law context, are limited, clearly defined and strictly controlled (*R. v. McClure*), [2001] 1 S.C.R. 445,

2001 SCC 14; R. v. Brown, [2002] 2 S.C.R. 185, 2002 SCC 32). **The aim in those decisions was to avoid lawyers becoming, even involuntarily, a resource to be used in the criminal prosecution of their clients, thus jeopardizing the constitutional protection against self-incrimination enjoyed by the clients.** In determining the propriety of the authorization and execution of the search in Mr. Maranda's office and examining the problem of the confidentiality of the information about the fees and disbursements billed to his clients, care must be taken to follow the general approach that can be seen in this Court's decisions in this area.
[emphasis added]

[34] In para. 14:

The first problem that arises is the question of the existence and effect, in Canadian criminal law, of a duty to minimize impairments of solicitor-client privilege **when a search in a lawyer's office is authorized and executed**. Under the current law, as set out in the decisions of this court, there is no doubt that such a duty exists. It rests on the informant who applies for a search warrant, the authorizing judge and those responsible for executing it.
[emphasis added]

[35] In para. 21:

This case generated a debate about the privileged nature of lawyers' billings for fees and disbursements. In the eyes of the parties, and of the Superior Court and the Court of Appeal, that question seems to have become the main subject of the legal proceedings that arose out of this case. It must be discussed in the context of the very first of the common law rules set out by Arbour J. in *Lavallee, Rackel & Heintz*, supra, at para. 49. **That rule prohibits the issuance of any search warrant relating to privileged information**.
[emphasis added]

[36] In para. 22:

At first glance, that rule is clear and stringent. The authorizing judge may not issue a search warrant for privileged documents unless the material submitted to the judge by the informant establishes that an exception to that privilege applies. In that case, the warrant applied for may be granted, on terms that seek to keep breaches of privilege to a minimum. **In this appeal, we must determine how that rule applies to information concerning lawyers' fees, in the context of a criminal investigation being conducted by the police**. However, the parties are not questioning the principles set out in *Mierzwinski*, holding that lawyers' billings are protected by privilege when they contain information regarding the content of communications between the lawyer and his or her client, both about the legal advice given and about the terms for payment of the lawyer's fees or the financial situation of the person who consults the lawyer (p. 877, *per* Lamer J.). In the Court's opinion,

> the scope of the privilege is broad. The reasons written by lamer J. suggest that courts should exercise great caution before trying to circumscribe or create exceptions to that privilege (pp. 892-93):
> [emphasis added]

[37] In para. 28:

> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. **In the context of criminal investigations and prosecutions, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination**.
> [emphasis added]

[38] In para. 29:

> ...**An application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution** involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.
> [emphasis added]

[39] In para. 33:

> **In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege**. While that presumption does not create a new category of privileged information, it will provide necessary guidance concerning the methods by which effect is given to solicitor-client privilege, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, **recognizing a presumption that such information falls *prima facie* within the privileged category** will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, which this court forcefully stated even more recently in *McClure, supra* (at p. 450).
> [emphasis added]

[40] The above excerpts from *Maranda* show that the Supreme Court of Canada was speaking of the protection of solicitor-client privilege within the context of an application for the issuance of a warrant for search and seizure of a lawyer's office in aid of a criminal prosecution. One must be wary of extrapolating from the judgment single sentences or paragraphs which would tend to support the

proposition that the amount of a lawyer's fees and disbursements can never, under any circumstances, be disclosed in situations where the information is not sought for the purposes of a criminal prosecution. I conclude that the Commissioner's decisions in the two files must be viewed in their own context.

[41] In *Maranda*, LeBel J. discusses the difference between a communication between a lawyer and his client for the purpose of obtaining legal advice and intended to be confidential on the one hand, and payment of fees alleged to be a fact incidental to the solicitor-client relationship. This distinction between a communication on the one hand and the "fact" of the payment of fees on the other was recognized by both the Quebec Court of Appeal in *Maranda* and by the Commissioner in his analysis of the two requests upon which he had to rule. LeBel J. recognized two lines of cases, one supporting the position taken by the Quebec Court of Appeal, others taking a position in favour of applying privilege to the gross amount of fees paid to a lawyer.

[42] LeBel J. is then reported, as follows, at para. 28:

> The problem here must be solved in a way that is consistent with the general approach adopted in the case law to defining the content of solicitor-client privilege and to the need to protect that privilege. **In the context of criminal investigations and prosecutions**, that solution must respect the fundamental principles of criminal procedure, and in particular the accused's right to silence and the constitutional protection against self-incrimination.
> [emphasis added]

[43] In para. 29 of the judgment, LeBel says, as follows:

> ...An application by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution involves the fundamental values and institutions of criminal law and procedure. The rule that is adopted and applied must ensure that those values and institutions are preserved.

[44] LeBel J. goes on, in para. 30, to say, "That rule cannot be based on the distinction between facts and communication." I pause to note that the rule referred to is a rule that it is to be applied where the application in issue is by the Crown for information concerning defence counsel's fees in connection with a criminal prosecution. In those circumstances, LeBel J. concludes that the rule cannot be based on the distinction between facts and communications.

[45] He concludes his remarks in para. 31, as follows:

> The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

[46] LeBel J.'s conclusions on this issue are found in para. 33 of the judgment:

> ...Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. That presumption is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum, ...

[47] It can be argued that the conclusions of LeBel J. in *Maranda* must be confined to situations where the information sought is as a result of an application for search and seizure by the Crown in pursuing a criminal prosecution. It can also be argued that LeBel J.'s conclusions extend to every instance where there is a solicitor-client relationship. However, in either instance, I find it open to the court to rebut the presumption identified by LeBel J. and to conclude, in certain circumstances, that the gross amount of a lawyer's account is neutral information not subject to solicitor-client privilege. I turn then to the two orders issued by the Commissioner.

ORDER PO-1922

[48] The material in this matter discloses the following:

a. The record sought to be disclosed is not being sought for the purpose of a criminal prosecution, but rather for publication to inform the public of the sums expended by the Ministry in the course of the prosecution of an accused person unrelated to these proceedings.

b. The record is a statement of the total amount of public funds paid by the Ministry to two lawyers for the legal services provided to two persons during the prosecution of the accused.

c. The record is a global amount. There is no itemization of services rendered; no dates and times for services are shown; no billing rates are shown; no individual account total is shown. The record reflects the total amount paid by the Ministry in aggregate form to two lawyers representing two different clients over a significant period of time in two separate proceedings.

[49] Applying a contextual analysis, I find the information contained in the record sought to be disclosed to be neutral. I find the record not to be a solicitor-client communication of a confidential nature made for the purpose of obtaining professional legal advice. I find the Commissioner was correct in concluding that the record is not protected by solicitor-client privilege.

ORDER PO-1952

[50] The material before the court discloses the following:

a. The record at issue is a summary of a number of invoices paid as legal fees and disbursements to four lawyers representing an accused on his appeal. The record includes the date, invoice number and amount of several invoices, as well as a sum total of the amount paid between May 26, 1997, and February 8, 2000. The record was created by Crown counsel using information supplied directly from the solicitor's statements of account, which had been submitted to Crown counsel in accordance with s. 684(2) of the *Criminal Code* for payment.

b. The record reflects the total amounts paid by the Ministry in aggregate form to four lawyers over a three-year period.

c. The record shows no itemization of services; discloses no billing rates; no individual account total is reflected on the record; it is not possible to ascertain any specific account billing from the content of the record.

[51] Applying a contextual analysis, I find the information contained in the record sought to be disclosed to be neutral. I find the record not to be a solicitor-client communication of a confidential nature made for the purpose of obtaining professional legal advice. I find the Commissioner was correct in concluding that the record is not protected by solicitor-client privilege.

(d) <u>Was it reasonable for the Commissioner to decide that the amounts paid by the Ministry did not qualify under the exemption from disclosure of personal information?</u>

<u>ORDER PO-1922</u>

[52] Section 2(1) of the Act provides as follows:

> "personal information" means recorded information about an identifiable individual including
>
> (b) . . . information relating to financial transactions in which the individual has been involved.

[53] Section 21 of the *Act* grants a personal privacy exemption to personal information. Section 2(1) of the *Act* defines "personal information", in part, to mean recorded information about an identifiable individual, including information relating to financial transactions in which the individual had been involved. The Commissioner did not accept the submission of the Ministry that the lawyers to whom the money was paid were readily identifiable, given the nature of the request and the public nature of their identity. The Commissioner found that no individual was identified on the only record that remained at issue in the appeal before him, nor was a dollar figure contained in the record itemized against any individual lawyer. The Commissioner found that the dollar amount was an aggregate of the payments made to two different lawyers and there was no other information contained in the record which would permit the aggregate figure to be broken out.

[54] The Commissioner further found the record did not contain the personal information of either of the two clients represented by the two lawyers. The individuals were not identified by name on the record. The Commissioner acknowledged that although their identities could perhaps be determined by other means, the actual record at issue in the appeal before him did not contain any information that can be linked specifically to either of the two persons. He found that the disclosure of the record would not increase the likelihood that accurate inferences could be drawn from the record itself. He concluded that the record could not qualify for exemption under s. 21 of the *Act*.

[55] I find the Commissioner was not unreasonable in concluding the record did not qualify for exemption under s. 21. His conclusion with respect to the privacy interest should not be disturbed.

ORDER PO-1952

[56] Section 2(1) of the *Act* provides as follows:

> "Personal information" means recorded information about an identifiable individual including
>
> (b) . . . information relating to financial transactions in which the individual has been involved.

[57] Section 21(1) of the *Act* provides, in part, as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[58] Section 21(3) provides as follows:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Affected Lawyers

[59] The Ministry submitted to the Commissioner that the total amount paid to the lawyers who represented the accused (the affected person) at his appeal qualifies as personal information under s. 2(1) of the *Act*. While the names of the lawyers to whom any money was paid did not appear on the record, the Ministry submitted the individuals to whom the amounts were paid were readily identifiable, given the nature of the request and the public nature of their identity. This, said the Ministry, tied the records to identifiable individuals, i.e., the affected person's lawyer.

[60] Affected lawyer #1 submitted that the information sought was personal information about the lawyers who represented the individual litigant (the affected person) in the Court of Appeal. Lawyer #1 submitted that the record contained a purported summary of a financial transaction in which the lawyers were paid and, accordingly, pursuant to para. 2[(1)](b), the record related to financial transactions in which an identifiable individual had been involved.

[61] The Commissioner disagreed. The Commissioner pointed out that no individual was identified on the page 1 record, nor were the dollar figures contained in the record itemized against any individual lawyer. The Commissioner did not accept that the content of the record identified the amount billed or paid to any individual lawyer. The numbers in the chart were aggregate amounts relating to four different lawyers and there was no other information contained in this record that would permit this aggregate figure to be broken out among the four lawyers in a way that would identify the amount billed or paid to any individual lawyer by the Ministry. The Commissioner went further to find that absent evidence or argument from the Ministry or the affected lawyers, there was no basis to conclude that information in the page 1 record could be used in conjunction with any other information in order to identify the amount billed or paid to any individual lawyer.

[62] I find that the Commissioner was not unreasonable in arriving at this conclusion.

The Affected Person

[63] Affected lawyer #1 submitted that the information sought was personal information about the individual litigant (the affected person) in the appeal. He submitted that the information was about a financial benefit -- funding for counsel -- received by the affected person pursuant to court order. He referred the Commissioner to the general definition of "personal information" and to para. 2[(1)](b) referring to a financial transaction in which the affected person received the benefit.

[64] The Commissioner disagreed. The Commissioner found that any financial transactions that formed the basis of the figures contained on the page 1 record were between the Ministry and the individual lawyers, not between the Ministry and the affected person. However, the Commissioner did find that the page 1 record contained information about the affected person in a more general sense. Since the affected person's identity was known to the Requester and others, and the aggregate figures reflected on the record related to various billings or payments made by the Ministry to his lawyers over a period of time, the Commissioner was persuaded this constituted information "about an identifiable individual, the affected person, and fell within the scope of the introductory wording of the definition of personal information in s. 2(1) of the *Act*".

[65] This finding required the Commissioner to consider whether the prohibition against releasing personal information about the affected person fell within one of the exceptions in s. 21(1)(a)-(f) inclusive. The Commissioner found the only exception with potential application in the circumstances of the matter before him was s. 21(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[66] Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides criteria for the institution to consider in making this determination; s. 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and s. 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Commissioner noted that the Divisional Court has found that once a presumption against disclosure has been established, it cannot be rebutted by one or more of the factors set out in s. 21(2) *(John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 106 D.L.R. (4th) 140 (Div. Ct.)).

[67] Lawyer #1 submitted to the Commissioner that the presumptions in s. 21(3)(c) and (f) applied. These sections read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
>
> . . .
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balance, financial history or activities or creditworthiness.

[68] The Commissioner noted in his reasons that he had already determined that the page 1 record did not contain information relating to a financial transaction involving the affected person. Applying the same reasoning, he found that the record also did not describe the affected person's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness. The Commissioner repeated that any aspects of the page 1 record that concerned finances related to the affected lawyers and not to the affected person.

[69] The Commissioner found that the application of s. 21(3) (c) was narrowly restricted to social services or welfare benefits which had no relevance in the context of the matter before him. He accordingly found that none of the s. 21(3) presumptions applied to the personal information of the affected person contained in the page 1 record.

[70] The Commissioner then reviewed the listed factors in s. 21(2) that favour privacy protection and found that none applied in the circumstances. He noted the fact that the affected person received legal services from the affected lawyers was a matter of public record and widely known. He found the information to be accurate and reliable (para. (g)); neither confidential nor highly sensitive (paras. (f) and (h)); and did not have the capacity to expose the affected person unfairly to pecuniary or other harm or to unfairly damage his reputation (paras. (e) and (i)). He found that disclosing the aggregate

amounts billed by or paid to the four affected lawyers by the Ministry for the legal services did not render any of those factors relevant.

[71] The Commissioner then went on to consider the provisions of s. 21(2)(a):

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of Ontario and its agencies to public scrutiny.

[72] The Commissioner noted the affected person was convicted of first degree murder after a highly-publicized and controversial trial. He applied for and was granted the right to have counsel appointed under s. 684(1) of the *Criminal Code* to represent him on an appeal. That application and the subsequent appeal were also the subject of significant media and public attention. In the Commissioner's view, the provision of public funds in order to represent the affected person on appeal was one component of the broader public interest in the matter. The Commissioner accepted the basic position of the Requester that disclosing the aggregate figures reflecting the costs for the legal services was desirable for the purpose of subjecting the Ministry to public scrutiny. He found the factor in s. 21(2)(a) a relevant consideration.

[73] Having found no relevant factors favouring privacy protection and one favouring disclosure of the personal information of the affected person, the Commissioner concluded that disclosure of the page 1 record would not constitute an unjustified invasion of the affected person's privacy.

[74] I find the Commissioner's decision on this point is not unreasonable.

[75] The application for judicial review is denied.

[76] The parties have 30 days to make written submissions as to costs.

I agree. — LANG J.
CARNWATH J.
I agree. — SOMERS J.

Released: April 14, 2004

COURT FILE NO.: 545/01
COURT FILE NO.: 677/01
DATE: April 14, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, CARNWATH & SOMERS JJ.

B E T W E E N:

MINISTRY OF THE ATTORNEY GENERAL

Applicant

- and -

TOM MITCHINSON, Assistant Information and Privacy Commissioner, JANE DOE, Requester

Respondents

AND B E T W E E N:

MINISTRY OF THE ATTORNEY GENERAL

Applicant

- and -

TOM MITCHINSON, Assistant Information and Privacy Commissioner, JOHN DOE, Requester

Respondents

JUDGMENT

CARNWATH J.

Released: April 14, 2004