DATE: March 14, 2005
DOCKET: C42504

COURT OF APPEAL FOR ONTARIO

DOHERTY, LASKIN and MACFARLAND JJ.A.

B E T W E E N:	)	
	)	
MINISTRY OF THE ATTORNEY GENERAL	)	Sara Blake for the applicant/appellant
	)	
Applicant/Appellant	)	William S. Challis
- and -	)	for the respondent, Mitchinson
	)	
	)	M. Edward Key
TOM MITCHINSON, Assistant Information and Privacy Commissioner, JANE DOE, Requester and JOHN DOE, Requester	)	for the respondent, John Doe
	)	
Respondents	)	
	)	Heard: March 7, 2005

On appeal from the judgment of the Divisional Court dated April 14, 2005

BY THE COURT:

[1] This appeal arises out of two orders made by the respondent, the Assistant Information and Privacy Commissioner ("IPC"), in response to disclosure requests made by two journalists. The journalists sought information in the possession of the Ministry of the Attorney General ("Attorney General"). The first disclosure order (PO-1922) required the Attorney General to disclose to the Requester the total amount of legal fees paid by the Attorney General to two lawyers who had acted for two intervenors in a criminal proceeding. The fees were paid pursuant to a court order that had directed the Attorney General to pay the legal fees of the two intervenors. The document that the IPC ordered disclosed revealed only the total amount paid by the Attorney General and not the amount paid to each lawyer.

[2] The disclosure second order (PO-1952) required the Attorney General to disclose payments made by the Attorney General to the four lawyers who had acted for Paul Bernardo on the appeal from his murder convictions. This court had appointed counsel for Bernardo on the appeal and directed that the Attorney General pay counsel's fees. The document that the IPC ordered disclosed revealed specific amounts paid and the dates of those payments, but did not reveal amounts paid to specific lawyers.

[3] The Attorney General unsuccessfully challenged the orders by way of judicial review. He then appealed to this court pursuant to leave to appeal granted by a panel of this court.

[4] There are three issues:

- was the information ordered disclosed protected by client/solicitor privilege and, therefore, not disclosable pursuant to s. 19 of the *Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the *Act*)?;

- was the information referred to in the documents "personal information" within the meaning of the *Act* and, if so, was it disclosable pursuant to s. 21(1)(f) of the *Act*?; and

- should counsel for the IPC be allowed to address the merits of the first two issues raised by the appellant?

[5] After the court heard submissions from counsel for the Attorney General on all three issues, it asked counsel for the IPC to make submissions as to his entitlement to address the merits of the solicitor/client issue. The court was concerned with the propriety of counsel for the IPC defending the merits of the decision made by the IPC on a judicial review application. After counsel for the IPC had made his submissions on the issue, the court retired to consider the matter.

[6] The court concluded that the appeal by the Attorney General failed on its merits on the first two issues without the need to hear submissions from the respondents. Consequently, it is unnecessary for the court to determine whether counsel for the IPC should be allowed to address the merits of the first two issues. The court indicated that the appeal would be dismissed with reasons to follow. These are those reasons.

The client/solicitor issue:

[7] The IPC decided that information concerning the amounts paid for legal fees by the Attorney General pursuant to the court orders was not subject to client/solicitor privilege. In reaching that conclusion, he drew a distinction between facts which were not protected by the privilege and communications about facts which could be protected by the privilege. He placed the amount paid for legal fees by the Attorney General into the former category.

[8] Subsequent to the decision of the IPC, the Supreme Court of Canada released its reasons in *Maranda v. LeBlanc* (2003), 232 D.L.R. (4th) 14. Those reasons address the question of whether information as to the amount of fees paid is sheltered under the client/solicitor privilege. LeBel J., for the majority, eschewed the distinction between communications and facts. The Divisional Court had the benefit of *Maranda* in considering the application for judicial review from the decision of the IPC. The reasons of Carnwath J., dismissing the application, review the analysis in *Maranda* in some detail and apply that analysis to the information the IPC ordered disclosed.

[9] We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda v. LeBlanc, supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

[10] *Maranda* arose in the context of a challenge to a search warrant issued in a criminal investigation. The court stresses the importance of the client/solicitor privilege in the criminal law context and the strength of the presumption that information relating to elements of that relationship should be treated as protected by the privilege in circumstances where the information is sought to further a criminal investigation that targets the client.

[11] While we think the context in which information is sought may be relevant to whether it is protected by the client/solicitor privilege, we accept for the purposes of this appeal, that in the present context one should begin from the premise that information as to the amount of fees paid is presumptively protected by the privilege. The onus lies on the requester to rebut that presumption.

[12] The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege. In determining whether disclosure of the amount paid could compromise the communications protected by the privilege, we adopt the approach in *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.). If there is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege, then the information is protected by the client/solicitor privilege and cannot be disclosed. If the requester satisfies the IPC that no such reasonable possibility exists, information as to the amount of fees paid is properly characterized as neutral and disclosable without impinging on the client/solicitor privilege. Whether it is ultimately disclosed by the IPC will, of course, depend on the operation of the entire *Act*.

[13] We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case. For example, having regard to the information ordered disclosed in PO-1952, we see no possibility that an educated guess as to the amount of hours spent by the lawyers on the appeal could somehow reveal anything about the communications between Bernardo and his lawyers concerning the appeal.

[14] The Divisional Court did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to client/solicitor privilege.

The interpretation of the relevant provisions of the *Act*:

[15] Counsel for the Attorney General argues that the interpretation of the *Act* by the IPC is subject to a correctness standard of review except insofar as the interpretation relates to statutory provisions that involve a balancing of competing interests. She submits that the interpretation of balancing provisions is subject to a reasonableness standard of review.

[16] This submission is contrary to previous decisions of the court which have subjected the IPC's interpretation of the statute to a reasonableness standard of review: see e.g. *Ontario (Workers Compensation Board) v. Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129 at 139-40 (Ont. C.A.). Counsel for the Attorney General submits, however, that the previous authorities from this court are contrary to more recent standard of review jurisprudence in the Supreme Court of Canada: see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2004), 242 D.L.R. (4th) 193 at 201-204 (S.C.C.).

[17] We need not decide whether the prior cases from this court imposing a reasonableness standard of review on decisions by the IPC turning on the interpretation of the *Act* have been overtaken by the more recent and more general standard of review jurisprudence from the Supreme Court of Canada. We will assume in keeping with the Attorney General's submissions, that the interpretation of the words "personal information" in s. 2(1) of the *Act* is subject to review on a correctness standard as is the interpretation of the provisions in s. 21(3) of the *Act*. We will further assume that the information sought in both requests amounted to personal information as that phrase is defined in the s. 2(1) of the *Act*.

[18] Assuming the information was personal information, we think the IPC was correct in holding that none of the provisions in s. 21(3) applied to the information sought in either request. Specifically, the fees paid to the lawyers by the Attorney General pursuant to the court orders could not be construed as information relating "to eligibility for social service or welfare benefits", or information relating to "the determination of benefit levels" (see s. 21(3)(c)). The payments made by the Attorney General had nothing to do with eligibility for anything, nothing to do with social services or welfare benefits, and nothing to do with the determination of any level of benefit.

[19] We are also satisfied that information as to the total amount paid for legal fees did not in anyway describe the finances of the clients to whom the legal services had been provided (s. 21(3)(f)). The clients had nothing to do with the payment of the fees by the Attorney General and the amount revealed nothing about their finances. Lastly, as the amounts disclosed did not relate to payments to any specific lawyer, disclosure of those amounts did not constitute disclosure of the lawyer's finances.

[20] Counsel for the Attorney General accepted that if none of the provisions in s. 21(3) applied, disclosure could be made if that disclosure did not "constitute an unjustified invasion of personal privacy" (s. 21(1)(f)). Counsel further accepted that this assessment is subject to review on a reasonableness standard. As we discern virtually no interference with anyone's personal privacy by the disclosure of this information, we cannot say that the decision of the IPC was an unreasonable one.

[21] For the reasons set out above, the appeal was dismissed without costs.

"Doherty J.A."
"John I. Laskin J.A."
"J. MacFarland J.A."

RELEASED: March 14, 2005