COURT FILE NO.: 330/02
DATE: August 14, 2003

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

O'DRISCOLL, LANE AND KOZAK JJ.

B E T W E E N:	)	
	)	
CHILDREN'S LAWYER FOR ONTARIO	)	*L.M. McIntosh and Elaine Atkinson*, for
	)	the Children's Lawyer and for Attorney
Applicant	)	General of Ontario
	)	
- and -	)	
	)	
	)	
	)	*C.D. Bredt, F. Kristjanson and S. Senoff*,
DAVID GOODIS, Senior Adjudicator,	)	for the Respondent Commissioner
Information and Privacy Commissioner and	)	
JANE DOE, Requester	)	*M.M. Thomson and C. Lonsdale, Amicus*
	)	*Curiae*
Respondents	)	
	)	
	)	**HEARD:** May 13 & 14, 2003

THE COURT:

Nature of Proceedings:

[1] This application for judicial review arises from an order (P-2006) dated April 19, 2002, and a reconsideration decision dated May 24, 2002 of an adjudicator of the respondent Information and Privacy Commissioner, acting under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, (FIPPA).

[2] The person requesting information (the requester) is an adult individual, identified by the pseudonym Jane Doe, who received legal representation in a child protection case when she was a child client of The Children's Lawyer for Ontario ("CLO"). The CLO also acted as her litigation guardian in two motor vehicle accident cases. Upon reaching majority, she requested delivery of "her file". Instead of treating this as a request from a client, the CLO treated it as if it were a request under FIPPA. In response to the request, the CLO identified 3,700 pages of records, and disclosed all but 933 pages to the requester. The CLO relied upon s. 19 of the Act, which provides an exemption for records that are subject to solicitor-client privilege and records that were created "by or for Crown counsel for use in giving legal advice or in contemplation or of for use in litigation", and upon s. 13

of the Act, which provides an exemption for records where disclosure "would reveal advice or recommendations of a public servant [or] any other person employed in the service of an institution".

[3] On appeal to the Commissioner by the requester, the CLO was ordered to disclose most of the records that remained at issue. The adjudicator concluded that the s. 19 exemption was unavailable because it could not be claimed as against a "client"; and that the s. 13 exemption was unavailable because the records at issue were prepared by the CLO for the benefit of the "client", rather than for the benefit of the government or the public at large.

[4] It is apparent that the reason for the request for her file is the client's dissatisfaction with the representation provided to her by the CLO[1].

Preliminary Motion As To The Standing of the Commissioner:

[5] The applicant, CLO, brings a preliminary motion seeking an order:

1. declaring that David Goodis, Senior Adjudicator, Information and Privacy Commissioner ("the adjudicator") does not have standing to participate in the judicial review of Order PO-2006 and the subsequent reconsideration decision; and

2. prohibiting the adjudicator from making written or oral submissions on the application; or,

3. in the alternative, prohibiting the adjudicator from arguing that his decision was correct based on reasons other than those given by him in his reasons for decision.

[6] The ground set out in the Notice of Motion is:

1. The adjudicator's participation in this application, in which he argues vigorously in support of the correctness of his decision, is inconsistent with a principled approach to the standing of an administrative tribunal on judicial review of its own decision.

I. Background

[7] On September 7, 2000, Jane Doe, a client of the CLO, sent a facsimile to the CLO containing a request for a copy of the client's files and giving instructions to the CLO not to proceed with the settlement proposed (". . . I'd like you to send me a copy of my complete files for my own use immediately! . . . I am directing you not to settle this case . . .").

[8] On September 7, 2000, a co-ordinator in the office of the CLO sent a copy of the client's fax to the office of the Information and Privacy Commissioner advising that the author of the fax was requesting information under s. 47 of FIPPA.

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[1] Public Record, tabs 14 and 17; Responding Record of the Respondent Commissioner, tab 1C.

[9] On the same day, the same co-ordinator in the office of the CLO advised the client what had been done with the latter's request for a copy of her files and instructions not to proceed with the proposed settlement.

[10] As far as the members of the court can ascertain from the material filed and the submissions of counsel, the client's September 7, 2000 request to her solicitor, the CLO, for a copy of her files, has never been addressed by the CLO. Moreover, counsel for the CLO did not proffer any reason why the matter has not been dealt with on a solicitor/client basis. We will have more to say about this later.

[11] The actions of the CLO's co-ordinator in sending the client's fax to the Information and Privacy Commissioner ("IPC") turned the client into a "requester" under the FIPPA, a person seeking access to all records relating to her held by the CLO. The matter has proceeded on that basis ever since.

[12] The "requester" was not represented by counsel but her Litigation Guardian was present in court and was laudatory of the submissions and interest shown by counsel for the IPC. The Litigation Guardian did not oppose the matter proceeding, even though it is a legal fiction that the client is a "requester".

[13] Of the 3,700 pages of records pertaining to the client identified by the CLO for a child protection and two (2) motor vehicle litigation files, the CLO refused access to 933 pages and granted access to the balance. In refusing access to the 933 pages, the CLO relied on ss. 13, 19, 21 and 49 of the FIPPA.

[14] The "requester", through her aunt as her representative, appealed the CLO's decision to the Information and Privacy Commissioner ("Commissioner"). An adjudicator of the Commissioner held a hearing by way of written representations.

[15] On April 19, 2002, the adjudicator delivered his 24-page decision ("Order PO-2006") reported: [2002] O.I.P.C. No. 55.

[16] In his Order PO-2006, the adjudicator ordered the release of all but 38 of the 933 pages of records. The CLO, as entitled under the FIPPA, asked the adjudicator for a reconsideration of Order PO-2006.

[17] By letter, dated May 24, 2002, the adjudicator delivered his decision on the request for a reconsideration; it did not alter the substance of [Order] PO-2006.

[18] On June 6, 2002, the CLO launched this application for judicial review of the original decision, Order PO-2006 and the May 24, 2002 reconsideration decision relative to the exceptions under s. 13 and s. 19 of the FIPPA. The "requester" did not file a Notice of Appearance. The adjudicator filed a Notice of Appearance to the judicial review.

[19] The adjudicator's counsel filed a factum stating that the adjudicator's decision was correct.

[20] The CLO alleges that the adjudicator's Factum argues that the adjudicator was correct not for the reasons given in Order PO-2006 but because the adjudicator finds that the CLO is not a "Crown counsel".

[21] The judicial review application came on for hearing on January 8, 2003 before a different panel of the court. At that time, counsel for the CLO raised this preliminary objection without any written notice to the court. Because the "requester" was not represented, the members of the court required that an *amicus curiae* be appointed to assist the court with whatever issues existed or might arise. The court adjourned the judicial review application to a date to be fixed and ordered that the preliminary issue be addressed at the commencement of the judicial review hearing.

[22] Through the assistance of the Advocates' Society, Ms. M.M. Thomson and Ms. C. Lonsdale were appointed by Then J. to be *amicus curiae*. They prepared concise and focused facta and presented thoughtful and concise submissions. We thank them for their assistance and help. Our appreciation of their time, skill and devotion was magnified when, at the end of the submissions, the members of the court enquired about the position of the parties regarding costs. We learned that counsel appearing as *amicus curiae* carried out their responsibility in the highest traditions of the Bar on a pro bono basis.

[23] On March 28, 2002, counsel for the CLO formally launched this application. Their factum on this preliminary motion concludes:

> 80. The Attorney General submits that the Senior adjudicator does not have standing to file written argument or to make oral submissions on this application for judicial review.

[24] The "requester" was neither represented nor appeared on the preliminary motion nor on the judicial review. However, her aunt was present throughout.

II. Some History of Judicial Review involving Orders of the Commissioner in Ontario, and her counterparts in British Columbia and Alberta

[25] From the time of the inception of the Commissioner's office in 1988, when the FIPPA came into force in Ontario, until March 2003, the Commissioner has always been named as a respondent in applications for judicial review of the Commissioner's orders and decisions.

[26] On March 26, 2003, the CLO, represented by counsel for the Attorney General, commenced an application for judicial review which for the first time did not name the Commissioner as a party respondent. On April 17, 2003, the Ministry of Natural Resources, represented by counsel for the Attorney General for Ontario, commenced another judicial review of a Commissioner's order and did not name the Commissioner as a party respondent.

[27] Since the coming into force of the FIPPA in 1988, the Divisional Court has heard sixty-five (65) judicial review applications of Commissioner's orders. Counsel for the Commissioner has actively participated as a respondent in all applications. Never has counsel for the Commissioner had

her/ his role limited, not even when the Divisional Court held that the standard of review was correctness.

[28] In fifty-one (51) of the sixty-five (65) applications for judicial review, the requester was named as a respondent. Of the fifty-one (51) respondent requesters, twenty-seven (27) were individuals, eleven (11) were media requesters and thirteen (13) were commercial requesters.

[29] Of the twenty-seven (27) individual respondent requesters, fourteen (14) or 52 per cent did not appear; five (5) or 19 per cent appeared without counsel and eight (8) or 30 per cent appeared with counsel.

[30] In twenty (20) of the fifty-one (51) cases where the requester was named as a respondent (39 per cent), no one appeared on behalf of the requester at the judicial review hearing. Of the respondent requesters not appearing on judicial review, fourteen (14) out of twenty (20) or 70 per cent were individuals. The remaining six (6) or 30 per cent were media or commercial requesters. Neither media nor commercial requesters were self-represented.

[31] In fourteen (14) of the sixty-five (65) cases, the requester has appeared as an applicant. Three (3) of those cases were individuals, eleven (11) were media and commercial requesters. In thirteen (13) of those fourteen (14) cases, the requester was represented by counsel. One (1) individual applicant requester appeared in person.

[32] In four (4) cases, the Commissioner has been granted leave to appeal to the Court of Appeal for Ontario. The Commissioner has never been refused leave on the ground that she lacks status to launch an appeal. The Commissioner has appeared both as an appellant and as a respondent before the Court of Appeal for Ontario on ten (10) occasions in appeals from the Divisional Court on matters of judicial review. In none of those cases has the Commissioner's role in making submissions been limited, even where the Court of Appeal has held that the standard of review was correctness.

[33] The affidavit of Tom Mitchinson, Assistant Commissioner, sworn April 4, 2003, points out that counsel for the Commissioner filed a factum in every case of judicial review. He deposes that where a judicial review applicant and a respondent opposed in interest are both represented at the hearing of the judicial review application, the submissions by counsel for the Commissioner are usually supplementary to the submissions of the other parties. Where an interested party is not represented, be it a requester, an affected third party or an institution, the oral submissions of counsel for the Commissioner are more complete.

[34] The Commissioner's factum on this motion contains the following:

> 47. In November, 2002 counsel for a requester brought a challenge to the standing of the Commissioner to make submissions in this Court on a judicial review application where the standard of review was reasonableness. The Attorney General took no position on the application. Chadwick, J. for the Court held as follows:

> With reference to the role of the counsel for the Commissioner, we have considered and followed the decisions in *Northwestern Utilities Ltd. v. Edmonton* and also the Supreme Court of Canada decision in *Pakar* (sic). In our view, the unique nature of the Privacy Commissioner and the legislation requires the Commissioner's counsel to be present and take an active part in these applications. As the reasonableness of the Commissioner's decision is an issue, we are of the view that counsel should be able to deal with reasonableness and any questions of jurisdiction. Therefore, we are not going to limit the role of counsel.
>
> *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2002] O.J. No. 4703 at para. 1 (Div. Ct.) (QL).

[35] The material filed indicates that since 1993 there have been approximately thirty-five (35) applications for judicial review of decisions or orders of the Commissioner under the *British Columbia Freedom of Information and Protection of Privacy Act* (the B.C. Act). The British Columbia Commissioner has been named as a respondent in each one of those judicial review applications. Each time, counsel for the Commissioner has filed a factum, appeared and made oral submissions. The British Columbia Commissioner has never been denied standing in relation to an application of judicial review or on an appeal from a lower court.

[36] The Information and Privacy Commissioner for the Province of Alberta has deposed that his office is always named as a respondent in judicial review applications involving orders made by his office. To date, his office has been served with ten (10) judicial review applications; in three (3), the Commissioner was the only named respondent. In Alberta, counsel for the Commissioner files briefs, appears and makes oral submissions to the court. No limits have been imposed on counsel for the Commissioner.

III. The Office of Commissioner and its Responsibilities

[37] In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 106 D.L.R. (4th) 140 (Div. Ct.), A.G. Campbell J. (for the majority) said:

> p. 781 O.R.:
>
> . . . the commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision-making under the Act reaches a final administrative focus in such appeals.
> . . .
>
> The commissioner is also given administrative and adjudicative responsibility for access to government information on the one hand, and the protection of individual privacy on the other. Under the scheme of the Act, the commissioner is responsible for five overlapping and integrated activities: reviewing government decisions concerning the dissemination of information; investigating public complaints with

> respect to government practices in relation to the use and disclosure of personal information; reviewing government administrative and records management practices; conducting research and giving advice on issues related to access and privacy; and educating the public concerning privacy and access issues.
>
> pp. 782-83 O.R.:
>
> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra*, the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.
>
> The commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.
>
> Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices.
>
> We therefore conclude the commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause.

[38] The Court of Appeal for Ontario adopted the second and third last paragraphs quoted above from *John Doe* in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, 164 D.L.R. (4th) 129 (C.A.), at pp. 472-73 O.R., p. 139 D.L.R. and added that, as of mid-1998, the Commissioner had issued some 2000 orders.

[39] In the factum of the *amicus curiae*, it is submitted:

> 25. The Amicus Curiae submits that there is a public interest dimension to the role of the Commissioner which warrants allowing the Commissioner to make certain

submissions on matters under judicial review even where the standard of review for the particular issue is one of correctness. Where the scope of the submissions address the functioning of the legislation and the potential impact of the judicial finding on policy development and further decisions of the IPC, the Commissioner has a valuable contribution to make to the judicial review itself.

29. The importance of the access to information regime requires that the Commissioner be present to address the broader policy aspects of the case before the court. It is unlikely that the public interest dimension of the access to information regime will be adequately addressed by the parties before the court in the absence of submissions by the Commissioner. The requestor in most cases would not have the sophistication to address these policy concerns.

30. Conversely, the Attorney General will possess sufficient sophistication to address the broader issues. However, the Attorney General is in an inherent conflict of interest with respect to access to information cases and cannot represent the public interest. The FIPPA regime regulates the release of government information. It is unreasonable to expect the Attorney General to advocate on behalf of the public interest when it will often be responding, as is the case here, on behalf of the party withholding the information. Such a proposition sits uneasily with the objective of FIPPA to have decisions regarding the disclosure of government information be reviewed independently of government.

31. ... The Commissioner ought to be able to present to this Honourable Court submissions relating to the functioning of the legislation and the potential impact of the judicial finding on policy development and further decisions of the IPC.

32. Nonetheless, the role of the Commissioner is not to replace the requestor nor indeed, to become the requestor's advocate. The interests of the two parties are distinct. The extent to which submissions may be made by the Commissioner should be limited in accordance with principles of administrative law and the intended role that [informs] that participation.

34. The Amicus therefore requests an order that the Information and Privacy Commissioner has standing to appear on the judicial review application if she so chooses and may make submissions with respect to the merits of its decision subject to such limitations as prescribed by this Honourable Court.

IV. The Pragmatic and Functional Approach to the Issue of Standing

[40] It is the common position of all counsel that whether a litigant has status and the nature of that status should be decided on the basis of the same pragmatic and functional approach designed by the Supreme Court of Canada for applications when the question is: what is the proper standard of review in a given case? This pragmatic and functional approach to determine the proper standard

of review was initiated by the Supreme Court of Canada in *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161, at p. 1088 S.C.R. per Beetz J., at para. 123.

[41] This approach has continued in the following decisions of the Supreme Court of Canada:

(a) *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983

(b) *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557

(c) *Pushpanathan v. Canada (Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982

(d) *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

(e) *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18 (SCC) per McLachlin C.J.C. at para. [20] to [33].

[42] Counsel for the Attorney of Ontario, appearing for CLO, opined that the proposed application of the pragmatic and functional approach to the question of a tribunal's standing on a judicial review application may well have been spurred on by the article: "Discovering What Tribunals Do: Tribunals Standing Before the Courts" by L.A. Jacobs and Thomas S. Kuttner, (2002) 81 Can. Bar Rev. 616-45.

[43] As was pointed out by Beetz J. in *Union des employés de service, local 298 v. Bibeault, supra*, at para. 123, the pragmatic and functional approach test regarding standard of review requires the balancing of four (4) factors:

(a) the statutory language,

(b) the nature of the tribunal,

(c) the purpose of the statute, and

(d) the nature of the problem before the tribunal.

V. Conclusions

[44] By reason of s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, as amended (JRPA), the Commissioner has the right, but not the obligation, to be a "party" on any judicial review application of her orders or decisions. We do not accept the submission of counsel for the Attorney General of Ontario appearing for the CLO that s. 9(2) of the JRPA only permits the Commissioner to be named as a party. We hold that s. 9(2) of the JRPA entitles the Commissioner to be a party on any judicial review application regarding a decision or order of the Commissioner.

[45] 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. See: *Major Mack Hotel v. Ontario (Liquor Licence Board)*, [1994] O.J. No. 2943 (Ont. Div. Ct.), affirmed on other grounds, [1999] O.J. No. 1418 (C.A.).

[46] In *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 et al.* (1985), 51 O.R. (2d) 481, 20 D.L.R. (4th) 84 (Div. Ct.), the majority (J. Holland and Rosenberg JJ.) and the minority (Osler J.) discussed the extent to which a "party" to a judicial review would be entitled to participate in submissions before the court. The members of the Divisional Court were unanimous on that issue. The decision of the Divisional Court was reversed, on other grounds, by the Court of Appeal: Blair, Cory and Grange JJ.A.: (1986), 56 O.R. (2d) 513, 31 D.L.R. (4th) 444 (C.A.). The Supreme Court of Canada affirmed the decision of the Court of Appeal for Ontario: [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524. Neither the Court of Appeal nor the Supreme Court of Canada discussed the issue of standing.

[47] Per Rosenberg J., at p. 488 O.R.:

> In the *Transair* case, Spence J., who was in the majority on this aspect of the decision, stated at p. 747 S.C.R., p. 440 D.L.R.:
>
> > The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing court by the parties and not by the tribunal whose actions are under review. In the words of Aylesworth J.A., as quoted above, such a proceeding would not indicate the impartiality of the Board or emphasize its dignity. (Emphasis added)
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> In the *Northwestern Utilities* case, Estey J., delivering the unanimous decision of the Supreme Court of Canada, stated at p. 709 S.C.R., p. 178 D.L.R.:
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> > The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.
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> In both these cases, however, the board was the appellant. In the present case the board is a party to the proceedings on the basis of s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, which reads as follows:
>
> > 9(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory

> power, the person who is authorized to exercise the power may be a party to the application.
>
> It was our view that the word "may" conferred on the board the right but not the obligation to be a party.
>
> Once the board is properly a party to the proceedings, it becomes a rule of court, rather than a rule of law, to decide the extent to which it will be entitled to participate in the argument. We were all of the view that since it was a long-standing procedure of the board that was under attack it would be appropriate if their counsel were allowed to make submissions in defence of their practice and, accordingly, we allowed their counsel full latitude in answering the submissions of the applicant.

Per Osler J. at p. 499 O.R.:

> In any event, while both *Transair* and *Northwestern Utilities* must be viewed in the light of what was said in *Bibeault*, we are of the opinion that the rule restricting the right of a tribunal to make submissions before the court is a rule of the court rather than a rule of law, and the extent of participation to be permitted to the board must depend on the circumstances of each case.
>
> Finally, it is not to be forgotten that Estey J., in *Northwestern Utilities*, found, at p. 708 S.C.R., p. 177 D.L.R. of the judgment, that, under the legislation there being considered, the board was "given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party".
>
> In Ontario, the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, provides, in s. 9(2), as follows:
>
> > 9(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.
>
> We do not regard the word "may" as giving us discretion to refuse the board standing as a party. We consider that, both as a matter of right and in any case as a proper exercise of our discretion, the board should be heard on the matter of the questioned procedure. We permitted submissions to be made without making a final decision on their admissibility. In my opinion, that tentative decision was correct and should now be confirmed. Accordingly, I shall take the board's submissions into account in deciding the matter.

[48] In his text, "Administrative Law" (Toronto, Ont.: Irwin Law, 2001), at p. 459, Professor David Mullan states:

In this regard, one of the interesting observations made by Osler J. in *Consolidated-Bathurst* was that

> the rule restricting the right of a tribunal to make submissions before the Court is a rule of the court rather than a rule of law, and the extent of the participation to be permitted to the [tribunal] must depend on the circumstances of each case.

Whether or not that does represent the current state of Canadian law in this area, Osler J.'s approach has much to commend it. The issue of tribunal participation would be far better conceived of in terms of judicial discretion than as a set of precise rules where tribunal participation depends on the grounds on which appeal or review is being pursued.

Under a discretionary approach, the principal question should probably be whether the participation of the tribunal is needed to enable a proper defence or justification of the decision under attack. If that decision will almost certainly be presented adequately by the losing party at first instance or by some other party or intervenor such as the attorney general, there may be no need for tribunal representation irrespective of the ground of judicial review or appeal. On the other hand, where no one is appearing to defend the tribunal's decision, where the matter in issue involves factors or considerations peculiarly within the decision maker's knowledge or expertise, or where the tribunal wishes to provide dimensions or explanations that are not necessarily going to be put by a party respondent, then there should clearly be room for that kind of representation to be allowed within the discretion of the reviewing or appellate court. Indeed, in at least some instances, a true commitment to deference and restraint in intervention would seem to necessitate it.

[49] In our view, 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. The unknown factor always is: "who will appear on the judicial review?" The court hopes for participation by the requester, the head and the Commissioner. The court hopes that each will file a factum, with counsel for the Commission, perhaps having a "watching brief" at the hearing. However, statistics and history show that rarely does a requester appear on a judicial review. Therefore, unless counsel for the Commissioner appears, the court would be left with only one party before it, the Head, a party represented by the Attorney General for Ontario. Indeed, in this case, if the ruling sought by the CLO were made, and absent the *amicus curiae*, the only party before the court would be counsel for the CLO in the person of counsel for the Attorney General of Ontario. That state of affairs should not be cultivated. To repeat the submission of the *amicus curiae's* factum:

> 30. Conversely, the Attorney General will possess sufficient sophistication to address the broader issues. However, the Attorney General is in an inherent conflict of interest with respect to access to information cases and cannot represent the public interest. The FIPPA regime regulates the release of government information. It is

> unreasonable to expect the Attorney General to advocate on behalf of the public interest when it will often be responding, as is the case here, on behalf of the party withholding the information. Such a proposition sits uneasily with the objective of FIPPA [s. 1(a)(iii)] to have decisions regarding the disclosure of government information be reviewed independently of government.

[50] While the members of the panel appreciate what Professor Mullan meant when he wrote (op. Cit.: p. 457): "Obviously, this is a domain fraught with uncertainty for any statutory authority evaluating whether or not it should attempt to defend itself in judicial review proceedings", the members of this panel cannot foretell 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.

[52] In the result, the motion launched by counsel for the CLO for an order declaring that the Commissioner does not have standing on this judicial review application is dismissed.

The Merits of the Judicial Review:

I. The Issues:

[53] There are two issues before us:

> a) Did the adjudicator err in interpreting the second portion of s. 19 of FIPPA (relating to Crown litigation privilege) as not applicable to exempt the records in question from disclosure?
>
> b) Did the adjudicator err in interpreting s. 13 of FIPPA (advice of a public servant) as not applicable to exempt the records in question from disclosure?

II. The Office of the CLO:

[54] Because the nature and role of the CLO is central to this case it is necessary to review its statutory framework and the evidence as to its functioning, with particular reference to its role as the Litigation Guardian and lawyer for children. Children cannot represent themselves nor retain counsel to conduct civil litigation. As parties under disability, children must commence, continue or defend proceedings by a litigation guardian: rule 7.01 [Rules of Civil Procedure, R.R.O. 1990, Reg. 194].

Where no other suitable person comes forward, the CLO is to be appointed as litigation guardian: rule 7.04(1)(a).

[55] The scope of the authority, and the concomitant responsibility, of a litigation guardian is described in rule 7.05(2):

> A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim or third party claim.

[56] In child protection proceedings, the CLO may be appointed to act as legal representative for a non-party child under the *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 38. The CLO normally performs this function through a panel of specially trained members of the private bar. The applicant submits that the role of the CLO in that case is to "place the minor's interests, views and preferences before the court and to provide context for those views and preferences".

[57] The CLO is appointed pursuant to s. 89 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which requires the CLO to be a lawyer, but is silent as to the structure of the office. The applicant asserts that [the] CLO is an "independent law officer of the Crown". The duties of the office are to be found in a wide variety of legislation. These provisions are summarized in the factum of the Amicus[2] as follows:

> . . . Section 89(3) provides that the [CLO] shall act as litigation guardian for a minor person or other person who is a party to a proceedings, where another Act or the Rules of Court require it. As such, its responsibilities are scattered in disparate pieces of legislation. They are summarized below with the appropriate legislative references:
>
> (a) To act as a litigation guardian on behalf of a minor in the context of civil litigation where the child is a party to the litigation; (see rules 7.04, 7.03, 7.06, *Child and Family Services Act*, s. 81(2))
>
> (b) To represent a minor in a child protection hearing (see sections 38(5) and 124(8) of the *Child and Family Services Act*).
>
> (c) To represent a child in a custody and access matters up to an included [sic] drafting a report for the assistance of the court where the child is not a party to the proceedings (see rules 7.04(2) and 69.16 and s. 112 of the *Courts of Justice Act*).
>
> (d) To review the fairness of settlements on behalf of minors, participate in the appointment of guardians for children, comment on the sale of property of a minor, the removal of a solicitor of record and the withdrawal of a special

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[2] Paragraph 13.

party's application (see rules 7.08(5), 66 and 67 and sections 47 and 59 of the *Children's Law Reform Act*).

(e) The power to inspect, remove and disclose information in the register and confirm consents by a minor (see sections 75(7) and 137(11) of the *Child and Family Services Act*).

[58] We accept as accurate, the CLO's self-description as an "independent" law officer of the Crown. As will appear, that does not lead us to conclude that she is "Crown counsel", as that phrase is used in s. 19 of FIPPA, but we do conclude that her office, although formally a branch of the Ministry of the Attorney General, is an independent office having specialized functions for which a large degree of independence from the Ministry is vital.

[59] In the cases handled for the requester, the CLO was appointed as litigation guardian in two civil files, a statutory accident benefits proceeding arising from a head injury to Jane Doe and a *Family Law Act* claim arising from an injury to Jane Doe's mother. Pursuant to an order of the Superior Court, the CLO was appointed under s. 38 of the *Family and Child Services Act* to provide legal representation to protect Jane Doe's interest in child protection proceedings.

[60] Most of these statutory duties, and all that are involved in this case, are the duties of any lawyer who takes a case. The Amicus submitted that the CLO, in reviewing a proposed settlement, exercises a quasi-public function in reporting on the proposal to the court. But the review is done for the protection of the minor, and only secondarily as a protection of the judicial system, ensuring that justice is both done and seen to be done. The review is in no sense performed for the benefit of the Crown, or the Ministry of the Attorney General. Even if the CLO does have some quasi-public aspects to her duties, the major part of her duties involve actual or potential litigation in which she acts in the same manner that a member of the private bar is obliged to act.

[61] Missing from this legislative catalogue, and not suggested by the applicant, is any notion that the CLO is part of the policy arm of the Ministry, preparing memos of advice for the Ministry alone. No doubt, if asked, the CLO would prepare a memo on policy but the catalogue of documents provided by the then-CLO, Mr. McTavish, (see below) does not suggest any such document would be found in the litigation files of Jane Doe. When these lawyers wrote memos to each other, they were not advising the Minister; they were representing Jane Doe, devising strategy, assessing the case, the reliability of the witnesses, the likely result of a trial and the other myriad factors dealt with by co-counsel in communications to each other.

[62] In these three instances, the CLO acted as a lawyer for the minor. That she was also the litigation guardian does not alter the fact that she was their lawyer. The CLO is a lawyer; her office is a law office; her agents are lawyers. Together, they undertook to represent Jane Doe in three litigations. They are her lawyers and she is their client. That this is so was tacitly admitted when the CLO did not seek judicial review of the part of the decisions before us that refused to permit the CLO to claim solicitor/client privilege against Jane Doe because she was their client.

III. The Claim for Exemption Under Section 19:

[63] Section 19 contains two different exemptions. A head may refuse to disclose a record:

a. "that is subject to solicitor-client privilege" (commonly referred to as "Branch 1" of s. 19); or

b. "that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation" (commonly referred to as "Branch 2" of s. 19).

[64] Although the CLO relied upon both branches before the adjudicator, it no longer relies upon Branch 1, as already noted. The CLO now relies upon Branch 2 of s. 19 with respect to most of the records remaining at issue in this application, including the following types of documents:

a. from the litigation guardian files -- interoffice memoranda/ notes/emails; handwritten notations; memoranda of phone conversations, including those between in-house staff and private sector counsel retained to act for The Children's Lawyer ("the private sector lawyer") or his staff; letters to/from in-house staff to/from the private sector lawyer; letters to/from in-house staff to/from other counsel; letters to/from in-house staff; memoranda to file/ handwritten notes by in-house staff; emails to/from other counsel; file documents prepared by in-house staff; draft documents;

b. from the child protection file -- memoranda of phone calls; memoranda to file/handwritten notes prepared by private sector counsel retained to act for the child ("private sector counsel"); letters to/from private sector counsel to/from in-house staff; draft documents; letters to/from private sector counsel to/from other counsel; letters to/ from private sector counsel to/from another agent of The Children's Lawyer; letters to/from private sector lawyer.[3]

[65] In submissions to the adjudicator, the CLO argued that the undisclosed records included documents that were subject to solicitor-client privilege, documents prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation, drafts annotated by counsel for use in giving legal advice and/or lawyers' notes, to which a litigant seeking his file from his lawyer is not entitled.[4] In support of this contention, it filed an affidavit from the then-CLO, Mr. McTavish, that he had retained the outside counsel to act in the litigation involving Jane Doe, and that they had prepared the documents in the course of that retainer for use in giving legal advice or in contemplation of or use in the litigation. Mr. McTavish referred to these lawyers as "outside counsel" and not as "Crown counsel". The characterization of them as "Crown counsel" in the submissions of the CLO is not supported by this affidavit. As well, Mr. McTavish did not indicate

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[3] Exhibit A to the affidavit of Willson McTavish, Application Record, Tab 7.

[4] Submissions by the Office of the Children's Lawyer, Application Record, Tab 4, pp. 45-47.

that these records were prepared to give advice to the Ministry on any policy or other matter beyond the narrow bounds of preparing the client's case for trial or settlement.

[66] In his initial decision, the adjudicator found that the solicitor-client privilege could not be claimed against the client, Jane Doe. It is her privilege and not the privilege of her lawyer. Arguments that the CLO was actually the client were overly technical and were rejected. It was not reasonable for the CLO to intend that its communications with outside counsel about her case would be confidential from Jane Doe, the very individual for whom they were acting. Reference was made to the decision of the Court of Appeal in *Chrusz*[5], where Doherty J.A. emphasized the importance of the pre-existing relationship between the parties in analyzing a claim of solicitor-client privilege by an insurer against its own insured. In assessing the intention as to confidentiality, the claim cannot be approached as if the parties were strangers. That finding is not complained of before us and is clearly correct.

[67] Under the second branch of s. 19, the adjudicator held that the purpose of litigation privilege was to protect the adversarial process by preventing counsel for one party from being compelled to prematurely produce documents to an opposing party or its counsel. It did not exist to protect the CLO from the individual the CLO represented. The adjudicator therefore concluded that Branch 2 could not be invoked by the TCL against the child it represented.

[68] Ten days after the release of the adjudicator's initial order, the CLO wrote requesting a reconsideration of the ruling as to s. 19, second branch. The request was based on this court's decision in *Big Canoe*[6], where the distinction between the two branches of s. 19 was addressed. The requester, an insurer, sought disclosure of the working papers and documents in a Crown prosecutor's file on a particular prosecution arising out of the death of the life insured in a confrontation with two other men. The insurer's purpose was to use the information to defend an action by the family of the deceased insured to obtain benefits by showing that the deceased insured's death was as a result of his participation in a criminal act.

[69] The adjudicator analyzed s. 19's second branch as analogous to litigation privilege and as not intended to give the Crown any privilege more extensive than was available at common law to other solicitor-client relationships. It was not intended to shield information from the client. She reasoned that, as the litigation had ended, the litigation privilege in the second branch could no longer be relied on.

[70] This court, affirmed by the Court of Appeal, held that the adjudicator was in error: there was no temporal limitation in the second branch of s. 19, and thus the protection granted by the section did not end with the litigation, even though the privilege at common law did. That was the plain meaning of the words of the section, and the statement of Minister Scott to the legislative committee indicated the intention was to give Crown counsel permanent exemption.

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[5] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)

[6] *Ontario (Attorney General) v. Big Canoe* (2001), 208 D.L.R. (4th) 327; aff'd (2002), 62 O.R. (3d) 167 (C.A.); leave to appeal to S.C.C. refused May 15, 2003.

[71] The adjudicator did reconsider his decision but declined to alter it as he did not think that *Big Canoe* had the effect contended for by the CLO.

[72] The CLO then brought this application for judicial review.

[73] The application calls for us to interpret two sections of the FIPPA, ss. 19 and 13, but in this part of the reasons we deal only with s. 19. The parties all agree that the task before the adjudicator as to s. 19 was a question of statutory interpretation and, therefore, the standard of review on this judicial review is correctness, as decided by the Court of Appeal in *Big Canoe, supra*.

[74] As it is both recent and authoritative, it is appropriate at the outset to consider the *Big Canoe* decision. The importance of this case in our context lies partly in what was said, and partly in what was not addressed. Because the case involved a Crown prosecutor in a criminal prosecution, the court did not have to consider the question of who are Crown counsel within the meaning of s. 19. The Court of Appeal did consider the statement of Minister Scott as part of the context, stating that he appeared to believe that the new section was extending solicitor client privilege to the Crown in cases where there might be a problem because of concern as to who the client was, but the court said that the two kinds of privilege are quite different. The error of the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit. It is clear from *Big Canoe* that the second branch of s. 19 is a free-standing statutory exemption and not a simple replication of the common law litigation privilege. It is to be interpreted as a statutory provision.

[75] Under the modern approach to statutory interpretation, the language of the statute must be addressed in its context. In referring to the context, the Court of Appeal said (pp. 172-73 O.R.):

> Finally, the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: Driedger on the Construction of Statutes (3rd ed. 1994) at p. 131:
>
> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[7]
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> (Emphasis added)

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[7] Quotation from *2747-3174 Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, per L'Heureux-Dubé J., at pp. 1005-06.

> [14] Applying that test supports the plain meaning test. The broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns. In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the Freedom of Information Act and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request.

[76] This passage is very important. It illustrates the concerns to be addressed. They include balancing the objective of transparency of government functioning and the interests of public knowledge against other concerns; and considering whether the purpose and function of FIPPA are impinged upon by one interpretation or the other. Having performed this analysis, the court found many disadvantages and no countervailing purpose or justification for an interpretation that would render the Crown brief in a criminal case available to the public upon simple request. In our view, this is the sort of analysis which we must perform.

[77] The CLO submits that "Crown counsel" in s. 19 includes the CLO, and so it is entitled to the exemption. The status of the requester as a client of the CLO is not relevant to the interpretation of the exemption, although it might inform the decision of the Head to claim the exemption. That decision is not before the court and so is irrelevant. The statute is of general application and must be interpreted in a way applicable to a broad range of requests and records in a broad range of circumstances. The interpretation of the exemption cannot be tailored to the identity or status of the requester. The decision of the adjudicator altered the exemption under the guise of interpreting it, when the plain meaning was that, as Crown counsel, the CLO was entitled to the exemption.

[78] The respondent and the Amicus submit that the CLO is not "Crown counsel" and therefore, on the plain meaning of the section, the CLO is not entitled to the exemption. Further, even if the CLO is "Crown counsel", its fiduciary duty to the client prevents it from availing itself of the exemption, which in any event cannot operate against the client. The CLO objects to these "new" arguments being submitted at the judicial review stage.

[79] The CLO's submission on this point is without merit. In the CLO's submissions to the adjudicator[8], specific submissions were made that the outside counsel were "Crown counsel" within s. 19. In a letter from the respondent to the Ministry prior to the hearing, the respondent raised the issues of fiduciary duty along with solicitor-client and other relationships. The Ministry, on behalf

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[8] Public Record vol. 1, tab 19, p. 96.

of the CLO, acknowledged that the CLO "may have some fiduciary duties toward [Jane Doe]" and argued that this did not affect her right to access information from [the] CLO. It is clear that these are not new issues. Although they may not have been front and centre at the hearing, they were raised in the record and are open to the respondent and the Amicus to raise before us.

[80] Turning to the task of interpretation that is before us, the first issue is what is included in the statutory reference to Crown counsel. The term is not defined in FIPPA, nor have we been referred to any definition in any other Act.

[81] The CLO submits that the Commissioner has several times held that the CLO is Crown counsel as are those lawyers from the private bar whom the CLO retains, indeed, any legal advisor employed or retained by the Crown[9]. The narrow definition of Crown counsel proposed by the respondent fails to recognize the unique position of the CLO and her counsel. Their provision of legal services to children takes place in the course of the administration of justice pursuant to statutory and other duties. It is not appropriate to analogize the CLO's unique function to that of a private sector counsel acting for an adult client.

[82] The respondent Commissioner submitted that in her role as litigation guardian or legal representative of a child, the CLO is not Crown counsel. She does not represent or advise the Crown or Her Majesty, which is the meaning to be given to the phrase. Although it is not a formal definition, s. 3(5) of the *Barristers Act*[10] is under the heading of Crown Counsel and preserves the traditional precedence in court accorded to ". . . any member of the bar when acting as counsel for Her Majesty . . . in any matter depending in the name of Her Majesty . . . before the courts . . .". The implication from this is that Crown counsel is one who actually acts for the Crown. The role of the CLO is to provide independent representation to a private party, here a minor. This role is simply not consistent with the very different role of acting as an agent of the Crown or as counsel for the Crown.

[83] The respondent and the Amicus have both submitted that the CLO owes fiduciary duties to the minor, duties of loyalty and candour and to act in the minor's interests. The fiduciary nature of the duties imposed on the CLO by the Rules and legislation referred to above is surely clear. The Commissioner elaborates on them in his factum, citing numerous authorities for the proposition:

- The role of the CLO is to provide independent, zealous and competent representation with independent professional judgment. The duty of confidentiality that is central to the normal client-lawyer relationship applies.[11]

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[9] It should be observed that the lead case, Order No. 52, [1989] O.I.P.C. No. 16, per Commissioner S. Linden, held that the term should be read to include "any person acting in a capacity of legal advisor to an institution covered by" FIPPA. Subsequent Orders (P-170 and P-1571) have enlarged this to any legal advisor employed or retained by the Crown, failing to acknowledge that the CLO does not act as an advisor to the Crown, but to the minor client.

[10] R.S.O. 1990, c. B.3.

[11] *Catholic C.A.S. of Toronto v. N.*, [2000] O.J. No. 5093, Ont. C.J. Prov. Div.

- In custody and access cases where the child is not a party, the Court of Appeal has held that the representation offered by the Official Guardian, now the CLO, must be "whole, complete and independent". The function of counsel retained by the CLO is to act as an advocate, calling evidence and making submissions.[12]

- The statutory scheme embodied in rule 7.05 is clearly fiduciary. The CLO is to "diligently attend to the interests" of the client and "take all steps necessary for the protection of those interests".

- The nature of the relationship was considered by Judge James of the then Provincial Division of the Ontario Court, who said that legal representation under s. 38 of the *Child and Family Services Act*, had the primary practical effect of dispensing with the concept of a retainer, without otherwise affecting the fiduciary ties in a solicitor and client relationship, which was now rooted in the court's order under s. 38(3).[13]

- The CLO meets the criteria for the imposition of fiduciary duties, apart from doing so on the basis of the solicitor and client relationship. Even if (as the Amicus suggests) the relationship is only analogous to that of solicitor and client, it is nevertheless fiduciary. It has the classic indicia of a fiduciary relationship: the scope for the exercise of discretion or power; the opportunity to exercise that power unilaterally so as to affect the minor's legal or practical interests; a peculiar vulnerability due to the minority status of the client; and an expectation that the CLO will be concerned with the minor's interests and not its own.[14] In the light of the statutory directions to the CLO, the minor must be assumed to have expected no less than the CLO's loyalty.

[84] These duties encompass an obligation to provide access to the information in the file, not only because the lawyer has no right to keep the client uninformed, but also because the minor is a person having a joint interest with the lawyer in the information. Thus, in *Re Ballard Estate*[15] there could be no solicitor-client privilege against disclosure of communications between the trustee and the estate solicitors to the beneficiaries of the estate because they and the trustee had a joint interest in the advice given to the trustee. Reference was made to a passage in *Phipson on Evidence*[16]:

> No privilege attaches to communications between solicitor and client as against persons having a joint interest with the client in the subject matter of the communication, e.g. as between . . . *trustee and cestui que trust*.

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[12] *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753 (C.A.).

[13] *C.A.S. of Metropolitan Toronto v. S.D.*, [1993] O.J. No. 1148.

[14] *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.) at 176

[15] (1994), 20 O.R. (3d) 350 (O.C.G.D.).

[16] 14th ed. 1990 [no page given]

[85] The client here, although a minor, nevertheless had a joint interest with the CLO in its communications about her case.

[86] The Amicus drew our attention to *Wewaykum Indian Band v. Canada*[17] where the Supreme Court held that the imposition of a fiduciary duty attached to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in the best interests of the beneficiary. The Amicus submitted that the CLO was likewise, as a fiduciary, bound to give to the beneficiary, its client, full disclosure appropriate to the matter at hand. The matter at hand is the right of the client to learn from the study of the file what was done, and not done, on her behalf, and why. However embarrassing or harmful to the interest of the CLO such disclosure may be, it is a legitimate reason for the client's request for her file.[18]

[87] We agree with the conclusion of the respondent as to the impact of these fiduciary duties on the issue before us in the respondent's factum, para. 53:

> The Children's Lawyer's duties include independent representation, acting in the interests of the minor and relinquishing her own interests. The fiduciary nature of the relationship carries with it the duty to act with utmost good faith and loyalty, and the obligation to grant access to information received or created by the Children's Lawyer in relation to the minor's cases. An interpretation of s. 19 which would prevent disclosure of the client's file to her on the grounds of the Children's Lawyer's relationship to the Crown/government, would be inconsistent with the Children's Lawyer's fiduciary duties of loyalty and candour, and raises the spectre of conflicting interests.

[88] In the light of these considerations, to read "Crown counsel" as including the CLO would mean that the legislature intended to deprive the clients and fiduciaries of the CLO of the right which every client of every other lawyer in Ontario possesses: access to the information in the lawyer's file, not by discretionary decision, but as of right, subject only to very limited exceptions, not related to FIPPA.

[89] How likely is it that the legislature intended to do that? That question takes us back to the modern rule of interpretation as discussed earlier:

> In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the

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[17] (2002), 220 D.L.R. (4th) 1, at paragraph 94 (S.C.C.).

[18] See *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, esp. pages 152, 153, where the court said that access to the patient's own records was important to enable the patient to determine if the doctor had acted with utmost good faith and loyalty and to reveal any improper conduct.

> legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[90] One available indicator of legislative meaning is the legislative history. We know that Minister Scott[19] did not think he was doing anything so drastic; he thought he was merely extending the law of solicitor and client privilege to a group of government lawyers who might be thought not to be protected by the existing law because they might not have a client. We also know from *Big Canoe, supra*, that the Minister was wrong as to the extent of the second branch of s. 19; it went much farther than he thought. But it is still appropriate to observe that the Ministerial statement not only says nothing about the CLO nor about depriving any client of that group of lawyers of any right, but is inconsistent with that intention.

[91] Obviously, the actual words are the key indicator of the intention of the legislature. A consideration of the possible meanings of the phrase "Crown counsel" is an essential element of the analysis. This phrase has sometimes been equated with "any legal advisor to the Crown", and it was urged on us that any lawyer employed or retained by the Crown would qualify. As already noted, Crown counsel is not defined, but the word "counsel" carries an unmistakable element of giving advice, and in the context, it must be advice to the Crown. Any definition involving the giving of legal advice to the Crown will not capture the CLO because it is not an accurate description of the actual function of the CLO, who, although a public servant, is in the business of advising her non-governmental clients and not the Ministry, on legal matters. Even when reviewing a proposed settlement on behalf of a minor, the CLO does not advise the Minister, she advises the court. In her role, she incurs legislated obligations and common law obligations that are fiduciary and which require her to devote her loyalty exclusively to those clients. That requirement of loyalty precludes her adopting the role of advisor to the Crown, certainly in respect of any matter in which she has a non-government client. In such a role, the CLO simply cannot act as Crown counsel.

[92] It may be that the CLO cannot in practice act for or advise the Crown in any case involving minors, because she will often litigate for her clients against the government, no doubt including the very Ministry under whose wing her independent office is found. If at the same time she is advising the Crown, presumably in her area of expertise, the potential for conflict and for the reasonable apprehension of conflict of interest is very real. It is not necessary to go that far; it is enough to say that the CLO, when appointed to represent a minor, or as litigation guardian of, or lawyer for, a minor, or in approving a settlement on behalf of a minor, does not act as Crown counsel and does not have the s. 19, second branch, statutory privilege. Since those functions largely describe the work of the CLO, there is no point in limiting the exclusion of the CLO from the section in any way. To the limited extent the office of the CLO might advise the Ministry on matters of policy, there are other privileges in FIPPA which can more appropriately be called upon to protect documents relating to that function.

[93] The same fiduciary requirements of loyalty, good faith and attention to the interests of her client, to the exclusion of her own, would preclude the CLO from invoking any right to withhold

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[19] Speaking to the Standing Committee of the Legislative Assembly, 33rd Parliament, 3rd session, Monday, March 30, 1987.

information from her client. If she has the s. 19 discretion to decide whether to disclose the file to her client or not, her ethical[20] and legal obligations would preclude any decision to withhold. Nor could she submit to the "head" exercising such a discretion. That would place her in an intolerable conflict of interest in which she is bound to adopt the position favourable to her client but is prevented from doing so.

[94] We should not adopt an interpretation of legislation that places a public servant in such a position of conflict of interest if there is a reasonable alternative. It would be absurd to suppose that the legislature intended such a result. The respondent put it succinctly in para. 63 of its factum:

> To read Branch 2 so as to exclude the child from access would lead to absurd consequences. The presumption that legislation is not intended to produce absurd consequences is a fundamental rule of interpretation. Moreover, "[a]bsurdity is not limited to logical contradictions and internal incoherence; it includes violations of justice, reasonableness, common sense and other public standards . . ." The primary 'absurd' results of reading Branch 2 in such a manner would be to put the Children's Lawyer in violation of its fundamental duties to the client/requester.
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> > R. Sullivan, *Driedger on the Construction of Statutes* (Markham: Butterworths, 1994), at 85-86.

[95] It does no violence to the text of s. 19, nor to the actual role of the CLO, to rule that the phrase "Crown counsel" in s. 19 simply does not include the CLO. She does not fall within the meaning which ought reasonably to be given to that phrase. Such an interpretation actually enhances her ability to perform her functions and maintain the confidence of her clients and the public that her actions are solely devoted to the welfare of her clients. As matters now stand, the refusal to disclose this client's own file to her can reasonably be seen as placing the interest of the CLO, in not being sued by Jane Doe, above the CLO's duty to her client.

[96] In *Big Canoe, supra*, the Court of Appeal described the broad purpose of FIPPA:

> The broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns.

[97] In addressing the nature and purpose of FIPPA, the CLO submits that it is an Act of general application and the interpretation of s. 19 should not be informed by considering the relationship between the CLO and the requester. This submission fails to give effect to a major purpose of FIPPA: to enable persons to have access to information about themselves held by government. The dominant fact in the present case is that the information is about the client's case and is being withheld by her lawyer. The Amicus put it well at para. 48 of its factum:

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[20] See the Rules of Professional Conduct, for example, Rule 2.09(9) as to the obligation on termination of the retainer to give the client all pertinent information. The CLO is technically no longer the appropriate representative for this client as she has reached the age of majority.

> The TCL has indicated in its factum that it would be inappropriate for the court to consider the relationship between the parties in interpreting s. 19 because s. 19 ought to be a law of general application. While the Amicus Curiae agrees that s. 19 is a law of general application insofar as it provides each individual with the same access to each category of information, one of the principal purposes of FIPPA is to provide individuals with a right of access to their own information[21]. It follows that each individual's right of access to a given record will depend on the individual's relationship to that information. The contextual analysis rejected by the TCL is the bedrock of the access to information regime enacted by Parliament and must underlie the court's assessment of each exemption.

[98] Placing this matter in the context of the broad purpose of the Act, we observe that there is no real issue of government functioning here. Both to the limited extent that the CLO is "government", and as the lawyer of its minor clients, it ought to operate transparently as to the services it offers to its clients. There is here no equivalent of the fear of public disclosure of matters of Crown strategy or police practices, whose disclosure could hamper the efforts of law enforcement, that informed the *Big Canoe* decision. There is no evidence that the CLO operates in the area of high policy-making, or if it does, that there is any policy side to any of these documents. All that is at stake here is whether the requester's lawyer has to tell her what it has been doing for her. Although the disclosure sought is to her alone, it is true that she could then disseminate the information to the Press, or perhaps by suing the CLO for negligence in its representation of her. What are the public concerns that would overbalance the right of this client, and all clients, to know this information about their own cases? None. If anything, the functioning of government (to the extent the CLO is government) would be enhanced by disclosure. If there is incompetence or negligence in the office of the CLO, it is in the interest of the public and government alike to learn of it and so be able to remedy the matter.

[99] Interpreting the section so as to exclude the CLO from the term "Crown counsel" is in accord with the broad purposes of FIPPA.

[100] Finally, the result accords with fundamental notions of justice. The CLO is appointed to help its clients and it is unjust to permit it to refuse to even disclose to them what it has done or refrained or neglected to do for them.

[101] In summary, interpreting s. 19's reference to Crown counsel as not including the CLO, meets the criteria for a modern interpretation set out by Driedger and adopted by the Supreme Court. Such a reading does no violence to the actual language; it is in accord with the purpose of FIPPA; it appropriately balances the right of the clients to know and the right of government to keep its governmental secrets; it does not disturb government's s. 19 privileges in its own litigation; it avoids putting the CLO into a serious conflict between her fiduciary and legislated duties to her clients and the discretion that may be exercised by the head; it avoids the absurdity of denying clients the right to know what their lawyer has done for them; it appropriately acknowledges the unique function of the CLO as public servants performing essentially private law duties for persons under the legal

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[21] FIPPA, section 1(b).

disability of childhood; and it does not purport to exempt these lawyers from obligations to their clients that are not only common to, but vital to the profession.

[102] The application for judicial review of the decision of the adjudicator as to the effect of s. 19 is dismissed.

IV. The claim for exemption under section 13:

[103] Under the marginal heading "Advice to Government", s. 13(1) of the FIPPA reads:

> "A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution."

[104] Subsections 13(2) and 13(3) set out exemptions to this general rule which are not relevant to the case at bar and which were not relied on by the adjudicator.

[105] The client/requester submitted to the adjudicator as to this section:

> There is no doubt that in addition to the protections that are needed to protect solicitor and client privilege, the government requires a system where they can seek advice from civil servants secure in the knowledge that advice is confidential.
>
> But: Any recommendations that were given in this case were given only because the CLO was appointed as her legal representative and litigation guardian.

[106] The list of documents referred to above from the affidavit of Mr. McTavish, the former CLO, and the submission to the adjudicator at page 27 of the Application Record, make it clear that the records that are claimed to be exempt do indeed consist entirely of communications in connection with the lawsuits being conducted by the CLO on behalf of Jane Doe:

> The records for which this exemption [has] been claimed incorporate advice that passed from one public servant to another about the conduct of the case.

[107] The adjudicator found that s. 13(1) was inapplicable because it only protects the following circumstance:[22]

> .... this exemption is designed to protect communications only within the context of the government making decisions and formulating policy *as a government*, not in its specialized role as an advocate representing the private interests of an individual in proceedings before a court. Here, as explained above in detail under the solicitor and client privilege discussion, any advice being given, and any decisions being made,

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[22] Application Record, tab 2, page 28, Reasons for Order PO-2006, page 21.

> are for the benefit of the child, not the [CLO] as a government agency or the public at large.

[108] The CLO submitted that the adjudicator improperly imposed two limitations to s. 13:

> First, that the section only applies in circumstances where the advice or recommendations are given in the context of government making decisions and formulations of policy or government functioning as government;
>
> and, second, that the advice or recommendations in this case did not benefit the government or public at large.

[109] The CLO submits that neither limitation can be supported on a reading of the plain meaning of the section. The words are plain and require no redrafting to narrow the exemption plainly provided for. There is no language limiting the exemption to the context of government decision-making, or decisions benefiting the government or the public at large. It has been left to the head to exercise discretion as to whether to disclose this kind of record. There is nothing for the adjudicator to do but enforce the discretion as exercised as long as the record contains advice or recommendations of a public servant.

[110] Before continuing, we turn to consider the standard of review of the respondent's decision as to s. 13. The pragmatic and functional approach should, of course, be applied. In a series of cases of which Pushpanathan[23] is a prominent example, the Supreme Court has developed the pragmatic and functional approach to determining the standard of review of administrative decisions, and the degree of deference to be accorded to the various tribunals which the courts are called upon to supervise. In this approach, the standard of review is determined by considering four contextual factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question.

[111] The FIPPA does not contain a privative clause or a statutory right of appeal. While the presence of a privative clause points to a lower standard of review, its absence is not a determinative factor and must be weighed against the other three factors.

[112] Where the Commissioner has greater expertise on the issue than the reviewing court, the standard of review is reasonableness rather than correctness. The Amicus submitted that the Commissioner's expertise lies "in the management of many kinds of government information". In determining whether a particular record qualifies as "advice or recommendations of a public servant" under s. 13(1), the Commissioner is exercising his particular expertise in classifying government information. The respondent Commissioner submitted that his specialized expertise in balancing the right to one's own personal information with the confidentiality of the government's decision-making

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[23] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. More recently, see *B.C. College of Physicians v. Dr. Q*, , [2003] S.C.J. No. 18, April 3, 2003, and *Law Society of New Brunswick v. Ryan*,[2003] S.C.J. No. 20.

process was clearly engaged in the decision at issue, which was squarely within his jurisdiction. The decision should receive deference.

[113] While the interpretation of s. 13 may not directly engage the Commissioner's expertise in the management of government information, or in determining whether particular documents are advice or recommendations of a public servant, his experience in the balancing of the right to one's own information versus the government's need for confidentiality is definitely engaged, for that is the very issue before us. Although at bottom, the question of whether s. 13 applies to the records in the office of the CLO that pertain to a particular case for a particular client, is a question of statutory interpretation, that issue, like the privilege issue discussed earlier, must be informed by an understanding of the entire Freedom of Information/Privacy regime, an understanding which the Commissioner and not the court, brings to the table.

[114] In *Workers' Compensation Board*[24], the Court of Appeal decided that the standard of review for a decision of the Commissioner determining the scope of the exemption in s. 17 of FIPPA was reasonableness, even though it was an exercise in statutory interpretation. Labrosse J.A. wrote:

> The purpose of the Act is to provide access to information under the control of government institutions, in accordance with the principles that information should be available to the public, that necessary exemptions should be limited and specific, and that decisions on disclosure of government information should be reviewed independently from government. The Commissioner, an officer of the legislature, is required to administer the Act and to provide independent review of government decisions on access to information. He is also required to determine if any of the statutory exemptions apply.
>
> In *United Brotherhood of Carpenters & Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at p. 335, 102 D.L.R. (4th) 402, Sopinka J. emphasized that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause".
>
> In *John Doe v. Ontario (Information and Privacy Commissioner)*, Campbell J., speaking for the majority of the Divisional Court, commented on the expertise of the Commissioner. At pp. 782-83, he stated:
>
> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra*, the commission is a

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[24] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1988), 41 O.R. (3d) 464 (C.A.).

> specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.

[115] The expertise of the Commissioner is a very persuasive factor weighing on the side of deference. His experience in balancing the government privacy/public right to know conflict is at the heart of the issue.

[116] The third factor is the purpose of the Act as a whole and the provision in particular. We return to *Big Canoe* on the first point: The broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns. The provision itself is an effort to put into words one of those "other concerns": the need for government privacy for certain documents containing advice. The question at issue is whether, viewed in the entire context of FIPPA and the rights of the clients of the CLO, this provision can apply against them. The balancing of such issues engages the expertise of the Commissioner.

[117] The final factor is the nature of the problem, which can be described as an issue of statutory interpretation, (normally the court's strong suit) in the context of this comprehensive and complex regime which requires, as A. Campbell J. put it, "a delicate balance"; "sensitivity" and "expertise".

[118] In the light of these authorities, and balancing the factors, the court should review this decision, made within the Commissioner's expertise, on a standard of "reasonableness"[25]. The question that we must ask ourselves is whether the adjudicator's interpretation was reasonable. The issue is not whether we would have read it as he did. It is whether what he decided is reasonably supported by the kind of analysis mandated by the modern rule as to the interpretation of statutes discussed earlier.

[119] We return to the merits of the decision that s. 13 did not apply against the interests of the clients of the CLO because it was intended to cover only advice given to government as government, and not when acting in the interests of the clients of the CLO. The adjudicator said:

> . . . this exemption is designed to protect communications only within the context of the government making decisions and formulating policy as a government, not in its specialized role as an advocate representing the private interests of an individual in proceedings before a court. Here, as explained above in detail under the solicitor and client privilege discussion, any advice being given, and any decisions being made,

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[25] See *Dr. Q, supra*, note 24.

> are for the benefit of the child, not the [CLO] as a government agency or the public at large.

[120] The effect of this decision is to read the CLO, in its specialized role, out of s. 13 without impairing the exemption's essential thrust of protecting the policy-making and advice giving functions of those who are actually advising the government. The CLO does not advise the government, at least not in the process of acting as solicitor for its clients, and that is the only role in which the exemption does not apply. Those who do advise the government are not deprived of any protection by this decision.

[121] In our view the decision is a reasonable one. As in the analysis of the privilege point, here the application of this exemption to the clients of the CLO would place the CLO in an untenable position. Her legislative and fiduciary duties demand a relationship of complete candour with her clients. While the words of s. 13 certainly admit of the literalism of the CLO's position, the modern rule requires more than literalism. Placed in the context already described at length throughout these reasons, excluding the CLO from this exemption is necessary to preserve the undivided loyalty and confidence that is the hallmark of the solicitor and client relationship and to keep the CLO out of serious conflict.

[122] Like the privilege decision, this decision appropriately balances the right of the clients to know and the right of government to keep its governmental secrets; it does not disturb government's s. 13 exemption in any other respect; it avoids putting the CLO into a serious conflict between her fiduciary and legislated duties to her clients and the discretion that may be exercised by the head; it avoids the absurdity of denying clients the right to know what their lawyer has done for them; it appropriately acknowledges the unique function of the CLO as public servants performing essentially private law duties for persons under the legal disability of childhood; and it does not purport to exempt these lawyers from obligations to their clients that are not only common to, but vital to the profession.

[123] The application for judicial review of the s. 13 decision is dismissed.

FIPPA and the Common Law:

[124] Up to this point, we have proceeded on the assumption, apparently shared by all the parties, that the client's rights are governed by FIPPA. We do not share this assumption, but, as the result is the same in this case, it is not necessary to explore it in detail.

[125] We wish to make it clear that it puzzles, and very much concerns, the court that the request of Jane Doe for her legal file was diverted to the FIPPA stream for handling at all. It was surely a straightforward request by a client, now of age, for information as to her own case from her own lawyers. That kind of request is common in the practice of law and is governed, if not by the common sense and goodwill of the parties, then by the Solicitors Act and the Rules of Professional Conduct of the Law Society. There seems to be no necessity to resort to FIPPA in such a case. Indeed, the reasons set out above illustrate that FIPPA is not designed to deal with such a request.

[126] In a recent case[26], where CTV sought an order requiring the Toronto Police Service to permit it to copy court records in a criminal case, the Court of Appeal said, at paras. 28-29:

> Finally, the Toronto Police Service argues that the existence of the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 precludes the court from exercising its common law jurisdiction to order access to court records. The respondent says that this legislation permits the appellant to apply for access to the exhibits it seeks and sets up criteria for evaluating such a request.
>
> [29] In my view, the simple answer to this argument is that the regime set up under this legislation has an entirely different purpose. It is designed to regulate access to private information which, but for the regime, would not otherwise be available to the public. By contrast, the jurisdiction which the appellant seeks to engage is over court records which the common law treats as presumptively accessible to the public. There is nothing in the legislation that suggests either explicitly or by necessary implication that the court's jurisdiction at common law is being curtailed or removed. This is hardly surprising since the legislation is designed for such a different purpose. The regime it establishes is simply one which co-exists with the court's jurisdiction. It does not replace it.

[127] Similarly, the common law regards the solicitor's information as presumptively available to the client, subject only to minor limitations, whereas FIPPA is established for the entirely different purpose of providing access to information that is not otherwise available to the public. Why the client's request was diverted into the FIPPA regime was not explained to us, nor was the applicability of that Act argued before the adjudicator or raised before us, in spite of our expressions of puzzlement. Therefore we have refrained from making any ruling on that issue, which will have to await another day.

[128] No party asked for costs, and none are awarded.

O'DRISCOLL J.
LANE J.
KOZAK J.

Released: August 14, 2003

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[26] *CTV v. Ontatio Superior Court of Justice*, [2002] O.J. No. 1141 (C.A.)

COURT FILE NO.: 330/02
DATE: August 14, 2003

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

O'DRISCOLL, LANE AND KOZAK JJ.

B E T W E E N:

CHILDREN'S LAWYER FOR ONTARIO

Applicant

- and -

DAVID GOODIS, Senior Adjudicator,
Information and Privacy Commissioner and
JANE DOE, Requester

Respondents

REASONS FOR JUDGMENT

THE COURT

Released: August 14, 2003