COURT FILE NO.: 571/04
DATE: 20060216

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

O'DRISCOLL J., MCCARTNEY R.S.J. AND SWINTON J.

B E T W E E N:	)	
	)	
ONTARIO FIRST NATIONS LIMITED PARTNERSHIP	)	*Tycho Manson*, for the Applicant
Applicant	)	
	)	
- and -	)	
	)	
	)	
INFORMATION AND PRIVACY COMMISSIONER/ONTARIO, MINISTRY OF THE ATTORNEY GENERAL and JOHN DOE, REQUESTER	)	*William S. Challis*, for the Respondent, Information and Privacy Commissioner/Ontario
	)	
	)	*Sandra Di Ciano*, for the Respondent,
Respondents	)	Ministry of the Attorney General
	)	
	)	
	)	**HEARD at Toronto:** February 16, 2006

SWINTON J.: (Orally)

[1] The applicant, the Ontario First Nations Limited Partnership (OFNLP), seeks judicial review of the Order of the Information and Privacy Commissioner, dated September 20, 2004.

[2] The Commissioner held that the Ministry of the Attorney General must disclose records that OFNLP provided to the Ministry of the Attorney General under the Casino Rama Revenue Agreement.

[3] The records at issue were prepared by two First Nations groups, OFNLP and MFNLP, and provided to the Ministry of the Attorney General pursuant to the Revenue Agreement, which apportions the net revenues of Casino Rama among the two groups for distribution among First Nations bands.

[4] The applicant argues that the Commissioner misapprehended or failed to take into account evidence before him of the commercial nature of the relationship between OFNLP and Casino Rama, and of the harm likely to result if the records were disclosed.

[5] The standard of review of the Commissioner's decision is reasonableness. The Court of Appeal has recently upheld the standard of reasonableness based on the purpose of privacy legislation and the expertise of such a decision maker:

> "In every review of disclosure decisions by government, the Commissioner is required by the Act to strike the delicate balance required between its two fundamental purposes, providing the public with the right of access to information held by government and protecting the privacy of individuals with respect to that information. This is not a task for which the courts can claim the same familiarity or specialized experience."
>
> (*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 at paragraph 31)

[6] An unreasonable decision is one that is not supported by reasons that stand up to a "somewhat probing examination" (*Law Society of New Brunswick v. Ryan* (2003), 223 D.L.R. (4th) 577 (S.C.C.) at paragraph 55).

[7] In coming to his decision, the Commissioner applied s. 17 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, which reads:

> "17.1 A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to:
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group or committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute."

[8] The Commissioner applied the well established three part test to the exemption under s. 17 of the Act, each part of which must be satisfied by a party resisting disclosure:

> (i) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

(ii) the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; and

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

[9] The Commissioner applied the jurisprudence interpreting "commercial information" as meaning "information that relates solely to the buying, selling or exchange of merchandise and goods." He accepted that Casino Rama operates as a commercial enterprise, and that records relating to the buying, selling or exchange of merchandise or services in the context of those operations would qualify as commercial information. However, he found that the records at issue relate to the administration of the Casino Rama Revenue Agreement among organizations that are not involved in the day-to-day operations of the Casino. Those records were prepared for the purpose of ensuring accountability to the province in the redistribution of those funds to First Nations communities. No merchandise or services were exchanged in that context. Therefore, he concluded that the commercial source of the funds did not transform the essential nature of the financial auditing information into commercial information. In our view, that finding was reasonable.

[10] The Supreme Court of Canada's decision in *Lovelace and Ontario* (2000), 188 D.L.R. (4th) 193 is only relevant to this case in its recognition of the Casino project as a "partnering" arrangement designed to generate revenue for Ontario's First Nations bands.

[11] In determining whether there is a reasonable expectation of harm if the information is disclosed, the Commissioner is entitled to test the alleged expectation of harm against the evidence and to reject unsupported assertions of harm (see (*Ontario (Minister of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.)).

[12] The Commissioner stated at page 21 of his decision:

> "Based on the evidence and argument provided to me in this appeal, I do not accept OFN's position that disclosing the audit reports would "reveal the annual net revenues of Casino Rama and would thereby allow a competitor to assess the financial condition and profitability of Casino Rama." Even if I were to accept that Casino Rama operates in a competitive environment, which has clearly not been established by the submissions put forward by the parties in this appeal, the information at issue here bears no direct relationship to the operations of Casino Rama. According to OFN, Casino Rama is operated by a large publicly traded company in the United States and no "financial information" at issue in this appeal belongs to that corporate body."

[13] He went on to say at page 22 of his reasons:

> "In my view, the audit reports and related documents that are at issue in this appeal do not fit within this policy framework. The OFN and MFN, as representatives of various First Nations receiving funds under the Agreement are not themselves

> engaged in competitive commercial activity. Different considerations might apply to records more directly related to the operations of Casino Rama, but those are not the type of records at issue here.
>
> MFN has provided no evidence or argument concerning any harm it might experience through disclosure of its audit reports. In my view, this itself is a strong indication that the harms identified in section 17(1) are not present as they relate to MFN in the circumstances of this appeal. As far as information relating to OFN is concerned, in my view, OFN has not provided the level of "detailed and convincing" evidence necessary to establish a reasonable expectation of prejudice to any competitive position that might exist, any significant interference with contractual or other negotiations in which it is involved, or any undue loss or gain to any person or organization. Accordingly, I find that the requirements of part 3 of the section 17(1)(a) and (c) test have not been established for any of the records that meet the requirements of parts 1 and 2."

[14] That conclusion was a reasonable one, given the nature of the documents and the evidence before the Commissioner.

[15] In reaching this decision, we have given no consideration to the additional facts in the respondent's factum which were not part of the record before the Commissioner and are not properly before us.

[16] For these reasons, the application for judicial review is dismissed.

O'DRISCOLL J.:

[17] With the concurrence of my colleagues, I have endorsed the back of the Notice of Application for Judicial Review as follows: "This application is dismissed for the oral/recorded reasons given for the Court by Swinton J. Counsel for the Ministry and counsel for the IPC of Ontario advise that they are not seeking costs. No order as to costs."

SWINTON J.
O'DRISCOLL J.
McCARTNEY R.S.J.

Date of Reasons for Judgment: February 16, 2006
Date of Release: March 21, 2006

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B E T W E E N:

ONTARIO FIRST NATIONS LIMITED PARTNERSHIP

Applicant

- and -

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO, MINISTRY OF THE ATTORNEY GENERAL and JOHN DOE, REQUESTER

Respondents

ORAL REASONS FOR JUDGMENT

SWINTON J.

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