COURT FILE NO.: 104/07
COURT FILE NO.: 394/06
DATE: 20070716

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LANE, LEDERMAN and SWINTON JJ.

B E T W E E N:	*Kim Twohig and Sarah Wright*, for the Applicant, Ministry of the Attorney General
MINISTRY OF THE ATTORNEY GENERAL Applicant	
- and -	
INFORMATION AND PRIVACY COMMISSIONER, AND SHELLEY MARTEL, REQUESTER Respondents	*William S. Challis*, for the Respondent, Information and Privacy Commissioner *Frank Addario and Emma Phillips*, for the Respondent Requester, Shelley Martel
HEARD TOGETHER WITH:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	
- and -	
INFORMATION AND PRIVACY COMMISSIONER, AND JANE DOE, REQUESTER Respondents	**Heard at Toronto:** June 18, 2007

LEDERMAN, J.

Nature of Proceedings

[1] There are two applications for judicial review before the Court.

[2] The Ministry of the Attorney General ("MAG") seeks judicial review of Order PO-2548 made by Donald Hale, adjudicator at the Information and Privacy Commissioner ("IPC"), on February 14, 2007. The Order was made under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA"), and ordered the MAG to disclose the total dollar figures for legal services rendered by the MAG (Constitutional Law Branch) to the Ministry of Health and Long-Term Care ("MOHLTC") and the Ministry of Education ("MOE") in respect of legal services provided in two actions before the Superior Court of Justice regarding the province's provision of services to children with autism (*Wynberg v. Ontario*; *Deskin v. Ontario*, [2005] O.J. No. 1228). The IPC ordered the MAG to disclose the total dollar figures contained in individual invoices and to disclose this information either in redacted form or by creating a new record containing this information.

[3] The MAG also seeks judicial review of Order PO-2484 made by John Higgins, senior adjudicator employed by the IPC under FIPPA on July 17, 2006. He ordered the MAG to disclose the total dollar figures on nine invoices for legal services rendered by the MAG to the MOHLTC in respect of an appeal to the Health Services Appeal and Review Board ("HSARB").

Background

Re: Order PO-2548

[4] In May 2004, the MOHLTC and the MOE received requests from the Respondent Shelley Martel ("Martel") for access to records pertaining to costs incurred and budgeted for the *Wynberg* and *Deskin* matters.

[5] The two civil actions to which the request relates – *Wynberg* and *Deskin* – were cases brought on behalf of 30 autistic children over the age of six.

[6] The Constitutional Law Branch of the MAG provided the legal representation of the government in respect of the *Wynberg/Deskin* litigation. The Constitutional Law Branch sent bills for legal fees and disbursements incurred to the "client" Ministries for which services were provided. The "client" Ministries in this case were the MOHLTC and MOE and the Ministry of Community

and Social Services. Martel's request was limited to the costs incurred by two of the three client Ministries.

[7] In her representations, Martel indicated that the costs of the *Wynberg/Deskin* litigation were a matter of public interest because the money spent on the litigation should have been spent on providing services to autistic children.

[8] Martel acknowledged that no aggregate figure for the costs existed, but asked that the individual costs be pulled from records to create a total.

[9] The Ministry asserted that the records were privileged, and that producing a single responsive record containing a global figure for costs would constitute creating a new record. It further stated that it is not required to create a new record to respond to a request, particularly given that the information requested to be compiled into a new record is subject to solicitor-client privilege under s. 19 of FIPPA which reads as follows:

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

[10] The IPC issued order PO-2548 whereby it ordered the MAG to disclose the aggregate total amounts for fees and disbursements contained in each of the responsive records that relate to litigation. The IPC upheld the MAG's decision to deny access to the remaining records and parts of the record identified as non-responsive to the request.

Re: Order PO-2484

[11] The MAG received a request under FIPPA for access to records detailing the expenses billed by the MAG to the MOHLTC in connection with a series of appeals that were before the HSARB. The proceedings related to reimbursement for medical testing for a rare form of eye cancer.

[12] The MAG claimed that all records are exempt under s. 19 of FIPPA because they are privileged.

[13] The decision was appealed to the IPC who ordered the MAG to disclose the total dollar figure from each of the nine invoices, or if it was more convenient, to assemble these figures on a single sheet of paper.

Standard of Review

[14] Both the Applicant and Respondent, IPC, submit that the standard of review of the IPC's decisions interpreting solicitor-client privilege at s. 19 of FIPPA is correctness. The respondent, Martel, submits that the standard is patent unreasonableness. We are of the view that the appropriate standard is, in fact, correctness, as the interpretation of s. 19 is an area where the Court's own expertise is overwhelming: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) at paras. 4 and 6.

Issues

1) Did the IPC err in its interpretation of s. 19 of FIPPA by applying the principles set out in *Maranda v. Richer*, [2003] 3 S.C.R. 193 and *Ontario (Attorney General) v. Ontario (Assistant Information and Private Commissioner)*, [2005] O.J. No. 941 (C.A.) ("*Mitchinson*") in holding that a rebuttable presumption of solicitor-client privilege extended to the legal bills of account, including amounts billed;

2) If those principles do apply, did the IPC err in concluding that the presumption of privilege was rebutted in the instant cases?

Did the IPC Err in Applying the Rebuttable Presumption of Privilege Test?

[15] The Applicant submits that the IPC misinterpreted the scope of the solicitor-client privilege and the application of the presumption. It relies on the case of *Stevens v. Canada* (1998), 161 D.L.R. (4th) 85 (F.C.A) which held that a legal account, including disbursements, is privileged in its entirety and should be covered by a blanket protection. The Applicant submits that the Supreme Court in *Maranda* did not overrule *Stevens* and thus, the information sought by the requester, which forms part of the legal account is, therefore, absolutely and not presumptively privileged. The Applicant

submits that the *Maranda* and *Mitchinson* cases are distinguishable because they involved a record of an “aggregate” figure for legal costs separate and apart from legal bills of account, whereas in the cases before the IPC there was no separate aggregate.

[16] Writing for the majority in *Maranda*, LeBel J. observed that courts have been divided on the question of whether information contained in legal billings is privileged. One line of cases supported the proposition that the amount of fees, with nothing more, is not a “communication” but rather a “fact” which is not subject to privilege unless the context dictated otherwise. Another line of cases, including *Stevens v. Canada*, held that a lawyer’s bill is a communication expressive of the relationship between the solicitor and client and the amount of fees should always be protected by a blanket privilege given the ability of opposing counsel to sometimes extract privileged information from apparently neutral billing amounts.

[17] With respect to such information, the Supreme Court rejected the fact/communication dichotomy and clearly established a new test for solicitor-client privilege for this kind of information. LeBel J. in *Maranda*, at paras. 28 to 34, in effect abandoned the absolutist approach taken by each line of cases and, instead, developed the “rebuttable presumption of privilege” test when a disclosure of lawyer’s billing information is sought.

[18] It is clear that *Maranda* overrules *Stevens* to the extent that the latter purported to recognize a blanket privilege for billing information.

[19] Rather, because the fact of billing information arises out of the solicitor-client relationship and of what transpires within it, and is so clearly connected, the Supreme Court held that that approach to be taken is that solicitor’s bills of account will be *prima facie* protected by privilege. However, the presumption of privilege can be rebutted where the disclosure of the information would not violate the confidentiality of the solicitor-client relationship by revealing directly or indirectly any communication protected by the privilege.

[20] In *Mitchinson*, the Ontario Court of Appeal addressed the application of this "rebuttable presumption of privilege" test in the context of an access to information request. At issue were two disclosure orders made by the IPC regarding legal fees paid by the Attorney General to outside counsel in two separate criminal proceedings. In dismissing the Attorney General's application for judicial review, the Ontario Court of Appeal held the following at paragraph 9:

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

[21] The Applicant also submits that the instant cases should be distinguished from *Mitchinson* and *Maranda* because the latter cases involved the disclosure of a single record prepared within the solicitor-client relationship, while in the instant cases, the IPC ordered the Minister either to disclose severed portions of a number of documents or to create a new single record showing the total sum of the fees. The Applicant would limit *Maranda* and *Mitchinson* to apply to only an aggregate amount in an "isolated record" rather than to figures contained in numerous statements of account. Neither *Maranda* nor *Mitchinson* draw any such distinction between disclosing legal fees in the form of severed information from existing documents, creating a new composite record, or disclosing a document in its entirety. The distinction advanced by the Applicant is artificial and I see no meaningful distinction, depending on how the bottom line of financial information is generated.

[22] As the "rebuttable presumption of privilege" test was clearly established by the Supreme Court in *Maranda* and applied by the Ontario Court of Appeal in the context of information requests in *Mitchinson*, it is clear that the IPC adjudicator applied the correct test.

Did the IPC err in finding that the presumption was rebutted?

[23] The Applicant submits that the IPC erred in finding that the presumption was rebutted in respect of the bottom line figures that were sought. It submits that a requester could infer privileged information which could reveal the state of preparation by a party for trial, whether experts had been

retained and whether compromise was a serious prospect. This potential becomes even greater, the Applicant submits, when there are incremental requests for seemingly neutral information.

[24] In the instant cases, there were not repeated requests for incremental billings. Even if multiple requests could be made in the future, the IPC is capable of viewing such further requests in light of any prior disclosure that had been ordered to determine whether there is a heightened risk of inferring privileged information.

[25] The Requesters asked only for the total amount of fees and did not seek any account details that would permit a deduction of privileged information. The IPC adjudicators clearly considered that the Requesters and counsel were "assiduous" and "knowledgeable" and stated that they were satisfied that the information sought would not result in their being able to discern information relating to litigation strategies pursued by the MAG or any other type of information that may be subject to privilege. Redaction of the dates from the records was expressly designed to avoid any prospect of disclosing privileged information about legal strategies or the progress of the litigation. Thus, the only information that was ordered disclosed consists of amounts with no corresponding dates or descriptive information.

[26] The Applicant asserted for the first time in this Court that an "assiduous inquirer" would be able to discern how the government has apportioned legal costs of litigation between each Ministry and, that in turn, would reflect the government's assessment of the strengths of the plaintiffs' claims in respect of each Ministry and of its respective liability. Having failed to raise this issue before the IPC, it should be precluded from doing so on this judicial review application. In any event, apart from the fact that it was the Applicant, itself, that revealed that there is such an apportionment, given the variety of factors that may affect apportionment, this information reveals nothing meaningful about communications between solicitor and client.

[27] It is clear that the IPC applied the proper legal principles as articulated by the courts in *Maranda* and *Mitchinson* and on the totality of the evidence before them, the adjudicators correctly found that the presumption of privilege was rebutted in the two cases. Thus, the s. 19 exemption did

not apply. In applying the rebuttable presumption of privilege analysis and ordering that this information be severed from the records and disclosed to the requesters, the IPC committed no reviewable error.

[28] The applications are, therefore, dismissed. The IPC is not seeking costs. If the other parties cannot otherwise agree as to costs, they may make written submissions within 30 days.

LEDERMAN J.
LANE J.
SWINTON J.

Released: July 16, 2007

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Respondents

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REASONS FOR JUDGMENT

LEDERMAN, J.

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