CITATION: St. Catharines (City) v. IPCO, 2011 ONSC 346
DIVISIONAL COURT FILE NO.: 351/09
DATE: 20110316

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

FERRIER, SWINTON & LEDERER JJ.

B E T W E E N:	
THE CORPORATION OF THE CITY OF ST. CATHARINES Applicant	*Daron L. Earthy*, for the Applicant
- and -	
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO and LINDA FAYE LANDRY Respondents	*William S. Challis*, for the Respondent, Information and Privacy Commissioner of Ontario
	HEARD at TORONTO: January 6, 2011

LEDERER J.:

[1] This application for judicial review is made in respect of a decision of the Information and Privacy Commissioner of Ontario. The decision allows for the release of a substantial portion of a report that had been withheld by the City of St. Catharines on the basis that it concerned a property matter dealt with by the General Committee of the Municipal Council in an in camera meeting.

BACKGROUND

[2] Linda Landry is the owner of land in the City of St. Catharines. She lives in a home located on the property.

[3] Neighbouring property, to the north and to the east, belongs to the City. Linda Landry parks her car on land that is owned by the City. A wood deck and sunroom that are part of the house extend on to City land. These encroachments have become an impediment to efforts she has made to sell her home.

[4] Linda Landry retained a lawyer and, with his assistance, approached the City in an effort to resolve the problem.

[5] Among the solutions that they proposed was the acquisition of property owned by the City.

[6] On April 28, 2008, at a meeting of councillors of the City of St. Catharines, sitting as the General Committee of Council, the lawyer, as part of a presentation, said:

> The problem which we are bringing to you this evening is the use of land for parking of one vehicle and on which a deck encroaches. We are seeking permission to acquire the land in question or to obtain a licence to permit the continued use of the land for the parking of one vehicle and for permission to continue the encroachment.

[7] In the same submissions he noted:

> Our request to the Council is that council authorize the continued use of the City land, as shown on the survey and permit the continued encroachment of the deck also as shown. We believe that the history of the deck and the improvements makes [sic] a strong case for adverse possession. However, Ms. Landry's desire is to resolve matters so that she may sell her home.
>
> As an alternative, Ms. Landry is prepared to enter into negotiations with the City to acquire the five-foot wide strip of land shown in Red. The acquisition of these lands will solve the issues of the use of the lands for parking and of encroachment by the deck.

[8] Later the same evening, the members of the General Committee of Council voted to adjourn to go "*in camera*" for the purpose of discussing certain items, including the request of Linda Landry. The Minutes of the General Committee, in recording the resolution, referred to this matter in the following way:

> Report from the Financial Management Services Department, Re: Property Matter-Potential Property Disposition (In Camera Pursuant to By-law No. 2007-311, as amended, Section G 6.3 (C) A Proposed or Pending Acquisition or Disposition of Land by the Municipality), Realty File 97-43; Legal Matter.

[9] The same Minutes record the consideration the Committee gave to this situation while *in camera*, as follows:

> That the recommendation contained in the report from the Financial Management Services Department, dated April 24, 2008, respecting a property matter - potential property disposition, be approved.
>
> CARRIED

and

> That the City of St. Catharines offer for sale to the abutting owner, the City's portion of the land containing the five-foot right-of way.
>
> LOST

[10] Subsequent to the meeting, Linda Landry asked that she be given a copy of the report referred to in the Minutes.

[11] The City refused the request. In a letter, dated May 16, 2008, the Deputy City Clerk explained why:

> Please be advised that Section 239(2) of the Municipal Act authorizes City Council meetings to be held closed to the public if the subject matter being considered deals with a proposed or pending acquisition or disposition of land by the municipality or a local board. As well Section 6(1)(b) of the Municipal Freedom of Information and Protection of Privacy Act provides that a head may refuse to disclose a record that reveals the substance of a meeting of City Council, a board, a commission, or other body or a committee of one of them, if a statute authorizes holding that meeting in the absence of the public. As a result, since the subject of your request was a property matter dealt with by City Council in an 'In Camera' meeting I am unable to release the report at this time.

[12] The letter went on to explain that, if she wished, Linda Landry could appeal this decision to the Information and Privacy Commissioner, which she did.

[13] In the decision made by the Commissioner, the City was ordered to:

- with the exception of only a few sentences, disclose the report;
- with respect to the few sentences which were excepted from disclosure, to exercise its discretion again and determine, taking into account factors identified in the Commissioner's decision, whether those items should be released; and,
- in the event that the City decided that any part of the report should remain undisclosed, to provide reasons for that determination.

[14] It is this decision which is the subject of the application for judicial review.

THE APPLICABLE LEGISLATION

[15] The applicable provision in this case is s. 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (hereinafter referred to as "MFIPPA"). It says:

> **6. (1)** A head may refuse to disclose a record,
>
> . . .
>
> (b) that reveals *the substance of deliberations of a meeting* of a council, board, commission or other body or a committee of one of them if a *statute authorizes holding that meeting in the absence of the public*.
>
> [Emphasis added]

[16] The application of s. 6(1)(b) requires determination of three questions derived from its wording. For the exemption to apply, the municipality must establish that:

1. a council, board commission or other body, or a committee of one of them, held a meeting;

2. a statute authorizes the holding of the meeting in the absence of the public; and,

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.

[17] The City of St. Catharines relied on s. 239(2)(c) of the *Municipal Act, 2001*, S.O. 2001, c. 25 as the statutory provision authorizing the holding of a meeting in the absence of the public. It says:

> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
> . . .
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board.

THE ISSUES FOR THE COURT

[18] There are three issues that the Court is required to resolve:

(a) What is the applicable standard of review?

(b) Did the Commissioner unreasonably conclude that the exemption found in s. 6(1)(b) of the *MFIPPA* only applied to a limited portion of the report?

(c) In reviewing the City's exercise of its discretion to refuse to disclose the report, was the jurisdiction of the Commissioner exceeded?

(a) What is the Applicable Standard of Review?

[19] The principal question is what standard of review applies to a decision made by the Commissioner regarding the interpretation and application of s. 6(1)(b) of the *MFIPPA*.

[20] In the now-seminal case of *Dunsmuir v. New Brunswick*, the Supreme Court of Canada affirmed the principle of deference to the decisions of administrative tribunals. It replaced what had been three available standards of review (correctness, patent unreasonableness and reasonableness simpliciter) with two (correctness and reasonableness). The case stated that, if the appropriate standard has been identified in a satisfactory manner, the question need not be re-visited in each succeeding decision (see: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paras. 57 and 64; and, see: *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678 at para. 24).

[21] In the case of *Ontario (Minister of Health and Long Term Care) v. Ontario (Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.), the Court of Appeal dealt with the standard of review applicable to a decision of the Commissioner interpreting a statutory provision allowing a Minister to refuse to confirm or deny the existence of a record if disclosure would constitute unjustified invasion of personal privacy. In doing so, it adopted the following quotation as demonstrative of the Commissioner's role and expertise:

> Unlike the tribunal under the *CHRA*, [*Canadian Human Rights Act*] 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.
> . . .
>
> 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.
>
> (*John Doe v. Ontario (Information & Privacy Commissioner) (1993), 13 O.R. (3d) 767* at pp. 781-783 as quoted in *Minister of Health and Long Term Care v. Ontario (Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321 (C.A.) at para. 29)

[22] The Court reviewed the situation in the context of each of the four factors of the "pragmatic and functional test", which was the law at the time. It found that reasonableness was the appropriate standard.

[23] The Supreme Court of Canada has recently affirmed that it is the reasonableness standard that generally applies to decisions of the Commissioner made in respect of the interpretation and application of freedom of information legislation. It said:

> Decisions of the Assistant Commissioner regarding the interpretation and application of FIPPA [*Freedom of Information and Protection of Privacy Act*] are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [1999] S.C.C.A. No. 134, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Commissioner)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23 at para. 70)

[24] The cases referred to consider the *Freedom of Information and Protection of Privacy Act*, rather than the legislation with which we are concerned here, being the *MFIPPA*. These two pieces of legislation are similar. The former considers access to information in the hands of the provincial government and the latter with the same issue in regard to municipalities. For the purposes of this analysis, there is no reason to distinguish between them.

[25] Insofar as the Commissioner's interpretation and application of s. 6(1)(b) of the *MFIPPA* is concerned, the applicable standard of review is reasonableness. However, this is not the end of a consideration of the appropriate standard of review.

[26] In this case, it is necessary to also account for s. 239(2)(c) of the *Municipal Act*. Counsel for the Commissioner submitted that the standard of review applicable to the Commissioner's interpretation and application of this section should be reasonableness. He submitted that s. 6(1)(b) of the *MFIPPA* and s. 239(2)(c) of the *Municipal Act* spring from the same set of background reports and are so "intimately connected" that, in dealing with them, the Commissioner is, in effect, responding to only one question.

[27] I disagree.

[28] The *Municipal Act* is not a statute that the Commissioner is responsible for administering. It has a broader reach. Questions respecting whether a council or committee properly exercised its discretion to hold a meeting in the absence of the public can arise in circumstances not associated with whether the record should be made public.

[29] In *London (City) v. R.S.J. Holdings Inc.*, [2007] 2 S.C.R. 588, the owner of land made the applications necessary for him to develop his property. In response, the City passed an interim control by-law putting in place a one-year freeze on development. The deliberations that led to the adoption of the by-law took place in two meetings of the council held in the absence of the public. The owner moved to quash the by-law for illegality (see: s. 273 of the *Municipal Act*). The substance of the application was that the City had contravened its general obligation to hold meetings in public. The Supreme Court of Canada confirmed the decision of the Court of Appeal ([2005] O.J. No. 5037) to grant the relief sought.

[30] Counsel for the Commissioner pointed out that there have been many occasions when decisions of the Commissioner have considered the joint application of s. 239(2)(c) of the *Municipal Act* and s. 6(1)(b) of the *MFIPPA*. This may be so, but it does not imply that the expertise of the Commissioner extends to the *Municipal Act* such that the applicable standard of review is reasonableness.

[31] In *Geranium Corporation v. (Ontario) Information and Privacy Commissioner*, 2007 CanLII 3219 (Div. Ct.), a developer sought access to a letter written to the municipality by an opponent to its project. The municipal council had approved the project, but the individual had appealed to the Ontario Municipal Board. The decision of the Commissioner determined that the letter should not be disclosed. It was information personal to its author (see: subsection 14(1) of the *MFIPPA*). The case required the Commissioner to consider sections of the *Planning Act* dealing with the obligation of the municipality to forward its record to the Board (see: *Planning Act*, R.S.O. 1990, c. P.13, subsections 17(29) and 17(42)). The developer sought judicial review. As has been found here, the parties there agreed that the standard of review in respect of the interpretation of the *MFIPPA* was reasonableness. However, in respect of the *Planning Act*, the Court found that the Commissioner was required to be correct.

[32] The *Planning Act* and the *Municipal Act* are statutes that may, at times, be considered by the office of the Privacy Commissioner. They are not that office's enabling statutes. Insofar as the Commissioner's interpretation and application of s. 239(2)(c) of the *Municipal Act* is concerned, the

applicable standard of review is correctness, as these are matters beyond the specialized expertise of the Commissioner.

(b) Did the Commissioner unreasonably conclude that the Exemption found in s. 6(1)(b) of the *MFIPPA* only Applied to Limited Portions of the Report?

[33] The Commissioner delegated to an Adjudicator the conduct of the inquiry and the preparation of the decision and order that responded to the appeal of Linda Landry. The Adjudicator considered the three questions identified in s. 6(1)(b) of the *MFIPPA*.

The First Question

[34] The answer to the first question was clear and not disputed by either of the parties to this application. The Adjudicator found there was a meeting.

The Second Question

[35] The Adjudicator concluded that, for the most part, s. 239(2)(c) of the *Municipal Act* did not apply to the meeting. This is the part of the decision which attracts correctness as the standard of review. The Adjudicator found that "City Council did not have the authority, under section 239(2)(c), to consider the subject matter of most of the report in a closed meeting." In arriving at this conclusion, the Adjudicator observed:

> ... the subject matter of most of the report does not deal with 'a proposed or pending acquisition or disposition of land by the municipality,' as required by section 239(2)(c). The bulk of the report contains background information and sets out other options (beyond the disposition of land) for addressing the appellant's request that the encroachment issues relating to her property be resolved.

[36] The Adjudicator relied only on the content of the report and not what was considered in the meeting to determine if all or part of the meeting was one that could be closed to the public. Given the content of the report, he concluded that only part of the meeting could be closed.

[37] I find the decision of the Adjudicator in this regard was not correct. The task before him was to determine whether there was statutory authority to hold the meeting in camera. In determining whether s. 239(2)(c) of the *Municipal Act* provided that authority, he was required to determine whether the purpose of the meeting was to deal with a disposition of land. The report gives some indication of whether the meeting was to deal with a disposition of land, but there were other indications as well.

[38] The difficulty is the Adjudicator used only the content of a report prepared in advance of the meeting. The report does not necessarily reflect what was discussed in the meeting. This is

underscored by the statements the lawyer made, before the decision to go in camera was taken, to the effect that his client wished to acquire land, obtain a licence or continue the encroachment. This suggested a meeting to examine the disposition of property in the context of other available options.

[39] The Adjudicator's determination was also made despite the Minutes of the General Committee. The Minute recording the decision to take the request of Linda Landry in camera does mention the report. This did nothing more than identify the item to be discussed. The Minute goes on to refer to the report as: "A Proposed or Pending Acquisition or Disposition of Land by the Municipality". This did not limit the meeting to what was in the report. This is made plain by the two Minutes which deal with the decisions made in the meeting. The first refers to the recommendation contained in the report, described as "respecting a property matter - potential property disposition", being approved. It does not outline the breadth of the discussion or what other material may have been referred to. The second does not refer to the report at all. It records a proposal that property be offered for sale. The proposal was rejected.

[40] These references to what took place in the meeting are consistent with the requirements of s. 239(2)(c) of the *Municipal Act*. They suggest that the meeting considered "a proposed ... disposition of land".

[41] The decision of the Adjudicator acknowledged that the City exercised its discretion in good faith. The Adjudicator had no reason to doubt the bona fides of the vote to consider the matter of the disposition of land in private. In the circumstances, subsection 239(2)(c) of the *Municipal Act* provided a statutory authorization for the meeting to be closed to the public.

[42] The error in the Adjudicator's analysis is underscored by a consideration of the practical implications of the decision made. The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.

The Third Question

[43] The answer to the third question, as considered by the Adjudicator, relied on the approach he took in dealing with the second question. He did not consider the entire report. He examined only if "those limited references in the report that address whether the City should dispose of the encroached-upon land to the appellant" should be disclosed. These are the same references on which he relied to determine which parts of the meeting could be closed. He found that release of those references would reveal the actual substance of the deliberations of the meeting. They are the only references he considered.

[44] If the Adjudicator had found that subsection 239(2)(c) of the *Municipal Act* provided a statutory authorization for the meeting to be closed to the public, he would have been required to consider whether any part of the report could have revealed the actual substance of the deliberations that took place in the meeting. Instead, he went forward based on an incorrect premise. There are large parts of the report he did not consider. In respect of the third question, the proper question was never asked.

[45] I find that the analysis undertaken by the Adjudicator was flawed. Nevertheless, when the report is considered as a whole, his conclusion that it should be released, with the exception of certain sentences dealing with the disposition of land, was within a range of reasonable, acceptable outcomes.

[46] There is very little in the report that reveals the actual substance of the deliberations of the meeting. In particular, I have turned my mind to the references in the report to an encroachment agreement, and I am satisfied that they do not reveal the substance of discussions concerning the disposition of land.

[47] Therefore, despite the flawed analysis of the Adjudicator, the decision concerning the application of s. 6(1)(b) to the report was a reasonable one.

[48] Finally, it should be noted that s. 6(2)(b) of the *MFIPPA* sets out an exception to the discretionary exemption in s. 6(1)(b). Under this exception, a municipality cannot refuse to disclose a record under s. 6(1)(b) if the subject-matter of the deliberations which apply to the record has been considered in a meeting that was open to the public. The participation of the lawyer in the meeting and correspondence delivered to him suggest the possibility that this exception could apply. The decision of the Adjudicator indicated that neither of the parties produced any evidence in support of this proposition. Consequently, it was determined that the exception raised by s. 6(2)(b) of the *MFIPPA* did not apply. In this court, the matter was raised but not pressed by either side.

(c) In reviewing the City's exercise of its discretion to refuse to disclose the report, was the jurisdiction of the Commissioner exceeded?

[49] Counsel for the City submitted that the Adjudicator exceeded his jurisdiction when, having found that the City acted in good faith in refusing access to the report, he ordered the City to "re-exercise its discretion" in respect of those parts of the report the decision did not order disclosed. Counsel went on to propose that the excess of jurisdiction was continued by the requirement that if the City, in its re-exercise of its discretion, determined not to release those parts of the report, it provide written reasons for its decision. These reasons would be subject to further review by the Adjudicator.

[50] The authority of the Commissioner to return matters to an institution for further consideration is referred to in the *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] S.C.J. No. 23 at para. 69 where the Court cited with approval comments made by the Commissioner:

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed

[51] The Court, at paragraph 71, described the scope of the Commissioner's reviewing authority, as follows:

> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for any improper purpose; the decision took into account irrelevant consideration; or, the decision failed to take into account relevant considerations.

[52] Thus, the Adjudicator had jurisdiction to return the issue of the exercise of discretion to the City for further consideration. The decision was a reasonable one, as the City's representations on the exercise of its discretion did not show that it considered relevant factors in refusing to disclose the exempt portions of the record, nor did it show that it considered the public and private interests in disclosure and non-disclosure. While the City argued that the Adjudicator has substituted its decision for that of the City, that is not the case.

CONCLUSION

[53] For the reasons reviewed herein, the application is dismissed. Counsel advised the court of their agreement that, regardless of the decision, there should be no costs.

LEDERER J.
FERRIER J.
SWINTON J.

Released: 20110316

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REASONS FOR JUDGMENT

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