Court File No.: 451/97
Date: February 6, 1998

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

FARLEY, MacDOUGALL and B. WRIGHT JJ.

IN THE MATTER OF the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

B E T W E E N:	)	
	)	
MINISTRY OF FINANCE	)	Sara Blake for the applicant
	)	
Applicant	)	
	)	William S. Challis for John Higgins, Inquiry
- and -	)	Officer
	)	
	)	Peter M. Jacobsen for John Doe, Requester
JOHN HIGGINS, INQUIRY OFFICER and JOHN DOE, REQUESTER	)	
	)	
Respondents	)	Heard: November 12, 1997

BLENUS WRIGHT J.:

[1] Under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ("*Act*") a journalist, in October, 1996, submitted a request to the Ministry of Finance for access to, "all documents on the economic, social and Ontario budget impacts of Quebec independence compiled since Jan. 1, 1995". The Ministry identified 11 records that responded to the request but denied access to them relying on exemptions found in ss. 13(1), 15(a) and 18(1)(d).

[2] On May 27, 1997, the respondent, John Higgins, an Inquiry Officer under the Act granted Order P-1398 ordering the Ministry to disclose Records 8, 9 and 11 in their entirety, and parts of Records 1, 2, 3, 4, 5, 6 and 7. The Ministry has disclosed Record 8 but refused to disclose the remaining Records. The Ministry applies for Judicial Review of that Order.

[3] The Inquiry Officer first determined whether the Records came within exemptions set out in ss. 13(1), 15(a) and 18(1)(d) of the Act.

Section 13(1) Advice or Recommendations

[4] The section states:

> 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.

[5] The Inquiry Officer decided:

> The Ministry submits that these records were prepared by public servants to advise the Minister of Finance on suggested courses of action which may be taken in respect of a wide range of issues relating to the possible independence of Quebec.
>
> I agree that the portions of Records 1, 6 and 7 identified by the Ministry, and Record 10 in its entirety, set out suggested courses of action to be accepted or rejected by their recipient during the deliberative process, and therefore qualify for exemption under section 13(1).

Section 15(a) Relations With Other Governments

[6] The section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > Prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[7] With respect to Records 1-7 and Record 9, the Inquiry Officer decided they were exempt under s. 15(a) because, "... if the records were disclosed, there would be a reasonable expectation of prejudice to intergovernmental relations between Ontario and Quebec". He further decided that Records 10 and 11 were not exempt under s. 15(a).

Section 18(1)(d) Economic or Other Interests

[8] The section states:

> A head may refuse to disclose a record that contains,
> information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

[9] The Inquiry Officer found that all the Records were exempt under s. 18(1)(d). In the event of Quebec independence or a "Yes" victory in a referendum on that subject he held that, "... if the records were disclosed, there would be a reason able expectation of injury to the ability of the Government of Ontario to manage the economy of Ontario".

[10] In summary, portions of Records 1, 6 and 7 and Record 10 in its entirety are exempt under s. 13(1). Records 1-7 and Record 9 are exempt under s. 15(a). All of the Records are exempt under s. 18(1)(d).

[11] The Inquiry Officer turned next to a consideration of the "public interest override" in s. 23 which states:

> An exemption from disclosure of a record under sections **13**, **15**, 17, **18**, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

[12] The Inquiry Officer concludes that there is a "compelling public interest" in disclosure of the Records. He stated:

> The possible consequences of Quebec independence, or a `Yes' victory in a referendum on that subject, have been a prominent feature of discussion and debate in the Canadian media and among members of the public for much of the past two decades. This debate has been characterized by strongly held views, often expressed in an impassioned way. Much of the discussion has focussed on the economic and legal difficulties which could result from Quebec independence, or a `Yes' vote, the potential for a diminished international presence for Canada, and a host of other significant consequences, many of which would clearly affect Ontario and its residents.
>
> In my view, this indicates `strong interest or attention' by the public, and I am therefore satisfied that there is a compelling public interest in disclosure of information about this subject. This compelling public interest relates to the need for informed public discussion.
>
> I am also satisfied that the records at issue are related to the compelling public interest I have just identified. I have reached this conclusion because, in the circumstances of this appeal, I believe that disclosure of the records would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard.

> Accordingly, I am satisfied that there is a compelling public interest in disclosure of the records at issue.

[13] The gist of his conclusion is: for the past two decades there has been public debate on Quebec independence which indicates a strong interest or attention by the public in the subject; and, therefore, the compelling public interest relates to the need for informed public discussion and the disclosure of the Records, "... would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard".

[14] Having decided that the Records should be disclosed because of a compelling public interest, the Inquiry Officer turned his mind to the question whether a compelling public interest in the disclosure of the Records "clearly outweighs" the purpose of the exemptions.

[15] With respect to the s.13(1) exemption, the Inquiry Officer said,

> ... While I recognize that the formulation of government policy in a confidential environment is also an important public policy concern, I have decided that this case represents an instance where this objective must yield to the public interest in disclosure. Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the records at issue are disclosed ...

[16] Considering the s.15(a) exemption, the Inquiry Officer decided:

> ... I recognize that protecting intergovernmental working relationships is also an important public policy concern. However, I have decided that this case represents an instance where this objective must yield to the public interest in disclosure. It is also clear that contacts between the governments of Quebec and Ontario will continue, of necessity, even if the records are disclosed ...

[17] When he applied the s. 18(1)(d) exemption the Inquiry Officer decided that parts of the Records which he highlighted were exempt from disclosure because public disclosure did not clearly outweigh the purpose of the exemption. As a result, parts of Records 1, 2, 3, 4, 5, 6 and 7 and Record 10 in its entirety are exempt from disclosure. His reasoning was:

> In my view, disclosure of the parts of the records which outline Ontario's strategic plans for dealing with a `Yes' victory, or with Quebec independence, would interfere with the government's ability to minimize any potential negative effects on the Ontario economy. I find this to be the case despite the fact that the records relate to the referendum held in October 1995, because I am satisfied that similar strategies would be used in relation to a future referendum. In my

view, the public interest in minimizing negative economic effects is more important than the importance of informed public discussion, and for this reason, I find that the compelling public interest in disclosure of the information I have just described above does not clearly outweigh the purpose of this exemption and section 23 does not apply to it.

Similarly, disclosure of detailed information in the records about the impact of a `Yes' victory, or Quebec independence, on particular sectors of the Ontario economy, would interfere with the government's ability to avoid negative economic effects, possibly even in advance of any referendum being held. Again, therefore, I find that the compelling public interest in disclosure of this information does not outweigh the purpose of this exemption and section 23 does not apply to it.

I have reached a different conclusion about those portions of the records which do not reveal such strategies or detailed information about affected sectors of the Ontario economy, but simply provide information about agreements and other economic relations between Ontario and Quebec and the impact of a `Yes' victory, or Quebec independence, on these relations. In weighing the compelling public interest in disclosure against the purpose of section 18(1)(d) with respect to such information, I have considered the Ministry's view expressed in its representations on this exemption, that disclosure of any of the information at issue would compromise the government's ability to maintain confidence in the Ontario economy. However, in my view, there is a distinction to be drawn between the information described in the last two paragraphs, to which I have not applied section 23, and the remaining information in the records.

In my view, confidentiality of information about the government's negotiating strategies or detailed information about the affected sectors of the Ontario economy is vital to the government's ability to protect the Ontario economy, and I have not applied section 23 to it for this reason. However, I have concluded that confidentiality of the remaining information is not as closely linked to achieving this important public interest. Therefore, in the circumstances of this appeal, and in view of the great importance of informed public discussion of this issue, I find that the compelling public interest in disclosure of the remaining information clearly outweighs the purpose of the section 18(1)(d) exemption.

Standard of Review

[18] In *Right to Life Association v. Metropolitan Toronto District Health Commission* (1991), 86 D.L.R. (4th) 441 (Ont. Div. Ct.), a steering committee submitted to the health council a proposal for the creation of a women's community health centre. This court upheld the Commissioner's decision refusing to disclose the names of the members of the steering committee. At p.444 the court stated:

> We are all of the view that the requested names of the individuals listed in the proposal are `personal information'. This is an interpretation of the statute which can be rationally supported.

[19] With specific reference to s. 23 of the *Act* the court commented:

> The applicant in argument dealt with s. 23 of the Act and submitted that the Commissioner erred in his application of that section. Section 23 of the Act states:
>
> 23. An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The Commissioner in dealing with this stated at p.185 of the Commissioner's record:

> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called `public interest override': there must be a compelling public interest in disclosure; and this compelling interest must *clearly* outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

The Commissioner had specifically addressed the fact that the record in question was a proposal which consists of an application of public funding and found:

> ... that the appellant has failed to demonstrate such a compelling public interest in disclosure of the personal information in the severed portions of the record which clearly outweighs the purpose of protecting personal privacy under section 21 of the *Act*.

He exercised his authority appropriately. He gave to the section the meaning that was intended thereby and we see no error in his application of the Act.

[20] I conclude from this case that the Commissioner must give an interpretation of the Act which can be rationally supported and give to a section of the Act a meaning that was intended by the section, otherwise, the court would find the interpretation to be incorrect.

[21] In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.), the majority decision of this court held that the Commissioner's decisions ought to be accorded "a strong measure of curial deference". Campbell J., writing for the majority, said:

> To the extent that information has become a commodity, the management of information by the commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.
>
> 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*, ... [[1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417], 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. Central to its task, and at the heart of its specialized expertise, is the commissioner's

> interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.
>
> 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.

[22] In this case a judge had acquitted an accused and stated that the four police officers involved in the case should be charged with fabricating evidence. A report of the Ontario Provincial Police exonerated the four police officers. The judge requested a copy of the report. The commissioner under the *Act* directed that the report be disclosed. On an application for Judicial Review this court quashed the commissioner's decision.

[23] Despite the court's statement that the commissioner's decision should be accorded "a strong measure of curial deference", the court in a majority decision held that the commissioner misinterpreted the *Act*. At pp. 783-784, Campbell J., for the majority, stated:

> ... The commissioner fundamentally misconstrued the scheme of the Act. His interpretation of the statute is one the legislation may not reasonably be considered to bear. In purporting to exercise a discretion in the form of a balancing exercise, he gave himself a power not granted by the legislation and thereby committed a jurisdictional error.

[24] While the commissioner had jurisdiction to determine whether the report should be disclosed, he misapplied sections of the *Act* to rebut the presumption of an unjustified invasion of personal privacy. Simply put, the commissioner misinterpreted the Act and gave an interpretation of the Act which could not be rationally supported, to use the language in *Right to Life*.

[25] Neither of the above decisions enunciate a standard of review of "correctness" or "patently unreasonable".

[26] However, our Court of Appeal has ruled that decisions made under the Act will be held to a standard of correctness. In *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.), the issue was whether certain records came within s. 10(1) of the *Act* which reads:

> 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

[27] The assistant commissioner decided that records in the possession of individual members of the Judicial Appointments Advisory Committee were records in the control of the Ministry of the

Attorney General. This court dismissed an application to quash that decision. Goudge J.A., in quashing the decision, commented on the standard of review at p. 618:

> In my opinion, the circumstances of this case require that the decision of the assistant commissioner be reviewed using the standard of correctness. The issue before the assistant commissioner was whether the documents in question were under the control of the Ministry. In other words, does s. 10(1) of the Act stretch to these records? That section is a jurisdiction-limiting one in the sense that records under the control of an institution are subject to the workings of the Act, both as to access and as to protection of privacy. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the commissioner or his designee. Moreover, the test found in s. 10(1), namely, `custody or control', is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the commissioner. Finally, the legislation has not seen fit to clothe the commissioner with the protection of any privative clause. Hence, using a pragmatic and functional approach, I conclude that the legislature did not intend the decision in issue here to be considered one within jurisdiction. Rather, it is one to be reviewed on the standard of correctness.

[28] There may be some question as to what was meant by the term "jurisdiction-limiting". There is no question that if the records did not come within s. 10(1) the assistant commissioner lacked jurisdiction to deal with them under the *Act*. However, the assistant commissioner had jurisdiction to determine whether the records came within s. 10. He had to make the correct decision. Since he did not, his decision was quashed.

[29] Of greater importance is the comment that, "... the test found in s. 10(1), namely, `custody or control', is not one requiring a specialized expertise to interpret". In my view there is a parallel between s. 10(1) and s. 23 of the *Act*. In my view an Inquiry Officer must correctly determine the test for a s. 23 override; this function requires no special expertise to interpret.

[30] This court made a somewhat contrary finding in a short endorsement in *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636, December 3, 1996, (Div. Ct.). The endorsement states:

> The interpretation and application of the various exemptions under the Freedom of Information Act as well as the public interest override in section 23 of the Act, lie at the heart of the Commissioner's specialized expertise and so the Commissioner's decisions in this regard are entitled to a high degree of curial deference. For this reason we rejected all arguments of the applicant save one without calling on the respondents. The respondents were called on to answer one

> question only, namely Did the Commissioner in deciding as to the existence of a compelling public interest take into account the public interest in protecting the confidentiality of the peer review process.
>
> After hearing the respondents we are satisfied that when the Commissioner stated at page 7 of his reasons `I am unable to accept Hydro's position that the results of the peer evaluation program should not be disclosed to the very public whose concerns about nuclear safety the program was designed to allay' that the Commissioner was addressing the argument of Hydro that disclosure of the peer review reports would severely compromise the reliability and frankness of future peer reviews. The Commissioner did consider but rejected the argument of Hydro.

[31] The view that the interpretation and application of the public interest override in s. 23 of the Act, "lie at the heart of the Commissioner's specialized expertise ..." would seem to me to be overly broad and generous. An Inquiry Officer has no special expertise to interpret the public override test.

[32] In order to get the flavour of the decision being upheld by this court it is necessary to go to the decision of Assistant Commissioner Mitchinson, Order P-1190, May 27, 1996. He ordered that the most recent peer evaluation report for each of the five nuclear plants operated by Hydro be disclosed. Dealing with the "compelling public interest" in disclosure, he stated at p. 7:

> It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standards. This simply does not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.

[33] He relied on a comment made by Commissioner Tom Wright in Order P-270. That order concerned the disclosure of agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee. At p. 7 he quoted from Commissioner Wright:

> ... In this appeal, disclosure of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.

[34] With respect to whether the compelling public interest in disclosure "clearly outweighs" the purpose for exemption he commented at p. 8:

> In my view, the potential economic and competitive interests of Hydro in pursuing partnership arrangements and contractual agreements are valid and consistent with the requirements for exemption under section 18(1)(c). I also accept that this exemption claim recognizes an inherent public interest in maintaining the ability for Hydro to negotiate the best possible deal in any partnership or contractual negotiations. However, in my view, when the monetary-based purposes of this exemption claim are balanced against the broad public interest in nuclear safety and public accountability for the operation of nuclear facilities, I find that these compelling public interests clearly outweigh the purpose of the section 18(1)(c) exemption, in the circumstances of this appeal.

[35] Although I question the one statement of this court, as noted above, I agree with the decision of the court in upholding the decision of Assistant Commissioner Mitchinson. The issue involved an important matter of public safety. There was a rational basis for the decision.

[36] In my view the same cannot be said for the Inquiry Officer's decision in this case. There is no rational basis to support his decision that there is a compelling public interest in the disclosure of the Records which clearly outweighs the purpose of the exemptions. Certainly there was no rational basis expressed by him in his decision, but rather an unsupported conclusion.

[37] The stark contrast between the two decisions points up the lack of any specialized expertise to interpret and apply s. 23 of the Act. Because the Inquiry Officer has no specialized expertise to interpret s. 23, the standard of review is correctness.

[38] I now turn to a discussion of the Inquiry Officer's decision.

Compelling Public Interest

[39] The word "compelling" has various dictionary meanings. I suggest that in the s. 23 context the plain meaning is: the public needs (in the sense it requires) to have the information in order to take some action or to use the information for their benefit. It is puzzling that the Inquiry Officer would use a secondary meaning of "compelling" as set forth in the Concise Oxford Dictionary, namely "rousing strong interest or attention or feeling of admiration" without justifying such use. That this is a secondary meaning is clearly illustrated when one reviews the definitions in the more definitive Oxford English Dictionary or The Shorter Oxford Dictionary.

[40] In a decision rendered December 5, 1989, (Order 128), Commissioner Sydney Linden held that the need for public debate, in and of itself, was not sufficient to outweigh the purpose of an exemption under s. 13(1) (advice and recommendations). At pp. 6 and 7 of his decision he stated:

> Clearly, one of the consequences, if not the purposes, of the Freedom of Information and Protection of Privacy Act, 1987 is to foster public awareness and discussion of issues by providing access to government-held records. It is also true that the existence of exemptions in the Act serve to deny the public some of the tools available to participate in these discussions, and it is for this reason that the Act contains the provision that `necessary exemptions from the right of access should be limited and specific'. However, in passing this Act, the Legislature acknowledged that certain types of records could or should be withheld from disclosure in order to protect legitimate interests of government, and certain exemptions were formulated and included in the Act. Having found that the records in this case do fall within the scope of one of these exemptions, subsection 13(1), I am not persuaded that the need for public debate, in and of itself, is sufficient to outweigh the purpose of this exemption. In my view, public debate may be restricted when access to government records is denied, but as long as the reasons for denying access fall within the scope of one of the Act's exemptions, such restrictions are not inconsistent with the principles of the legislation. (Emphasis added)

[41] In that case the request concerned information exchanged between the Ministry of Labour and the Workers' Compensation Board on the subject of Bill 162. At p. 4 of the decision the Commissioner sets out the purpose of s. 13(1):

> In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

[42] The Commissioner concluded:

> ... As stated earlier, to satisfy the requirements of section 23, the compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of a particular record in question (emphasis added). Your submission is record-specific, and even if it were not, I am not convinced that possible difficulties in effectively challenging the `broad rule making powers and legal powers of the Board' is sufficiently compelling so as to outweigh the need for the government to receive full and frank advice and recommendations from its employees.

[43] With respect to what the public would do with the information in the present case, the Inquiry Officer said that the information, "... would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard".

[44] However, the public in Ontario have had no political choices to make on Quebec independence as provided for in the last two referendums. It was only the public resident in Quebec who had the political choice to vote either "Yes" or "No" to "Quebec independence".

[45] How can there be a compelling public interest in disclosure of government information where the Ontario public has no real power to do anything with the information except to continue to discuss and debate the issues? There is no evidence that the general public needs or even wants the information contained in the Records. The public may have an interest in the question of Quebec independence but, there is no "compelling" public interest in the disclosure of these Records when "compelling" is given its more appropriate meaning.

[46] In my view the Inquiry Officer has failed to provide sufficient reasoning to support his decision that there is a "compelling" public interest in the disclosure of the Records.

[47] But, even if it is assumed that there is a compelling public interest in disclosure, has the Inquiry Officer shown that the compelling public interest in disclosure "clearly outweighs" the purpose of the exemptions?

"Clearly Outweighs"

[48] A close reading of the Inquiry Officer's decision reveals that he places significantly more emphasis on the "compelling public interest" and, in my view, does not properly balance that interest with the purpose of the exemptions and, gives little weight to the word "clearly" in "clearly outweighs".

[49] For example, in dealing with the s. 13(1) exemption he said, "Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the records at issue are disclosed". As true as that statement may be, if the current Records are to be disclosed, then the continuing formulation of government policy on Quebec independence will fall into the same category and be required to be disclosed. The Inquiry Officer did not consider whether such disclosure might place a damper on the advice and recommendations sought by government including research and papers prepared. The government may be circumspect in the type of information it requests and perhaps leery of having too much information produced in written form because of the possibility that the information would have to be disclosed. One may also question that a logical extension of the Inquiry Officer's reasoning would be that to overcome the public interest override, the government would have to demonstrate that disclosure would compel it to cease seeking advice.

[50] The Inquiry Officer made a similar statement in relation to the s. 15(a) exemption. He stated, "It is also clear that the contacts between the governments of Quebec and Ontario will continue, of necessity, even if the records are disclosed". Again, as true as that statement may be, the Inquiry Officer did not address the distinct disadvantage to Ontario in its future contacts and negotiations with Quebec if Ontario's confidential information is disclosed. The Quebec government would have knowledge of Ontario's positions on various issues but Ontario would not have similar information from Quebec. The Inquiry Officer has failed to consider the possible prejudice to the conduct of

intergovernmental relations by the Government of Ontario which is the very purpose of the s. 15(a) exemption. Neither has the Inquiry Officer considered the broader implications of the information being disseminated across Canada. It can be assumed that the Government of Ontario and the governments of the other provinces of Canada, along with the Federal Government, do not wish to see Quebec separate from Canada. In fact, the Provincial and Federal Governments appear to be discussing ways to keep Quebec in Canada without the necessity of future referendums. It can also be assumed that these discussions are very sensitive with research and documents being prepared by the Provincial and Federal Governments.

[51] Should all that information which finds its way into Ontario material be made public? The Inquiry Officer has given little thought to the political repercussions of his decision. If the requested information is disclosed to the media, the Ontario Government views would be disseminated across Canada. How would that information be used in Quebec by either the "Yes" or "No" sides? How would that information be used by other Provincial Governments and the Federal Government? Could the information harm the seeking of a consensus between governments outside of Quebec to find a way to keep Quebec in Canada?

[52] As for the s. 18(1)(d) exemption, the Inquiry Officer appears to have concluded that Ontario's ability to manage the economy would be impaired by the revelation of some of the material. However, as to the rest, he concludes without explanation that some should be disclosed without seeing if the balance falls clearly in favour of a compelling public interest.

[53] The *Act* clearly establishes that certain confidential and sensitive information is exempt from disclosure, unless there is a compelling public interest in disclosure which clearly outweighs the purpose for the exemptions.

[54] In reference to Records 1-7 and Record 9 the Inquiry Officer stated:

> ... my assessment is that if the records were disclosed, there would be a reasonable expectation of prejudice to intergovernmental relations between Ontario and Quebec.

[55] Dealing with all of the Records he said:

> I am satisfied that disclosure of any of the records at issue could reasonably be expected to be injurious to the ability of the government to manage the economy of Ontario, in the event of Quebec independence or a `Yes' victory in a referendum on that subject.

[56] I have difficulty rationalizing those strong statements for exempting the Records from disclosure with his weak and unconvincing reasons which he provides for his decision that the compelling public interest "clearly outweighs" the purpose for the exemptions. In my view the Inquiry Officer has failed to provide appropriate reasons why the compelling public interest "clearly outweighs" the purpose of the exemptions.

[57] The Inquiry Officer was clearly wrong in ordering disclosure. If the standard of review is not correctness, on the facts of this case the decision is patently unreasonable. There is a public interest in the general topic of Quebec independence but there is no "compelling public interest" which warrants disclosure of the information contained in these government records. Furthermore, there is no compelling public interest in disclosure which "clearly outweighs" the purpose of the exemptions. Order P-1398 made May 27, 1997 is quashed without costs.

B. WRIGHT J.
I agree. — FARLEY J.

MacDOUGALL, J. (dissenting):

Background Facts:

[58] The Minister of Finance brings this Application to quash the order of Inquiry Officer John Higgins ("Inquiry Officer") made May 27th, 1997 ("the Order") under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("the Act").

[59] On October 3rd, 1996 the Requester, a journalist, submitted a request to the Applicant Ministry of Finance for access to "all documents on the economic, social and Ontario budget impacts of Quebec independence compiled since January 1st, 1995". The Ministry identified 11 records (referred to individually as records number 1 through 11) that responded to the request. The Ministry denied access to these records relying on the exemptions contained in sections 13(1) (advice to government), 15(a) (relations with other governments) and 18(1) (d) (economic interests of Ontario) of the Act.

[60] Subsequently, the Ministry indicated it would disclose record 8 to the Requester. The ten remaining records, as summarized by the Inquiry Officer, consisted of analytical summaries of agreements and other relations between the government of Ontario and Quebec and the respective communities, a paper on the possible economic consequences of Quebec independence, a summary of possible models for division of Canada's national debt, and a paper setting out strategies for relations with Ontario's creditors in the event of Quebec independence.

[61] The Requester appealed the Ministry's decision to the Ontario Information and Privacy Commission.

[62] In the Ministry's representation to the Inquiry Officer the Ministry requested that the Inquiry Officer issue,

> an order of a few words, in couched language, so that neither the index [of records] nor information about the substance of the records is released through a public vehicle.

[63] The Inquiry Officer noted in his order that the Ministry's representations were detailed and that he had not elaborated on them in order to avoid disclosing the contents of the records.

[64] With respect to portions of records 1, 6 and 7 and record 10 in its entirety, the Inquiry Officer accepted the Ministry's submission that they qualified for exemption under s. 13(1) of the Act. This section gives the head of an institution a discretion to refuse to disclose a record where this would reveal the advice or recommendations of a person employed in the service of an institution.

[65] With respect to records 1 to 7 and record 9 the Inquiry Officer held that disclosure of those records could reasonably be expected to prejudice the Ontario government's position in negotiations between Ontario and Quebec in the event of a "Yes" victory over Quebec's independence and that this in turn could reasonably be expected to prejudice inter-governmental relations between Ontario and Quebec. The Inquiry Officer agreed with the head of the institution's decision that these records were found to qualify for exemption under s. 15(a). This section allows a head the discretion to refuse to disclose a record where the disclosure could reasonably be expected to prejudice the conduct of inter-governmental relations by the government of Ontario or an institution.

[66] With respect to record 10 concerning relations between Ontario and its investors, and record 11 concerning possible relations between the governments of Quebec and Canada, the Inquiry Officer found that neither of these records were sufficiently linked to relations between the government of Ontario and another government so that their disclosure could reasonably be expected to prejudice the conduct of such relations and therefore the s. 15(a) exemption did not apply.

[67] Under the provisions of s. 18(1)(d) the Inquiry Officer found that all of the records at issue in the appeal qualified for the exemption under this section. Under this section a head may refuse to disclose a record that contains information where the disclosure could reasonably be expected to be injurious to the financial interests of the government of Ontario or the ability of the government of Ontario to manage the economy of Ontario.

[68] The Inquiry Officer then went on to consider the effect of the section 23, "public override" provision. Section 23 of the Act provides that exemptions under sections 13, 15 and 18 do not apply, "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption".

[69] The Inquiry Officer described in his reasons the test which must be met to evoke the s. 23 "public override":

> An analysis of s. 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a compelling public interest in disclosure, and (2) this compelling public interest must clearly outweigh the purpose of the exemption. If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply.
>
> Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests must yield on occasion to the public interest in access to information which has been requested.

> An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

[70] The Inquiry Officer then conducted an independent review of the records and concluded that there was a "compelling public interest" in their disclosure. He stated:

> The possible consequences of Quebec independence, or a "Yes" victory in a referendum on that subject, have been a prominent feature of discussion and debate in the Canadian media and among members of the public for much of the past two decades. This debate has been characterized by strongly held views, often expressed in an impassioned way. Much of the discussion has focused on the economic and legal difficulties which could result from Quebec independence, or a "Yes" vote, the potential for a diminished international presence for Canada, and a host of other significant consequences, many of which would clearly affect Ontario and its residents.
>
> In my view, this indicates "strong interest or attention" by the public, and I am therefore satisfied that there is a compelling public interest in disclosure of information about this subject. This compelling public interest relates to the need for informed public discussion.
>
> I am also satisfied that the records at issue are related to the compelling public interest I have just identified. I have reached this conclusion because, in the circumstances of this appeal, I believe that disclosure of the records would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard.
>
> Accordingly, I am satisfied that there is a compelling public interest in disclosure of the records at issue.
> ...
>
> The possibility of a "Yes" vote, or the independence of Quebec, is a political issue of virtually unprecedented importance in the history of the Canadian nation, and has a significant potential impact on the people of Ontario. In my view, the need for informed public discussion of this issue is a very important consideration, and for this reason the public interest in disclosure is very compelling. (Emphasis added.)

Standard of Judicial Review

[71] The Ministry submits that the appropriate standard of review in this case is "correctness". The Respondents submit that the proper test is that the court should only interfere with the decision of the Inquiry Officer as it relates to the public interest override if the decision was patently unreasonable or clearly wrong.

[72] In the Supreme Court of Canada case, *Pezim v. B.C. (Superintendent of Brokers)*, 114 D.L.R. (4th) 385, Iacobucci, J. at 404, in discussing the principles of judicial review, stated:

> From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering the question the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance is whether or not the question goes to the jurisdiction of the tribunal involved.

[73] Iacobucci, J., in discussing the spectrum ranging from the standard of reasonableness to that of correctness stated:

> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a decision of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights.

[74] In the *Pezim* case the court was dealing with the provincial *British Columbia Securities Act*. In reviewing the "where it considers it to be in the public interest", the court stated:

> ... even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.
>
> In my view, the pragmatic or functional approach articulated in *Bibeault* is also helpful in determining the standard of review

> applicable in this case. At p. 1088 of that decision, Beetz, J, writing for the court, stated the following:
>
> > ... the court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reasons for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

[75] After reviewing the provisions of the *British Columbia Securities Act*, particularly the provisions dealing with the Commission's "public interest mandate", Iacobucci, J. stated:

> In reading these powerful provisions, it is clear it was the Legislature's intention to give the Commission a very broad discretion to determine what is in the public interest. To me this is an additional basis for judicial deference.

[76] Iacobucci, J. continued:

> Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law. In the case at bar, the Commission's primary role is to administer and apply the *Securities Act*. Thus, this is an additional basis for deference ... Thus, on precedent, principle and policy, I conclude as a general proposition that the decisions of the Commission, falling within its expertise warrant judicial deference.

[77] There have been a number of cases where this court has commented on the standard of review of the Privacy Commissioner's decision under the *Freedom of Information and Protection of Privacy Act*. These cases have been helpfully summarized in 18 Adv Q. 427 by G. Fahey and D. Goodis.

[78] In the case of *Right to Life Assn. of Toronto and Area v. Metropolitan Toronto District Health Council* (1991), 86 D.L.R. (4th) 441 (Div. Ct.) the issue before the court was whether the Commissioner erred in finding that a list of names of persons in a record was "personal information" within the meaning of s. 2(1) of the *Provincial Act*. In considering the scope of review of the Commissioner's decision, Callaghan, C.J.O.C. adopted the oft-quoted passage from the judgment of Dickson, J. in *S.E.I.U., Local 33 v. Nipawin District Staff Nurses Assn.* (1991), 86 D.L.R. (4th) 444:

> There can be no doubt that a statutory tribunal cannot with impunity ignore the requisites of its constituent statute and decide questions any way it sees fit. If it does so it acts beyond the ambit of its powers, fails to discharge its public duty and departs from legally permissible conduct. Judicial intervention is then not only permissible but

> requisite in the public interest. *But if the Board acts in good faith and its decision can be rationally supported on a construction which the relevant legislation may reasonably be considered to bear, then the court will not intervene*.

[79] The court went on to consider whether the Commission's interpretation of "personal information" in s. 2(1) was a "construction and interpretation which may reasonably be considered to bear", and concluded that it was.

[80] It was argued by the Applicant in that case that the Commissioner erred in his application of s. 23.

[81] The court noted that the Commissioner set out the two requirements in s. 23 that there must be a compelling public interest in disclosure, and this compelling interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the record in question.

[82] The court made only a very brief referral to the Commissioner's finding. The court stated:

> The Commissioner had specifically addressed the fact that the record in question was a proposal which consists of an application of public funding and found:
>
> ... that the appellant has failed to demonstrate such a compelling public interest in disclosure of the personal information in the several portions of the record which clearly outweigh the purpose of protecting personal privacy under the section of the Act.

[83] The court further stated:

> He exercised his authority appropriately. He gave to the section the meaning that was intended thereby and we see no error in his application of the Act.

[84] In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, the court considered the Commissioner's interpretation and application of the law enforcement exemption in the Act. The issue was whether the Commissioner had erred in finding that a record was not a "law enforcement report" for the purpose of s. 14(2)(a) of the *Provincial Act*. In reviewing the appropriate standard of review the court adopted the statement of Callaghan, C.J.O.C. in the *Right to Life Assn.* case where the court refused to interfere with the decision of the Commissioner where the decision could be rationally supported on a construction which the relevant legislation may reasonably bear. The court concluded that the Commission is a specialized and expert tribunal with respect to decisions interpreting the exemptions from the right of access:

> The Commissioner has accumulated a great deal of experience and expertise in interpreting and applying the Act and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. Specifically, he has accumulated experience and expertise in balancing three competing interests; public access to information; individuals' right to protection of privacy in respect to personal information held by government; and the government's interest in confidentiality of government records. In this regard, the Commissioner has received over 1,500 appeals under the Act in the past three years, and over 800 appeals under the *Municipal Freedom of Information and Protection of Privacy Act* in the past two years. Further, the Commissioner has issued over 530 orders to date (432 under the Act and 105 orders under the Municipal Act) and, accordingly, has developed a body of jurisprudence that guides it and functions as a precedent.
>
> We conclude that the proper test is curial deference to those decisions which lie within the Commissioner's area of expertise. Thus, a distinction can be made between decisions of the Commissioner relating to such matters as constitutional interpretation, to which no deference would be appropriate, and decisions interpreting the exemptions provided for by the Act which are squarely within his specialized area of expertise, to which curial deference is appropriate.

[85] The court concluded that the interpretation of s. 14(2)(a) of the Act was within the specialized expertise of the Privacy Commissioner and that his interpretation was one that the section could reasonably bear.

[86] In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Ont. Div. Ct.), the issue before the court was whether the Commissioner erred in interpreting the personal privacy exemption provision. The court analyzed decisions of the Supreme Court of Canada, including *Canada (Attorney-General) v. Mossop* (1993), 100 D.L.R. (4th) 658, [1993] 1 S.C.R. 554. In the *Mossop* decision the court was considering a decision of a tribunal appointed under the *Canadian Human Rights Act* (C.H.R.A.) which issued a decision interpreting the term "family status" in s. 3 of that Act. LaForest, J., in discussing the nature of C.H.R.A. tribunal's expertise stated:

> The superior expertise of the Human Rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They

> must, therefore, review the tribunal's decision on questions of this kind on the basis of correctness, not on a standard of reasonability.

[87] In discussing the *Mossop* case, the court in *John Doe v. Ontario* distinguished the function and duties of the Privacy Commissioner from that of the CHRA.

> The Information and Privacy Commissioner, unlike the ad hoc tribunal established by the CHRA to decide a single dispute, is appointed as an officer of the legislature by the Lieutenant Governor in Council on the address of the Assembly for a five-year term, and is prohibited from holding any other offices during that term. The commissioner has staff, including assistant commissioners, mediators and other officers who assist the commissioner in performing his functions and duties under the Act (ss. 4(3), (4), 5(1) and 8(1)).
>
> Although the commissioner deals to some extent with basic social values, they are not as basic as the values at stake in human rights legislation where the statutory questions are often the same *Canadian Charter of Rights and Freedoms* questions in which courts have developed expertise and need not defer to other tribunals.
>
> Under the Act, unlike the CHRA, the adjudicative function is performed by the same person who administers the specialized area of regulatory activity. Such adjudicative function, again unlike the CHRA, is integral to the supervision of its specialized area of regulatory activity. The commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4 and 50).
>
> Unlike the tribunal under the CHRA, 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.

[88] In the *John Doe* case the appellant had submitted to the court that the *Right to Life* case was no longer good law because of the Supreme Court of Canada case of *Canada (Attorney General) v. Mossop*. The court in *John Doe* proceeded to cite the decision of Callaghan, C.J.O.C. and stated:

> The Divisional Court will ordinarily follow its previous judgements, unless they have been overruled by a higher authority. We are of the view that Right to Life has not been overruled.

[89] The court drew an analogy between the Commissioner's role and that of other specialized tribunals. The court determined that:

> "To the extent that information has become a commodity, the management of information by the commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.
>
> 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 936, supra*, the commission is a special 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. Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.
>
> 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."

[90] This standard of deferring to the Commissioner's interpretation and application of its statute, in particular the interpretation of the exemptions from the right of access, so long as the construction is one that the statute can reasonably bear has been consistently applied by the courts. In several other cases the courts have upheld the Commissioner's interpretation and application of various other provisions of the Act. These include the **definition of personal information**, in *Toronto (City) v. Hale, Inquiry Officer*, Toronto Doc. 743/92 (October 25, 1994, Ont. Div. Ct.), **the exemptions for personal privacy**, in *Ministry of Government Services v. Ontario (Mitchinson, Assistant Information & Privacy Commissioner)* Toronto Doc. 839329 (February 11, 1994, Ont. Div. Ct.), **the exemptions for cabinet records**, in *Ontario (Minister of Consumer & Commercial Relations) v. Fineberg*, (December 21, 1995, Ont. Div. Ct.) leave to appeal refused [1996] O.J. No. 1838 (C.A.), **advice and recommendations**, in *Ontario Human Rights Commission v. Ontario*, unreported, Toronto Doc. 721/92 (March 25, 1994, Ont. Div. Ct.), **law enforcement**, in *Ontario (Attorney General) v. Ontario (Information & Privacy Comm. Inquiry Officer)* (1994), 116 D.L.R. (4th) 498, 19 O.R. (3d) 197, 73 O.A.C. 311 *sum nom. Ontario (Attorney General) v. Fineberg* (Div. Ct.), leave to appeal refused September 12, 1994, **solicitor-client privilege**, in *Ontario (Minister of Consumer & Commercial Relations) v. Fineberg, supra*, and **danger to safety or health**, in *Toronto (City) v. Ontario (Information and Privacy Commissioner)* (1995), 86 O.A.C. 368 (Div. Ct.).

[91] The Ontario Court of Appeal recently reviewed the standard of review in a judicial review of a decision of the Ontario Privacy Commissioner in *Walmsley v. Ontario (Attorney-General)* 34 O.R. (3d) 611 (Ont. C.A.). This case dealt with a request for access to records relative to the appointment of a specific individual as a judge of the Ontario Court (Provincial Divisions). The issue was whether the documents that were in the personal possession of individual members of the Judicial Appointments Advisory Committee were under the control of the Ministry of the Attorney General for the purposes of s. 10(1) of the Act. The Commissioner had found that they were.

[92] The Court of Appeal, in deciding whether s. 10(1) of the Act stretched to the documents in question, determined that s. 10(1)

> ... is a jurisdiction-limiting one in the sense that records under the control of an institution are subject to the workings of the Act, both as to access and as to protection of privacy. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the commissioner or his designee. Moreover, the test found in s. 10(1), namely, "custody or control", is not one requiring a specialized expertise to interpret.

[93] The court, after referring to the statement of Iacobucci, J. in *Pezim*, found that,

> ... the circumstances of this case require that the decision of the assistant commissioner be reviewed using the standard of correctness.

[94] The court went on to say:

> By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the commissioner.

[95] In summary therefore, it appears clear that a court reviewing the Commission's decisions in considering the applicability of the exceptions under ss. 13(1), 15(a) and 18(1)(d) of the Act should exercise a strong measure of curial deference.

[96] Should this same curial deference apply to the exercise of the Commissioner's duty in considering the public override provisions in section 23? In other words, does this aspect of the Commissioner's duty fall within a different category than the Commissioner's consideration of the exemption provisions?

[97] Returning to the "pragmatic or functional approach" adopted by Iacobucci, J.A.C. in *Pezim*, in considering this question the court should examine: (1) the wording of the enactment conferring jurisdiction on the administrative tribunal; (2) the purpose of the statute creating the tribunal; (3) the reason for its existence; (4) the area of expertise of its members; and (5) the nature of the problem before the tribunal.

(1) <u>The Wording of the Enactment Conferring Jurisdiction on the Commission:</u>

[98] With respect to the context of this case, in setting out the purposes of the Act s. 1 provides that the Act is a) to provide a right of access to information under the control of institutions in accordance with the principle that,

> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) government information should be reviewed independently of government;

[99] S. 50 of the Act provides that any person who has made a request for access to a record may appeal any decision of a head to the Commissioner. The Commissioner is then required to conduct an inquiry to review the head's decision (s. 52). After all of the evidence for an inquiry has been received, the Commissioner is required to make an order disposing of the issues raised by the appeal (s. 54). The Commissioner is entitled to make an order that "may contain any terms and conditions the Commissioner considers appropriate". (s. 54(3)). The commissioner under s. 59 has broad powers to order an institution to cease collection practises and destroy collections of personal information that contravene this Act (s. 59(b)) and in appropriate circumstances, authorize the collection of personal information otherwise and directly from the individual (s. 59(c)); engage in or commission research into matters affecting the carrying out of the purposes of this Act s. 59(d));

conduct public education programs and provide information concerning this Act and the Commissioner's role and activities (s. 59(e)) and; receive representations from the public concerning the operation of this Act (s. 59(f)).

[100] Section 70 provides that the Act binds the Crown.

(2) <u>The Purpose of the Statute Creating the Commission:</u>

[101] As stated above, s. (1) of the Act specifically sets out the purposes of the Act:

> (1) The purpose of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government;

[102] The public's entitlement to access to information in the hands of the government, subject to specific limitations, has recently been commented upon by the Supreme Court with reference to the *Federal Access to Information Act* (A-1). The federal legislation describes the purpose of that Act in terms very similar to the Ontario Act. In *Dagg v. Canada (Minister of Finance)* [1997], 2 S.C.R. 403 at p. 432 LaForest, J. stated:

> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that government them; see David J. Mullan, "Access to Information and Rule Making", and John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1991), at p. 54.
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians

and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965) *31 Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

> Parliament and the public cannot hope to call the government to account with an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view ...

Access laws operate on the premises that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-179:

> There are not two stores of politically-relevant information, a larger one shared by the professionals, the whole time leaders and persuaders, and such smaller one shared by ordinary citizens. No leader or persuader possesses more than a small amount of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [emphasis in original]

Rights to state-held information are designed to improve the workings of government; to make it more effective, responsible and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to regard the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

(3) <u>The Reason for the Commissioner's Existence:</u>

[103] The court in *Ontario (Solicitor-General) v. Ontario (Assistant Information and Privacy Commissioner)* 102 D.L.R. (4th) 602 (Ont. Div. Ct.) helpfully summarized the reason for the Commissioner's existence:

> The *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, contains a comprehensive scheme governing access to

> information held by government institutions and assuring the protection of the privacy of individuals with respect to personal information held by the government in the Province of Ontario.
> ...
>
> Section 10 of the Act makes clear that every person has a right of access to government-held records unless the record or part of the record falls within one of the exemptions set out under ss. 12 through 22. These exemptions are intended by the legislature to protect certain defined interests. The exemptions to the right of disclosure include such matters as Cabinet records (s. 12), law enforcement (s. 14), trade secrets and other confidential third party information (s. 17), and personal privacy (s. 21). Certain of these exemptions are discretionary (i.e., the law enforcement exemption in s. 14), which means that even if the requirements of the exemption are satisfied, the government is nevertheless required to exercise its discretion as to whether or not the record should be released. Other exemptions (i.e., s. 21 - personal privacy) are mandatory. Further, even if one of the exemptions is applied, the government must disclose as much of the record as can be reasonably severed without disclosing the information that falls under one of the exemptions (s. 10).
>
> In short, the task of the commissioner is to perform a balancing act between the individual's right to privacy and the public's right to know. The task is a permanent one.

(4) <u>The Area of Expertise of its Members:</u>

[104] The Commissioner's primary "day-to-day" responsibilities in the area of requests for information is to weigh the competing interests of the public's right to access to information and the government's interest in confidentiality of government records. Before considering the public override provision, the balancing process requires the Commissioner to begin with the premise of the Act that the public has a right to government information unless one of the exemptions apply. For example, under s. 15 the Commissioner would weigh the public's right to know against whether the disclosure could reasonably be expected to prejudice the conduct of inter-governmental relations by the government of Ontario or an institution. Under s. 14 the weighing is between the public's right to know and whether the disclosure could reasonably be expected to interfere with law enforcement matters. Under s. 15 the weighing is between the public's right to know and whether the disclosure could reasonably be expected to prejudice the defence of Canada or any foreign state, allied or associated with Canada, or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism. Under s. 18(1)(a), the weighing is between the public's right to know against a record that contains trade secrets or financial, commercial, scientific or technical information that belongs to the government of Ontario or an institution that has monetary value or potential monetary value, or a weighing where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution, or

whether disclosure could reasonably be expected to be injurious to the financial interests of the government of Ontario or the ability of the government of Ontario to manage the economy of Ontario. Under s. 20 the weighing is between the public's right to know against whether the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[105] If after determining that the public's right to know is "out-balanced" by the exemptions, the Commissioner is then required to determine if there is a compelling public interest to release the information to the public which clearly outweighs the purpose of the exemption.

(5) The Nature of the Problem Before the Court:

[106] The problem before the court is the decision of the Inquiry Officer to apply the s. 23 override provision of the Act and order disclosure of certain records he found to be otherwise exempt from disclosure. In other words, the Inquiry Officer found that there was a compelling public interest in disclosing certain records that clearly outweighed the purposes of the exemptions that he agreed applied to the records.

[107] The courts have previously commented on the s. 23 public override review required by the Commissioner.

[108] In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.) at p. 783 the court stated:

> Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core functions of information management.

[109] In *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.); leave to. appeal refused [1997] O.J. No. 694 (C.A.), the court stated:

> "The interpretation and application of the various exemptions under the *Freedom of Information Act, as well as the public interest override in section 23 of the Act*, lie at the heart of the Commissioner's specialized expertise and so the Commissioner's decisions in this regard are entitled to a high degree of curial deference. (emphasis added).

[110] In applying the pragmatic or functional approach, I am satisfied that the Commissioner has been given a broad discretion to continually weigh the public's right to obtain information in the government's hands against the need for the government's ability to operate effectively in developing policy in a confidential environment and to protect the valuable working relationship with intergovernmental contacts and to protect Ontario's economic security. The Commissioner, in performing the necessary weighing of opposing interests, is required in two other sections of the Act to consider the "public interest". In s. 11 there is a mandatory provision for disclosure if there are

reasonable and probable grounds to believe that it is in the public interest to do so and the record reveals a grave environmental, health or safety hazard to the public.

[111] Under s. 17(1)(b) there is a mandatory refusal requirement to disclose a record from a third party after taking into account "the public interest".

[112] In my opinion, the balancing exercise required by s. 23 is a similar exercise although it requires the application of a much higher standard.

[113] The criteria to be applied in s. 23, however, does not affect the standard of review to be applied. The balancing exercise required by s. 23, although employing a much a higher standard, involves the same opposing interests.

[114] As this case turns on a question of interpretation of the governing statute and falls squarely within the area of expertise of the Commission it is my opinion that the appellate court should give curial deference to the opinion of the Inquiry Officer on the issue before it.

[115] The appropriate standard to apply, therefore, is not whether the Inquiry Officer was correct, but whether his interpretation and application of s. 23 is one which the section can reasonably bear.

Did the Inquiry Officer reasonably interpret and apply s. 23 by ordering disclosure of certain records and portions of other records otherwise found exempt under s. 13(1), 15(a) and 18(1)(d) of the Act?

[116] The first consideration is to review the Inquiry Officer's finding that there was a compelling public interest in disclosure of the records.

[117] The Inquiry Officer applied the Oxford Dictionary definition of "compelling" as meaning "rousing strong interest or attention" from an earlier decision in Order P-984. In Order P-984/August 28, 1995, the Inquiry Officer who decided that matter stated at p. 4:

> One of the principle purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.
>
> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to

> make effective 'use of the means of expressing public opinion or to make political choices.

[118] The Ministry submits that the Inquiry Officer should have used the definition for the verb "to compel" which is defined as - "to constrain, force, drive forcibly" - rather than the adjectival definition for "compelling" defined as - "raising strong interest or attention".

[119] In my view, the Inquiry Officer's definition of the modifying word "compelling" before the words "public interest" is reasonable. The level of public interest to be found would, in this interpretation, be similar to the use of the modifying word compelling in describing "compelling evidence". That is, "strong" or "weighty" or "very cogent evidence".

[120] It cannot, in my opinion, be said that the definition applied by the Inquiry Officer in determining the meaning of "a compelling public interest" is unreasonable or incorrect.

[121] The Ministry further submits that the Inquiry Officer adopted too low a threshold test for identifying a "compelling public interest". The Ministry submits that "the need for informed public debate" is insufficient to meet the test for a "compelling" public interest.

[122] In considering whether there was a compelling public interest shown by the public in releasing the information, the Inquiry Officer took note of the fact that,

> Possible consequences of separation or a "Yes" victory in a referendum has been a prominent feature of discussion and debate in the Canadian media and the public for much of the past two decades.

[123] He also adopted the Ministry's submissions that,

> The breakup of a country like Canada would be an unprecedented event and there is no historical example for predicting the economic consequences of same.

[124] The Inquiry Officer considered the "need for informed public debate" in the context of the issue. The issue was the economic, social and Ontario budget impacts of a "Yes" vote in the Quebec referendum or Quebec separation. The Inquiry Officer noted that, as previously stated, this was a,

> ... political issue of virtually unprecedented importance in the history of the Canadian nation and has a significant potential impact on the people of Ontario.

[125] The Inquiry Officer then went on to find that,

> The need for informed public discussion of this issue is a very important consideration, and for this reason the public interest in disclosure is very compelling.

[126] The statement of LaForest, J. in *Dagg v. Canada (Minister of Finance)* referred to earlier, bears repeating in this context:

> The overarching purpose of access to information legislation then is to facilitate democracy it does so in two related ways. It helps to ensure first that citizens have the information required to participate meaningfully in the democratic process, and secondly that politicians and bureaucrats remain accountable to the citizenry.

[127] The Canadian author and philosopher John Ralston Saul in his recent book Reflections of a Siamese Twin - Canada at the End of the 20th Century (1997) (Viking Publication) at p. 460 makes a similar comment:

> The primary consideration is that in a democracy legitimacy lies with the citizenry. That is what makes a democracy superior to other forms of social organization and the process which leads to important decisions is not simply supposed to include the citizen, it is supposed to use the intelligence of the society which lies within the legitimacy of the citizen in order to minimize the chances of making major mistakes. That is the primary characteristic of a democracy. That use of the citizenry's intelligence is what differentiates a democracy from the various sorts of dictatorships, whether direct and brutal or sophisticated and managerial in the corporatist's mode.

[128] I also note that, coincidentally, several days after the court heard submissions, the Government of Ontario ran a series of prominent newspaper advertisements with large, bold headlines, stating: "IF YOU WANT TO BE HEARD YOU HAVE TO SPEAK UP". The advertisement stated,

> Nine Premiers and two territorial leaders recently met in Calgary and set out some thoughts for discussion on Canadian values and on strengthening Canadian Unity.

[129] The "Calgary Frameworks" for discussion was then summarized. The advertisement then stated:

> This is your opportunity to have your say on Canadian unity - on Ontario's role in Canada's future as a nation.

[130] Within days householders in Ontario received a questionnaire entitled "ONTARIO SPEAKS - A DIALOGUE ON CANADIAN UNITY". The questionnaire asked citizens of Ontario for "their ideas, opinions and input into the national unity question to help the Ontario government develop its policy on this issue".

[131] This is a noteworthy example of the importance of the citizens' participation in setting government policy and the related necessity for information to be available to the public, subject only to certain limited exemptions.

[132] In considering whether there was a compelling public interest in the disclosure of the records, the Inquiry Officer set out his reasoning as follows:

> The possible consequences of Quebec independence, or a "Yes" victory in a referendum on that subject, have been a prominent feature of discussion and debate in the Canadian media and among members of the public for much of the past two decades. This debate has been characterized by strongly held views, often expressed in an impassioned way. Much of the discussion has focused on the economic and legal difficulties which could result from Quebec independence, or a "Yes" vote, the potential for a diminished international presence for Canada, and a host of other significant consequences, many of which would clearly affect Ontario and its residents.
>
> In my view, this indicates "strong interest or attention" by the public, and I am therefore satisfied that there is a compelling public interest in disclosure of information about this subject. This compelling public interest relates to the need for informed public discussion.
>
> I am also satisfied that the records at issue are related to the compelling public interest I have just identified. I have reached this conclusion because, in the circumstances of this appeal, I believe that disclosure of the records would introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard.

[133] The Inquiry Officer first described the topic, i.e. the possible consequences of Quebec independence. He then proceeded to characterize the "subject" in terms of its seriousness to the citizens of Ontario. He noted that the subject had been a "prominent feature of discussion in this Canadian media and among members of the public". He also noted that this discussion and debate had gone on for "much of two decades".

[134] He described the debate as having been "characterized by strongly held views, often expressed in an impassioned way". He pointed out that much of the discussion about the results of Quebec separating focused on the "economic and legal difficulties" that would result. As well, he noted the discussion of the possible consequences of Quebec separating, which focused on "the potential for a diminished international presence for Canada and a host of other significant consequences, many of which could clearly affect Ontario and its residents".

[135] The Inquiry Officer, in my view, gave a reasoned and perhaps an understated characterization of the topic to which the records related. It cannot be said that he was in error in his description of the topic nor of the description of the debate and discussion that has existed and does exist in the media and among the citizens of this province.

[136] As a result of determining that there was "strong interest or attention" by the public he was satisfied that, given the significance of the issue, there was a compelling public interest in disclosure of information about this subject. He then related this compelling public interest to the "need for informed public discussion" and found that the records at issue were related to the compelling public interest he identified.

[137] The Inquiry Officer, who had the benefit of reviewing the records, went on to find that in his opinion, in the circumstances of the appeal, the disclosure of the particular records in issue would,

> ... introduce information into the public domain which would enhance the ability of the public to formulate and express opinions about the possibility of Quebec independence and to make political choices in that regard.

[138] Can it be said that it was unreasonable for the Inquiry Officer to conclude that the strong public interest in information concerning the economic consequences on the citizens of Ontario of a "Yes" vote in the Quebec referendum or of Quebec's separation from Canada was not a "compelling public interest"?

[139] In considering the nature of important issues or subjects where information might come within the category of a "compelling public interest" in a s. 23 public override context, one might think of possible environmental, health or safety hazards. However, as previously stated, s. 11 of the Act requires a mandatory disclosure of any record where there are reasonable and probable grounds to believe that it is in the public interest or there is a grave environmental, health or safety hazard.

[140] In the case of *Ontario Hydro v. Mitchinson, supra* the court was dealing with a request for access to a copy of all peer evaluation reports for each of the five nuclear plants operated by Hydro. The requester was a newspaper reporter. In the Inquiry Officer's findings he stated:

> It is clear that public concerns regarding the safety of nuclear facilities was the impetus behind the creation of Hydro's Peer Evaluation Program. In my view, it is not possible to allay these concerns by merely advising the public that reviews of nuclear operations are conducted against the highest possible standard. This simply does not provide enough information for the public to assess the adequacy of the program in meeting its objectives. I am unable to accept Hydro's position that the results of the Peer Evaluation Program should not be disclosed to the very public whose concerns about nuclear safety the Program was designed to allay.

> As far as Hydro's submissions about confidentiality and the openness of its employees are concerned, in my view, it is in the interests of both Hydro and the public to ensure that Hydro continues to receive frank and open input and to report on nuclear safety issues in the most fulsome manner possible. This enables Hydro to represent itself in its commercial ventures as operating nuclear plants as closely as possible to the highest standards of excellence.

[141] The Inquiry Officer went on to adopt the comments of his colleague Inquiry Officer Tom Wright, who discussed the issue of nuclear safety and the s. 23 public override in Order P-270. That appeal,

> ... involved a request for agendas and minutes of the Senior Ontario Hydro/Atomic Energy of Canada Limited Technical Information Committee (SOATIC), which were denied by Hydro under section 17(1) of the Act. In considering whether there was a compelling public interest in disclosure of nuclear safety related information, he stated:
>
> > In my view, there is a need for all members of the public to know that any safety issues related to the use of nuclear energy which may exist are being properly addressed by the institution [Hydro] and others involved in the nuclear industry. This is in no way to suggest that the institution is not properly carrying out its mandate in this area. In this appeal, disclose of the information could have the effect of providing assurances to the public that the institution and others are aware of safety related issues and that action is being taken. In the case of nuclear energy, perhaps unlike any other area, the potential consequences of inaction are enormous.
> >
> > I believe that the institution, with the assistance and participation of others, has been entrusted with the task of protecting the safety of all members of the public. Accordingly, certain information, almost by its very nature, should generally be publicly available.
> >
> > In view of the above, it is my opinion that there is a compelling public interest in the disclosure of nuclear safety related information.

[142] The Divisional Court, in upholding the decision of its Inquiry Officer stated in a very terse endorsement:

> The interpretation and application of the various exemptions under the *Freedom of Information Act* as well as the public interest override in section 23 of the Act, are at the heart of the Commissioner's specialized expertise and the Commissioner's decisions in this regard are entitled to a high degree of curial deference.

[143] In a political and economic context, however, where there is the possible dissolution of the country as a result of a province neighbouring Ontario containing approximately 15% of Canada's entire land mass and representing 25% of the country's population and approximately 23% of Canada's Gross Domestic Product withdrawing from the Canadian Federation, one would be hard-pressed to come up with an subject of greater public interest.

[144] Having determined that the disclosure of the information to the public was a compelling public interest, the Commissioner then proceeded to consider and analyze whether this compelling public interest "clearly outweighed" the prejudice and injury against which the exemptions were designed to protect.

[145] The Ministry submitted that the Inquiry Officer "failed to consider and analyze" how the public interest in disclosure "clearly outweighed" the prejudice and injury against which the exemptions were designed to protect. I adopt the submissions of the Respondents on this issue. I find that the Inquiry Officer clearly turned his mind to this issue. While recognizing that "formulation of government policy in a confidential environment" and "protecting intergovernmental working relationships" were also important public policy concerns, the Inquiry Officer found it "clear" that even if its records are disclosed, "the formulation of government; policy on this subject will proceed as necessary" and "contracts between the governments of Ontario and Quebec will continue of necessity".

[146] With reference to records found exempt under s. 18(1)(d) the Inquiry Officer proceeded to distinguish information which would disclose the Ontario government's negotiation strategies, or detailed information about potential impacts on affected sectors of the Ontario economy, from other information. The Inquiry Officer found that maintaining the confidentiality of these strategies and impact studies was "vital" to the government's ability to protect the Ontario economy and that the public interest in disclosure did not outweigh the purpose of the exemptions from this information. The Inquiry Officer did not order the disclosure of these portions of the records. On the other hand, information about Ontario/Quebec agreements and impacts on Ontario/Quebec relations was found to be "not as closely linked to achieving this important public interest".

[147] In weighing these various factors in the balance, the Inquiry Officer noted that minimisation of any potential negative effects on Ontario's economy would "represent an important public interest for Ontarians".

[148] I am satisfied that the Inquiry Officer did engage in the analysis required by s. 23 and articulated a reasoned and rational basis for applying the public interest override.

[149] The Ministry made reference to an earlier decision of the Inquiry Officer in Order 128, December 5, 1989, where it was held that the "need for informed public debate" was insufficient to meet the test for a "compelling" public interest.

[150] In that case the Inquiry Officer was dealing with draft legislation amending the *Workers' Compensation Act* and the requester sought copies of all background papers and other related material. The Inquiry Officer held that the records fell within the s. 13 exemption. In considering the s. 23 override provision he held that "the need for public debate in and of itself is sufficient to outweigh the purpose of this exemption".

[151] I agree with the submissions of the Respondents that this decision did not purport to lay down a general proposition that the need for public debate can never override the purpose of an exemption. Rather, this case was decided with reference to the specific records at issue. The subject matter and the surrounding circumstances must be considered.

[152] In my view, the Inquiry Officer was reasonable and not clearly wrong. I agree with the observations of Inquiry Officer Tom Wright that

> Certain information, almost by its very nature, should generally be publicly available.

[153] The Ministry submitted that given the decision of the Inquiry Officer all future studies or reports on the broad issue of the economic impact of Quebec's separation on Ontario will become public. I note that in the Inquiry Officer's reasons, in my opinion, he has specifically limited his comments to these particular records that were prepared within a specific time period and were no doubt related to the time of the 1995 Quebec referendum. The finding of a compelling public interest in the information contained in the records was directly related to the enhancement of the ability of the public "to formulate and express opinions about the possibility of Quebec independence, and to make political choices in that regard".

[154] It is important to recall that over the last 20 years there have been several attempts by the federal and provincial governments to devise policies to resolve Canada's "national unity" crisis. Proponents of Quebec's separation have argued that the rest of Canada is not "interested or willing to make the necessary changes to accommodate Quebec's aspirations".

[155] As previously noted, the premiers of the provinces outside Quebec, along with the territorial leaders, are making a further attempt to persuade the citizens of Canada outside Quebec to discuss changes that might be acceptable to the majority of citizens in quebec. It is reasonable to assume if this latest "Calgary Framework" is not successful, further proposals will be offered before any "Quebec separation".

[156] Given these circumstances, and having particular regard to the acknowledged significant consequences of Quebec becoming an independent state, surely information obtained by the Province of Ontario directly bearing on an extremely important aspect of this subject, i.e., the economic impact on Ontario of a Quebec separation, is information that should be in the public domain at this

time. Government leaders are asking for public input by the citizens on this very issue. The citizens of Ontario are being required to make political choices on the Ontario government's stance in changes being proposed to further the national unity debate.

[157] Considering the standard to apply on this judicial renew I am satisfied that the consideration and analysis of the Commissioner was appropriate. His analysis was reasoned and he did apply a rational basis for the public interest override. It is obvious to me that the approach taken by the Commissioner as set out in his reasons which were, at the request of the Ministry, to be in "couched language" set out an acceptable reasoned process. The adequacy of a Commissioner's reasons has been considered by the court in *Toronto (City) v. Information and Privacy Commissioner (Ont.)*. In that case, the City had asked the commissioner not to make public details of an alleged incident of violence because this might serve to endanger a City employee. in considering the city's subsequent objection to the Commissioner's alleged failure to consider this incident at all, this Court found the Commissioner's Order equivocal on its face, but dismissed the objection citing two decision of the Supreme Court of Canada. Reference is made to the *Nipawin* case, [1975] 1 S.C.R. 382; 41 D.L.R. (3d) 6, at p. 13:

> A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

[158] In another decision of the Supreme Court of Canada, *Woolaston v. Minister of Manpower and Immigration*, [1973] S.C.R. 102; 28 D.L.R. (3d) 489, at p. 492, the following is found in the reasons of Laskin, J.:

> I am unable to conclude that the Board ignored the evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or disbelieve it.

[159] In my opinion, the Application for judicial review should therefore be dismissed.

MacDOUGALL, J.
(DISSENT)

Released: February 6, 1998

Court File No.: 451/97
Date: February 6, 1998

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

FARLEY, MacDOUGALL and B. WRIGHT JJ.

B E T W E E N:

MINISTRY OF FINANCE

Applicant

- and -

JOHN HIGGINS, INQUIRY OFFICER and JOHN DOE, REQUESTER

Respondents

REASONS FOR JUDGMENT

BLENUS WRIGHT J.
MACDOUGALL J. (dissenting)

Released: February 6, 1998