Court File No: 28/98

ONTARIO COURT (GENERAL DIVISION)
DIVISIONAL COURT

(FARLEY, CHAPNIK and KARAM JJ.)

THE MINISTER OF LABOUR (Office of the Worker Adviser)

Applicant

- and -

HOLLY BIG CANOE, Inquiry Officer and "JOHN DOE", Requester

Respondents

Counsel: *Leslie M. McIntosh* for the Applicant
David S. Goodis for the Respondent Inquiry Officer
John Doe in person

Heard: May 29, 1998

E N D O R S E M E N T

BY THE COURT

JUNE 2, 1998

This application was for an order setting aside Order P-1510, dated January 5, 1998, made by the Inquiry Officer ("Officer") and restoring the decision of the Applicant to withhold three Ministry memos totalling four pages (which on their face would appear not to be relevant as to the Requester's injury claim under the *Workers' Compensation Act*) from release to the Requester. The Applicant asserted that the Officer had erred in interpreting s.14(1)(e) and s.20 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, as requiring as the test in each instance for refusing to disclose a record as being namely "a reasonable expectation of probable harm".

> s.14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...

> (e) endanger the life or physical safety of a law enforcement officer of any other person.
>
> s.20 A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual
>
> (emphasis added).

The Officer concluded at p.3 of her reasons:

> In support of its view that sections 14(1)(e) and 20 apply to the records, the Ministry has referred to other documents (which are not at issue in this appeal) and has provided an affidavit to support its contention that the disclosure of any of the records would endanger the life or physical safety or seriously threaten the health or safety of the individuals whose names appear in the records.
>
> Without discounting the real and valid concerns many public officials may have concerning their personal safety which may result from their employment, but sections 14(1)(e) and 20 of the Act require me to objectively assess the connection between the disclosure of the records at issue and the endangerment or threat that is contemplated. The Act requires me to determine if the disclosure of the record could reasonably be expected to endanger the life or safety of a person in the case of section 14(1)(e) or in the case of section 20 to seriously threaten the health or safety of the individual.
>
> Having considered the Ministry's representations and the other circumstances of this appeal, including the nature of these particular records, I am not convinced that there is a reasonable expectation of probable harm to the individuals whom the Ministry has identified as being at risk. Accordingly, I find that the records do not qualify for exemption under sections 14(1)(e) or 20.
>
> (emphasis added)

The courts have accorded a high degree of curial deference to the Commissioner's decisions where the interpretation and application of various exemptions under the Act had been determined to lie at the heart of the Commissioner's specialized expertise. It should however be noted that apparently s.14(1)(e) has not been dealt with by the court previously. On the other hand, as noted by the Officer in her factum, the Commissioner is regularly required to interpret the words "could

reasonably be expected to" under a multitude of provisions of the Act. These words cannot, in our view, be looked at in isolation; rather they must be examined in the context of the words which follow.

There was direct knowledge affidavit evidence put forward to the Officer on a sealed basis as to the psychiatric and other medical reports concerning the Requester (which reports are in the possession of the Requester) which express concern that the Requester would act out his threats of violence against Ministry staff. Endangerment or the serious threatening as to the safety of a person does not mean that there must be probable harm. As well, a reasonable expectation in the context of these two sections does not import a requirement that there is likely to be a "bad result" based on a balance of probabilities. Even considering the French version of the relevant provisions (which must be viewed on an overall basis for comparison with the English and not on a word for word basis), the test used by the Officer of a "reasonable expectation of probable harm" does not in our view conform to the purposes of the sections, their substance or the overall context of the Act. To interpret the provisions of these two sections as the Officer has, is in our view at least patently unreasonable. Thus it is not necessary to deal with the specific standard of review. It would seem to us that the reports referred to above are a sufficient and rational basis to found a reasonable expectation of endangerment to or a serious threatening as to the safety of staff at the Applicant.

The application is allowed.

J.FARLEY
S.CHAPNIK
N.KARAM