DATE: November 29, 2002
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COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., CARTHY AND GOUDGE JJ.A.

B E T W E E N:	)	
	)	
ATTORNEY GENERAL OF ONTARIO	)	William S. Challis
	)	and John Higgins
Applicant (Respondent in Appeal)	)	for the appellant
	)	Holly Big Canoe
- and -	)	
	)	
	)	Luba Kowal
HOLLY BIG CANOE, INQUIRY OFFICER	)	and Priscilla Platt
	)	for the respondent
	)	Attorney General
Respondent (Appellant)	)	
	)	
- and -	)	Michael Kortes
	)	for the respondent
	)	James Doe, Requester
JAMES DOE, REQUESTER	)	
	)	
Respondent (Respondent in Appeal)	)	
	)	**Heard:** September 20, 2002

On appeal from the order of the Divisional Court (Justices Dennis O'Leary, James Carnwath and Susan Lang) in the Superior Court of Justice dated December 7, 2001.

CARTHY J.A.:

[1] This appeal is centered upon s. 19 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F. 31 reading:

> 19. A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

[2] This is one of a list of exemptions from production under the operative terms of the Act. The question on appeal is whether the working papers and documents in a Crown prosecutor's file are exempted from disclosure once the prosecution is completed and the file is closed.

[3] The appeal, by leave of this court, is from a Divisional Court order on a judicial review application, overturning an inquiry officer's finding that the prosecutor's file was no longer exempted after the end of the prosecution. The requester's original application was for production of a wide range of material, most of which was found to be exempted under other sections of the Act, and what remains at issue are some photos and a video of an incident that had been the subject of a prosecution and is now the subject of private litigation.

Standard of Review

[4] The Divisional Court found that the standard of review was that of correctness, but in any event, that the inquiry officer's decision was unreasonable. My ultimate view is that the officer was wrong in her analysis of the statute but I would be hesitant in saying she was unreasonable. It is my view that the standard is one of correctness. This court held correctness to be the standard for interpreting s. 10(1) of the Act in *Walmsley v. Ontario (A.G.)* (1997), 34 O.R. (3d) 611 at 617-618 (C.A.) [hereinafter *Walmsely*] and came to the same conclusion concerning an interpretation of s. 65(6) in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), [2001] S.C.C.A. 509, leave to appeal dismissed [hereinafter *Solicitor General*]. The court came to the opposite conclusion when dealing with s. 14(1)(e) and s. 20 in *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) [hereinafter *Minister of Labour*].

[5] The difference between these cases is clear. In *Minister of Labour*, the inquiry officer was determining whether the release of documents might endanger the health or safety of an individual. Her expertise and experience in balancing factors played a clear role in her decision. In *Walmsley* and *Solicitor General*, no expertise of the inquiry officer was relevant to the interpretation of the sections and each involved a jurisdictional question in the sense of determining whether documents were within the purview of the Act.

[6] In the present case a review of the reasons of the inquiry officer is telling. She reviews at length all the then available jurisprudence concerning solicitor-client privilege and litigation privilege and then applies her well-reasoned analysis to interpret s. 19, all without reference to any matter that could be termed expertise as to the day to day implementation of the Act. It was a purely legal exercise aimed at determining whether these documents fell within or without the purview of the Act. The relative expertise of the court is, in this circumstance, overwhelming and the inquiry officer should properly be held to a standard of correctness.

The Merits

[7] I agree with the Divisional Court that the inquiry officer erred in her interpretation of s. 19.

[8] She begins her analysis by dividing s. 19 into two branches, the first referring specifically to solicitor and client privilege and the second referring to the language that generally describes what is known as litigation privilege. Since litigation privilege ends with the litigation she concludes that this statutory exclusion should be limited to the same extent. Her conclusion is expressed as follows:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

[9] Thus her conclusion that once the litigation is completed the protection ends. Her analysis ignores the fact that branch 2 has no temporal limit as expressed in s. 19. It is expressed as a permanent exemption just as is solicitor and client privilege. The inquiry officer has accurately defined the common law but not the statute. She was undoubtedly influenced by the legislative history of the section and, in particular, the comments she quotes of Attorney General Scott when branch 2 was added to the exemption. He stated to the Standing Committee:

> **Hon. Mr. Scott:** As I said the other day, this is just to expand the coverage designed to ensure protection for solicitor-client material to crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.
> …
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> To be fair, Mr. Chairman, I do not think it really extends section 19; it clarifies it. The use of words, "for use in giving legal advice or in contemplation of or for use in litigation" really adds nothing because they would be within our understanding of what a solicitor-client privilege is anyway.
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> The key words, and the words that clarify, are "crown counsel" because the case is made that crown counsel may not, in a highly theoretical sense, have a client. Because crown counsel has a kind of independent role that a normal lawyer does not have, a crown counsel may be thought, in a technical sense, not to have a client. The policeman is not the crown counsel's client, but as a matter of clarification it was recognized that opinions given by crown counsel

> should be producible or not in the same way as opinions given by any other crown lawyer [sic].
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> Ontario Standing Committee on the Legislative Assembly, Hansard, 3rd session, 33rd Parliament, No.23 (Monday, March 30, 1987, Morning Sitting), M-1,M-3.

[10] The distinctions between the two types of privilege were thoroughly canvassed in *General Accident Assurance Co. v. Chrusz*. (1999), 45 O.R. (3d) 321 (C.A.). At pp. 330-331 the following summary appears:

> R. J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence, L.S.U.C.* Special Lectures (Toronto: De Boo, 1984) at p. 163. He stated at pp. 164-65:
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> > It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
> >
> > Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs

> of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
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> **Rationale for Litigation Privilege**
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> Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect – the adversary process – among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted; there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.

[11] What is clear now but perhaps not so clear in 1987 is that the two privileges are distinct and separate in purpose, function and duration. Solicitor and client privilege protects confidential matters between client and solicitor forever. Litigation privilege protects a lawyer's work product until the end of the litigation.

[12] The Minister appears to have thought that the words used in branch 2 described the ambit of solicitor-client privilege and could be applied where there was no true client. In fact those words describe the work product or litigation privilege which covers material going beyond solicitor-client confidences and embraces such items as are the subject of this proceeding, photographs and a video gathered in the preparations for litigation.

[13] If we are assisted in any way by the context of this statement it is in knowing that the intent was to give Crown counsel permanent exemption. Solicitor-client privilege for confidential matters does not come to an end. The Ministry thought it was merely extending this privilege to Crown counsel and, thus, must have intended that it be permanent. And that is the plain meaning of the words used in branch 2. The error made by the inquiry officer was in assuming the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit. Neither the words of the Attorney General nor of the s. 19 supports that approach. In *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, L'Heureux-Dubé J. spoke in favour of what she termed the "modern" approach to the interpretation of statutes in these terms at pp. 1005-1006:

> Finally, the "modern" interpretation method was reformulated in Canada by Professor R. Sullivan: *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131:
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> > There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. [Emphasis added.]

[14] Applying that test supports the plain meaning test. The broad intention of the Act is to offer transparency to government functioning with exceptions where the interests of public knowledge are overbalanced by other concerns. In the present case, the requester seeks assistance in a civil proceeding following a criminal prosecution concerning the same incident. The purpose and function of the Act is not impinged upon by this request. However, to open prosecution files to all requests which are not blocked by other exemptions could potentially enable criminals to educate themselves on police and prosecution tactics by simply requesting old files. Among other concerns that come to mind are that witnesses might be less willing to co-operate or the police might be less frank with prosecutors. It should be kept in mind that this is the *Freedom of Information Act* and does not in any way diminish the power of subpoena to obtain documents, such as those in issue here, where appropriate and relevant in litigation. I can therefore see no countervailing purpose or justification for an interpretation that would render the Crown brief available upon simple request.

[15] For these reasons I would dismiss the appeal. Costs are not sought.

Released: November 29, 2002

"J.J. Carthy J.A."

"I agree R. Roy McMurtry C.J.O"

"I agree S. T. Goudge J.A."