COURT FILE NO.: 233/99 and 132/00
CONSOLIDATION NO.: 316/98
DATE: December 7, 2001

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

O'LEARY, CARNWATH & LANG, JJ.

B E T W E E N:	)	
ATTORNEY GENERAL OF ONTARIO	)	*Luba Kowal*, for the Applicant
Applicant	)	
- and -	)	
HOLLY BIG CANOE, INQUIRY OFFICER and JAMES DOE, REQUESTER	)	*William S. Challis* and *Shirley Senoff*, for the Respondent, Holly Big Canoe
	)	*Paul Bates* and *Michael W. Kortes*, for the Respondent, James Doe, Requester
Respondents	)	
	)	**HEARD:** October 25 & 26, 2001

CARNWATH J.:

[1] The Requester, an insurance company, sought the contents of Crown files prepared for a criminal prosecution. The Attorney General refused to disclose the files, and on appeal to the Privacy Commissioner, an Inquiry Officer refused to order disclosure of the majority of the files, citing privacy considerations. The Requester applies for judicial review, as does the Attorney General, the latter alleging the Inquiry Officer was wrong in law in her interpretation of s. 19 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ("*FIPPA*").

[2] The major issue to be decided is whether the Inquiry Officer erred in holding that the common law principles in civil cases respecting termination of litigation privilege (usually raised in subsequent civil litigation) have equal application to criminal prosecutions when construing s. 19 of *FIPPA*. We find her conclusion was unreasonable and wrong in law. Whether reviewed on the standard of reasonableness or correctness, her decision cannot stand. The Attorney General's appeal succeeds. That result disposes of all other issues raised on the appeals to the effect that none of the records sought to be disclosed by the Requester may be disclosed.

BACKGROUND

[3] In 1993, Mr. A. and Mr. B. confronted Mr. C. with a gun. This confrontation led to Mr. A.'s death. Charges of manslaughter and criminal negligence causing death were laid against Mr. C, but subsequently withdrawn. Mr. B. was charged and convicted of a number of weapons offences connected to the incident. Mr. A.'s family has sued an insurance company (the Requester) to recover death benefits under the deceased's life insurance policy. The insurance company has denied liability, alleging the insured's death was a result of his participation in a criminal act.

[4] In May, 1996 and April, 1977, the Requester sought access under *FIPPA* to the Crown Attorney's complete files relating to the prosecutions of Mr. B. and Mr. C. In July, 1997, the Ministry identified 1,951 pages of responsive records consisting of general correspondence, internal memos, documentary evidence, Crown briefs, pre-trial brief, court documents, preliminary inquiry transcript, and photographs and a video showing the scene of the incident. The Ministry denied access to the records on the basis of the exemptions contained in section 19 (solicitor-client privilege) and subsection 21(3)(b) (unjustified invasion of personal privacy). The Requester appealed to the Information and Privacy Commissioner.

[5] In January, 1998, the Inquiry Officer requested additional submissions from the parties respecting the application of section 19 to the records in issue, as a result of her decision in Order P-1342 which "altered our interpretation of branch 2 of section 19 .... to incorporate the common law limitations on solicitor-client privilege". More specifically, the Inquiry Officer invited submissions on "whether the litigation privilege enjoyed by the Crown has been lost through the absence of reasonably contemplated litigation or disclosure to parties adverse in interest...and how the adversary system of justice would be harmed through disclosure of the specific records ...".

[6] On May 11, 1998, the Inquiry Officer issued Order P-1561. Relying on her previous decision in Order P-1342, she held that almost all records were no longer privileged due to the termination of the criminal proceedings. Therefore, they did not qualify for exemption under "Branch 2 of section 19". Only six pages of handwritten notes entitled, "Matters to Consider", and a five-page letter from the Crown Attorney, dated March 15, 1994, retained their privileged status following the termination of the prosecutions in question, based on their characterization as "opinion" work. The Inquiry Officer also held that some of the records were exempt under section 21 of the *Act*, but did not specify which ones.

[7] In May, 1998, the Ministry applied for judicial review of Order P-1561 (Court File No. 316/98). Before the scheduled hearing date, the Inquiry Officer rescinded Order P-1561 on the ground she had failed to determine which records contained personal information. She ruled that all issues under both sections 19 and 21 should be considered anew. In January, 1999, the Requester revised and clarified the records it sought. Both the Requester and the Attorney General submitted additional written representations.

[8] On March 22, 1999, the decision in Reconsideration Order R-980036 was issued. Almost all the records were exempted on the basis they constituted an unjustified invasion of personal privacy, pursuant to section 21. Only a series of photographs and correspondence passing between

the Requester's counsel and the Attorney General were found not to contain any personal information. With respect to section 19, the Inquiry Officer reprised her reasoning in Orders P-1342 and P-1561 to the effect that the photographs were not exempt from disclosure, due to the termination of the Crown's litigation privilege at the end of the criminal proceedings.

[9] In April, 1999, the Attorney General applied for judicial review of Reconsideration Order R-980036 (Court File No. 233/99). In March, 2000, the Requester applied for judicial review of the Reconsideration Order (Court File No. 132/00), contesting the findings made by the Inquiry Officer under section 21.

[10] In order to avoid unnecessary duplication of documents, a judicial review of Order P-1561 (Court File No. 316/98) has not been formally abandoned or dismissed. It remains alive on the consent of the parties. A consent Order was issued ordering the applications in Court File Numbers 233/99 and 132/00 be heard together with the application in Court File No. 316/98 and that a single record of proceedings be filed.

THE REASONS OF THE INQUIRY OFFICER IN RECONSIDERATION ORDER R-980036

[11] The Inquiry Officer began her reasons by noting the comprehensive index of the records in issue attached to her reasons as Appendix "B". The records are divided into eight categories, A to H inclusive, with detailed pagination to identify individual documents. She further noted the Requester removed categories E and H from the appeal.

[12] She then proceeded to discuss the remaining six categories of records, viewed from the perspective of invasion of privacy, as provided for in s. 21 of the *Act*. In doing so, she reviewed each record individually and considered whether it contained personal information and to whom that personal information related.

[13] She found that all the records in categories A, B and C were exempt from disclosure under s. 21 of the *Act*, as disclosure would be an unjustified invasion of personal privacy. In so interpreting and applying the provisions of s. 21, her expertise was engaged. The standard of review is reasonableness - we find her conclusions about categories A, B and C to be reasonable, in construing s. 21.

[14] The records in category D comprise the Crown brief, including will says, witness statements, accident reports, statements by police officers, and police officers' notes. In addition, there were one hundred and sixty-three photographs and a video of the incident scene. After considering the exemptions and presumptions in s. 21, the Inquiry Officer concluded that all the records in category D, with the exception of certain photographs and the video, were properly exempt under s. 21 of the *Act*. Her expertise was engaged and we find her conclusions about category D to be reasonable, in construing s. 21.

[15] The records in category F consist largely of correspondence between Crown, defence counsel, and a trial co-ordinator. Applying the provisions of s. 21, the Inquiry Officer concluded that none of the records in category F should be disclosed, except for pp. 15-29. (The Requester had

abandoned any request for disclosure of pp. 15-29.) The expertise of the Inquiry Officer was engaged and we find her conclusions about category F to be reasonable, in construing s. 21.

[16] The records in category G contained police officers' notes, a lab report, and other information compiled by the police during their investigation. After a careful and detailed analysis, the Inquiry Officer concluded all the records in category G were exempt from disclosure, pursuant to s. 21 of the *Act*. Her expertise was engaged and we find her conclusions about category G to be reasonable, in construing s. 21.

[17] Thus, at the end of the Inquiry Officer's application of s. 21 to the requested records, there remained the following which did not qualify for exemption under s. 21:

- photographs of the accident scene on pp. 53 and 54 in category B. (However, the Requester abandoned any request for disclosure of these records.)

- various photographs and the video in category D. (However, the Requester abandoned any request for the photos in category D, except for those on pp. 63, 69 and 70.)

- correspondence between the Crown and the Requester on pp. 15-29 of category F. (However, disclosure of these records was abandoned by the Requester.)

[18] The Inquiry Officer then turned to consider whether those records which were not exempt under s. 21 might nevertheless be exempt under s. 19 of the *Act*, which provides as follows:

> 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.

[19] The Inquiry Officer analyzed s. 19 as having two branches which provide a head with the discretion to refuse to disclose:

1. a record that is subject to solicitor-client privilege (Branch 1); or,

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

[20] The Inquiry Officer then conceded that the photographs and video were records prepared for Crown counsel in contemplation of or for use in litigation in accordance with Branch 2. However, she went on to quote with approval from her previous decision in Order P-1342 in which she considered whether Branch 2 would be available in cases where a record would not qualify for solicitor-client privilege at common law under Branch 1:

> 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.

[21] In essence, the Inquiry Officer concluded that the principle of solicitor-client privilege or "work product" in civil litigation, sometimes called "litigation privilege", applied equally to criminal prosecutions. The significance of this finding is as follows: Civil litigation privilege ends when the litigation ends; the material developed by a lawyer for a client (work product) which does not fall within privileged solicitor-client communication, is no longer privileged.

[22] The Inquiry Officer reviewed all the records for which the s. 19 exemption was claimed by the Ministry and concluded they were all prepared for the dominant purpose of existing or reasonably contemplated litigation. She then noted that all litigation involving the Crown was at an end and found that the photographs and video in category D, not protected by privacy considerations, were no longer exempt from disclosure.

[23] The Inquiry Officer concluded her reasons by finding that the Requester's submission with respect to Crown waiver and the "public interest override" in s. 23 of the *Act* did not assist the Requester.

STANDARD OF REVIEW

[24] Two recent decisions of the Ontario Court of Appeal have defined the standard of review when considering orders of the Information and Privacy Commissioner. Where the Commissioner is applying his expertise in balancing the need for access and the right to protection of privacy, the standard of review is reasonableness simpliciter or simple reasonableness. *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 164 D.L.R. (4th) 129 at p. 139 (Ont. C.A.). See also, *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Officer of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

It is common ground that where the Commissioner's expertise is not engaged, the standard of review is correctness.

ANALYSIS

[25] Counsel for the Inquiry Officer submits the standard of review is reasonableness when considering the Inquiry Officer's conclusions about s. 19 and litigation privilege. In support of this proposition, counsel cites the decision of this Court in *Attorney General of Ontario v. Holly Big Canoe, Inquiry Officer*, [1997] O.J. No. 4495, (Sept. 8, 1997), Toronto Doc. 179/97 (Div. Ct.). The decision was also cited by the Inquiry Officer in support of her analysis of Branch 2 of s. 19, in her Order P-1342. Before determining the standard of review to be applied to the Inquiry Officer's

Order, reference must be made to her analysis of the Divisional Court decision which reviewed her Order P-1342.

[26] The Inquiry Officer made a fundamental error in her analysis of that decision. The matter involved a Crown prosecution of a lawyer for fraud. The lawyer was acquitted and sought records from the Law Society with respect to discipline proceedings which eventually were dropped. The records included materials sent voluntarily to the Law Society by the Crown, but the Ministry nevertheless refused to permit their disclosure.

[27] The Inquiry Officer made two findings:

> (1) The records were not protected by s. 19 because the Crown prosecution had ended. The Inquiry Officer found the limitations on common law privilege in Branch 1 should apply to Branch 2 of s. 19. She found the wording of s. 19 "does not clarify this issue, and, on this basis, the legislative history of the exemption is relevant to the proper interpretation of the exemption". Her review of the legislative history led her to conclude that litigation privilege expired when the litigation expired, even where the litigation was a criminal prosecution.
>
> (2) The records were not protected by s. 19 because the Crown had voluntarily sent the records to the Law Society, thereby waiving any privilege that otherwise attached.

[28] Her decision was appealed by the Attorney General to the Divisional Court. That court found "the Crown voluntarily waived privilege and that information is no longer shielded from disclosure under the ... *Act*". Nowhere in the reasons of the Divisional Court is there any discussion or reference to the Inquiry Officer's finding that records otherwise exempted under Branch 2 of s. 19 lose their exemption when the prosecution is concluded. The decision is therefore of no precedential value in determining whether the Inquiry Officer's interpretation of s. 19 is reasonable or correct.

[29] This court must therefore examine the analysis of the Inquiry Officer in P-1342, which led to her conclusion that, once the prosecution is over, material in Crown files is available under the Act, absent any privacy considerations. Her conclusion is directly contrary to that reached by Inquiry Officer John Higgins in Order P-667, issued April 28, 1994, where he observes "Previous orders of the Commissioner's office make it clear that the termination of litigation does not affect the application of Branch 2 of the s. 19 exemption (Orders P-538 and P-624)". Apparently, a difference of opinion exists among Inquiry Officers.

[30] The Inquiry Officer began her Branch 2 analysis as follows:

> The second branch of section 19 is parallel to the two branches of the common law solicitor-client privilege. The circumstances of this appeal raise the issue of whether the limitations on the common law privilege should also generally apply to Branch 2 of section 19. The wording of the exemption itself does not clarify this issue and,

> on this basis, the legislative history of the exemption is relevant to the proper interpretation of the exemption.

[31] With respect, we disagree with her analysis. Branch 2 of s. 19 is not parallel to the two kinds of common law solicitor-client privilege contained in Branch 1. Exemptions from disclosure under Branch 1 will change over time as solicitor-client privilege changes in accordance with the evolving common law. What is exempt today under Branch 1 may not be so tomorrow, and *vice versa*.

[32] In contrast, when it comes to Branch 2, there is no issue to "clarify". There is no reference in Branch 2 to the common law principle of solicitor-client privilege (which includes litigation privilege). A head may refuse to disclose a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation. The language is clear and unambiguous. Unlike Branch 1, no external considerations such as a change in the common law, can serve to import a different way of construing the meaning of Branch 2. We find no need to resort to the legislative history of the exemption in order to properly interpret it. As A.P. Herbert's Lord Mildew put it - "If Parliament does not mean what it says, it must say so". Thus, if it was not the intention of Branch 2 of s. 19 to enable government lawyers to assert a privilege more expansive or durable than that available at common law to solicitor-client relationships (the Inquiry Officer found it was not), it was open to the Legislature to say so.

[33] It remains to determine whether the Inquiry Officer's expertise was engaged when construing s. 19, as was submitted by her counsel. This Court had occasion to consider s. 19 and solicitor-client privilege in *Ontario (Minister of Finance) v. Information and Privacy Commissioner (Ont.)* (1997), 102 O.A.C. 71 (Div. Ct.). Sharpe J., speaking for the panel, is reported as follows, at p. 75:

> On the other hand, where decisions of specialized administrative bodies relate to questions of law as to fundamental rights which do not fall within the specialized expertise of the tribunal and with which the courts deal on a regular basis, the appropriate degree of curial deference may be attenuated: see *Pezim v. British Columbia Securities Commission et al.*, [1994] 2 S.C.R. 557; 168 N.R. 321; 46 B.C.A.C. 1; 75 W.A.C. 1; 114 D.L.R. (4th) 385, at 405. In my view, solicitor-client privilege is such an area and the deference to be accorded to the Commissioner's decisions is attenuated. Solicitor-client privilege has been identified by the Supreme Court of Canada as a fundamental right: *Solosky v. Canada*, [1980] 1 S.C.R. 821; 30 N.R. 380, at 839 per Dickson, J. It cannot be said that defining the scope of solicitor-client privilege is a matter within the specialized expertise of the Commissioner.

We agree with the panel's conclusion. When considering the application of solicitor-client privilege to s. 19 of the Act, we find the Inquiry Officer not to be engaged in an area of her expertise, but rather to be dealing with a question of law as to fundamental rights, which does not fall within her specialized expertise. For the reasons expressed in paragraphs [31] and [32] above, we find the Inquiry Officer to be wrong in law in her analysis of s. 19.

[34] Even if the standard of review to be applied was that of simple reasonableness, her conclusion on s. 19 cannot stand. In *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, Cory J., in the context of discussing the meaning of "patent unreasonableness", provided a definition of the word "unreasonable". At p. 963, he stated:

> "Unreasonable" is defined as "not having the faculty of reason; irrational. ... Not acting in accordance with reason or good sense".

Hence, to conclude that a decision is unreasonable, the Court must find that it is irrational or not in accordance with reason.

[35] With respect, we find the Inquiry Officer's analysis of s. 19 to be irrational and not in accordance with reason. Two of her findings in particular fall within the definition of unreasonable: that there was a parallel between Branch 1 and Branch 2 of s. 19 and that it was necessary to "clarify" the language of Branch 2 of s. 19.

[36] The central purpose of *FIPPA* is to shine a light on the actions of government. Here, the avowed purpose of the Requester is to short-cut the discovery process by gaining access to Crown files prepared for a criminal prosecution. We find the discretion granted by the Legislature in Branch 2 of s. 19 to refuse disclosure of Crown files in the circumstances defined in Branch 2 is reasonable; the construction placed on s. 19 by the Inquiry Officer is not. We further find that construction to be wrong in law.

[37] The Ministry's appeal is allowed and the decision of the Inquiry Officer regarding s. 19 is quashed. The Requester's appeal is dismissed and the decision of the Inquiry Officer regarding s. 21 is confirmed.

[38] The parties have 21 days to file written submissions as to costs.

CARNWATH J.
I agree — O'LEARY J.
I agree — LANG J.

Released: December 7, 2001

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JUDGMENT

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