

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

SMITH A.C.J.O.C., SOUTHEY and ROSENBERG JJ.

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| B E T W E E N: |) | |
| |) | |
| GREAT LAKES POWER LIMITED |) | <u>Peter A. Milligan</u> |
| |) | for the Applicant |
| |) | |
| Applicant |) | |
| |) | <u>William S. Challis</u> and |
| - and - |) | <u>Mary C. L'Donoghue</u> |
| |) | for the Privacy Commissioner |
| |) | |
| |) | <u>Donald G. Mitchell</u> |
| TOM WRIGHT, INFORMATION AND |) | for the Regional Assessment |
| PRIVACY COMMISSIONER (ONTARIO), |) | Commissioner |
| REGIONAL ASSESSMENT COMMISSIONER, |) | |
| REGION NO. 31 AND ONTARIO HYDRO |) | <u>Mitchell Weinberg</u> |
| |) | for Ontario Hydro |
| |) | |
| Respondents |) | |
| |) | |
| |) | <u>HEARD:</u> May 17, 1996 |

ROSENBERG J. (orally):

[1] I would not allow the two affidavits which are the subject of the objection as I do not feel they are appropriate in these proceedings. They can be broken into three categories:

- (1) They deal with matters that are alleged to have taken after the award in question.
- (2) They repeat matters that are already in the record before us.
- (3) They refer to other matters that were available to be put before the Privacy Commissioner but were not.

[2] Dealing with the first category that is evidence of matters that took place after the award, I think that they are not appropriate and it would be an inappropriate precedent to allow in Judicial Review of an award matters that occurred afterwards. Mr. Milligan said that these allegations of fact

show an ongoing abuse of process. In my view, it would be most inappropriate to allow in such evidence either the conduct of the initial proceedings can be shown to be an abuse of process or not. After the award, evidence would lead to a new process after the award when both sides would be entitled to submit affidavits with their versions of the after award facts. This would, in my view, not be the function of the court in Judicial Review. With regard to the matters that are referred to that are already in the record, presumably they are innocuous because they are in the record but to the extent that they put a different slant or different interpretation of the facts the record should speak for itself. With regard to the elaboration by evidence that was available but not put in the Privacy Commissioner, it would be most unfair and I think inappropriate to ask us to make a decision on other evidence that could have been put into the Privacy Commissioner that wasn't. Mr. Milligan said that if he had known what test the Privacy Commissioner was going to apply, he would have changed some of our approach in our submissions. It appears, firstly, that the Applicant did not know the approach to be taken but in my view the test is, was the approach, or test applied by the Privacy Commissioner right or was it not to enter into a controversy about what would have been done differently if it was known that he was going to take the wrong approach is not the function of this court. We consider the argument as to the application of the test by the commissioner and decide on that basis, not on evidence that shows what different information might have been sent to the Privacy Commissioner. That would be pure speculation and not relevant to our decision.

[3] There may be certain aspects of the affidavits that will be relevant material. The example what occurs to me is the fact that the Applicant is not a public company. If that type of clear black and white fact cannot be admitted by the other side or is not admitted by the other side and may well be that we will look to some very limited parts of the affidavit for that purpose, but, in my view, that is the outside limit of the usefulness of these affidavits process of Judicial Review.

ROSENBERG J.

SOUTHEY J. (orally):

[4] With the greatest respect to my brother Rosenberg, I feel that the affidavits ought to be permitted to remain as part of the record in this court. One of the grounds on which judicial review

is sought is abuse of process. In my judgment, the basis for the claim for abuse of process is something that can be established by affidavit evidence.

[5] The Assessment Commissioner who has brought a motion to exclude the affidavits from the record before this court relies on the decision in Re Keeprite Workers Independent Union, et al (1980), 29 O.R. (2d) 513. That was an application for judicial review of an arbitration award made under a collective agreement subject to the Labour Relations Act. The proceedings in the case at bar do not involve an arbitration. They involve what has been described, I think accurately, as an inquisitorial process in which the Information and Privacy Commissioner is required to hear the interested parties in the absence of one another. In my view, the proceeding that have given rise to the decision here sought to be quashed are so different from those of an arbitration hearing that the Keeprite decision does not provide authority for excluding the affidavits in this case.

[6] I would permit the affidavits to remain in the record. If they turn out to deal with matters that can be argued on the basis of the Commissioner's report only, no harm will be done by having them in the record. On the other hand, if they are excluded, it may be that it will be difficult to understand the basis of an argument based solely on the statements in the report of the Privacy Commissioner. I would permit the affidavits to remain in the record.

SOUTHEY J.

SMITH A.C.J.O.C. (orally):

[7] I would concur with the reasons of my brother Southey and the motion for an order striking the affidavit of Mr. Bradford Nixon sworn July 7, 1994 and Supplementary affidavit of Bradford Nixon sworn September 21, 1995 and the order striking reference to the said affidavits in the factums filed by the applicant is dismissed.

SMITH A.C.J.O.C.

RELEASED: June 17, 1996

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SMITH A.C.J.O.C., SOUTHEY and ROSENBERG JJ.

B E T W E E N:

GREAT LAKES POWER LIMITED

Applicant

- and -

TOM WRIGHT, INFORMATION AND PRIVACY
COMMISSIONER (ONTARIO), REGIONAL
ASSESSMENT COMMISSIONER, REGION NO. 31
AND ONTARIO HYDRO

ORAL JUDGMENT

ROSENBERG J.

RELEASED: June 17, 1996