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COURT OF APPEAL FOR ONTARIO

OSBORNE, DOHERTY AND GOUDGE JJ.A.

IN THE MATTER of a decision of the Commissioner under the *Freedom of Information and Protection of Privacy Act*

C25156

B E T W E E N:	)	
	)	
THE HONOURABLE ASSOCIATE CHIEF JUDGE ROBERT WALMSLEY	)	David Stratas and Penny Bonner, for Associate Chief Judge Robert Walmsley
Respondent (Appellant)	)	
- and -	)	Leslie M. McIntosh, for the Attorney General of Ontario
THE ATTORNEY GENERAL OF ONTARIO	)	Mary O'Donoghue, for Irwin Glasberg, Assistant Information and Privacy Commissioner
Applicant (Respondent in Appeal)	)	
- and -	)	
	)	Heard: June 2 and 3, 1997
IRWIN GLASBERG, ASSISTANT INFORMATION AND PRIVACY COMMISSIONER and JANE DOE	)	
Respondents (Respondents in Appeal)	)	

C25158

A N D B E T W E E N:	)
	)
THE ATTORNEY GENERAL OF ONTARIO	)
Applicant	)
(Appellant)	)
- and -	)
	)
	)
IRWIN GLASBERG, Assistant Information and Privacy Commissioner, JANE DOE, and THE HONOURABLE ASSOCIATE CHIEF JUDGE ROBERT WALMSLEY	)
Respondents	)
(Respondents in Appeal)	)

GOUDGE J.A.:

[1] Both the Attorney General of Ontario and the Honourable Associate Chief Judge Walmsley appeal from the judgment of the Divisional Court released March 27, 1996 which dismissed the Attorney General's application to quash the order of Assistant Information and Privacy Commissioner Glasberg dated June 16, 1994. The Assistant Commissioner found that, for the purposes of s. 10(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"), the Ministry of the Attorney General had control over the records in the hands of the Chair, Judge Walmsley, and the individual members of the Judicial Appointments Advisory Committee (the "committee"). He ordered the Ministry to obtain from these members copies of all documents relating to the selection of a certain individual to the position of judge of the Ontario Court (Provincial Division). For the reasons that follow, I have concluded that the assistant commissioner erred in his finding, that the appeal should be allowed, and his order quashed.

The Legislation

[2] Broadly speaking, the Act provides a scheme for controlled access to records in the hands of the Provincial Government and a parallel scheme for the regulated protection of privacy of those

whose personal information is documented in those records. The purposes of the Act are set out in s. 1 as follows:

> 1. The purposes 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; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[3] The important definitions for this case are found in s. 2 as follows:

> 2(1) In this Act,
> . . . . .
>
> "institution" means,
>
> (a) a ministry of the Government of Ontario, and
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;
> . . . . .
>
> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine

> readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

[4] The critical section for this appeal is s. 10(1). It reads as follows:

> PART II
>
> Freedom of Information
>
> Access to Records
>
> 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.

[5] The process for exercising this right of access begins with a request to the head of the institution who must first determine if the records sought fall within the access scheme of the Act. Then the Act provides a number of bases upon which the head may refuse access to those records that come within s. 10(1). The requester is entitled to appeal any decision of the head to the Commissioner or his designee, in this case the assistant commissioner.

[6] Part III of the Act is entitled "Protection of Individual Privacy". While not central to this appeal, it can be noted that this part contains the parallel scheme for retaining and storing personal information and regulating its use where such information is in the control of an institution.

The Factual Background

[7] This matter began with a request made by the respondent Jane Doe for access to certain records relating to the appointment of a specific individual as a judge of the Ontario Court (Provincial Division). By the time the matter reached the assistant commissioner, the only records

in issue were the documents in the personal possession of individual members of the committee, including Judge Walmsley.

[8] Judges of the Ontario Court (Provincial Division) are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, pursuant to s. 42 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[9] The committee was set up in December 1988 by the Attorney General of the day, Ian Scott. Attorney General Scott described its purpose and mandate to the legislature as follows:

> The lay-dominated advisory committee will do a great deal to remove any unwarranted criticism of political bias or patronage in appointments to the judiciary while enhancing community and public involvement and reinforcing confidence in the judiciary and the justice system. Such a committee, with a broad base of representation from across the province, will ensure that the justice system reflects the needs, the values and the attitudes of the community as a whole.
>
> The Advisory Committee on Judicial Appointments will have the following mandate: First, to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations. ([1988] Ont. Leg. Debates 6835)

[10] In its Final Report dated June 1992, the committee described its role this way at p. 20:

> The committee is a true nominating committee. It is a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment.

[11] At the time relevant to this case the committee had no statutory or regulatory foundation.[1] Its members, two judges, four lawyers and four laypersons had never been employees of the Ministry

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[1] The *Courts of Justice Amendment Act*, 1994, S.O. 1994, c. 27, s. 43 established the Judicial Appointments Advisory Committee as a creature of statute.

or of the Government of Ontario. Nor were they appointed to the committee by order-in-council. They received no salary but only a per diem honorarium paid out of Ministry funds. The Ministry also paid for travel and other expenses and provided an administrative officer to co-ordinate administrative support for the committee and act as liaison between committee members and Ministry personnel in order to maintain an arm's length relationship between the two groups. There was no contract or memorandum of understanding codifying the relationship between the Ministry and the committee or its individual members.

[12] The application form filled out by persons interested in judicial appointment conveyed much information to the committee. It did not refer to the Attorney General nor suggest that the Attorney General played any role in the consideration of the application by the committee. The committee members made all the inquiries concerning applicants (except for an inquiry to the Law Society of Upper Canada which was made by the administrative officer). The consideration of the candidates was done entirely by the committee members. The Attorney General was not involved in any discussions or decisions by committee members regarding candidates to be recommended for consideration by the Attorney General.

The Decisions Below

[13] In determining whether the documents in the possession of individual committee members were records "in the custody or under the control of" the Ministry for the purposes of s. 10(1) of the Act, the assistant commissioner addressed two questions. He first determined that the committee must be considered a part of the Ministry rather than a completely distinct advisory body. He did so on the basis that the work of the committee was so closely connected to the activities of the Ministry that it could be said to be a part of the Ministry.

[14] The assistant commissioner then went on to determine that the documents in the possession of individual committee members fell under the control of the "Committee/Ministry" for the purposes of the Act. He relied for this conclusion primarily on the documents being held by members because of their role on the committee, the relevance of these documents to the function of both the

committee and the Ministry, the likely reliance on these documents in deciding appointments, and the conclusion that the Ministry had the authority under the Act to regulate the use, disclosure and destruction of the personal information in the documents.

[15] The assistant commissioner made clear that his decision that these documents came within s. 10(1) of the Act left open the applicability of the various criteria in the Act on the basis of which access could be denied by the Ministry to records under its control. He then ordered the Ministry to obtain copies of the documents from the individual committee members and provide the requester with its decision concerning access.

[16] The Divisional Court dismissed the application for judicial review of this decision. Using the standard of review of correctness it determined that the documents acquired by individual committee members were acquired by them as agents of the Attorney General. The court said that the documents, being under the control of his agents, were, in law, under the control of the Attorney General. It then agreed with the two conclusions of the assistant commissioner and refused the application.

Analysis

[17] There are two issues presented by this appeal. First, what is the appropriate standard of review to be applied to the decision of the assistant commissioner? Second, on that appropriate standard, can the documents in the possession of individual committee members be said to be in the custody or under the control of the Ministry pursuant to s. 10(1) of the Act?

The Standard of Review

[18] Against a backdrop that accords a growing recognition to the specialized expertise of an increasing variety of administrative tribunals, and hence a general attitude of reasonable deference to their decisions, the courts have developed a flexible approach to determining the appropriate standard of review. In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 590, 114 D.L.R. (4th) 385, Iacobucci J., speaking for the full court, put it this way:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. . . .
>
> 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 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.

[19] 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.

Was the Decision of the Assistant Commissioner Correct?

[20] The assistant commissioner found that s. 10(1) of the Act extended to the documents in the possession of individual members of the committee, as being records under the control of the Ministry. It was not argued (nor could it be argued) that these records were thereby in the custody of the Ministry.

[21] The finding of control was based in part on the conclusion that the committee could be said to be a part of the Ministry. With respect, I disagree. Individual committee members were not employees of the Ministry. Even if they were in some respects agents of the Ministry, that is not enough to make them part of the Ministry. If it were, any agency of a ministry would automatically be subject to the Act and s. 2(1)(b), designating specified agencies to come within the Act, would be superfluous. Nor could the nature of the work of the committee have made its members part of the Ministry. Nothing in the definition in s. 2(1)(a) suggests this. Nor would the legislature have intended that simply by giving independent advice to the Attorney General individuals would be subjected to the access provisions and recordkeeping obligations of the Act. Hence, in my view, the records in question could not be said to have come within s. 10(1) on the basis that individual committee members were part of the Ministry. They were not.

[22] The question that remains is whether the documents in the possession and control of individual committee members were also under the control of the Ministry. In my opinion, the assistant commissioner was in error to base his answer in part on the Ministry's authority over the same documents under the right to privacy part of the Act, since that authority would itself arise only if the documents were indeed under the control of the Ministry. Rather, in light of the purposes of the Act, the answer properly depends on an examination of all aspects of the relationship between committee members and the Ministry that are relevant to control over the documents.

[23] It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role on the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question

of Ministry control, much more important are the following considerations. Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry. Hence, it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry. In my opinion, the assistant commissioner was wrong in so deciding.

[24] I would therefore allow the appeals and quash the decision of the assistant commissioner with costs here and in the Divisional Court.

GOUDGE J.A.
I agree. – OSBORNE J.A.
I agree. – DOHERTY J.A.

RELEASED: June 19, 1997