**COURT FILE NO.:** 257/99
**DATE:** 20060508

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**DIVISIONAL COURT**

**RE:** Attorney General of Ontario
Applicant

- and -

Holly Big Canoe, Adjudicator and
David Goodis, Senior Adjudicator,
Information and Privacy Commissioner/Ontario
and John Doe, Requester
Respondents

**HEARD:** November 23, 2005

**BEFORE:** Lane, Then and Pardu JJ.

**COUNSEL:** *Luba Kowal*, for the Attorney General of Ontario, Applicant;

*William S. Challis*, for the Respondents other than the Requester;
No one appeared for the Requester.

## R E A S O N S F O R J U D G M E N T

**LANE J.:**

[1] This application for judicial review seeks to quash part of Order PO-1664 made by Holly Big Canoe, an adjudicator of the Information and Privacy Commissioner ("IPC") as amended by Reconsideration Decisions of David Goodis, senior adjudicator, dated October 17 and November 24, 2003, all of which were made under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F. 31, as amended ("FIPPA"), whereby the Ministry of the Attorney General ("the Ministry") was ordered to disclose certain records to the requester, John Doe.

### Overview

[2] Following his conviction for assaulting his wife in 1998, the requester sought access to records relating to the criminal prosecution against him. By letter dated May 4, 1998, the requester made a request to the Ministry for access to the Crown brief, doctors' certificates, his wife's

affidavit, his daughter's witness statements and all other relevant information pertaining to the criminal charges laid against him. He did this after his defence counsel, acting on the advice of Crown counsel, refused to provide him with a copy of the Crown brief which had been disclosed to defence counsel prior to the trial in the usual fashion. His defence counsel directed the requester to apply under FIPPA.

[3] The Ministry identified a number of responsive records but denied access to all of them under a number of exemptions, but principally the solicitor-client exemption, s. 19:

> 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.

[4] This section is generally regarded as having two branches: the first is the exemption for documents covered by the well-known solicitor-client privilege; the second is the exemption created by all the words following "privilege" and is similar to the common law "litigation privilege" protecting "solicitor's work product" or the "solicitor's brief".

[5] The requester appealed to the IPC from the refusal of the Ministry to disclose the records. The appeal was heard by adjudicator Ms. Holly Big Canoe. On April 1, 1999, the requester's appeal was allowed in part and the Ministry was ordered (Order PO-1664) to disclose a number of records from the Crown's prosecution file, largely on the theory that the exemption under the second branch of s. 19 of FIPPA had terminated when the relevant litigation terminated. The adjudicator also found that no privilege attached to records consisting of communications sent between Crown counsel and defence counsel and that privilege had been waived as to any documents actually disclosed to defence counsel in the course of the prosecution.

[6] The Ministry sought judicial review of Order PO-1664 but the application was stayed, along with a number of other cases, pending the disposition of judicial review and appeal proceedings in a test case involving the interpretation of the solicitor-client exemption. That test case also involved a request for access to records in a Crown prosecution file. The adjudicator held that the exemption in the second branch of section 19 ended when the litigation ended, as was the case with the common law solicitor's brief privilege. She therefore granted access to some documents. The Divisional Court quashed the decision of the adjudicator, holding that the exemption in the second branch of section 19 did not contain any temporal limit. The Court of Appeal affirmed the decision of the Divisional Court in 2002 and the Supreme Court refused leave to appeal in May 2003[1].

[7] After the decision in *Big Canoe* was released Mr. Goodis, a senior adjudicator, ruled that the decision in Order PO-1664 should be reconsidered. He undertook two reconsiderations. In his first reconsideration decision on October 17, 2003, he determined that adjudicator Big Canoe had erred

---

[1] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2001), 208 D.L.R. (4th) 327 (Div. Ct.); (2002), 62 O.R. (3rd) 167 (C.A.); leave to appeal refused [2003] S.C.C.A. No. 31; hereinafter "*Big Canoe*".

in ordering that the Ministry disclose certain records from the Crown brief on the basis that the privilege claimed over them was based on the second branch of s. 19 and so had expired when the prosecution terminated. In so doing, adjudicator Goodis followed the holding of the Divisional Court and the Court of Appeal in *Big Canoe*, *supra*. The affected documents included drafts of the indictments, documents generated by the court proceedings, letters to and from the police, handwritten notes on documents received, and other similar matters.

[8] However, adjudicator Goodis also concluded that that adjudicator Big Canoe had not erred in Order PO-1664 in finding that a number of records from the Crown prosecution file were not privileged. He confirmed the order that the Ministry disclose them to the requester. This was done with respect to two kinds of records: correspondence between the Crown and counsel for the defence; and records disclosed to the accused and his counsel pursuant to the Crown's duty to disclose. Adjudicator Goodis wrote that there was no basis for concluding that records sent to or received from the requester's counsel were privileged: they simply lacked the confidential underpinnings necessary to attract litigation privilege; nor was the purpose of privilege served by protecting records already sent to the opposite party. To find such records privileged would lead to an absurd result.[2]

[9] The Ministry asked for a further reconsideration as to 17 specific records, raising these issues: (a) that records disclosed under the Crown's disclosure obligations are subject to an implied undertaking and the act of disclosure was not a waiver of privilege; (b) certain records contained personal information of persons other than the requester which the first reconsideration decision had not considered; (c) certain records were in fact non-responsive and should not have been ordered disclosed for that reason. The Ministry did not ask for reconsideration of the decision as to the 13 records, which were correspondence between counsel.

[10] On November 24, 2003, the second reconsideration decision was released.[3] In it, adjudicator Goodis rejected the Ministry submission that disclosure to the accused is not a waiver. He observed that under *Stinchcombe*[4], the Crown was not obliged to produce privileged material to the accused except in unusual circumstances where the constitutional right to make full answer and defence outweighs the public interest in maintaining the privilege. There was no suggestion that the Crown had been required to produce these documents despite the existence of privilege and it was reasonable to conclude that these records were not privileged in the first place. He also rejected the Ministry submission that the records produced to the accused under disclosure requirements were subject to an implied undertaking. He cited authority that use of Crown disclosure documents by the recipient in a civil litigation was not a forbidden "collateral" use and that any such implied undertaking binds the recipient of the information, but does not create any privilege in that information in the party that produced it. He rejected the submission that the requester could be denied access to his own personal information that the Crown had already disclosed to him and referred to sections 47 and 21 of FIPPA. If the requester was under some restriction as to the records

---

[2] First Reconsideration Decision, Supplementary Public Record, Tab 6, pages 26-27.

[3] Application Record, Tab 10.

[4] R. v. Stinchcombe, [1991] 3 S.C.R. 326 paragraphs 16, 20-22.

under some other part of the law, receiving the same record under FIPPA would not release him from such a restriction. Further, the absence of a privilege for these records did not imply ready access to them by the general public. The personal privacy (s. 21) and law enforcement (s. 14) exemptions would provide protection.

**The Issue**

[11] The principal issue in this judicial review is whether records disclosed by the Crown to the defence, and correspondence passing between Crown and defence counsel in the course of the prosecution, fall within the section 19, second branch, exemption. The Ministry submits that all the records in issue are exempt under sections 19 and 49(a) of FIPPA because they were created by or for Crown counsel for use in the prosecution. Another issue involves the availability of the personal privacy exemption to protect another individual's personal information under sections 21 and 49(b). The Ministry's position is that the adjudicators committed jurisdictional error in interpreting FIPPA and in concluding that the records in question were not exempt. The Commissioner supports the reasoning of the decisions under review.

[12] The twenty-seven records remaining in dispute under s. 19 fall into two categories:

a) correspondence exchanged between Crown counsel and the requester's criminal defence counsel; (records 31, 32, 33, 35, 36, 37, 38, 39, 45, 49, 50, 138, 139) and

b) documents created for Crown counsel for inclusion in the Crown brief, (records 98, 99, 100, 101, 104, 116, 120, 121, 125, 126, 128, 129, 130, 131).

**Standard of Review**

[13] The standard of review is determined by the application of the well known 'functional and pragmatic test', based on a consideration of four factors: the existence or absence of a privative clause in the enabling statute of the administrative tribunal; the expertise of the tribunal relative to the court; the purpose of the legislation; and the nature of the problem.[5]

[14] FIPPA lacks a privative clause and a statutory right of appeal. In *John Doe*[6], this court held that, although there was no privative clause in FIPPA, the court should bestow a "high degree of curial deference" on the decisions of the IPC, per A. Campbell J. at page 782:

> To the extent that information has become a commodity, the management of information by the Commissioner is similar to the management of other commodities

---

[5] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193, 208-215 (S.C.C.); *Ryan v. Law Society of New Brunswick* (2003), 223 D.L.R. (4th) 577 at 587-592, (S.C.C.); *Dr. Q. v. College of Physicians and Surgeons (British Columbia)* (2003), 223 D.L.R. (4th) 599 at 609-613 (S.C.C.).

[6] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3rd) 767 (Div. Ct.).

> by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.

[15] Both parties submitted that the standard of review with respect to the issue of solicitor-client privilege under s. 19 of FIPPA is correctness. The language of the Court of Appeal in *Big Canoe*, *supra*, sets out that adjudicator Big Canoe's analysis of s. 19:

> [page 169] "... was a purely legal exercise aimed at determining whether these documents fell within or without the purview of [FIPPA]. The relative expertise of the court is, in this circumstance, overwhelming and the inquiry officer should properly be held to a standard of correctness."

[16] So far as the issues arising under sections 21 and 49 of FIPPA as to the protection of personal information, both parties submitted that the standard of review was one of reasonableness. In *Minister of Health*[7], the Court of Appeal applied this standard to s. 21, based on the purpose of privacy legislation and the expertise of the Commissioner:

> In every review of disclosure decisions by government, the Commissioner is required by [FIPPA] to strike the delicate balance required between its two fundamental purposes, providing the public with the right of access to information held by government and protecting the privacy of individuals with respect to that information. This is not a task for which the courts can claim the same familiarity or specialized experience.

[17] I agree with the submissions of the parties that the standard of review as to solicitor-client privilege, litigation privilege and s. 19 of FIPPA is correctness; and that as to sections 21 and 49, the standard is reasonableness.

**Principles of Statutory Interpretation**

[18] The modern rule of statutory interpretation was formulated by Elmer Driedger[8] and was accepted as the preferred approach by the Supreme Court in *Rizzo*[9]. In *Big Canoe*[10] the Court of Appeal discussed the rule at page 173:

---

[7] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), 73 O.R. (3rd) 321 at paragraph 31 (C.A.).

[8] E. A. Driedger, *The Construction of Statutes*, Butterworths, 1974, p. 67; see also 4th edition, 2002, page 1.

[9] *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41.

[10] *Ontario (Attorney General) v. Big Canoe* (2002), 62 O.R. (3rd) 167 (C.A.); leave to appeal refused May 15, 2003 S.C.C.

> 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:
>
> 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 in its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[11]

**The Scheme of the Act**

[19] In approaching sections 19, 21 and 49, the first observation is that they are part of an Act with several purposes. The first is described in section 1(a) as being to provide a right to access to information under the control of the government of Ontario, or an agency thereof, upon the principles that information should be available to the public, subject to exemptions that are necessary, limited, specific and independently reviewed. The second purpose, set out in section 1(b) is to protect the privacy of individuals as to their personal information held by government. The third, also in section 1(b), is to provide individuals with a right of access to that personal information.

[20] These purposes are equal in importance and closely inter-related. Every section must be construed in the light of all three. The second observation is that, while the first purpose is expressly stated to be subject to exemptions, there is no such reservation in the statement of the second and third purposes. That does not mean that there are no limits on the implementation of the second and third purposes, but it does signal that we should not carry any such limitation beyond its narrowest scope. In order to meet the test of reasonableness, a head exercising the discretion granted by the second branch of section 19, must do so bearing in mind the three purposes of the Act and the other sections which bear upon the decision.

[21] One such section requiring consideration is section 49, which permits a head to refuse to disclose personal information to the very individual to whom it relates where, inter alia, sections 14 (law enforcement) or 19 would apply; or where the disclosure would constitute an unjustified invasion of another person's privacy. This is clearly an effort to reconcile two aspects of FIPPA which have some potential to conflict: the right to one's individual personal information and the need to limit disclosure of materials from the Crown brief of a sensitive nature. Since both purposes are fundamental to FIPPA, this section must be read so as to trench as little as possible upon each

---

[11] Quotation from 2747-3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)*, [1996] 3 S.C.R. 919, per L'Heureux-Dube J. at 1005-06.

purpose. This section also highlights the importance of section 19 and the protection it gives to the Crown brief. That protection can trump a person's right to his or her own personal information, one of the three purposes of the Act.

[22] Section 19, second branch, is the centre of the discussion, in particular whether it, or the Crown's common law privilege, have been waived by the delivery of the Crown brief disclosure to the accused, now the requester. Section 14, the law enforcement exemption, raises different issues. Section 14 (1) authorizes the head to refuse disclosure where it could reasonably be expected to interfere with law enforcement. Of particular relevance to the submissions are subsections (c) and (d) relating to the reasonable expectation that the material would reveal current police investigative techniques or procedures, or disclose the identity of a confidential source or information received solely from such a source.

[23] The scheme of the Act clearly places a heavy emphasis on the protection of the Crown brief. It is not difficult to see why that would be so. It may well contain material of a nature which would embarrass or defame third persons, disclose the names of persons giving information to the police, disclose police methods, and so forth. In discussing whether disclosure to the accused should be subject to an implied undertaking confining the use of the material to the defence of the charges, Lord Hoffman, for the majority in *Taylor*[12] set out the importance of the Crown brief at paragraphs 36 and 37:

> Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected.
>
> 37. One must also consider the interests of persons who are mentioned in the statements. Information given to the police or investigatory authorities will frequently contain defamatory or at least hurtful allegations about other people. That is to be expected in a criminal investigation. Such people may never be charged or know that they were under suspicion or that anything untoward was said about them. If such allegations are given publicity during the course of the proceedings, they will have to suffer the consequences because of the public interest in open justice. Even then, the judge will often be able to prevent the introduction of allegations about third parties which are not relevant to the issues in the case. But there seems to me no reason why the accused should be free, outside court, to publish such statements to

---

[12] *Taylor v. Serious Fraud Office*, [1998] 4 All E. R. 801 (H.L.).

> the world at large. The possibility of a defamation action is for most people too expensive and impractical to amount to an adequate remedy.

[24] In *Wagg*[13], Rosenberg J.A. quoted the above passages from *Taylor* and added that there were additional policy reasons for protecting the Crown brief, including that it may contain documents over which the Crown could claim public interest immunity, or might attract privilege or which, broadly speaking, it would not be in the public interest to produce. All of these considerations justified "the adoption of the screening process where the Crown brief, for whatever reason, finds its way into the hands of a party in a civil case." In my view, these same considerations must inform the analysis of the scheme of FIPPA and of section 19 in particular.

[25] The importance of the protection of the Crown brief has thus been emphasized at the highest judicial levels, as well as being the subject of at least three sections of FIPPA; sections 14, 19 and 49(a). It is also important to observe that FIPPA is not the only source of protection for the Crown brief; the common law has addressed the subject in *Wagg* in the context of the use of the brief in civil proceedings. Equally, sections 14 and 19 of FIPPA are confined within their Act; they offer no protection in the civil litigation context: that is the preserve of the courts.

**Analysis: Branch 2 of Section 19**

[26] I begin with the observation that the second branch of section 19 is not the source of litigation or 'work product' privilege in the Crown brief. Litigation privilege grew out of solicitor-client privilege, but has a different policy justification. It is not related to the confidences between solicitor and client, but to the needs of the adversary system. Counsel must be free to make full and timely investigations, including obtaining information from third parties, statements from witnesses, and the like, without having to share the results with the opponent. Crown counsel's litigation brief enjoys the protection of this common law litigation privilege[14], subject to the over-riding constitutional obligation to make disclosure to the accused imposed by *Stinchcombe*[15]. Prior to *Stinchcombe*, the law was unsettled as to Crown disclosure. The element of surprise was still present in the criminal system, long after it had vanished from civil litigation. The prosecutorial bar was often co-operative in making voluntary disclosure, but it was not mandatory.[16]

[27] It is clear from *Big Canoe*, *supra*, that the second branch of section 19, unlike the first, does not simply import the common law into FIPPA. The second branch does not even refer to the common law litigation privilege. This point was made by Carnwath J., for the Divisional Court, in *Big Canoe* at paragraphs 31 and 32, where he said that while the extent of solicitor-client privilege

---

[13] *P (D) v. Wagg* (2004), 184 C.C.C. (3d) 321 (Ont. C.A.) at page 339, paragraph 46.

[14] Sopinka, Lederman and Bryant: *Law of Evidence in Canada*; 2nd ed. Supp. Para. 14.75.1; See also the useful survey of the subject by Binder J. in *R. v. Trang* (2002) 168 C.C.C. (3rd) 145 (Alta. Q.B.).

[15] Supra; note 4.

[16] Ibid. paragraph 10.

in the first branch would vary as the common law evolved, the second branch was fixed by the words of the section. The language was clear and unambiguous: the head may refuse to disclose a record prepared as described in the statute. It was submitted that the Court of Appeal did not adopt this reasoning, but at paragraph 9, Carthy J.A. points out that the inquiry officer had accurately defined the common law [of litigation privilege] but not the statute. At paragraph 13, he described the error made by the inquiry officer:

> The error made by the inquiry officer was in assuming that the intent was to grant litigation privilege to Crown counsel and then reading in the common law temporal limit.

[28] In my view, this comment shows that Carthy J.A. agreed that the second branch was not an importation of common law litigation privilege, but an enactment in its own right. His subsequent finding that, unlike litigation privilege, the statutory exemption did not terminate when the litigation terminated, is consistent with this view.

[29] The decision of the Court of Appeal in *Big Canoe* was informed by a particular piece of legislative history, which the court concluded demonstrated that the intent of the legislation was that the branch 2 exemption should be permanent, as solicitor-client privilege is, and not die with the litigation as is the case with common-law litigation privilege. That history was in accord with the plain meaning of the words of section 19 which contained no temporal limit. Thus, neither the legislative history nor the actual language supported the finding of the inquiry officer.

[30] No additional legislative history was drawn to our attention with regard to whether the exemption created by the second branch could be lost by the prior production of the records to the opposite party in the course of the litigation. Certainly common law litigation privilege can be lost in such a fashion, as can solicitor-client privilege, even though the latter has achieved quasi-constitutional status as a fundamental aspect of our judicial and legal system. Generally, production to the opposite party in the litigation effectively ends the privilege.[17] However, we must not commit the error of assuming that, because the documents described in the second branch would be privileged as work product at common law, all the law of litigation privilege applies, (see *Big Canoe* at paragraphs 8 and 9). While a privilege can usually be waived by voluntary disclosure, nothing in the section expressly addresses the impact upon the exemption in section 19 of such a prior waiver of the privilege by disclosure.

[31] In *Big Canoe 1997*[18] this court held that the section 19 exemption had been waived by waiver of the Crown's solicitor-client privilege. The Crown had given information about the criminal prosecution of a lawyer to the Law Society for use in a Law Society hearing. After he was acquitted, the lawyer sought production of those documents from the Society under FIPPA and the Crown

---

[17] See the comments of Sharpe J.A. (in chambers) in *G. (N.) v. Upper Canada College* (2004), 70 O.R. (3rd) 312; paragraph 13.

[18] *Ontario (Attorney General) v. Big Canoe, John Doe and The Law Society of Upper Canada*, [1997] O.J. No. 4495, (Div. Ct.) (hereafter "*Big Canoe 1997*").

resisted on the grounds of section 19. The Inquiry Officer had made two findings: that the records were not protected by section 19 because the prosecution had ended; and that the records were not protected by section 19 because they had been sent voluntarily to the Law Society.[19] O'Leary J., for the panel, endorsed the record:

> In our view any obligation that counsel for the Crown had to the Law Society did not obligate him to report anything that would entail a breach of solicitor-client privilege. Accordingly by reporting or sending to the Law Society what was privileged the Crown voluntarily waived privilege and that information is no longer shielded from disclosure under the [FIPPA].
>
> Section 42(g) of [FIPPA] which permitted the Crown to disclose to the Law Society information relating to John Doe does not in our view require the disclosure of privileged information or protect the disclosure of such information from waiver of privilege.

[32] Although there were two findings by the Inquiry Officer, the reasons dealt with only one: that the release of the material was not compelled by section 42 (g) and privilege was lost by voluntary release. The Divisional Court in *Big Canoe 1997* did not need to refer to the Inquiry Officer's other finding, that the section 19 second Branch privilege ended with the prosecution.

[33] In *Big Canoe 2001*, Carnwath J. referred to this aspect of *Big Canoe 1997* at paragraph 28:

> 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 section 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 section 19 is reasonable or correct.

[34] This makes it clear that the Divisional Court decided *Big Canoe 1997* on the basis that the solicitor-client privilege and the associated section 19 exemption had been lost by voluntary disclosure. In this court, we are bound to follow the *Big Canoe 1997* finding that waiver of the common law privilege by voluntary delivery of the records to a third party ends the section 19 privilege, unless the later case of *Big Canoe* has impliedly over-ruled it. Since *Big Canoe* stresses the difference between the common law litigation privilege and the section 19 exemption under FIPPA, the two cases may well not stand together, but, as I have concluded that there has been no voluntary waiver of the common law privilege, that question will have to await another day. I turn therefore to the effect of a *Stinchcombe* disclosure.

---

[19] This information comes from the reasons of Carnwath J., who was on the panel which heard *Big Canoe 1997*, in *Ontario (Attorney General) v. Big Canoe*, [2001] O.J. No. 4876, paras. 25 - 27 (Div. Ct.) "*Big Canoe 2001*".

[35] So far as common-law privilege is concerned, there is ample authority in support of the point that privilege at common law is generally only lost by voluntary disclosure[20]. Most recently this court has held, in *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*[21], that the release of privileged documents to a company's auditors under compulsion of a statute[22] was not voluntary and hence did not waive the privilege, except for the purposes of the auditors and the audit. Hence the subsequent unauthorized delivery of such documents to the Commission by the auditors did not permit the Commission to use them. The key question in considering waiver is whether the documents were released voluntarily. In this present case, the documents in question were released to the requester, in his former capacity as the accused, by the Crown pursuant to the duty to do so under *Stinchcombe* and not voluntarily. Therefore, the Crown's common law litigation privilege was waived only for the purposes of the defence of the accused. In any event, there has been no voluntary disclosure and *Big Canoe 1997* is distinguishable.

[36] It was submitted that the Crown's *Stinchcombe* disclosure was subject to an implied undertaking not to use the data except for the defence of the accused, and therefore its use to sue the Crown, as it appears the requester may wish to do, would be a breach of that undertaking. There is, as Rosenberg J.A. said in *Wagg*,[23] a powerful case for such an implication. However, as in *Wagg*, so in this case, the interests that ought to be represented before a court deciding such an issue[24] were not before us and it is not strictly necessary to decide the issue. The real issue before us is not what the requester intends to do with the information, but whether, as a member of the public, he is entitled to obtain it in the face of the refusal of the head to release it. Since I am persuaded that the language of section 19 does not require the production of the Crown brief under FIPPA, that issue is also for another day.

[37] If the statute does not import the common law of litigation privilege, what does it do? In my view, it creates, for FIPPA purposes only, an exemption: a statutory discretionary power in the head to withhold a certain class of document. It happens to describe a class of document which, at common law, would be protected by litigation privilege, but would cease to be privileged when the relevant litigation terminated. While, as noted earlier, this exemption is similar to common law litigation privilege, they are not identical in origin, content or purpose. The common law litigation privilege exists to protect the lawyer's work product, research, both legal and factual, and strategy from the adversary. By contrast, the section 19 exemption exists to protect the Crown brief and its sensitive contents from disclosure to the general public by a simple request. The common law privilege ends with the litigation because the need for it ceases to exist. The statutory exemption does not end because the need for it continues long after the litigation for which the contents were created. The common law privilege can be waived by Crown counsel, as the person having carriage of the

---

[20] See: Sopinka et al., op. cit. paragraphs 14.96 ff.

[21] [2005] O.J. No. 4418 (Div. Ct.).

[22] Section 153 of the *Ontario Business Corporations Act*.

[23] Paragraphs 45-47.

[24] The Advocates' Society, the Criminal Lawyers Association and the Canadian Civil Liberties Association, to name a few.

matter. If, as *Big Canoe* establishes, the second branch of section 19 is not a mere statement of the common law, but an enactment on its own, the exemption surely would have to be waived by the person having such authority: the head.

[38] In *G. (N) v. Upper Canada College*[25], the Master had made an order for the production, in a civil matter, of a videotape from the Crown brief in an ongoing criminal trial. Sharpe J.A. refused a stay of the Master's order pending the Crown's motion for leave to appeal. He said:

> The purpose of litigation privilege, as distinct from solicitor-client privilege, is to protect work product in the adversarial litigation process: see [*Big Canoe*]. It follows that production to the opposite party in the litigation effectively ends the privilege. The videotape has already been produced to the accused in the criminal proceedings and hence in that litigation, privilege no longer attaches to the videotape. Litigation privilege, unlike solicitor-client privilege, does not survive the litigation in which it arose, although legislation may extend broader protection to material prepared for the purposes of litigation: [*Big Canoe*]. (emphasis added)

[39] In the last portion of the quoted excerpt, Sharpe J.A. recognizes the very distinction of interest to us in the present case: that FIPPA has extended a different form of protection to the Crown brief for its purposes. This is consistent with the decision of the Court of Appeal in *CTV*[26] in which it was submitted that the municipal version of FIPPA precluded the court from ordering access to court records. The court disagreed, stressing that FIPPA did not alter the common law powers of the court to order access to records under its control. The regime established by FIPPA is one which co-exists with the court's jurisdiction, but does not replace it.

[40] In the present case, part of the argument submitted by the Commissioner[27] appeared to assume that the provisions of FIPPA can somehow be applied to the screening mechanism mandated by the *Wagg* case. In my view, this notion overlooks the different purposes for which the court's jurisdiction and that of the Commissioner under FIPPA exist. The purposes and imperatives of FIPPA are quite different from those of a court determining the access which the parties will have to documents necessary to do justice in a particular case. The kind of discretionary power in the head to withhold access, embodied in section 19, has its place in dealing with requests from the public generally, but is unacceptable when the interests of justice require the documents to be available. The court must be the final arbiter in such a case.

[41] Nothing in FIPPA affects the *Stinchcombe* obligations of the Crown to make timely disclosure of all relevant materials in its possession to the accused person prior to the trial. The decision as to that disclosure lies with Crown counsel. By contrast, the section 19 discretion to refuse to disclose a record lies with the head, not with Crown counsel, and applies only to production of

---

[25] (2004) 70 O.R. (3rd) 312; Sharpe J.A. in chambers.

[26] *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.).

[27] In particular paragraphs 86 -90 of the Respondents' Factum.

the material under FIPPA. Persons with some other independent right to disclosure can take the appropriate alternative route to obtain the documents. The accused obtains disclosure through Crown counsel; the civil litigant obtains it via the Rules of Civil Procedure, subject to screening (*Wagg*); the client of the Childrens' Lawyer obtains it through the *Solicitors' Act*. FIPPA has nothing to do with any of this. In *Big Canoe*, Carthy J.A., for the court, made the point clear at paragraph 14 where he said:

> It should be kept in mind that this is [FIPPA] 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.

[42] Similarly, in *Children's Lawyer*[28], the requester had an independent right to her litigation file as a client of the agency, arising from the *Solicitor's Act* and the jurisprudence as to solicitor-client relations. Indeed, the court questioned why the agency had diverted her request for her file into the FIPPA stream at all. In *Wagg*,[29] the screening mechanism devised by the courts is necessary precisely because the restrictions in FIPPA do not reach the civil discovery process and are inappropriate for it, but public policy requires some continuing protection of the Crown brief.

[43] The Ministry submitted that there was no reason why a *Stinchcombe* disclosure should affect the second branch of section 19 exemption, which rests upon an entirely different basis than litigation privilege. Its language contains no reference to the material being privileged at common law as the basis for the exemption. On the contrary, the conditions for the exemption are explicitly related to the purpose for which the material was created. Further, the section 19 exemption has an important role to play in protecting the Crown brief from production to the public "upon simple request." The protection of the Crown brief has continuing relevance to the public interest in protecting police methods and sources and in protecting the identity of witnesses and encouraging others to come forward and this relevance continues long after the litigation has ended. Just as nothing in the language of section 19 suggests that the exemption is terminated by the termination of the litigation, similarly there is nothing in the language or the context to suggest that the FIPPA exemption is terminated by the loss of the common law litigation privilege. They are two separate matters. There should be no generalized public access to the Crown's work product even after the case has ended.

[44] For the reasons already set out, I agree with this position, for there is a clear need to protect the information in the Crown brief from dissemination to the public as a matter of course upon "simple request", which could lead to undesirable disclosure of police methods and the like. The limited waiver of the Crown's litigation privilege by a *Stinchcombe* disclosure cannot be turned into

---

[28] *Ontario (Childrens' Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3rd) 692 (Div. Ct.); affirmed (2005), 75 O.R. (3rd) 309 (C.A.).

[29] *P. (D) v. Wagg* (2002), 61 O.R. (3rd) 746 (Div. Ct.); affirmed with variation (2004), 71 O.R. (3rd) 229 (C.A.).

a waiver of the section 19 exemption so as to entitle any person to insist upon access to the records. Crown counsel has no authority to waive the FIPPA exemption.

[45] As to the Senior Adjudicator's decision that some of the records may not have been privileged in the first place, in my view this is irrelevant. The issue is not common law privilege, but whether the records meet the description in the second branch of section 19. Those records at issue are in the Private Record filed with the court and, with the exception of the letters from defence counsel to Crown counsel, clearly fit the description. Those letters were prepared and sent to Crown counsel in the course of the prosecution, but it would stretch the language "prepared ... for Crown counsel .... for use in the litigation" to include them. I would hold that they are producible as outside the reach of section 19. The letters from Crown counsel to defence counsel fall within the definition, but are outside of any reasonable "zone of privacy" and the adjudicator's decision to require their release is a reasonable order in the circumstances.

[46] In summary, the litigation privilege of the Crown derives from common law, pre-existed FIPPA and may be waived by production to the opposite party of material prepared by or for the Crown for use in litigation, but, where made under compulsion of law, the waiver is a limited one. Where through FIPPA, documents are sought which fit the description in the second branch of section 19, the question of whether they are, or ever were, privileged at common law is not the test. The test is the definition in the section. It may be thought that this gives the head an overly broad discretion, but in my view that is what the statute says. Nor does the exercise of that discretion to withhold end the requester's opportunity to obtain the documents he seeks. An application under FIPPA is not the only route to obtain the Crown brief. Where relevant, the Crown brief will be available to parties to litigation via the court, subject only to the *Wagg* screening and without reference to FIPPA.

**Other Sections of FIPPA Referred To**

[47] In addition to section 19, other sections of FIPPA have been raised in the submissions. These sections, like any other legislation, must be read in the context of the entire Act and in a purposive fashion so as to achieve the purposes and objects of the Act. The sections raised are:

> a) Section 10 provides that every person has a right of access to a record ... in the custody or control of an institution unless the record is exempt under one or more of sections 12 to 22.
>
> b) Where an individual seeks access to the individual's own personal information, section 47 provides a right of access, subject to certain statutory exemptions, in particular section 49.
>
> c) Section 49 provides that a head may refuse to disclose personal information to the individual to whom it relates (a) where, inter alia, section 19 would apply to the disclosure of the personal information, or (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

d) Section 21(1)(f) provides that a head shall refuse to disclose personal information to someone other than the individual him/her self, except if the disclosure does not constitute an unjustified invasion of personal privacy.

e) Section 21(3)(b) creates a presumption of unjustified invasion where the information is identifiably part of an investigation into a possible violation of law, except as necessary for prosecution or further investigation.

[48] "Personal information" is defined in the Act to mean "recorded information about an identifiable individual". Subsection 2(1) provides a detailed but non-exhaustive list of examples of what personal information means, including:

> (a) information relating to age, sex, marital or family status
>
> (b) information relating to the medical, psychiatric, psychological, criminal or employment history of the individual ...;
>
> (d) the address of the individual;
>
> (f) the individual's name, where it appears with other personal information relating to the individual.

[49] Section 53 provides that where an institution refuses access to a record, the institution bears the burden of proving that one of the statutory exemptions applies.

[50] The Attorney General submits that these sections apply to preclude the disclosure of certain records[30], because they contain the personal information of an individual, and identify that individual as a complainant or witness in certain criminal proceedings. It is clear that the requester already knows this information, but release of it without restrictions will enable it to be disseminated in a form which would identify the individual in that context contrary to the presumption created by section 21(3)(b), *supra*. This is an issue of balancing the privacy interests and the disclosure interests and is within the expertise of the adjudicator and not of the court.

[51] It was submitted that the Senior Adjudicator was correct to find that refusing the release of records to this requester, who already had seen them, and whose lawyer actually still had them, was an absurd result. With respect, I do not agree. Given the importance which FIPPA accords to the protection of the Crown brief, and the significant differences between the release of documents to an accused in response to the imperative of *Stinchcombe*, a limited waiver of privilege at best, and possibly subject to an implied undertaking as to future use, on the one hand, and the unrestricted release of the same documents to a member of the public, albeit the former accused, on the other hand, I am far from thinking the refusal of the latter is absurd.

---

[30] Nos. 100, 101 and 116 in the Private Record.

[52] In the result, I would allow the application for judicial review and quash Order PO-1664, as amended by Reconsideration Decisions of Senior Adjudicator David Goodis dated October 17, 2003 and November 24, 2003, and remit the matters in issue before us to the Senior Adjudicator for re-consideration in the light of the legal principles set out herein. Costs, if demanded, may be addressed in writing.

LANE J.
THEN J.
PARDU J.

**DATE:** May 8, 2006