DATE: November 26, 2004
DOCKET: C40867

COURT OF APPEAL FOR ONTARIO

ABELLA, MOLDAVER AND GOUDGE JJ.A.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as Represented by the Minister of Health and Long-Term Care of Ontario	)	Freya Kristjanson and John Higgins for the appellant
	)	
Applicant (Respondent in Appeal)	)	
	)	
- and -	)	
	)	
TOM MITCHINSON, Assistant Commissioner, Information and Privacy Commissioner/Ontario	)	Leslie M. McIntosh for the respondent
	)	
Respondent (Appellant)	)	
	)	
- and -	)	
	)	
JOHN DOE AND JANE DOE, Requesters	)	
	)	
Respondents (Respondents in Appeal)	)	
	)	
	)	**Heard: July 6 and 7, 2004**

On appeal from the order of Justice Robert A. Blair and Justice Colin L. Campbell, Justice Susan E. Lang dissenting, of the Divisional Court dated June 26, 2003.

GOUDGE J.A.:

INTRODUCTION

[1] The *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("the Act") provides Ontario with a detailed and sophisticated regulatory scheme designed to give the public a right of access to information held by the provincial government, but also to protect the privacy of individuals with respect to that information. A number of different questions arising from this scheme have found their way to this court. This appeal adds to that list. The central question concerns s. 21(5) of the Act and the test to be applied when the head of a provincial institution, who cannot disclose the contents of a record because that would constitute an unjustified invasion of personal privacy, seeks to respond to a request for information by refusing to confirm or deny the very existence of the record.

[2] The Information and Privacy Commissioner, who sits at the apex of the statutory scheme, decided that in these circumstances the head must find that disclosure of the existence of the record would itself convey information to the requester that would constitute an unjustified invasion of personal privacy, even though the contents of the record remained undisclosed. Only then can the head refuse to confirm or deny the existence of the record.

[3] The majority of the Divisional Court found this to be an unreasonable decision, given the language of s. 21(5) of the Act. Lang J. (as she then was) dissented, concluding that the Commissioner's interpretation of the discretionary power given to the head by s. 21(5) was neither unreasonable nor irrational.

[4] For the reasons that follow, I agree with Lang J. and I would therefore allow the appeal.

BACKGROUND

[5] The fundamental purposes of the Act are twofold: to provide a right of access to the public to information in the control of the provincial government; and to protect the privacy of individuals with respect to personal information about them held by the provincial government. A corollary purpose is that decisions on disclosure should be reviewed independently of government. To that end the Act creates the office of the Information and Privacy Commissioner and makes the Commissioner an officer of the Legislature responsible to it and not to the provincial government.

[6] Section 1 of the Act sets this out clearly:

> 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.

[7] When a request is received for access to information in a record held by a ministry of government, the Act requires the Minister as the "head" of the institution to balance the considerations of access and privacy to determine whether to disclose the contents of the record.

[8] Where the subject of the request is personal information, s. 21 guides the Minister's decision. Section 21(1) prohibits the Minister from disclosing personal information unless one of the specified exceptions is applicable, the most important of which is that the disclosure does not constitute an unjustified invasion of personal privacy. If an exception applies, the Minister must disclose. Section 21(3) lists circumstances deemed to be an unjustified invasion of privacy and s. 21(4) lists other circumstances that are deemed not to be such an invasion. Where neither of these subsections apply, s. 21(2) sets out a number of factors which the Minister must consider in deciding whether disclosure of the personal information constitutes an unjustified invasion of personal privacy. In other words, the Minister is to use these factors in applying the test of "unjustified invasion of personal privacy" created by the Act to balance the right of access and the protection of individual privacy.

[9] Section 21(5) is the critical section in this appeal. It speaks not to the disclosure of the contents of a record of personal information, but to the Minister's discretion to refuse to acknowledge that such a record exists at all. It says, "A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy."

[10] Section 50 of the Act gives the person who made the access request the right to appeal any decision of a Minister to the Commissioner. The sections that follow give the Commissioner quite unique powers in conducting the appeal. Section 51 allows the Commissioner to authorize a mediator to attempt to settle a matter. Section 52 allows the Commissioner to review the Minister's decision by conducting an inquiry in which the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and its procedural protections do not apply and in which the Commissioner has powers of entry and compelled production. Then s. 54(1) of the Act provides, "After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal."

[11] Although the Act contains no privative clause protecting the Commissioner's decision, there is also no provision authorizing an appeal from that decision.

[12] Finally, in s. 59, the Commissioner is given broad powers apart from deciding individual appeals, which include giving advice on the privacy protection implications of proposed legislation and conducting research and public education relevant to the Act and its purposes.

[13] The context for this appeal is a dispute between an individual and the Ministry of Health and Long Term Care over the level of public funding provided by the Minister for the home care for that individual. The individual took his case to the Public Services Board, which was empowered to adjudicate the dispute, and that action led to considerable public discussion, debate in the Provincial Legislature, and significant media interest. When the individual withdrew his appeal, two journalists applied under the Act for access to any records that would explain the withdrawal, including the details of any settlement made by the Ministry with the individual.

[14] The Minister responded to both requests by relying on s. 21(5) of the Act. The Minister simply refused to confirm or deny the existence of any records responsive to the requests.

[15] Both requesters appealed to the Commissioner. In both cases, the Commissioner declined to uphold the Minister's decision to refuse to confirm or deny the existence of any records. He set out his reasoning concerning the operation of s. 21(5) as follows:

> A requester in a section 21(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 21(5), an institution is denying the requester the right to know whether a record exists, even if it does not. This section gives institutions a significant discretionary power which should be exercised only in rare cases (Order P-339).
>
> An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. It must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested records would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy (Orders P-339 and P-808 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.))
>
> Therefore, in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that:
>
> 1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and
>
> 2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

[16] He then went on to find that the Minister did not establish that if there were responsive records, revealing their existence would itself constitute an unjustified invasion of personal privacy.

[17] The Minister did not contest this second requirement before the Commissioner. It did so for the first time before the Divisional Court. On the appeal to the Commissioner, the Minister simply argued that if there were responsive records, revealing their existence would constitute an unjustified invasion of personal privacy. The Commissioner disagreed and found to the contrary.

[18] The Minister applied for judicial review of both decisions. Counsel for the Commissioner responded to the application, but no one appeared for the two requesters.

[19] Both in the Divisional Court and in this court the two principal issues were first, the proper standard of review to be applied to the two-part test that the Commissioner found must be met if the Minister seeks to engage s. 21(5) of the Act, and second, whether that test survives the application of that standard of review.

[20] There were two subsidiary issues as well. The first was if the two-part test was one which the Commissioner could properly apply, was there any basis to interfere with his conclusion that the Minister had not met the second part of the test? The other did not relate to s. 21(5) at all but rather to the Commissioner's decision that if a certain particular record does exist, its contents must be disclosed in response to the requests. The issue was whether there was any basis to interfere with that finding.

[21] The majority of the Divisional Court and Lang J. agreed that the proper standard of review was that of reasonableness. They parted company however on the second main question. The majority found that the Commissioner's two-part test is an interpretation of s. 21(5) that the language of the subsection cannot reasonably bear because the second part of the test (i.e., whether revealing the existence of a record would itself be an unjustified invasion of personal privacy) then becomes a statutory test not found in the subsection. The majority saw s. 21(5) as a protective mechanism to ensure airtight protection for a report where disclosure of its contents would be an unjustified invasion of personal privacy. In their view, the subsection permits the Minister to refuse to confirm or deny the existence of such a report where that minimal disclosure would not affect the individual's privacy in any unjustified way.

[22] On the other hand, Lang J. found that the two-part test is reasonable because the second part of the test merely circumscribes the discretion given to the Minister by s. 21(5) in a way that is consistent with the purposes of the Act.

[23] On the first subsidiary issue, both the majority and Lang J. agreed that if the Commissioner's two-part test is reasonable there is no basis to interfere with his application of that test in these circumstances.

[24] On the final issue, the majority held that because the Commissioner's two-part test was unreasonable, thereby restoring the Minister's decision to refuse to confirm or deny the existence of any records, the Commissioner's order to disclose the contents of a specific record (assuming such a record exists) must fall. Lang J. on the other hand found no basis to interfere with this particular order.

ANALYSIS

[25] I propose to deal with the same issues as the Divisional Court did, recognizing as it did, that the two principal issues warrant most of the attention.

THE FIRST ISSUE – THE STANDARD OF REVIEW

[26] The pragmatic and functional analysis to be used in determining the appropriate standard of review is by now well-known. The four contextual factors to be considered assist in the basic task, namely ascertaining the extent of judicial review that the legislature intended for a particular decision of an administrative agency, here the Commissioner's decision that the Minister could not invoke s. 21(5).

[27] The first contextual factor is whether the legislation speaks expressly to the role of the court in reviewing the administrative decision, either by providing a privative clause or a statutory right of appeal. The former favours a more deferential standard of review, the latter a more searching standard of review. In this case, the Act provides for neither. It does not point to either the significant deference of patent unreasonableness or to the strict scrutiny of correctness.

[28] The second contextual factor is the relative expertise of the Commissioner and the court both in relation to the Act generally and to the particular decision under review. One of the principles the Act is expressly founded on is that disclosure decisions should be reviewed independently of government. It creates the office of the Commissioner to deliver on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker. In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the Act's explicit objectives suggests that the courts should exercise deference in relation to the Commissioner's decisions.

[29] In *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767, Campbell and Dunnet JJ. eloquently articulated the role given to the Commissioner. They said this at 781-83:

> Unlike the tribunal under the CHRA, [*Canadian Human Rights Act*] the commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision-making under the Act reaches a final administrative focus in such appeals.
>
> …
>
> Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in *New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra*, the commission is a specialized agency

> which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.
>
> The commission has issued over 500 orders in the five years since its creation [by 1998, 2000 and now significantly more], resulting in an expertise acquired on a daily basis in the management of government information.
>
> Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.

[30] Much of this passage has already been cited with approval by this court. See, for example, *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R (3d) 464 at 472-73.

[31] In every review of disclosure decisions by government, the Commissioner is required by the Act 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 of 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.

[32] The disclosure decision under review here required the striking of that delicate balance in the specific context of s. 21(5). The elaboration of the requirements of that subsection undertaken by the Commissioner constitutes an interpretation by him of his constituent legislation. Where a tribunal with broad relative expertise must bring that expertise to the task of interpreting a specific provision of its own legislation, the courts should exercise considerable deference. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

[33] Finally, the legislation calls on the Commissioner not just to decide individual appeals but to give general policy advice. This is another reflection of the Commissioner's relative expertise that suggests the need for judicial deference.

[34] The third contextual factor is the broad purpose of the Act as a whole and of s. 21(5) in particular. In my view, the Act is conceived as a mechanism to advance the right of the public to access information in the hands of government, to protect the privacy of individuals with respect to that information, and to balance the tension between those two objectives. The Commissioner's role is central to advancing this legislative purpose both by resolving particular disputes and by providing general policy advice. In resolving disputes such as this one the Commissioner is not addressing a binary dispute between two private individuals. The dispute is not limited to the Ministry and the requesters because it involves the privacy of another individual. All three made representations to the Commissioner. More fundamentally however, it is a conflict between the public interest and access to information and the individual interest in personal privacy. This requires the consideration of much broader interests than just those of two opposing litigants and reflects a dispute that is more polycentric than bipolar. Thus the broad purpose of the Act as a whole and s. 21(5) in particular is consistent with a less searching rather than a more searching standard of review.

[35] Finally, the nature of the problem before the Commissioner must be considered. The Commissioner decided the nature of the test to be met by the Minister under s. 21(5) in order to refuse to confirm or deny the existence of a record. He then applied that test to the facts of this case.

[36] While the latter involves a question of mixed fact and law, there is no doubt that in interpreting the meaning of s. 21(5) the Commissioner was addressing a pure question of law. Particularly where statutory interpretation is involved, the tribunal's answer to a question of law will not attract judicial deference, given the court's own expertise in such matters, unless the legal question is "at the core" of the tribunal's expertise. See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2004), 41 C.C.P.B. 106 (S.C.C.).

[37] Section 21(5) provides that the Minister has discretion to refuse to confirm or deny the existence of a record disclosure of which would constitute an unjustified invasion of personal privacy. The question of law for the Commissioner was the constraint if any placed by the Act on the exercise of that discretion. From the time of *Roncarelli v. Duplessis*, [1959] S.C.R. 121, it has been clear that such a statutory discretion cannot be absolute and untrammelled but must be read in light of the policy and objects of the statute granting it. See *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paras. 91-94, Binnie J.

[38] Here the Commissioner was required to determine the reach of the Minister's discretion in light of the Act's two fundamental purposes, the right of public access and the protection of individual privacy, and the need to balance them. In my view, this goes precisely to the core of his expertise. It is the essence of his mandate, both in deciding individual appeals and providing general advice. Hence even though the nature of the problem before the Commissioner involves a pure question of law, that does not dictate strict scrutiny by the court.

[39] When these factors are viewed together, I conclude that they all suggest that a moderate deference be accorded to the Commissioner's decision. None suggest the greater deference of the patently unreasonable standard nor the strict scrutiny of the correctness standard. Rather, reasonableness is the proper standard of review to be applied to the Commissioner's decision.

THE SECOND ISSUE – THE REASONABLENESS OF THE COMMISSIONER'S STATUTORY INTERPRETATION

[40] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 the Supreme Court of Canada elaborated on the content of the reasonableness standard of review at para. 56:

> I conclude that the third standard should be whether the decision of the Tribunal is unreasonable.… An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

[41] To repeat, s. 21(5) of the Act says: "A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy."

[42] The Commissioner's reasons for decision begin with the obvious, namely that the subsection gives the Minister a significant discretionary power. The Commissioner went on to find that to invoke s. 21(5) the Minister must be able to demonstrate both that the disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy and that the disclosure of the fact that the records exist would in itself convey information to the requesters, disclosure of which would constitute an unjust invasion of personal privacy.

[43] All parties agree that the first requirement is mandated by s. 21(5). It is the second that is in issue, namely, where the first requirement is met, whether the Minister's discretion to refuse to confirm or deny the very existence of the records is constrained by his obligation to show that disclosing the fact of their existence would itself constitute an unjustified invasion of personal privacy. The question is whether this is a reasonable interpretation of s. 21(5). In my view it is.

[44] All agree that where the disclosure of the contents of a record would be an unjustified invasion, s. 21(5) gives the Minister a discretion to refuse to confirm or deny the existence of that record. There is also no doubt that the Minister's discretion in s. 21(5) is properly constrained by the policy and the objects of the Act under which it is granted. This proposition is not contested by the respondent. Although there is no express language in the subsection limiting the exercise of that discretion, the law requires that it be read in accordance with the objects and purposes of the Act. Indeed this is the essence of the contextual approach to statutory interpretation. In *C.U.P.E., supra*, Binnie J. put it this way at para. 106:

> This contextual approach accords with the previously mentioned *dictum* of Rand J. in *Roncarelli, supra*, that "there is always a perspective within which a statute is intended [by the legislature] to operate" (p.140), and Lord Reid's caution in *Padfield, supra*, that the particular wording of a ministerial power is to be read in light of "the policy and objects of the Act" (p. 1030).

[45] The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy. It puts a constraint on that discretion that is a reasonable reflection of the policy and purposes of the Act. In other words, it is a reasonable interpretation of the subsection and its grant of ministerial discretion, given the fundamental purposes of the Act.

[46] The scheme of the Act is designed both to advance public access to information and protection of individual privacy and also to provide the necessary balancing of these purposes. In s. 21(1)(f) the Act itself uses the concept of an unjustified invasion of personal privacy to strike the balance between access and privacy with respect to personal information contained in a report. This threshold for disclosure gives sufficient right of public access while sufficiently protecting individual privacy. The Commissioner's reading of s. 21(5) uses the same concept for the same purpose where the information is the fact of the existence of a report rather than its contents. The Minister has discretion to refuse to confirm or deny that fact if its disclosure would constitute an unjustified invasion of personal privacy. This recognizes the need to provide some right of public access to that fact but also the need to provide some protection of individual privacy with respect to it. The Commissioner reads the discretion given by the subsection to be constrained in this way in reflection of the Act's fundamental purposes and the balance required to be struck between them. In my view this is a reasonable interpretation particularly given that the Act itself uses the same concept to define the threshold for disclosure of personal information contained in a report. To balance the fundamental purposes of the Act this way where the information concerned is the fact of the existence of such a report cannot be said to be an unreasonable reading of the subsection. It is a reasonable constraint on the Minister's discretion in light of the scheme of the Act and its purposes.

[47] This was the conclusion reached by Lang J. Where she and I part company with the majority of the Divisional Court is that they would strike the balance between access and privacy differently and would read s. 21(5) to provide airtight protection to the privacy interest so that the ministerial discretion to refuse to confirm or deny existence of a report could be exercised even if disclosure of that fact constituted little or no invasion of personal privacy. Although that might be another possible interpretation of the grant of discretion in s. 21(5) that would strike a different balance between access and privacy, it does not render the Commissioner's interpretation unreasonable. Rather the Commissioner's interpretation reflects the same balance between access and privacy that the legislature itself has used in the Act.

[48] In summary, the Commissioner's interpretation of s. 21(5) constrains the Minister's discretion in a way that reflects the Act's two basic purposes and strikes the same balance between them that is found elsewhere in the Act. The interpretation is rationally supportable. Although these

supporting reasons were fully developed by the counsel for the Commissioner in the judicial review process, they are not articulated in the Commissioner's own reasons. This simply reflects the fact that before him no one contested the constraint on the Minister's discretion. In the end, the Commissioner's reading of s. 21(5) and the limits on the discretion it confers, is supported by reasons that can stand up to a somewhat probing examination.

THE THIRD ISSUE – THE APPLICATION OF THE TEST TO THIS CASE

[49] The respondent argues in the alternative that if the Commissioner's interpretation of s. 21(5) stands, the Minister would disclose information that would be an unjustified invasion of personal privacy if he went beyond refusing to confirm or deny the existence of any reports responsive to the requests. The respondent bases this on the particular wording of the requests.

[50] I agree with both the majority of the Divisional Court and Lang J. that the Commissioner's finding on the merits of the appeal falls squarely within his expertise. It deserves significant deference in this court.

[51] The Commissioner found that if the Minister simply confirmed the existence of such reports (assuming there were any), that would not tell the requesters anything not already implicitly known to them nor would it reveal anything about the contents of those reports, assuming they existed. Neither finding is unreasonable. Moreover, it is hardly unreasonable to focus not on the wording of the request but on the possible response to assess the information that that response might convey and its impact on the privacy of the individual concerned. This ground of appeal therefore fails.

THE FOURTH ISSUE – THE COMMISSIONER'S SPECIFIC DISCLOSURE DECISION

[52] In addition to dealing with s. 21(5), the Commissioner went on to order that, assuming a particular report exists, the Minister would have to disclose its contents because to do so would not be an unjustified invasion of personal privacy.

[53] Without commenting on that conclusion the majority of the Divisional Court set aside this order because it found that the Minister could exercise his discretion under s. 21(5) to refuse to confirm or deny responsive records altogether. In my view the majority erred in doing so because the Minister's discretion under s. 21(5) can only arise if the disclosure of the contents of the report would constitute an unjustified invasion of personal privacy. Since the majority did not question the Commissioner's conclusion to the opposite effect, it erred in finding that the Minister's discretion under s. 21(5) could be applied to such a record if it existed.

[54] Nor was the Commissioner unreasonable in his conclusion that disclosure of the contents of the particular report, assuming it existed, would not be an unjustified invasion of personal privacy. In doing so he found that the presumed unjustified invasion in s. 21(3)(a) had no application here nor did the factors favouring nondisclosure found in s. 21(2)(f) and (h). In my opinion the application of these statutory provisions to the facts of a case lies at the core of the Commissioner's expertise. The court can interfere with this conclusion only with the exercise of significant deference. The Commissioner offered no statutory interpretation in making his specific order but focused on the

factual circumstances before him. There is no basis to interfere with his conclusion that on these facts the Minister's disclosure requirement would exist.

CONCLUSION

[55] I would therefore allow the appeal, set aside the order of the Divisional Court, and dismiss the application for judicial review. The parties agree that there should be no costs here or below and it is so ordered.

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

Abella J.A. (Dissenting):

[56] I have had the benefit of reading the reasons of Goudge J.A. While I agree with him that the appropriate standard of review is reasonableness, I do not, with great respect, share his view that the standard has been met in this case.

[57] The Requestors, who chose to remain anonymous, sought access to "any information that would explain the withdrawal of…two matters from the Health Services Appeal Board" and "confirmation that a pre-hearing settlement was reached that would change the level of publicly-funded service the (affected person) would receive, the terms of that settlement and when the settlement was reached".

[58] Because disclosure of the information they sought would or could potentially reveal private information, the Ministry refused to confirm or deny the existence of any responsive records on the grounds that to do so would constitute an unjustified invasion of the individual's personal privacy.

[59] On the appeal of the Ministry's decision, the Ministry summarized for the Assistant Commissioner the basis for its decision as follows:

> …in the circumstances of this appeal, disclosure of the fact that a record exists would in itself convey personal information within the definition under section 2(1). Disclosure of the existence or non-existence of the record containing the requested information would reveal the fact that the named individual did or did not decide to settle his claims…by entering into "Minutes of Settlement". The manner in which an individual party to litigation decides to proceed, or not to proceed, is the personal information of that individual, and such information is highly sensitive within the meaning of the section 21(2)(f) of [the Act].

[60] The Assistant Commissioner refused to uphold the Ministry's exercise of discretion.

[61] The inherent tension in the *Freedom of Information and Protection of Privacy Act* is how to reconcile – and balance – the public's right to know with the protection of privacy. The complex legislative scheme attempts to mediate the tension between these two equally compelling principles by providing for access to records held by government unless the record falls within an exempted category. One of those categories, found in s. 21(1)(f), is that an individual's personal information cannot be revealed unless the information does not constitute an unjustified invasion of personal privacy. Some circumstances, set out in s. 21(3) of the Act, are deemed to constitute an unjustified invasion; on the other hand, s. 21(4) lists exceptions to these presumptions.

[62] The provision at issue in this case, s. 21(5) states:

> A head may refuse to confirm or deny the existence of a record *if disclosure of the record* would constitute an unjustified invasion of personal privacy. [emphasis added]

[63] Unlike many other provisions in the Act, including the subsections that precede it in s. 21, s. 21(5) is relatively uncomplicated. It deals with a simple issue: when the very existence of a record need neither be confirmed nor denied.

[64] I agree with the Assistant Commissioner that s. 21(5) anticipates the possibility of a two-stage analysis. I disagree, with respect, about the second stage he proposes.

[65] The first stage is the determination whether disclosure of the record would constitute an unjustified invasion of personal privacy. If it would not, clearly the head must confirm or deny the existence of the record. If, however, disclosure of the record would violate an individual's personal privacy and the report itself is, as a consequence, protected from public scrutiny, the second stage requires the head to decide whether to further protect it by refusing to confirm or deny its existence.

[66] It may well be that one of the factors the head will consider in making this latter decision is whether disclosing or denying a protected report's existence would reveal information constituting an unjustified invasion of privacy, but that is different from elevating that consideration to a statutory requirement, as the Assistant Commissioner proposes. The test applied by the Commissioner, in my view, unreasonably fetters what the statute has designated to be a wide discretion, and reduces it to one available "only in rare cases". There is no overriding rationale – statutory or philosophical – that would justify circumscribing the protective discretion in s. 21(5) so strongly.

[67] As previously stated, this provision allows a head to refuse to confirm or deny the existence of a record *if disclosure of the record* itself would constitute an unjustified invasion of personal privacy. The two-part test applied by the Assistant Commissioner would fundamentally change the clear meaning of this section by dramatically restricting a head's discretion: he or she can only refuse to confirm or deny the existence of a record if disclosure **not** of the record, as s. 21(5) stipulates, but disclosure of the ***existence*** of the record, would constitute an unjustified invasion of privacy. This amounts to reading in words to a section in order to read down its protective scope, an unwarranted diminution of what is, on its face, a statutory attempt to enhance that very protection.

[68] It seems to me that this proposed test goes beyond the mere interpretation of a constituent statutory provision. Section 21(5) is neither vague, ambiguous, nor contextually anomalous. It is, with respect, a singularly uncomplicated provision which offends neither the scheme of the Act nor its objectives. In s. 21(5), the legislature gives an individual whose personal information in a record is, under the Act, entitled to privacy protection from a requesting third party, the additional protection of permitting a head to refuse even to disclose whether such a record existed. As Blair R.S.J., writing for the majority in the Divisional Court, stated:

> Subsection 21(5) is in the Act to make certain that when a record containing personal information is protected from disclosure by operation of the foregoing provisions of the legislation, that protection is not undermined *indirectly* through disclosure in some other fashion. Not much imagination is required to envisage situations where merely disclosing the existence or non-existence of a record could have the same privacy-destroying effect as disclosure of the record itself. Thus, the protective mechanism encompassed in subs. 21(5) of the Act is a vital statutory shield without which the central concept of protection of privacy – reflecting, I repeat, a fundamental Canadian value – could not be safeguarded adequately.
> …
>
> …[Section 21(5)] represents a decision by the Legislature that the risk of indirect disclosure undercutting the privacy protection mandated by s. 21 outweighs the potentially minimal benefit of disclosing the mere existence (or non-existence) of the record where disclosure of that existence (or non-existence) itself would not be an unjustified invasion of personal privacy.
> …
>
> …[I]ts role is as a protective mechanism to ensure that [personal] information, when it cannot be disclosed directly, is not inadvertently disclosed indirectly.

[69] It was, and remains, open to the legislature to add language curtailing the ambit of the head's discretion, as suggested by the Assistant Commissioner. In the absence of any such language, it seems to me to be an unreasonable interpretive stretch to so construe the provision.

[70] I would dismiss the appeal without costs.

Released: November 26, 2004 "RSA"

"R.S. Abella J.A."