

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

*Re: The Licence Appeal Tribunal (Number 68 **Institution** in the Gen Reg.)*

IN THE MATTER OF an Appeal involving a Deemed Refusal Decision under Appeal Number PA25-00294 under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*“FIPPA”*] and associated regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 (*“Reg 459”*) and *General*, RRO 1990, Reg 460 (*“Reg 460”* or *“Gen Reg”*)) (collectively, the *“Attendant Regulations”*)

IN THE MATTER OF an Appeal involving applicability, paramountcy and consideration of the below statutes and provisions therein

In the matter of an Expedited Process transformed into an inquiry (expedited) (*“Inquiry (Expedited)”*) on September 29, 2025

Appellant’s Index Subject: Relief sought in the Inquiry Phase as of November 4, 2025

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51.	<i>Derenzis et al v. His Majesty the King et al</i> , 2025 ONSC 2761	2025	896 to 910
	VOLUME #17: Exceptions to Solicitor-Client Privilege		
52.	<i>Smith v. Jones</i> , 1999 CanLII 674 (SCC) Present: Lamer CJ and L'Heureux-Dube, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ. Majority: six judges Dissenting: Lamer CJ and Major and Binnie JJ (3 judges) On appeal from BCCA Heard: October 8, 1998 Reasons for Decision: March 25, 1999 ¹	1999	911 to 956
	VOLUME #17(A): POST SMITH V. JONES CASES – CIVIL ARENA – EXCEPTIONS TO PRIVILEGE ▪ Analogy: burden of privilege rests with the party who asserts it and the burden in <i>FIPPA</i>(ON) is on the Institution (not a non-institution) ▪ Exceptions to privilege include: abuse of process; breaches of regulatory statutes, torts and other breaches of duty; breach of confidence and breach of fiduciary duty ○ (<i>nota bene</i>: However, a mere assertion that the lawyer's advice was sought in furtherance of an illegal purpose would not be sufficient; some convincing evidence of the illegal purpose is required)²		
53.	Three cases underscoring the exceptions to solicitor-client privilege (Goldman Sachs x 2; and Blank v. Canada (Minister of Justice) <i>Goldman Sachs & Co. v. Sessions</i> , 2000 BCSC 67; <i>Goldman, Sachs & Co. v. Sessions</i> , 1999 CanLII 5317 (BCSC); <i>Blank v. Canada</i> (Justice), 2015 FC 956;	1999, 2000 and 2015	957 to 988; 989 to 1020
	VOLUME #17(B): INQUIRY PHASE (EXPEDITED OR NOT); DOCTRINES OF <i>FUNCTUS OFFICIO</i> , ISSUE ESTOPPEL, <i>RES JUDICATA</i> AND ABUSE OF PROCESS		

	▪ The Commissioner shall make an order disposing of the issues raised in the Appeal after all evidence has been received, in an inquiry (section 54(1) of <i>FIPPA</i>) ▪ Commissioner is not functus officio until all evidence is received (not disclosed records per se) and the Commissioner has issued an order disposing of all ISSUES in the OIPC Appeal ▪ (The current issues are outlined in the Comprehensive and Consolidated Factum)		
	VOLUME #17(B)(I): MOOTNESS ▪ [no issue of mootness herein; disputes have not disappeared; records in issue have not been disclosed to the Applicant; the response is not from an adjudicative tribunal but from a named cluster for 13 different and distinct tribunals; the response does not comply with section 26 and 29 of <i>FIPPA</i>;]		
54.	<i>Borowski v. Canada (Attorney General)</i> , 1989 CanLII 123 (SCC), [1989] 1 SCR 342		1021 to 1047
	VOLUME #17(C): SECTION 54(1) OF <i>FIPPA</i>		
55.	<i>Ontario Northland Transportation Commission (Re)</i> , 2013 CanLII 61848 (ON IPC) at paragraph 36 as per Daphne Loukidelis		1048 to 1059
	VOLUME #17(D): ISSUE ESTOPPEL ▪ [The issue of Tribunals Ontario not being a party to the Inquiry (Expedited) has already been decided in late September 2025]		
56.	<i>Penner v. Niagara (Regional Police Services Board)</i> , 2013 SCC 19		1060 to 1105
57.	<i>Smith Estate v National Money Mart Company</i> , 2008 ONCA 746		1106 to 1118
	VOLUME #18: <i>Functus Officio</i>³		
58.	<i>Canadian Broadcasting Corp. v. Manitoba</i> , 2021 SCC 33, 461 D.L.R. (4th) 635 at para. 34 [“ <i>CBC v. Manitoba</i> ”]		1119 to 1172
	VOLUME #19: Doctrines against premature and interlocutory judicial reviews; the alternative adequate and available alternate remedy doctrine (the “AAAR Doctrine”) and exhaustion doctrine (the “Exhaustion Doctrine”)		
	VOLUME #19(A): LEGISLATION		

59.	<i>Judicial Review Procedure Act</i> , RSO 1990, c J.1 <i>et seq</i> (the “ <i>JRPA</i> ”)	1990	1173 to 1177
	VOLUME #19(B): JUDICIAL REVIEW IS A DISCRETIONARY REMEDY; PREMATURITY		
60.	<i>Metro Ontario Real Estate Limited v. Corporation of the City of Orillia</i> , 2020 ONSC 7002	2020	1178 to 1186
	VOLUME #19(C): AARD DOCTRINE AND EXHAUSTION DOCTRINE		
61.	<i>Vochay v. College of Massage Therapists of Ontario</i> , 2012 ONCA 541	2012	1187 to 1211
62.	<i>C.B. Powell Ltd. v. Canada (Agence des services frontaliers)</i> , 2010 FCA 61 at paras. 30-33	2010	1212 to 1229
	VOLUME #19(D): WHEN DOES THE DIVISIONAL COURT INTERVENE DESPITE A DETERMINATION, DECISION AND/OR ORDER NOT BEING FINAL (see: (1) Deeply flawed; (2) want of jurisdiction; (3) potential prejudice of risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of admin proceedings without interruption until their conclusion; (4) real unfairness; (5) natural justice breach rising to the level of “clear and obvious” application will be successful; (6) broad implications; (7) fatally flawed process; and (8) Lack of jurisdiction, privacy rights at issue or resultant or prospective hearing would be unfair		
63.	<i>Lourenco v. Hegedus</i> , 2017 ONSC 3872 at paragraph 6	2017	1230 to 1234
64.	<i>Gage v. Ontario (Attorney General)</i> 1992 CanLII 8517 (ON SCDC), 90 D.L.R. (4th) 537 (Div. Ct.) at 553).	1992	1235 to 1249
65.	<i>Unimac-United Management Corp. v St. Clare’s-Monaco Place</i> , 2015 ONSC 4760 [“ <i>Unimac</i> ”]	2015	1250 to 1255
66.	<i>London District Catholic School Board v. Weilgosh</i> , 2024 ONSC 3857 [“ <i>Weilgosh</i> ”]	2024	1256 to 1273
67.	<i>Roosma v. Ford Motor Co. of Canada</i> , 1988 CanLII 5633 (ONSCDC) [“ <i>Roosma</i> ”] at paragraphs 25 and 26 (<i>SEE</i>: “Delay is at odds with the rationale of appointment of the Tribunal”).	1988	1274 to 1283
68.	<i>Rowe v. College of Nurses of Ontario and al.</i> , 2023 ONSC 6414 [“ <i>Rowe</i> ”]	2023	1284 to 1288
	VOLUME #20: Voidable versus Void and Void Ab initio ⁴		

	▪ “Void” has a well-established legal meaning: it imports a lack of validity or legal force. ▪ <i>Ab initio</i> is a Latin term meaning “from the beginning”. A defect of this nature is so fundamental that the act, agreement, or filing “never had any legal effect from inception” ▪ A <i>total absence of jurisdiction</i> (e.g., lack of <i>vires</i>, or the legal existence of the entity to be a party) renders the conduct of a person and/or board (commission) a nullity ▪ A creature of statute cannot confer jurisdiction or capacity where none exists		
69.	<i>Price v. Turnbull's Grove Inc.</i> , 2007 ONCA 408	2007	1289 to 1299
	VOLUME #21: Standing (sufficiency of interest) versus legal capacity (juristic personality or power to be a party) ▪ Locus standi: the right or capacity to commence a proceeding or appear in a proceeding⁵		
70.	<i>Wilfrid Laurier University (Re)</i> , 2019 CanLII 104373 (ON IPC) at paragraph 6 citing Sara Blake, <i>Administrative Law in Canada</i> , (3rd. ed.), (Butterworth’s, 2001), at page 106, cited in Order MO-1519	2019	1300 to 1307
	VOLUME #22: Declaration #2 of the Appellant and the designation of the OIPC Appeal as an Inquiry (Expedited)		
71.	Declaration #2 of the Appellant, November 1, 2025 ⁶	Nov 2025	1308 to 1324
72.	OIPC (Ms. Sherwood, Case Lead) designation of this Appeal as an Inquiry (Expedited) on September 29, 2025 Ms. Sherwood (Case Lead) represented the following as facts: ▪ On July 21, 2025, 2025, the IPC asked the tribunal whether a final decision had been issued and for a response by August 1, 2025. The tribunal required assistance from the IPC to identify the appellant’s access request. ▪ On August 8, 2025, the IPC asked the tribunal for a status update, requesting a response by August 15, 2025. No response was received. ▪ On August 20, 2025, the IPC requested a status update from the tribunal on when a final decision could be expected. No response was received. ▪ On August 25, 2025, the IPC asked the tribunal to respond to the IPC’s request for a status update by September 2, 2025. The tribunal responded that it needed more time to respond to the appellant’s access request.	Sept 29, 2025	1325 to 1328

	▪ On September 5, 2025, the IPC asked the tribunal to issue a decision by September 19, 2025. On that date, the tribunal advised that it required more time ▪ To prevent any further delays, I have decided to conduct an inquiry and issue this Notice of Expedited Inquiry. ▪ Burden of Proof: ○ Under section 53 of the Act, if an institution refuses or is deemed to have refused an access request, the burden of proof in respect of the refusal lies on the institution		

¹Holding: appeal dismissed and BCCA order is affirmed subject to a directive (file unsealed and the ban on the publication of content was removed except for parts of the psychiatrist's affidavit which did not fall within the public safety exception)

Summary:

Solicitor-client privilege highest privilege recognized by the courts and principle of fundamental important of the admin of justice

SC privilege: not absolute subject to limited exceptions

Danger to public safety is a justification

- Clear risk to identifiable person or group;
- Risk of serious bodily harm or death;
- Danger imminent

²*O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v. Darbishire*; *Goodman & Carr v. Minister of National Revenue*, [1968] O.J. No. 1248 (Ont. H.C.); *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, [2007] B.C.J. No. 179 (B.C. S.C.); *Goldman, Sachs & Co. v. Sessions* (1999), 1999 CanLII 5317 (BC SC), 38 C.P.C. (4th) 143 (B.C. S.C.); *Nanaimo Immigrant Settlement Society v. British Columbia*, [2003] B.C.J. No. 2305 (B.C. S.C.). The party challenging lawyer-and-client privilege on the grounds of fraud or criminal activity must make out a *prima facie* case of fraud before the privilege is lost: *O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v. Darbishire*; *Sperry Corp. v. John Deere Ltd.* (1984), 1984 CanLII 5875 (FC), 82 C.P.R. (2d) 1 (Fed. T.D.); *Silverman v. Morresi* (1982), 28 C.P.C. 239 (Ont. Master).)

³(nota bene: doctrine provides that once **a matter** is finally ruled upon, the administrative decision maker or judge has discharged its office and cannot re-open the matter. Indeed, to do so would impede on "orderly appellate procedure")

⁴The purported *FIPPA* response by Tribunals Ontario under section 26 and 29 of *FIPPA* is a jurisdictional nullity – void ab initio – non-waivable

Jurisdiction cannot be created by the parties (i.e. some consent agreement)

⁵Tribunal must act fairly and impartially

Standing (sufficiency of interest) versus legal capacity (juristic personality or the inherent power to be a party to litigation)

Tribunals Ontario does not have a legal capacity or juristic existence – foundational defect – foundational nullity (i.e. response tendered by a non-entity or non-juristic entity – void ab initio)

Foundational jurisdictional failure prevents the court from recognizing the entity is a proper entity

The Legislature only allows the head of the Institution and not a person of a non-institution under *FIPPA*

It was a legal non-act rendering it void ab initio

Tribunals do not have any inherent jurisdiction

Even where inherent jurisdiction is available it cannot override legislation

The Legislature passed section 50(3) of *FIPPA* that upon receiving notice of appeal, the Commissioner shall inform the head of the Institution and MAY inform any other institution or person with an interest in the appeal including an institution under *MFIPPA*

Ergo, if another institution is not implicated by transfer or forwarding, the Commissioner may inform an interested institution or interested person but if not notified, there is no right of any other institution, through its head, to be participate in the Appeal.

⁶Subject: failure of the LAT to produce the Two Undisclosed Motion Orders despite Appellant duly completing and delivering a copy of the LAT's Electronic Submissions for specific Adjudicative Records"

Nota bene: another issue that has arisen in the context of the Inquiry Phase (Expedited)

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

*Re: The Licence Appeal Tribunal (Number 68 **Institution** in the Gen Reg.)*

IN THE MATTER OF an Appeal involving a Deemed Refusal Decision, under Appeal Number PA25-00294ⁱ under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*“FIPPA”*] and Associated Regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 (*“Reg 459”*) and *General*, RRO 1990, Reg 460 (*“Reg 460”* or *“Gen Reg”*))

IN THE MATTER OF an Appeal involving applicability and consideration of the below statutes other than *FIPPA*

In the matter of an Expedited Process appeal before the OIPC under the OIPC’s:

- a. *Code of Procedure for appeals under MFIPPA and FIPPA* (the *“Code”*), specifically Rule 9;
- b. Practice Directions, specifically **Practice Direction #13**

In the matter of an Inquiry (Expedited) under Part V of *FIPPA*

**COMPREHENSIVE REPRESENTATIONS/FACTUM OF THE APPELLANT DURING THE INQUIRY
PHASE**

DATED: November 4, 2025

APPELLANT

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LICENCE APPEAL TRIBUNAL

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AND TO:

Head of Public Institution

Mr. Sean Weir
Executive Chair of the LAT
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FILED WITH THE FOLLOWING INSTITUTION:

The Office of the Information and Privacy Commissioner of Ontario (the “OIPC”)	
2 Bloor Street East,	
Suite 1400	
Toronto,	ON
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Via email: info@ipc.on.ca	

CHAPTER #1: OVERVIEW: PUBLIC INTEREST ISSUES AND ALL ISSUES DECIDED IN AN INQUIRY BY A COMMISSIONER'S ORDER

1. It is not **hyperbole** to **aver** that this instant Appeal before the Office of the Information and Privacy Commissioner (OIPC) **encompasses** a greater **panoply** of matters imbued with **public exigency** than any reported *ratio decidendi* of the last six years, **subsequent to the enactment** of the 2019 amendments to the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the **promulgation** of **cognate** statutes such as the *Tribunals Adjudicative Records Act (TARA)*. Moreover, it is not an **overstatement** to submit that this OIPC Appeal, necessitated by the reliance upon thirteen distinct **adjudicative tribunals** under an **umbrella nomenclature**—which is demonstrably **not** an **Institution** pursuant to *FIPPA*—stands as the most **consequential** matter in the last decade for the benefit of the citizenry.
2. The matters under consideration are deemed to be elusive of traditional appellate purview and are demonstrably imbued with **utmost import** for the **praxis and procedural regimen** enforced before the Office of the Information and Privacy Commissioner; this import extends concomitantly to the determination of substantive outcomes, which may be either **salutary or detrimental**, concerning the comprehensive regulatory framework for accident benefits that emanates from the *Statutory Accident Benefits Schedule (SABS)* and *O. Reg. 283*, which operates *pari passu* with the former. This scheme **mandates** that injured persons seek recourse through the Licence Appeal Tribunal (LAT) when automotive insurance companies are **called into question** for their non-compliance.
3. The factual and procedural **matrix** provides an **unprecedented** context. The sole instance in which the alleged conduct was more **egregious** in a singular instance was the reporting of legal counsel to the Law Society of Ontario (LSO) while the individual was representing a Catastrophic Impairment (CAT) client in *Ms. Derenzis*, perpetrated by none other than the Executive Chair of the LAT. It is **axiomatic**, and **judicial notice** may be taken by the Tribunal, that the reporting of a licensee to the LSO possesses the **potential** to result in professional **excommunication** or, in lesser instances, to materially **impinge** upon an individual's right to life, liberty, and security to some quantifiable degree. Professional discipline proceedings are **quasi-criminal** in nature (see: *Dr. Henderson and Pierce*). The actions of the **Head** of an **Institution** in lodging a formal complaint regarding a lawyer's conduct, however **misconstrued** or **fallacious**, would invariably be accorded **considerable gravity**. At a minimum, such an act is **tantamount** to a coercive threat and affects the capacity of counsel to adequately represent clients before the LAT.

CHAPTER #1, VOLUME #1: STATUS OF “TRIBUNALS ONTARIO” UNDER *FIPPA*: A JURISDICTIONAL NULLITY

4. From a **rigorous textual** and **teleological** analysis of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 (ATAGA)* and its attendant regulations (*O. Reg. 126/10, O. Reg. 91/11, O. Reg. 90/11, O. Reg. 88/11*), it is **unequivocally evident** that “**Tribunals Ontario**” exists solely as an administrative **nomenclature** for a cluster of adjudicative tribunals. It is **not**, *per se*, a distinct legal entity, corporation, agency, board, or commission prescribed as an **adjudicative tribunal** or an **Institution** within the meaning of *FIPPA*. All statutory obligations concerning accountability, governance, and appointments are ultimately **vested** in the individual, statutorily designated **adjudicative tribunals** that comprise the cluster (see: **Inquiry Record**, Tab 3, page 110).
5. In these **circumstances**, the LAT’s inclusion of a non-respondent and non-party as the sole respondent, **counter** to the **Appellant’s** *section 280(2)* of the *Insurance Act* application for dispute resolution (the “LAT Proceeding”), is one where the LAT receives **remuneration** for its adjudicative services. The originating form **clearly demonstrates** that the LAT is the entity collecting personal information pursuant to the *Licence Appeal Tribunal Act, 1999 (LATA)*. **It must be recognized that** there is no *Tribunals Ontario Act*; the entity constitutes merely an amalgamation of nomenclatures among three former clusters. Similarly, the former SLASTO, Social Justice Cluster, and the Environment and Land Tribunals were **not** deemed **Institutions** under *FIPPA*. Should the registered voters desire the merger of bodies, for example, the LAT and the Landlord and Tenant Board (LTB), to constitute a **new Institution** under *FIPPA*, a **petition** must be submitted to a Member of the **Legislature** to **promulgate** such a Bill. No **current source law** extends to this degree or has officially designated **Tribunals Ontario** as a separate **Institution** under *FIPPA*, an adjudicative tribunal under *TARA* or *ATAGA*, or a public body under the *Archives and Recordkeeping Act (ARA)*. Consequently, it remains a **notional** and **amorphous** nomenclature umbrella, lacking the confined and delineated boundaries requisite for a *FIPPA Institution*. The purported response, having been issued by a corporate **non-entity** operating *ex contractu* and not *ex lege*, fails *in limine* to satisfy the elementary jurisdictional prerequisite of a valid statutory response, constituting a **legal non-act** that possesses no effect *ipso jure*.

CHAPTER #1, VOLUME #2 OBLIGATIONS OF THE HEAD OF AN INSTITUTION

CHAPTER #1, VOLUME #2(A): PRESERVATION AND RECORDKEEPING

6. The **preservation** of records constitutes a guarantee and **ensuing obligation** upon the **Head** of an **Institution** (*i.e.*, vis-à-vis that **Institution**) based upon its **custody or control** (see: *section 10.1* of *FIPPA*). The **strictures** of preservation, recordkeeping, retention, *et al.*, of records, are **not homogeneous** across **Institutions**, even when one individual simultaneously presides as the **Head** of another. These obligations are **variable**, contingent upon the classes and types of records germane to the specific **Institution**. The duty

to preserve is a **fundamental administrative obligation**, the breach of which can undermine the entire **regimen of transparency** intended by *FIPPA*, thereby precipitating a potential **mandamus** remedy to compel compliance with this foundational statutory duty.

CHAPTER #1, VOLUME #2(B): DISCLOSURE REQUIREMENTS

7. The **mandate** of a **Head** of an **Institution** to disclose (see: *section 11* and *23* of *FIPPA*) will **fluctuate**, contingent upon the **genre** of **Institution** and the specific **issues** currently under review. The exercise of this mandate must be conducted with **scrupulous regard** for the principle of maximum disclosure, with exemptions being construed **narrowly** and the onus of proof resting **exclusively** upon the **Institution** asserting the exemption.

CHAPTER #1, VOLUME #3: PROCEDURAL AND JURISDICTIONAL ISSUES BEFORE THE OIPC

CHAPTER #1, VOLUME #3(A): THE EXPEDITED APPEAL PROCEDURE AND COMMISSIONER-DIRECTED INQUIRY

8. Another matter of considerable public interest that has arisen is the question of whether the **Expedited Appeal Procedure** (see: *OIPC Code of Procedure*) **co-exists** with *section 54(1)* of a Commissioner-directed Inquiry. Specifically, *Rule 9.03* of the *Code of Procedure* authorizes the Commissioner to issue an order without receiving further submissions from the Parties (see: **Inquiry Record**, page 7, paragraph 37).
9. Under *FIPPA*, and now within the **ambit** of an Inquiry (Expedited), the Commissioner must **adjudicate** all issues in this OIPC Appeal, but only following the **receipt** of all relevant evidence by the OIPC. The **operative question** then becomes: what **recourse** is available to the Commissioner when a party, such as the LAT, **refuses to adduce any evidence**? This is particularly salient given that the *Statutory Powers Procedure Act (SPPA)* is **not applicable** to an Inquiry. The deliberate omission of evidence by a statutory respondent contravenes the spirit of administrative *bona fides* and potentially warrants a finding adverse to the **Institution** upon a standard of review analogous to that used in *a fortiori* circumstances.

CHAPTER #1, VOLUME #3(B): THE CONSTRUCTION OF PERMISSIVE LANGUAGE

10. The **common law**, since 1986 (see: *Information Commissioner v Minister of Employment and Immigration*, 1986 CanLII 6836), through the Supreme Court of Canada (SCC), has **established** that a “**may**” in a statute or regulation can **congeal** into a “**must**,” where the permissive language is **coupled** with an obligation under a Part of a statute or within the same section or subsection (see: **Inquiry Record**, pages 7 and 8). **Enabling**

words are **invariably compulsory** where their purpose is to **effectuate** a pre-existing legal right (see: **Inquiry Record**, page 8, paragraphs 37 and 38).

11. The dichotomy between “**may**” versus “**shall**,” or “**Permission**” versus “**Mandatory**,” is a persistent theme throughout this OIPC Appeal and affects all of its constituent issues, which are **required** to be decided pursuant to *section 54(1)* of *FIPPA*.

CHAPTER #1, VOLUME #3(C): FINDING OF RECORD EXISTENCE: RES JUDICATA OR ISSUE ESTOPPEL

12. The Commissioner can only dismiss an appeal **immediately** if the Notice of Appeal fails to present a **reasonable basis** for confirming the record or the Personal Information to which the Notice of Appeal **pertains** (see: **Inquiry Record**, Tab #2, page 70). The definition of “**exists**” is one that exists at the time that the access request was made and the Appeal was made. Therefore, the Commissioner has **already determined**, on a **preliminary basis**, that the records within the thirteen Records Classes **exist**.

CHAPTER #1, VOLUME #3(C)(I): PRIVACY BREACH AND OFFENCE PROVISIONS

13. The **Appellant’s declaration #1** of September 15, 2025 (see: **Inquiry Record**, Tab #1), **condescended upon particulars** that concern remains that the LAT may have transgressed the **Appellant’s** privacy rights and potentially committed a privacy breach (see: section 40.1 of *FIPPA*, passed in 2024) (see: Tab #1, paragraph 41). Offences under *FIPPA* may also be **at issue herein**, which **underscores** the necessity of an order, even without a further hearing from the LAT—subject to the LAT tendering all evidence that is **relevant** to all the issues in this Appeal (see: *section 54(1)* of *FIPPA* and *Rule 9.03(f)* of the *OIPC Code of Procedure*).
14. Section 61 of *FIPPA*:

“No person shall,

- (a) wilfully collect, use or disclose personal information in contravention of this Act;
- (b) wilfully maintain a personal information bank that contravenes this Act;
- (b.1) wilfully contravene section 49.8;
- (c) make a request under this Act for access to or correction of personal information under false pretenses;
- (c.1) alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record;
- (d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;
- (e) wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or
- (f) wilfully fail to comply with an order of the Commissioner. R.S.O. 1990, c. F.31, s. 61 (1); 2014, c. 13, Sched. 6, s. 2 (1); 2019, c. 7, Sched. 31, s. 8; 2024, c. 24, Sched. 2, s. 14.”

15. “Person” includes a corporation (see: section 87 of the *Legislation Act*). “Individual” means a natural person (see: *ibid*).

CHAPTER #1, VOLUME #4: DOCTRINES OF JURISDICTIONAL NULLITY, FINALITY, AND JURISTIC CAPACITY

CHAPTER #1, VOLUME #4(A): THE DOCTRINE OF *FUNCTUS OFFICIO* AND FINALITY

16. The principle of *functus officio* dictates that subsequent to the definitive pronouncement upon a matter, the administrative decision-maker or judicial officer is deemed to have fully discharged its function and is thereby **precluded** from any subsequent re-opening of the matter. Any deviation from this fundamental doctrine would constitute an impediment to the integrity and **orderly execution** of appellate procedure. This principle is rooted in the doctrine of **finality** and the concept of *res judicata* in its most attenuated form, preventing **ad nauseam** reconsideration of matters already adjudicated. Consequently, once the statutory **Head** of the **actual Institution** discharges the *FIPPA* obligation, the matter is closed; the purported exercise of authority by a **non-Institution** does not trigger the protections of *functus officio*, as the office itself was never properly engaged.

CHAPTER #1, VOLUME #4(B): JURISDICTIONAL DEFECTS: VOID, VOID *AB INITIO*, AND VOIDABLE

17. The term “**void**” possesses a clearly delineated legal signification, importing an intrinsic want of validity or legal force. The concept of *ab initio*, a Latin designation, signifies “from the commencement.” A jurisdictional deficiency of such a **fundamental character** renders the resultant action, agreement, or filing a total **nullity**, such that it is deemed to have been **bereft of any legal effect from its inception**. The resulting purported “response” is not merely **voidable**—an act possessing legal force until formally annulled by a competent body—but is **void ab initio**, necessitating no subsequent order of the Commissioner to invalidate its existence; it is inherently **non-existent** in law. A complete want of jurisdiction—for instance, a deficit of *vires* or the non-existence of the **juridical personality** required for an entity to constitute a proper party—**inexorably precipitates** an act of nullity. Such a foundational deficiency is inherently incapable of conferring jurisdiction or legal capacity where none previously subsisted. The purported *FIPPA* response furnished by **Tribunals Ontario** pursuant to *sections 26 and 29* of *FIPPA* is assessed as a jurisdictional nullity—a defect of the category *void ab initio*—which is **incapable of waiver**. Furthermore, the creation of jurisdiction cannot be effectuated through the mere assent of the parties, such as by way of an agreement predicated upon consent. Administrative tribunals, lacking any form of **inherent jurisdiction**, are bound strictly by their enabling legislation; even in those limited instances where inherent jurisdiction is recognized, it cannot operate to supersede or contravene legislative enactments.

CHAPTER #1, VOLUME #4(C):STANDING VERSUS LEGAL CAPACITY: THE FOUNDATIONAL DEFECT

18. A critical analytical distinction must be maintained between the concept of: (i) **standing** (which pertains to the sufficiency of interest to institute a proceeding or *locus standi*); and (ii) **legal capacity** (which pertains to the **juristic personality** or the inherent power requisite to constitute a party to litigation, often termed *persona standi in judicio*).
19. “**Standing**”, although a threshold requirement, addresses whether a party’s interest is sufficiently non-*de minimis* to justify judicial or administrative intervention. The venerable Latin phrase is “locus standi” which is the right or capacity to bring an action or to appear in court or a tribunal. As the OIPC is a creature of statute, its power, as a separate entity at law, is governed by the enabling statute that brought it into existence. Any such exercise of power by it, which is inconsistent with the statute, is void ab initio – void from the very beginning. Any acts that are tied to the initial void ab initio act are also void, not merely voidable (i.e. valid until challenged and set aside), because they are, by analogy, “fruit from the void ab initio tree”.
20. “**Legal capacity**”, conversely, is a **foundational prerequisite**; it speaks to the very existence of the entity’s ability to hold rights, incur obligations, or act under the law. For example, a “minor” has no legal capacity to be sued or sue in his or her personal capacity so it must be denoted by *guardian ad litem*. Moreover, a trust cannot be sued or sue but must be sued or sue by capacity of its trustees. While a trust has the ability to hold property, it acts through its trustees and can only commence a lawsuit or defend in the name of the trustees on behalf of the trust. This is different from a body corporate which is a separate entity and has legal capacity.

CHAPTER #1, VOLUME #4(C)(I):PROCEDURAL IRREGULARITIES, JURISDICTIONAL NULLITIES, AND FOUNDATIONAL NULLITIES

21. There is a distinction between a procedural irregularities, jurisdictional nullities and a foundational nullity.
22. In Canadian jurisprudence, the concept of nullity is inextricably linked to the doctrine of jurisdictional error. A defect in *locus standi* or legal capacity, when assessed rigorously, must be understood as challenging the court’s or an administrative tribunal’s fundamental authority to proceed, making the ensuing steps also nullities.
23. For a court or tribunal to render a valid judgment or to accept a filed document, it must have jurisdiction over both the subject matter and the parties involved. Jurisprudence establishes that an order or judgment is void ab initio if it is entered by a court or tribunal that lacked jurisdiction of the subject matter or over the parties, or if the court acts in a manner outside the character of the order it has power to render.
24. A key distinction is made between a total **lack of jurisdiction** (a foundational defect) and an **excess or abuse of jurisdiction** (an error made within the court’s authorized sphere).

25. A *total absence of jurisdiction* (e.g., lack of *vires*, or the legal existence of the entity to be a party) renders the act a nullity. This contrasts with errors such as a breach of natural justice or procedural fairness, which, while serious, are often characterized as an *excess or abuse* of jurisdiction rather than a total lack thereof. Even these latter errors can result in the decision being declared null and void, as stated in older authority: “a decision given without regard to the principles of natural justice is void”.
26. However, the legal consequence of a lack of *locus standii* tied to legal capacity is a defect in *authority* rather than merely a defect in *process*. If a person files a document when they inherently lack the legal capacity or juristic personality required for judicial engagement, this is not a procedural misstep (such as using the wrong form¹⁷ or missing a deadline). Instead, it represents a complete failure of the foundational requirement that there be two juristic persons capable of engaging in binding litigation. This fundamental failure is considered the “absence of jurisdiction in the first place”, a flaw that cannot be cured by subsequent remedial efforts.

CHAPTER #1, VOLUME #4(C)(III): APPLICATION OF THE LAW TO “TRIBUNALS ONTARIO”

27. Whether it is a “person” or not is nuanced and tricky issue of statutory interpretation because of the definition of “person” under the *Legislation Act*, 2006 (Ontario). “Person” includes a corporation but it does not exclude other kinds of “persons”.
28. However, whether it is a “person” and whether it can be sued or sue is a different issue. A “person” can exist (i.e. a trust) but it does not have the power to sue or be sued despite the ability to hold property like a principal residence wherein the trust under tax laws in Canada has the potential benefit of the “principal residence tax exemption” (i.e. being able to sell the home without any tax consequences on the increase in the property from time of purchase to time of disposition).
29. **Tribunals Ontario** is demonstrably deficient in the attribute of **legal capacity** or juristic existence, thereby exhibiting a **foundational defect** that results in a **foundational nullity**. Moreover, it
30. Nonetheless, it did not have standing in this Appeal as of September 29, 2025, and, ergo, its purported response under *FIPPA* and in the Inquiry Phase was without authority as a party to the OIPC Proceeding.
31. This response, having been tendered by a non-entity or a non-juristic entity, is rendered *void ab initio*. Such a foundational jurisdictional failure operates to prevent the judicial or quasi-judicial recognition of the entity as a proper entity. The **Legislature** only permits the **Head** of the **Institution**, and not a representative of a non-**Institution**, to act under *FIPPA*. The tendering of a response by the non-**Institution** constitutes a legal **non-act**, rendering it *void ab initio*. This deficiency, being one of capacity, is non-waivable by a valid statutory party and cannot be cured retroactively through estoppel or consent, as the inherent power to act was never present.

32. The following table outlines the distinctions between a defect category, example scenarios in tribunal proceedings, classification, status under “irregularity vs. nullity analysis” and waiver status.

Defect Category	Example Scenario in OIPC proceedings	Classification	OIPC powers	Waiver
Procedural Irregularity	A section 26 and 29 <i>FIPPA</i> response late; error in understanding of requirements under <i>FIPPA</i> ; Missing index of records; late response in the face of a direction or order from the OIPC; failure to tender an affidavit to verify compliance	Voidable (Irregularity)	Curable (Amendment granted by request or consent order of parties (subject to approval))	Waivable by parties if not an order of OIPC Commissioner
Foundational Irregularity	Paying the \$10 fee for an appeal of non-personal information records when records sought, but refused, are non-personal information records (Amount required is \$25)	Irregularity	Curable	No waiver by the OIPC but curable by payment of additional amounts
Foundational or Jurisdictional Nullity	Section 26/29 <i>FIPPA</i> response filed by a dissolved entity or non- Institution when the Institution ; Response filed by an individual without authority/capacity to represent the named party, breach of the Law Society Act and/or LSO By-Laws; Document filed by a non-juristic entity; Document filed by a person without an interest in the Appeal and without notice from the Commissioner absent seeking leave (permission) to participate in the OIPC Appeal; Document filed and served	Void Ab Initio (Nullity)	Non-Curable (Absence of jurisdiction).	Non-Waivable (Can be raised at any time by a legally valid party).

33. However, in the context of the OIPC, it is always about the interplay between *FIPPA* and its attendant regulations vis-à-vis other statutes and their attendant regulations.

34. The SPPA has applicability under *FIPPA* but only during the pre-inquiry phase but it does not have any applicability during an Inquiry Phase.
35. While the *Legislation Act* does not have much guidance on what constitutes a “person”, the SPPA does which was most sensible for purposes of having an OIPC proceeding have a proper foundational and not be a nullity.
36. It is axiomatic that under *FIPPA* only the requestor, in his, her or its capacity as an “**Appellant**”, and an “**Institution**” have an automatic right of participation in an Appeal before the OIPC.
37. A “municipality” is defined by referenced to the *Municipal Affairs Act* under the SPPA (vide: subsection 1(1)). Whether a municipality is an **Institution** under *MFIPPA* is a non-issue herein.
38. A proceeding is commenced when a requestor commences an Appeal under section 50 of *FIPPA*. It is commenced against the **Institution** or **Institutions**, if forwarding or transfer are at issue.
39. If notice was given to an affected person under section 28 of *FIPPA*, where the **Head** has reason o believe (not reasonable grounds) information referred to in subsection 17(1) of *FIPPA* or that, by and before granting a request for access to a record (perhaps one of many records requested) that is personal information that the **Head** has reason to believe might constituted an unjustified invasion of personal privacy for the purposes of clause 21(1)(f), then that affected person may also commence an appeal to the OIPC (see: paragraph under subclause 50(1)(c), wherein an affected person is appealing the decision of a **Head** under *FIPPA* to the Commissioner).
40. Once the proceeding is commenced, the proceeding is in being before the OIPC and the SPPA applies. The SPPA will apply until or if the Commissioner designates the proceeding as one where an Inquiry will be conducted (see: ss. 52(1) of *FIPPA*).
41. While “Tribunals Ontario” has the name of ‘tribunal’, it does not have a “statutory power of decision” as per section 1(1) of the SPPA or the *JRPA* for that matter.
42. The **Legislature** has been clear on what is the meaning of “person” and extended that meaning by reference to ss. 1(2) of the SPPA:
- “(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to a proceeding in the exercise of a statutory power of decision under the statute conferring the power shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties. R.S.O. 1990, c. S.22, s. 1 (2)
43. “Tribunals Ontario” is not a municipality, an trade union or council of trade unions, and not an unincorporate association of employers. Rather, “Tribunals Ontario” is merely a nomenclature for 13 distinct adjudicative tribunals, all governed by different enabling statutes involving distinct issues involving the residents and citizens of Ontario, which was amalgamation of names or clusters into one cluster of a singular name. As such, “Tribunals Ontario” is not a person under the SPPA, ss. 1(2) because it is not involved in the exercise of a statutory power of decision under a “STATUTE” conferring the power to do so. The statutory power to

- exercise a statutory power of decision is on the “tribunal” to exercise a statutory power or decision is conferred by or under a “Statute” (not merely a regulation) (see: ss. 1(1) of the SPPA).
44. As the OIPC has not made any rules under ss. 17.1(4) or section 25.1 of SPPA, section 2 is inapplicable. However, section 64 of the *Legislation Act* applies to *FIPPA* and its attendant regulations.
45. Procedural requirements under *FIPPA* or its attendant regulations that apply to a “Proceeding” may be waived with the consent of the parties and the OIPC. However, the emphasis is on the word of “procedure” along with the consent of the “parties”.
46. The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding (see: section 5 of the SPPA).
47. It is “déjà vu all over again” for this **Appellant** as this law arose in the LAT Appeal Proceeding wherein section 5 of the SPPA had to be analyzed in detail by the **Appellant** and on the third attempt, under a different legal bases in May 2024 with the benefit of “status certificates” involving SNIC and TDGIC (showing their distinctness) from the FSRA, the **Appellant** was able to remove the improperly and unlawfully denoted insurance company of TDGIC. The Insurance Act, parenthetically, did not specify the persons as “parties” so the analysis under the language of “persons entitled by law to be parties to the proceeding” was required. As TDGIC was nowhere to be found in a single piece of correspondence from August 31, 2022 to December 24, 2023, including the “denial letters” submitted to the LAT after the **Appellant** commenced the LAT Appeal, TDGIC had no standing in the LAT Appeal. Even Mr. David Karat, an unauthorized representative for SNIC, filed a response to the LAT application, pursuant to section 280(2) of the Insurance Act, in the name of SNIC. However, prior to Mr. Nieuwland, a lawyer licensee employed by “TD Insurance Staff Legal”, filed a declaration of representative for TDGIC, VC Lake of the LAT, issued a decision with the wrong style of cause, “McLean v. TDGIC” in relation to three motions of the **Appellant** that all referenced McLean v. SNIC.
48. Similarly, “Tribunals Ontario” could not be a party to this OIPC Appeal as the sole respondent herein.
49. Under the SPPA, only a party to a proceeding may be represented by a representative (see: “representative” means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding). Mr. Karat had acted for a “party” to the LAT Appeal Proceeding but he was not a “Representative” as he was neither a lawyer nor a paralegal and he did not fall under any exemptions under the LSO By-Laws because he represented in his email signature block that he was authorized for four different insurance companies that formed the “TDIA Group”.
50. There was no dispute that TDGIC, SNIC, TDHA and Primum were all distinct entities with distinct corporate histories and different FSRA registration numbers and had legal capacity as “corporations”. However, TDGIC and Primum had no standing (*locus standi*) whatsoever. SNIC, as the Sole Underwriter, and *prima facie* name on the initial OCF-1 send to the **Appellant** had what it appeared to be standing and at

least during the period prior to the **Appellant** delivering via fax his OCF-1 to the fax number 416.774.3120 in early October 2022. It was learned by the **Appellant**'s investigations in late July 2024 that said fax number of 416.774.3120 was that of TDHA but not SNIC. As such, TDHA was the "First Insurer" pursuant to *Reg 283*, "Disputes Between Insurers". By common law, which was settled in the cases involves *Zurich v. Chubb*, along with the Justice Akazaki decision in 2024, *SABS* and *Reg 283* worked in harmony and were *pari passu* in that a breach of *Reg 283* was equivalent to a breach of *SABS*. Simply put, TDHA had rights available to it under *Reg 283* to exercise those rights during the 90 day period after receipt of the **Appellant**'s OCF-1 but it did not exercise the same. As such, it morphed from "Provisional First Insurer" to "Permanent First Insurer" in January 2023.

51. The aforementioned impugned decisions of the LAT were not of Tribunals Ontario. As such, the LAT could be a party to the *JRPA* Application commenced on November 15, 2024, in the Divisional Court (SCJ) (Toronto Region) but Tribunals Ontario could not. It has since been discovered as of last week that Mr. Boyce, acting for the LAT through Ms. Maciel (a law clerk) purported to serve a Notice of Appearance on November 27, 2024, albeit to the incorrect email address for service in the *JRPA* Application (of this **Appellant** in his capacity as an Applicant) but never "delivered" (see: Rule 1.03 of the *Rules of Civil Procedure* which requires "filing" with proof service). The **Appellant**, as soon as he became aware that there may had been an issue with "delivery", put the LAT (along with the Respondent Insurance Companies) that none of them had filed with proof of service their Notices of Appearances. The **Appellant**, similarly in relation to the distinctions between procedural irregularities, foundational irregularities and jurisdictional nullities, provided them with a time frame to confirm or deny whether they had filed with proof of service the same. They could not provide any evidence, as it was not subject to proof or disproof by the **Appellant** as he did not and could not have access to their confidential, private and secure JSO portal accounts.
52. As such, without any filing with proof of service, along with valid service, of their Notices of Appearances, the *JRPA* Application could not have been assigned for case management, which was discretionary not mandatory as per the *Rules of Civil Procedure*, along with any practice directions or guides subject to the *Rules of Civil Procedure*. Moreover, as per the *Rules of Civil Procedure*, Rule 38.07, none of the Respondents had filed Notices of Appearances and were not entitled to any further notice of steps in the *JRPA* Proceeding and also disentitled to file any documents in the *JRPA* Proceeding. Notably, the LAT failed to forthwith deliver a Notice of Appearance altogether and failed to file the record of proceeding (the "ROP") during the ROP temporal period (the "ROP Temporal Period") as required by statute (section 10 of the *JRPA*). Consistent with not delivering Notices of Appearances r even filing the same, the Respondent Insurance Companies and the LAT did not deliver (including filing with proof of service) any respondent factums and application records within 30 days of the **Appellant**'s delivery of his application record and factum on December 12, 2024. The **Appellant** filed and paid for his certificate of perfection on December 13, 2024,

which perfected the *JRPA* Application which required and necessitated the putting the *JRPA* Application on a “list for hearing” as per the *Rules of Civil Procedure*, Rule 68.05.

53. While the live and undecided issue of a conflict of interest involving Justice Shore vis-à-vis a variety of grounds (as she was counsel in her equity partner status to Mr. Papadimitropoulos in a matrimonial litigation involving the Individual Insured in the SNIC Insurance Policy who was his ex-wife and the Applicant’s common law spouse at material times), along with further evidence to be obtained, and jurisdictional and foundational nullities is to be decided, along with lack of notice, insufficient notice or an inability, *FIPPA*, along with cases like *McInerney v. MacDonald*, 1992 CanLII 57, work in harmony with civil litigation. This is particularly apposite when judicial review is on the record and to be conducted in a summary manner. It also applies to litigation outside of the *JRPA* Proceeding which may involve those outside of the style of cause between the **Appellant** and others.
54. As found in 1992 by the SCC in *McInerney*, denial of access may caused unfounded lawsuits. In this regard, *FIPPA* and the OIPC work in tandem with a different branch of government in the courts so that they are not flooded with unfounded lawsuits or lawsuits pointing the proverbial litigation finger at non-responsible persons.

CHAPTER #1, VOLUME #4(D):CONSTRAINTS ON PARTICIPATION UNDER *FIPPA* SECTION 50(3)

55. It must further be noted that the **Legislature**, through the enactment of *section 50(3)* of *FIPPA*, stipulated that upon receiving a notice of appeal, the Commissioner **shall** apprise the **Head** of the **Institution**, and possesses the discretionary authority (denoted by “**MAY**”) to inform any other **Institution**, including an **Institution** subject to *MFIPPA* or person possessing an interest in ‘the appeal’. Ergo, in the absence of an implication via transfer or forwarding, if a subsequently interested **Institution** is not formally notified, no legal right is conveyed to that **Institution**, via its **Head**, to participate in the appeal. This discretionary power does not create an **automatic right of participation** for all interested parties but the Commissioner must notify those potentially interested parties.

CHAPTER #1, VOLUME #4(E):THE DOCTRINES OF SOLICITOR-CLIENT PRIVILEGE VERSUS DELIBERATIVE SECRECY

CHAPTER #1, VOLUME #4(E)(I):THE SOLE MANDATORY EXEMPTION FOR DISCLOSURE TO A REQUESTOR: SECTION 21 OF *FIPPA* (SIX SUBSECTIONS)

56. There is only one **mandatory exemption** of non-disclosure under *FIPPA*, which is *section 21* of *FIPPA*. This exemption is **patently inapplicable** based upon the LAT’s conduct herein and on the face of the record

(see: **Inquiry Record**, page 70, paragraph 3). To the extent it were applicable, the **Appellant** possesses an **overwhelming override** pursuant to *section 21(b)* of *FIPPA* (compelling health and security circumstances) (see: definitions in Tab #1, **Inquiry Record**). The presence of a compelling public health and safety concern overrides the mandatory nature of this exemption, necessitating disclosure pursuant to the legislative scheme's overarching commitment to accountability.

CHAPTER #1, VOLUME #4(E)(II): SOLICITOR-CLIENT PRIVILEGE RECORDS CAN BE DISCLOSED – PERMISSIVE

57. The **Legislature**, in enacting *section 19(1)(a)* of *FIPPA*, referenced **solicitor-client privilege**, which, at **common law**, is understood to **encompass** litigation privilege.

CHAPTER #1, VOLUME #4(E)(II)(A): SOLICITOR-CLIENT PRIVILEGE

58. Solicitor-client privilege must be **as near to absolute** as possible when it exists and the legal test has been **satisfied** in that regard. However, this privilege is the property of the client and is **susceptible to waiver** by the client. Furthermore, there has been an **expansion** of recognized exceptions to privilege, which now includes breaches of law that are **not exclusively criminal in nature** (see: **Inquiry Record**, Tab 53, citing *Darbishire, Goodman & Carr; Orca Bay Hockey Lt.d Partnership* (2007 BCSC)).
59. The **onus** rests upon the client to establish the **existence** of privilege *in the first instance*. Conversely, the burden falls to the **Institution** to **persuade** the OIPC that an exemption **applies**. To date, the LAT has failed to tender a **valid response** pursuant to *FIPPA*. The absence of a properly issued response by a statutorily defined **Institution** prevents the invocation of any exemption, including *section 19*, as the entire administrative process remains in a state of **void ab initio**.

Chapter #1, volume #4(E)(II)(b): Prerequisites for Privilege and Exceptions

60. Solicitor-client privilege **requires** the satisfaction of the following criteria:
- Communication:** There must be communication between a client and a legal advisor;
 - Relationship Formation:** A solicitor-client relationship must have been formally established;
 - Professional Capacity:** The legal advisor must be acting in their **professional capacity** as a lawyer or paralegal in Ontario;
 - Purpose of Advice:** The communication must be for the purpose of **seeking or giving legal advice**. Documents that are purely business, factual, or accounting in nature, and are not related to the provision of legal advice, are **generally not privileged**; and
 - Intention of Confidentiality:** The intention must be that the communications were **confidential** in character. The privilege is **susceptible to forfeiture** when it is intentionally shared or disclosed to a

third party who is **external** to the solicitor-client relationship and is **not essential** to the communication process.

61. Solicitor-client privilege is fundamentally intended to **foster** full and **unreserved disclosure** between the client and solicitor. It must be emphasized that the **crime/fraud/unlawful act exception** has been broadened jurisprudentially to encompass misconduct that is not explicitly criminal, including regulatory breaches, breaches of fiduciary duty, and tortious conduct. The establishment of “**colour to charge**,” which is more than merely a speculative allegation, is the requisite standard for displacing the privilege on the basis of the exception.

CHAPTER #1, VOLUME #4(E)(III):LITIGATION PRIVILEGE

62. Litigation privilege is a **distinct legal doctrine** in that it applies to communications created in **anticipation of litigation** or **during litigation** where the documents or correspondence possess a **dominant purpose** related to the **prosecution or defence** of litigation.
63. It is a **transient** privilege that **extinguishes** upon the conclusion of the litigation at issue.
64. Ergo, the question arises as to whether the misconduct of an unauthorized representative in Mr. Karat, who the LAT engaged in a litany of unlawful sanitizing steps for him and an insurance company without locus standi, was acting in anticipation of the *JRPA* Proceeding or in relation to the LAT Appeal Proceeding. The more pressing question is who was instructing, advising, and/or having a high degree of control over Mr. Karat’s fraudulent conduct. The **Appellant** later learned that the timing of Mr. Karat and Ms. Dunk (albeit under a fictitious name) agreement to purchase a one million dollar home, while saddled with a 98 percent loan to asset value of their then home on 625 Grandview Avenue, Oshawa, Ontario (the “Grandview Oshawa Home”) occurred some two weeks after the TDI Karat Theft. At said time, Mr. Karat and Ms. Dunk had not even listed their home, where they were joint tenants, despite having continuing mortgage obligations with embedded insurance requirements therein under the Canadian Housing Mortgage Corporation due to not being able to have paid 20 percent of the value of the home. Bluntly, Mr. Karat and Ms. Dunk, a paralegal at Himelfarb Prozanski LLP in Toronto, had not even put 2 percent down payment on the value of that Grandview Oshawa Home. It is not to castigate them as they were entitled to do so and Scotia Mortgage Corporation was entitled to loan them said funds to purchase subject to compliance with CHMC. The day that the **Appellant** filed his *JRPA* Application and served the Respondent Insurance Companies and the LAT, Mr. Karat and Ms. Dunk listed their home for their Grandview Oshawa Home for sale. It was listed for \$599,000 which was approximately \$45,000 more than they paid for the same in 2020. As such, when considering property taxes, utilities, moving costs, and upkeep, they had netted zero subject to any equity paid down on the property. However, with such a high loan to asset ratio along with CHMC insurance premiums to pay each month, over a four year period (only 48 payments), the majority would have gone to

interest pursuant to the declining balance method. In layman terms, they had little to no equity in their property. A sale of \$600,000 of a home with little to no equity in the property would not have allowed them to purchase a one million dollar home on 591 Fleet Avenue, Oshawa, Ontario (the “Fleet Avenue Oshawa Home” or “Fleet Oshawa Home”) and certainly without any assurances of knowing whether the Grandview Oshawa Home would sell and if so for how much. Moreover, with higher interest rates in 2024, Mr. Karat and Ms. Dunk would have been required to have paid more of a down payment in order to secured mortgage financing. The agreement of purchase and sale for the Fleet Avenue Oshawa Home was completed on November 7, 2024. Without no to little equity in the Grandview Oshawa Home and no guarantee of a sale, where would be the funds come from in relation to Mr. Karat who had been enrolled in education for seven years, including a paralegal program without any degree or diploma to show for it, and worked short term jobs from 2013 to 2016, and commenced with TD Insurance Group in 2016 as a legal assistant. Prior to that he misrepresented he was a paralegal with a now defunct “expungement and pardon legal service company” whose paralegal was since removed from the LSO directory as a practicing paralegal. The average salary for a paralegal at Himelfarb Prozanski, from public search engine results, is \$57,000 per year. The average salary for an adjuster at TDI is about the same. As one can see from the public Google maps, there were two cars in the driveway at the Grandview Oshawa Home and Ms. Dunk and Mr. Karat appear to be new parents. Ergo, there was no dispute that the record of proceeding would have evidenced highly particularized allegations against Mr. Karat and the LAT involving a variety of distinct conflicts of interests involving the LAT and that of TDI. They both had much to lose and much to gain. The likes of Mr. Boyce is an individual lawyer licensee who was an adjudicator with the LAT for some years along with the Ontario Police Civilian Commissioner wherein he gave 14-0-1 favourable decisions to insurance companies in the TDIA Group and to that of impugned police officers. The likes of fraud, extortion, bribery and abusive conduct are all special causes of nullity and unravel prejudicial steps to a victim of the same in a proceeding. Moreover, those are all grounds for exceptions to privilege.

65. While the argument that lawyers owe no duty of care to opposing litigants on its face seems right as per the “hired gun model” or “zealous advocate” and fiduciary duties to their client, the duty of care is not the same as the fiduciary duty to one’s own client.
66. In *Laiken v. Carey*, the ONSC in 2011 (as per Madam Justice Roberts) found as follows:

“[54] This issue was also before the Court in *Brignolio v. Desmarais, Keenan & Robert*[9]. In his decision, Mr. Justice D. Lane held, at paragraph 17, that an action does not lie against an adverse party or his counsel based on a lawyer’s breaches of ethical duties since such duties are owed to the Court and to the Law Society of Upper Canada, but not to the opposite party in litigation, and referenced the public policy rationale that protects a lawyer from such actions:

“If the policy of the court were otherwise, the same difficulties would arise as would arise in the case of negligence. There would be a temptation, which many would find irresistible, to re-litigate in actions against their opponent's counsel the issues which they have lost in the main litigation, or

to attempt to handicap the other side by eliminating experienced and knowledgeable counsel from the case. The public policy in such instances is referred to by Lord Donaldson of Lymington M.R. in *Al-Kandari v. J.R. Brown & Co.* [1988] 1 All E.R. 833 at p. 835 (C.A.) cited in the Cluthe case ... as follows:

I would go rather further and say that, in the context of “hostile” litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes.

In my view, the same principles apply to allegations of breaches of ethical conduct.”

[55] There are a few well established exceptions to the general rule that a lawyer owes no duty to opposing or third parties, including:

- i. Where a lawyer gives an undertaking to the Court or the opposing or third parties and fails to perform it, the lawyer may be ordered to do that act or make good the loss flowing from the failure to perform the undertaking.
- ii. Where a lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy, those intentional torts are not defeated by the rule that a lawyer owes no duty of care to the opposing party in litigation.

[56] Further, there is no absolute bar to an action against a lawyer by an opposing or third party whom the lawyer has injured while the lawyer was acting outside the scope of his or her duty as a solicitor. A lawyer can be liable to an opposing or a third party where the lawyer commits an independent tortious act that causes foreseeable injury

67. In the middle of that archetypal Venn diagram of: (i) special causes of nullity; (ii) exceptions to privilege; and (iii) no immunity for opposing counsel are the following:
 - a. Fraud;
 - b. Bad faith (dishonesty);
 - c. Extortion;
 - d. Bribery;
 - e. Intentional torts (not mere simple negligence); and
 - f. Abuse of process.
68. The “bait and switch” game by multiple persons and individuals was on full display in December to February 2025.
69. Firstly, Mr. Karat and Mr. Papadimitropoulos, the TDI *SABS* Manager, were engaged in a litany of impersonation and fraud involving the **Appellant**’s library card and replacing cancelled fraudulently obtained library cards dovetailing to the day or day thereafter of the **Appellant**’s filings in the Divisional Court.
70. Secondly, The Honourable Madam Justice Shore was engaged in the unauthorized assigning the *JRPA* Proceeding for case management and assigning herself as the individual judge which has now been discovered, through confirmation with the Divisional Court, as having been the facts and contrary to law (see:

Rule 77.05 and .06 of the *Rules of Civil Procedure*). Leaving that aside it has since been discovered that The Honourable Madam Justice Shore had prior judicial involvement with the Applicant in a different capacity albeit undisclosed to the Applicant. The Honourable Madam Justice Shore has since been reported to the Canadian Judicial Council – not for the truth of its contents but for context herein (colour to the charge).

71. With further non-filing by the LAT and Respondent Insurance Companies as required by the *Rules of Civil Procedure*, Mr. Papadimitropoulos was no longer employed by any of the insurance companies in the TDI Group but had somehow became an employee of the TD Bank (legal department) at the end of January 2025 as per the LSO Directory. However, a newly created LinkedIn by Mr. Papadimitropoulos claimed he was no longer with TDI Group at the end of December 2024 – shortly before The Honourable Madam Justice Shore engaged in the jurisdictional nullity void ab initio steps of assigning the *JRPA* Proceeding for case management by her direction and to herself.
72. If there were any filings by the LAT, which were captured by the Access Request, none have been provided by the LAT.
73. Leading into February 2025, the very law firm that employs(ed) Ms. Dunk through a lawyer at the law firm in Ms. Pinto engaged in acting for Mr. Karat in both the sale of the Grandview Oshawa Home and the Fleet Oshawa Home but for Ms. Julia Karat (sic) in the purchase of the Fleet Oshawa Home and Ms. Julia Dunk in the sale of the Grandview Oshawa Home.
74. Would Himelfarb Prozanski LLP not know the legal name of Ms. Julia Dunk in the purchase of the Fleet Oshawa Home, which was prior to the sale of the Grandview Oshawa Home, but know her legal name in the sale of Grandview Oshawa Home? The question answers itself.
75. However, without a fictitious joint tenant in the purchase of the Fleet Oshawa Home, Mr. Karat, at law was the only one to benefit in the purchase of the same.
76. Without much equity in the Grandview Oshawa Home, there was not much in the way of value for it on its listing price.
77. However, it was represented that on the same day that Mr. Boyce for the LAT purported to “serve” the Notice of Appearance but did not file with proof of service the same as Ms. Maciel did not serve the correct email address and would have been required to swear an affidavit of service when filing the same that “miraculously”, the Grandview Oshawa Home sold for \$721,500. Ergo, miraculously, the Grandview Oshawa Home, with a spread of some \$400,000 between the Fleet Oshawa Home and Grandview Oshawa Home, somehow sold for \$122,000 more than its listing price.
78. *But who was the purchaser or were the purchasers of the Grandview Oshawa Home?*
79. When it could not get any more fraudulent on its face, it did.
80. The primary joint tenancy purchasers were Ms. Dorothy During-Gibbs and Mr. Michael Gibbs. The former was at the material time a social worker and employee of CAMH in the very CAMH building at 1025 Queen

Street, Toronto, Ontario. Mr. Michael Gibbs, the husband of Dorthy During-Gibbs, was a former, although in his 40's public health of Ontario and Ontario Ministry of Health worker.

81. Mr. Peter Gibbs as spent his entire career in the transportation sector. He began in insurance over 35 years ago as an Executive Director of Administration for a large Canadian Transportation Group. Prior to the merge with Jones DesLauriers, Gibbs worked for Safety Insurance for over 16 years as one of their most trusted transportation advisors. Gibbs is a Registered Insurance Broker of Ontario (RIBO) (see: JDMI website (Our Team Peter Gibbs)). Mr. Peter Gibbs purchased an apparent 1 percent interest as a tenant-in-common on his own in a property.
82. Mr. Peter Gibbs' wife was the founding member and former president of the Friends of the CAMH Archives (FoCA), an organization that supports the CAMH Archives. The CAMH Archives preserves materials related to the history of Canadian mental health and addiction services, while the FOCA has supported research and preservation efforts, including establishing bursaries and advocating for the preservation of historical sites.
83. It was later learned that Mr. Karat was hiding in a "TIDES classroom" (see: "TIDES classroom" is a training program for Trauma-Informed De-Escalation Education for Safety and Self-Protection (TIDES)). To teach the TIDES program, a classroom setting can be used for training on trauma-informed approaches, de-escalation techniques, and safe physical interventions, notes CAMH) which was FOB protected before he engaged in the theft and the **Appellant** went to use the facilities for a few minutes. With 625 Grandview Avenue, Oshawa, being approximately 60 km away from the CAMH location, what is the probability that a CAMH social worker purchased a property for \$122,000 without any fraudulent connection with the cast of characters at the TDIA Group? The question answers itself.
84. CAMH did refer to him as a thief in internal emails of CAMH unionized workers who were part of the OPSEU union. The very same union that employees the court staff at the courthouses in the OCJ, SCJ and Court of Appeal.
85. Ergo, some of the 13 Record Classes encompass documents that may be on their face subject to litigation privilege wherein there is a solicitor-client relationship between a solicitor and the LAT. However, since "Tribunals Ontario" cannot be a client per se as it would have to be a specific tribunal under that umbrella reference to 13 distinct tribunals then no litigation privilege could exist either.

CHAPTER #1, VOLUME #4(E)(IV)LITIGATION PRIVILEGE IS LESS ABSOLUTE THAN SOLICITOR-CLIENT PRIVILEGE

86. This privilege is generally deemed **less absolute** than solicitor-client privilege due to its temporary nature and is subject to balancing with the overarching public interest in truth-seeking and judicial or administrative efficiency. In the context of *FIPPA*, the **Head** of the **Institution** at issue is permitted to disclose solicitor-

- client privilege records along with litigation privilege records because the **Head** of the **Institution**, being the **Head** of the client, can waive the same or find that the records (communications) are subject to exceptions.
87. The SCC, in *Smith v. Jones*, 1999 CanLII 674, as per Rosenberg J.A. in *Chrusz* (at page 369), found that any recognized exceptions to solicitor-client privilege would **apply equally** to litigation privilege (see: **Inquiry Record**, Tab 2, page 71).
88. The core of the issue is whether the alleged theft of an individual's personal property, monetary access, and credit cards, alongside hard copy and electronic materials, for the **represented intent** by an applicant or **Appellant** to bring an appeal or judicial review, falls under the scope of documents created "**to assist in the conduct of anticipated litigation.**" While such materials would undoubtedly assist, they would fall under the **unlawful acts exception** cited in *McDermott v. McDermott*, 2013 BCSC 534 (CanLII), citing *O'Rourke v. Darbishire and Others*, 1920 AC 581 at page 604 (see: **Inquiry Record**, Tab 2, page 71, paragraph 6).
89. **Ergo**, the fundamental questions are: **Who is the client** and **who is the legal advisor** in this OIPC Appeal? This is a **prerequisite** for the LAT to confirm. The name of the legal advisor is **not subject to privilege**. Furthermore, a mere listing of communications subject to privilege, coupled with a brief summary, is **not subject to privilege**.
90. If the LAT can **establish** the client and solicitor(s), it must then **displace the burden** by **demonstrating** that each specific record is subject to solicitor-client privilege. To the extent that certain records are subject to solicitor-client privilege, the **Appellant concedes** that the burden would then fall upon the **Appellant** for **displacing** the privilege. However, the exceptions to privilege have **evolved** such that the exception is no longer limited to merely criminal misconduct but now **encompasses** unlawful conduct causing injury to others, breaches of regulatory statutes, contracts, torts, and other breaches of duty (see: **Inquiry Record**, Tab 2, page 71, paragraph 6, endnote 14). As the theft and remain and have been subject to a longstanding conspiratorial agreements between a variety of conspirators those records between the conspirators are not subject to any form of privilege.
91. There are two branches of the tort of conspiracy:
- a. Predominant purpose conspiracy: This branch involves a combination or agreement between two or more parties where the **predominant purpose** of their concerted action is to cause injury or harm to the plaintiff;
 - a. Means used: The means used to cause harm may be either lawful or unlawful. If the main aim is to injure the plaintiff, otherwise lawful actions become tortious due to the malicious intent;
 - b. Key element: The necessity of proving that the primary goal of the conspiracy was to inflict harm on the plaintiff.
 - b. Unlawful means conspiracy: This branch involves an agreement between parties to use **unlawful means** to injure the plaintiff. The defendants must commit some unlawful act (e.g., a crime, a separate tort, or a breach of statute). The plaintiff does not need to prove that the predominant purpose was to

injure; it is sufficient to show that the defendants knew or should have known that injury to the plaintiff was likely to result from their unlawful conduct.

92. As Callaghan J. made clear in *Can. Cement Lafarge Ltd. v. BC Lightweight Aggregate Ltd.*, 1979 CanLII 426 (B.C.S.C.), "where unlawfulness is found, the object of the conspirators becomes irrelevant."
93. The unlawful means is easily established by the theft by the TDI Karat Theft and the subsequent conduct involving the LAT, wherein VC Morissette was engaged in salacious comments towards the Applicant in made decisions (not naming the Two Undisclosed Motion Orders which remain outstanding) (i.e. he was causing strain upon the Tribunal (see: September 13, 2024, decision of the LAT as per VCM).
94. Lord Denning, in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522, espoused a broader view of "unlawful means" as "an act the defendant 'is not at liberty to commit' -- in other words, an act WITHOUT legal justification." This was adopted in *Reach M.D.*, (2003) 65 O.R. (3d) 30 (C.A.), where Laskin J. found "Unlawful means at least include what occurred here: the Committee made a ruling that it was not AUTHORIZED to make. Its ruling was beyond its powers. I see no policy reasons for taking a narrower view of unlawful means".
95. Furthermore, simply aiding and abetting a co-conspirator to commit unlawful means could itself qualify as unlawful means (*2038724 Ontario Ltd. V. Quizno's Canada Restaurant Corp*, 2010 ONCA 466, pp. 46-49). The Courts have recognized that it is not necessary for both conspirators to engage in the unlawful act(s), so long as the unlawful act of one conspirator was a probable consequence of the original common design (*Claiborne Industries Ltd. v. National Bank of Canada*, 1989 CanLII 183 ONCA; *Kuwait Oil Tanker Co. v. Al Bader*, [2000] 2 All E.R. (Comm) 271; *Golden Capital Securities Ltd. V. Holmes*, [2005] 1. W.W.R. 631; and *HM Revenue & Customs v. Begum*, [2010] EWHC 1799).
96. Therefore, the LAT's conduct in the LAT Appeal Proceeding after the unlawful conduct of Mr. Karat and their own CMO, followed by a fraudulently misrepresented power outages depriving an injured person (**Appellant**) of a file number with the LAT and so on, was a probable consequence of the original common design to utilize a fictitiously responsible insurance company in TDGIC.
97. Moreover, the LAT's conduct at the *JRPA* Proceeding, which prejudiced the rights of the **Appellant** (including steps, directions, determinations and orders et al) will naturally be set aside on grounds of, inter alia, fraud and other grounds, was a probable consequence of the original common design of the conspirators even if the LAT was not found to be a conspirator in a conspirator in the conspiratorial agreements.
98. That is a different question than whether the LAT had a high degree of control or authority of the actions of Mr. Karat and Respondent Insurance Companies in the TDI Karat Theft and subsequent fraudulent conduct thereafter.
99. However, if Mr. Nieuwland (counsel to the Respondent Insurance Companies) and Mr. Boyce (counsel to the LAT) were not the ones engaging in the impersonation, fraud et al in December 2024 and January 2025,

then who was informing the de facto fraudsters on the very dates of private and confidential serving along with filings to engage in further fraudulent misconduct?

100. It is trite that remaining silent in the face of fraud is sufficient to find a third party who knows that another has made fraudulent misrepresentations liable for fraud as well (see: *Sugar Peat v. Marwick*, *Derry v. Peek*).
101. To **displace** solicitor-client privilege during a timeframe and in relation to **impugned conduct** concerning communications and records, the Applicant must demonstrate **colour to charge** (see: Tab 53 of the **Inquiry Record**, citing *Goldman Sachs*). Herein, there is **more than mere colour** to the charge, but also the charges themselves.

CHAPTER #1, VOLUME #4(F): DELIBERATIVE SECRECY DIFFERENT FROM SOLICITOR-CLIENT PRIVILEGE (INCLUDING LITIGATION PRIVILEGE)

102. Solicitor-client privilege **includes** litigation privilege, but **neither** is **synonymous** with **deliberative secrecy**.
103. Justice Nishikawa **succinctly** set out the law in *Grogan v. Ontario College of Teachers*, 2023 ONSC 2980, at paragraphs 16-18. Deliberative secrecy is a **core component** of administrative independence: it **promotes the finality** of a decision by **precluding** the disclosure of how and why decision-makers reached their conclusions, while simultaneously creating a **zone of confidentiality** in which decision-makers may engage in **collegial debate** and seek appropriate feedback to ensure **consistency**.
104. The **Appellant** has not even been **granted access** to two “**final orders**” (the “Two Undisclosed Motion Orders”) from July 24 and August 16, 2024, through either *FIPPA* or *TARA*. The LAT cannot rely on litigation privilege *per se* during a proceeding, but perhaps it could be asserted in relation to the time that an applicant or **Appellant declares** an intention to bring an appeal or judicial review. The **primary divergence** is that solicitor-client privilege constitutes a **fundamental legal right** that **sanctifies** confidential communication for the purpose of seeking or giving legal advice. Conversely, “**deliberative secrecy**” generally refers to a broader rule, principle, or policy to **maintain the privacy** of certain information, often for **Institutional** or governmental functions. The concept of **private** information is **qualitatively different** from **confidential** information, and that which is **secret** is distinct from both.
105. Solicitor-client privilege serves as a **shield against compulsory disclosure**, signifying that the information **cannot be compelled** to be produced in court or to a third party (subject to very narrow exceptions). Under *FIPPA*, the **Head** of the **Institution** possesses a **permissive authority** to disclose or not disclose records subject to solicitor-client privilege. **Ergo**, the **Institution must** be the client. If the **Institution** is not the client, then no solicitor-client privilege can apply, as a **third party cannot waive another’s privilege**. The privilege belongs **solely** to the client, and **only** the client can waive it, even following the **cessation** of the lawyer-client relationship.

106. “**Deliberative secrecy**” is **not** a single, universal legal doctrine akin to solicitor-client privilege. This principle protects the **internal discussions**, notes, and working documents of **decision-making bodies**, such as judges, juries, or administrative tribunals. However, those specific types of records are **not subject to FIPPA** due to the exclusionary provision of *section 65(3.1)*, which states:
107. “*This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity.*”
108. The purpose of this exclusion is to ensure that decision-makers can engage in **robust, frank, and independent** discussions, **unfettered** by public pressure or undue influence when arriving at a decision. However, under *FIPPA*, those communications related to draft decisions or draft orders that are created by or for a person acting in a quasi-judicial capacity (an adjudicator or Vice-Chair) are **excluded from the Act’s application**. It is *paramount* to note the specific phrasing: the exclusion applies to records *created by or for a person* acting in a quasi-judicial capacity, focusing on the individual’s role and the nature of the communication, thereby distinguishing it from communications that are purely administrative or managerial in nature, even if involving quasi-judicial personnel.
109. In sum, solicitor-client privilege is centered upon **protecting a client’s private access** to legal counsel, whereas deliberative secrecy is centered upon **protecting the private internal function** of government or judicial bodies.

CHAPTER #1, VOLUME #4(G): APPLICATION TO THE LAT AND DERENZIS JURISPRUDENCE

110. In *Derenzis*, the LAT claimed privilege over emails involving counsel who provide legal advice, provide comments on draft decisions when requested, and assist in the finalization and publication of decisions. However, the **Two Undisclosed Motion Orders** (which are final on their face) remain **undisclosed** to the **Appellant**. Whether they fall under *TARA* or *FIPPA* remains a **live issue**.
111. It is **axiomatic** that LAT counsel provides both legal and non-legal services; as such, LAT counsel’s communications must be **analyzed on a case-by-case basis** to determine whether each communication is privileged: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at paragraphs 19-20.
112. In *Derenzis*, Mandhane J. found at paragraph 40:

“The Tribunal claims solicitor-client privilege over nearly seventy emails, which include communications involving counsel, law clerks, staff, adjudicators, and larger staff teams. Having reviewed the emails, it is found that some of them are properly considered privileged insofar as they relate to the request for and receipt of legal advice. However, many emails are not related to legal advice at all because they are **administrative**; they relate to the internal processing of Derenzis’ application by the LAT and **cannot be properly characterized** as related to legal advice.” (Emphasis added).
113. Similar issues **emanate** herein, along with distinct **aggravating factors**.

114. If the LAT **persists** in its refusal to provide evidence herein, it **cannot leverage** its own recalcitrance to **delay** the Commissioner from issuing orders as **required** to dispose of all issues in the Inquiry (Expedited).
115. In-house counsel may have **varied roles**, and **not all** of their activities fall under the purview of legal counsel activities. The LAT employs a **litany** of in-house counsel, as does TD Insurance (TDI), albeit under the business name “TD Insurance Staff Legal.” The **mere status** of the parties as client and lawyer does **not automatically confer** a **blanket** of privilege. Consequently, this **Appellant** is **entitled to access** records regarding discussions that may have transpired leading up to and following October 25, 2024, between the LAT and the TDI Group concerning the alleged **theft of property, unlawful conduct, potential conspiratorial agreements**, and/or tacit **approval** of such activities (as referenced in *Goldman Sachs & Co. v. Sessions*, 2000 BCSC 67, paragraph 12). Providing a list of privileged communications in open court **does not**, in itself, constitute a waiver of privilege or an intrusion upon the relationship between solicitor and client.
116. Moreover, the **obvious inference** is that the LAT had a **high degree of control** over TDI and Mr. Karat in the **Karat TDI Theft**. The LAT had **bestowed** many “**favours**” upon the TDI Group and Mr. Karat, suggesting an **implied quid pro quo** between the LAT and TDI. If the LAT was involved, even **tangentially** or by **maintaining silence** upon the receipt of related records (irrespective of whether via government or personal emails, similar to the *Greenbelt Decision*), governmental **transparency** and **accountability** **necessitate** immediate preservation and production. To the extent that a record constitutes a communication between a **public Institution** (LAT) and a **non-public Institution** (TDI), those records are **not subject to any form of privilege** because TDI cannot be the client of the LAT, and the LAT cannot be the client of TDI. The **Appellant’s** affidavits, sworn at various times since December 2024, which are **materially relied upon** herein and provided with these submissions, accompanied by external objective evidence from the Centre for Addiction and Mental Health (CAMH) and the Toronto Public Library (TPL), **furnish clear “colour to the charge.”**

CHAPTER #1, VOLUME #4(H): THE ABSENCE OF LITIGATION PRIVILEGE BETWEEN THE LAT AND RESPONDENT INSURERS: ANALYTICAL PRECISION IS REQUIRED ON A RECORD-BY-RECORD BASIS AND TEMPORAL PERIOD BASIS

117. Litigation privilege is contingent upon litigation being **in existence** or **reasonably contemplated**, and the documentation must have been created for the **dominant purpose** of litigation. In relation to the former, the test is **objective**: a **reasonable person**, fully apprised of all the relevant information, would conclude that litigation is a **real likelihood** rather than a mere **ephemeral possibility**.
118. As such, emails between counsel (LAT and Respondent Insurance Companies) **cannot be subject** to litigation privilege for the following reasons. Litigation privilege applies to:
- a. **The Client**: Any created document or communication the client creates, but for the **dominant purpose** of litigation;

- b. **The Lawyer/Counsel:** Any documents or communications created by the lawyer/counsel for the client; and
 - c. Non-Client or Non-Lawyer: Communications created for or by:
 - a. Agents/employees; or
 - b. Third parties.
119. Under the category of agents or employees, this includes employees, directors, investigators, or other agents of the client who are **gathering information** or **preparing materials** specifically at the direction of the client or the lawyer for use in the litigation. A common example is an internal investigation report prepared by a company’s safety officer immediately after an incident, written specifically to be sent to the company’s legal counsel to assist in potential litigation.
120. The three Respondent Insurance Companies share the **same Chief Executive Officer** (CEO) in Mr. Russell. The LAT’s **Head** under *FIPPA* is that of Mr. Weir. The employees of the Respondent Insurance Companies are **not** employees of the LAT.
121. Under the category of “**third parties**,” this includes the **genre** of expert reports or witness statements of non-parties in litigation, where they are taken by a lawyer or investigator.
122. **Compellingly**, with the benefit of **hindsight**, Mr. Nieuwland for the Respondent Insurance Companies did not wish to file a **Notice of Appearance** for the Respondent Insurance Companies when they were **required forthwith to “deliver”** (see: *Rules of Civil Procedure, Rule 1.03*).
123. **Ergo**, there **cannot subsist** any litigation privilege between parties such as the LAT and the Respondent Insurance Companies in litigation, even when they are both respondents, as they **cannot serve as client and solicitor** to each other. Furthermore, **neither entity** satisfies the requirements of being an agent, employee, or third party under the doctrine of litigation privilege. The communications may have been **intended to be confidential**, but they are **not *inter partes*** a solicitor and client; thus, no solicitor-client privilege applies.
124. Crucially, in the context of administrative adjudication before the LAT, the Tribunal occupies a **quasi-judicial role** and is expected to maintain strict **impartiality**. The relationship between the LAT and the adversarial insurer **precludes** the establishment of a **common interest privilege** analogous to that which might exist between co-defendants. Such a privilege requires a joint effort toward a common objective that is not merely procedural but involves substantive legal strategy. The LAT’s statutory mandate mandates neutrality, which is **inherently incompatible** with the shared defensive purpose required to ground litigation privilege with an adversarial party.

CHAPTER #1, VOLUME #4(I): THE LAT’S CONSTRAINED ROLE IN JUDICIAL REVIEW

125. The jurisprudence of the Divisional Court, including *Ontario (Energy Board)*, followed by precedents such as *Tranquilli*, *Drewlo*, and *Hutchinson v. Aviva* and others, has established that while the LAT may be a party by statute (see: *section 9(2) of the Judicial Review Procedure Act (JRPA)*), its participation rights are often

quite truncated or narrow, and are typically confined to not arguing the merits, with limits imposed on the length of the factum, submissions, and oral argument. The role of the tribunal in judicial review is primarily to defend the integrity of its process and to provide the record, not to substantively defend its decision against the parties *inter se*.

126. As such, the Respondent Insurance Companies stood in a qualitatively different standing than an adversarial party.
127. While it should not be a requisite annotation, the LAT is a tribunal that represents itself to be quasi-judicial. The act of providing a template for a Notice of Appearance to the very Respondent Insurance Companies that were adversarial to the **Appellant** constitutes conduct that ascends to the level of a conflict of interest. The question answers itself.
128. The means by which that transaction transpired must be addressed by record disclosure from the LAT, even if it involves notes pertaining to a telephone meeting between a law clerk (LAT) and the Respondent Insurance Companies (law clerk or assistant).
129. Counsel to the LAT, whether operating behind the scenes as they do in communicating with adjudicators of the LAT, does not escape the exclusionary provision of deliberative secrecy (*i.e.*, *section 65(3.1) of FIPPA*), where the communications are not specifically related to draft decisions or draft orders and they must be created by or for a person who is acting in a quasi-judicial capacity. Ergo, if the communications are not created by or for a person in a quasi-judicial capacity, then *FIPPA* applies. To connect this to the preceding argument, Mr. Nieuwland for the Respondent Insurance Companies, or any of their paralegals, law clerks, or legal administrative staff, could not possibly be acting in a quasi-judicial capacity.
130. *TARA* also possesses a similar exemption concerning draft notes and decisions at *section 1(3) of TARA*, but *TARA* employs the language for purposes of excluding “adjudicative records” wherein communications created by or for a member of a tribunal in connection with a proceeding before the tribunal in which the member is presiding. As such, the member of the LAT must be presiding over the specific matter. Consequently, the member would have to be seized to be considered presiding. The distinction between *FIPPA*’s *section 65(3.1)* and *TARA*’s *section 1(3)* is dispositive: the former excludes records based on the *capacity of the recipient/creator* (quasi-judicial function) whereas the latter excludes records based on the *connection to a specific proceeding* over which the member is *presiding*. Records falling outside these narrow statutory exclusions are subject to *FIPPA* disclosure mandates.
131. The additional issues in the OIPC Appeal arose subsequently to the void response of Tribunals Ontario on October 14, 2025 (see: **Inquiry Record**, Tab #5), and were delineated, *inter alia*, in the **Appellant**’s Tertiary Submissions (see: **Inquiry Record**, Tab #6). The **Appellant** prosecuted Declaration #2 at the conclusion of the week of October 27 to 31, 2025, when the LAT failed to provide access to the Two Undisclosed Motion Orders, notwithstanding the **Appellant**’s compliance—which is not a prerequisite *per se*—with an electronic form as provided to him (see: **Inquiry Record**, Tab 7).

132. It is truism that pursuant to *FIPPA* and the *General Regulation*, the LAT is an **Institution**, but Tribunals Ontario is not.

CHAPTER #1, VOLUME #4(J): RELEVANT BACKGROUND HEREIN

133. On the 20th day of March, 2025, the **Appellant** commenced a formal application by tendering to the Licence Appeal Tribunal (hereinafter “the LAT”) both the statutorily prescribed monetary remuneration and a sufficiently detailed written request (vide: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 24(1)(b)) (hereinafter “*FIPPA*”). This application (collectively, “the Access Request”) was premised upon the **Appellant**’s belief that an “**Institution**” (vide: *FIPPA*, s. 2, “Definitions”) maintained custody and/or control over some or all of the records delineated within 13 distinct classes (hereinafter “the 13 Record Classes”). Pursuant to the explicit directives articulated in sections 26 and 29 of *FIPPA*, an obligation was imposed upon the LAT to deliver its comprehensive response within a 30-calendar-day period originating March 20, 2025. This statutory obligation was subject to a singular exception: a formal determination by Mr. Weir, the designated **Head** of the LAT (under the *General Regulation*, R.R.O. 1990, Reg. 460), positing that the Access Request was, upon reasonable grounds, frivolous or vexatious. No such opinion was conveyed by Mr. Weir, formally or otherwise, by the operative deadline of April 19, 2025. Furthermore, the LAT demonstrably did not formulate the opinion that the Access Request was insufficiently particularized in relation to the records sought. Had such a deficiency been perceived, the LAT would have been statutorily bound (vide: *FIPPA*, s. 24(2)) to apprise the **Appellant**—then acting in his capacity as an applicant—of the specific lacuna. Consequently, the concomitant requirement to proffer assistance in the reformulation of the Access Request was not activated. It follows, *ergo*, that in accordance with the unequivocal will of the **Legislature**, the Applicant was deemed to have achieved full compliance with *FIPPA* section 24(1)(b). As of April 19, 2025, it was established as a matter of law that an experienced employee of the LAT, upon the exertion of reasonable effort, possessed the capacity to identify the records sought (hereinafter “the Records Sought”). The unambiguous language of section 24(1), in force *in situ* since 1996, mandates this conclusion.
134. The **Appellant**’s Access Request did not solicit continuing access to the Records Sought, as such access is contemplated by *FIPPA* section 24(3). Ipso facto, the provisions articulated in section 24(5) of *FIPPA* are entirely inapplicable to the extant matter.
135. By April 4, 2025, the LAT had not availed itself of the forwarding or transfer mechanisms delineated in *FIPPA* sections 25(1) and 25(2).
136. Pursuant to the “Request Forwarding Provisions” (s. 25(1)), a specific, mandatory duty is imposed upon the **Head**. Only in the event that the LAT did not possess custody or control of the Records Sought, Mr. Weir was statutorily required to execute all necessary inquiries to ascertain whether another *FIPPA*-defined

Institution maintained said custody and control. Upon determining that such an **Institution** existed, Mr. Weir was obligated, within 15 days of the Access Request’s receipt (i.e., by April 4, 2025), to complete two distinct actions:

- a. Forward the **Appellant**’s Access Request to the other **Institution(s)**; and
- b. Transmit written notice to the **Appellant** confirming that the Access Request had been forwarded.

137. The “Request Forwarding Provisions” (s. 25(1)) and the “Request Transfer Provisions” (s. 25(2)) are not juridically coterminous; they address distinct statutory scenarios. The Request Transfer Provisions introduce a permissive discretion for the **Head** to transfer a request—and, significantly, the physical record itself—to another **Institution**. This discretion is strictly governed by the “**Record Greater Interest Test**.” The mechanism of section 25(2) necessarily implies that the initial recipient (the potential “Transferor **Institution**”) possesses custody and/or control of the sought record(s) but is, by this action, relinquishing both the request and the record(s) to a “**Transferee Institution**” that is deemed to hold a superior interest therein. While sections 25(1) and 25(2) are operationally distinct, they share procedural similarities: both mandate a 15-day timeline for action and require that written notice be furnished to the applicant (vide: *FIPPA*, s. 25(4)). In computational terms, the invocation of either provision introduces a minimum 15-day delay into the access-to-information process.

CHAPTER #1, VOLUME #4(J)(I): THE “RECORD GREATER INTEREST TEST” (SECTION 25(3))

138. To exercise the discretion endowed by section 25(2), the **Institution Head** must rigorously apply the statutory legal test articulated in section 25(3). An **Institution** is deemed to possess a “greater interest” if:
- a. The record was originally produced in or for the potential **Transferee Institution**; or
 - b. Where the record was not originally produced for an **Institution**, the potential **Transferee Institution** was the first to receive the record or a copy thereof (the “**First Institution Receipt Test**”).

CHAPTER #1, VOLUME #4(H): DETERMINATION OF “INSTITUTION” STATUS UNDER GOVERNING LEGISLATION

A. THE LACUNA OF “INSTITUTION” STATUS FOR “TRIBUNALS ONTARIO” UNDER FIPPA

139. An entity qualifies as an “**Institution**” under *FIPPA* only if it falls within one of the following enumerated, exhaustive categories:
- a. The Legislative Assembly;
 - b. A Ministry of the Government of Ontario;
 - c. A service provider organization within the meaning of s. 17.1 of the Ministry of Government Services Act (hereinafter “*MGSA*”);
 - d. A hospital; or

- e. An agency, board, commission, corporation, or other body designated as an **Institution** in the regulations.

140. “Tribunals Ontario” is manifestly not the Legislative Assembly, a hospital, or one of the 32 designated Ministries of the Government of Ontario. Furthermore, the *General Regulation* under *FIPPA* specifically designates the LAT (at item 68) but makes no mention whatsoever of “Tribunals Ontario.”
141. Moreover, section 17.1 of the *MGSA* empowers the Lieutenant Governor in Council (LGIC) to designate service provider organizations. The LGIC has designated only “ServiceOntario” in this capacity. Therefore, any legal analysis vis-à-vis section 17.1 of the *MGSA* is rendered moot.

B. THE ABSENCE OF “PUBLIC BODY” STATUS FOR “TRIBUNALS ONTARIO” UNDER THE ARA

142. A parallel exegesis of the *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A (hereinafter “*ARA*”) yields an identical conclusion. A “public body” under section 2 of the *ARA* includes the *Executive Council, Ministers, Ministries, Public Inquiries Act, 2009* commissions, or an entity designated by regulation. The Designated Public Bodies regulation (O. Reg. 336/07) lists the LAT as Designated Public Body number 74. Conspicuously absent from this regulation is any reference to “Tribunals Ontario.” Parenthetically, the definition of “public body” under the *ARA* is distinct from its usage in other statutes, highlighting the imperative for precise legislative interpretation.

C. DELINEATION FROM “ADJUDICATIVE TRIBUNAL” STATUS (TARA & ATAGAA)

143. The status of “Tribunals Ontario” is further clarified by an examination of cognate legislative frameworks.
144. Under the *Tribunal Adjudicative Records Act, 2019*, S.O. 2019, c. 7, Sched. 60 (hereinafter “*TARA*”), a “tribunal” is an adjudicative tribunal prescribed by regulation. The *General Regulation* (O. Reg. 211/19) enumerates the LAT (at item 16) but does not list “Tribunals Ontario.” Similarly, under the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5 (hereinafter “*ATAGAA*”), an “adjudicative tribunal” is a prescribed entity. The relevant regulation (O. Reg. 126/10) designates the LAT (at item 12) but, again, entirely omits “Tribunals Ontario.”

D. SYLLOGISTIC CONCLUSIONS ON THE STATUS OF “TRIBUNALS ONTARIO”

145. Ergo, the following propositions are self-evident and flow inexorably from the statutory record: “Tribunals Ontario” is not:
- a. A listed “**Institution**” under *FIPPA* or its attendant regulations;
 - b. A “Designated Public Body” under the *ARA* or its attendant regulations;
 - c. An “adjudicative tribunal” under *TARA* or its attendant regulations; or
 - d. An “adjudicative tribunal” under *ATAGAA* or its attendant regulations.

146. The import of this distinction is monumental. As a non-**Institution**, “Tribunals Ontario” is statutorily precluded from engaging in any permissive or mandatory conduct prescribed by *FIPPA*. As a non-public-body under the *ARA*, its records are, axiomatically, “private records,” an identification that fundamentally alters the analysis of the Archivist of Ontario (the “Archivist”) regarding archival value (vide: *ARA*, s. 2(1)).

IV. THE JURISPRUDENTIAL AND STATUTORY INTERPLAY: *FIPPA*, THE *ARA*, AND RECORDS DISPOSAL

A. THE SECTION 65(1) *FIPPA* EXEMPTION: THE “PLACING” OF RECORDS IN THE ARCHIVES OF ONTARIO

147. The **Legislature** confirmed, through subsection 3(1) of the *ARA*, that the *ARA* does not operate to limit laws governing access to information in respect of records held by public bodies. Subsection 3(2) extends this principle to privileges respecting records transferred to the Archivist.
148. This framework must be construed in *pari materia* with section 65(1) of *FIPPA*, which articulates a critical exemption from *FIPPA*’s applicability. It states:
149. Application of Act 65 (1) This Act does not apply to records placed in the archives of an educational **Institution** or the Archives of Ontario by or on behalf of a person or organization other than, (a) an **Institution** as defined in this Act or in the *Municipal Freedom of Information and Protection of Privacy Act*; or (b) a health information custodian as defined in the *Personal Health Information Protection Act*, 2004.
150. The applicability of *FIPPA* is, therefore, contingent upon the capacity and authority of the entity that placed the records (the “Records Placer”) in the Archives of Ontario (the “AO”).

B. DISTINGUISHING “RECORDS PLACER” FROM “RECORDS TRANSFEROR”

151. A “Records Placer” is not juridically coterminous with a “Records Transferor,” a distinction mandated by a harmonious construction of *FIPPA* and the *ARA*.
152. The Disposal of Personal Information regulation, R.R.O. 1990, Reg. 459 (hereinafter “*Reg 459*”), promulgated under *FIPPA*, explicitly references the AO. Section 2(1) of *Reg 459* permits *FIPPA* **Institutions** (excluding educational **Institutions**) to “dispose” of personal information in only two ways:
- a. Transferring it to the AO (an “**AO Transfer**”); or
 - b. By destroying it (a “**PI Destruction**”).
153. Ergo, an AO Transfer constitutes a form of disposal, but it is legislatively distinct from destruction.
154. Crucially, *Reg 459* only permits a *FIPPA* **Institution** to “dispose” of personal information. A non-*FIPPA* **Institution** (i.e., “a person or organization other than” an **Institution**, per *FIPPA* s. 65(1)) may be a “Records Placer” but cannot be a “Records Transferor” under this regulatory scheme.

155. It therefore follows, de jure, that where a record is deposited with the AO by a Records Placer (a non-*FIPPA*/non-*MFIPPA* entity), section 65(1) of *FIPPA* is triggered. This placement ipso facto exempts an **Institution** that did not place the record, but which may still retain custody or control of it, from all of *FIPPA*'s obligations vis-à-vis that specific record.

C. THE PERSONAL INFORMATION DISPOSAL REGULATION (R.R.O. 1990, REG. 459)

156. The *Personal Information Disposal Regulation* stipulates further obligations incumbent upon **Institution Heads**. Section 3 mandates that the destruction of personal information requires the **Head**'s authorization. Section 5 requires the **Head** to undertake all reasonable measures to ensure the destruction is irreversible, such that the information cannot be reconstructed or retrieved.
157. Section 6 of *Reg 459* compels the **Institution** (in its capacity as a Records Transferor) to maintain a "Disposal Record" detailing the personal information destroyed or transferred to the AO, including dates. This "Disposal Record" must not, itself, contain personal information.
158. This regulatory framework creates a dichotomy: an AO Transfer by an **Institution** (a Records Transferor) results in the AO acquiring custody of the personal information, while the **Institution** retains a (non-personal) Disposal Record. Conversely, a record "placed" by a Records Placer (a non-**Institution**) is not subject to *Reg 459*, although it activates the *FIPPA* s. 65(1) exemption for any **Institution** that happens to hold a copy.

D. THE CONUNDRUM OF "CUSTODY" AND "CONTROL" POST-*HALE*

159. The operative terms "custody" and "control" are not endowed with statutory definition within *FIPPA*. Jurisprudence, however, has provided significant clarification. "Control," as articulated in Ontario (Criminal Code Review Board) v. *Hale* (**Inquiry Record**, Tab 34), manifests as the right to make a prospective demand upon any person—not necessarily restricted to another **Institution**—for a specified record.
160. Ontario common law, consonant with the principles established in *Hale*, imposes no requirement for such control to be immediate. Rather, any demonstrable ability to demand or solicit the record from another person (encompassing both organizations and individuals, vide: *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 89) is sufficient to satisfy the common law indicia.
161. The Ontario Court of Appeal in *Hale* explicitly adopted and affirmed the precedential reasoning from federal jurisprudence, such as *Canada Post Corporation*, which espouses that access to information legislation, being quasi-constitutional in nature, must be accorded a fair, large, and liberal interpretation consistent with its remedial objectives.
162. This principle of statutory interpretation was subsequently codified by the **Legislature** in sections 63 and 64 of the *Legislation Act, 2006*, which applies to all Ontario statutes and regulations.

163. E. The Archivist's Powers vis-à-vis Public Body Records (*ARA*, Section 20)
164. The *ARA* vests the Archivist with specific powers vis-à-vis public bodies (a designation, as established, that does not include "Tribunals Ontario"). Section 20 of the *ARA* empowers the Archivist to designate public records—extant in the custody or control of a public body—that may be of "Archival Value" and are at imminent risk of being damaged, destroyed, or disposed of.
165. This designation (the "Archivist Public Body Records Designation") must be provided in writing to the public body (s. 20(2)). Upon receipt, the public body is proscribed from damaging, destroying, or disposing of the designated records for a 45-day period (s. 20(3)).
166. During this 45-day review period, the Archivist may examine the records (s. 20(4)). If the Archivist determines the records are, in fact, of Archival Value, the Archivist shall direct the public body to do one of two things:
167. Transfer the records to the custody and control of the AO by a specified date; or b. Enter into or amend an agreement with the Archivist pursuant to subclause 18(1)(a).
168. Transfer the records to the custody and control of the AO by a specified date; or
169. Enter into an agreement with Archivist under subclause 18(1)(a) or amend an existing agreement between the Archivist and that LGIC designated Public Body under the *ARA*'s attendant regulation.

CHAPTER #1, VOLUME #2: ANALYSIS OF ARCHIVAL OBLIGATIONS AND PROCEDURAL JURISDICTION STATUTORY INTERPRETATION OF ARCHIVAL DISPOSITIONS

170. The statutory framework established under Subclause 18(1)(b) of the *Archives and Recordkeeping Act (ARA)* encompasses a covenant with another juridical or natural person or entity.
171. This covenant mandates that the aforementioned party shall assume custodianship of all or a stipulated portion of the Public Body's records deemed to possess Archival Value upon the cessation of their requisite retention period. This assumption of responsibility is invariably coupled with the supplementary obligations of perpetual retention and rigorous preservation, alongside the imperative to afford public access in strict accordance with the Archivist's binding directives.
172. It must be observed, *ex necessitate rei*, that the entirety of Subsection 18(1)(b) is inapplicable to a formal contractual agreement, or MOU (Memorandum of Understanding), between the Public Body and the Archivist themselves. This conclusion is inexorably drawn from the foundational common law doctrine of privity of contract, which precludes the application of terms to a covenanting party that are explicitly designated for a third-party repository.

173. Any agreement or understanding—as exemplified by the extant MOU between Mr. Weir and MAG—executed by the Public Body subsequent to the reception of the 45-day designation notice constitutes an action deemed entirely without legal effect.
174. The parties to the MOU are as follows executed on this 22nd day of December 2022:
- “Memorandum of Understanding
between
The Attorney General of Ontario
(hereinafter called the "Minister")
and
The Executive Chair of Tribunals Ontario
(hereinafter called the "Executive Chair")”
175. Mr. Weir was acting in his capacity as an individual albeit in a professional capacity but “Tribunals Ontario” was not a party to the MOU. Ergo, Tribunals Ontario cannot be a party herein. It would be far easier for Tribunals Ontario to a party to a contract than a party to an appeal before the OIPC.
176. The **Appellant** does not agree with characterizations in the MOU relating to much of what it claims that is not solidified in statute or regulation. Nonetheless, it provided as an example of the parties to the MOU. Suffice it to say, it is poorly drafted and analytically imprecise.
177. Where the drafters of this MOU came to the conclusion that “Tribunals Ontario” was deemed to be independent or required to be independent and “responsible for the statutory mandate of its Constituent Tribunals, for adjudicative decisions, resolution of disputes and case management within the statutory mandate of its Constituent Tribunals, and for Tribunal Ontario’s ongoing administration” (see: clause 1.3 of the MOU). A nomenclature cluster under the ATAGAA’s attendant regulation does not specify the same.
178. Nonetheless, clause 1.5 confirms the obvious: “The MOU does not supersede the provisions of any legislation governing Tribunals Ontario or its Constituent Tribunals, nor is it intended to interfere with the independence of Tribunals Ontario or of its Appointees in rendering adjudicative decisions or in resolving disputes, consistent with the legislation, common law and principles of natural justice”.
179. The designation notice acts as an imprimatur of preservation, establishing a period of interim custodia legis over the records in question. The primary and overriding intent of this review period is the meticulous safeguarding of records, thereby precluding any detrimental alteration or outright destruction. The only potential exception to this comprehensive freeze is a formal **Personal Information Disposal**, governed by the *Personal Information Disposal Regulation*, involving a transfer for disposition to the very Archives of Ontario, wherein the Archivist has already formally declared that a record or classes of records may be of

Archival Value. Any contrary agreement attempting to unilaterally circumvent this protective mechanism is, consequently, rendered null and void pursuant to section 20(6) of the enabling statute.

180. Irrespective of this analytically imprecise MOU, *FIPPA* operates with an independent (of government) Commissioner and whether “Tribunals Ontario” is an **Institution** or not is the will of the **Legislature** and its members of the same which is a principle of democracy.

CHAPTER #1, VOLUME #3(A): THE PRINCIPLE OF ISSUE ESTOPPEL

181. The issuance of the aforementioned purported communication from “Tribunals Ontario” constituted an egregious abuse of process by both that entity and the LAT (Licence Appeal Tribunal). This is predicated upon the incontrovertible fact that the issue concerning the identification of the sole and correct Respondent in this OIPC Appeal had already been dispositively determined by the OIPC itself. Consequently, the LAT (and, by extension, “Tribunals Ontario”) were estopped in perpetuum from re-litigating this matter by the strictures of the doctrine of issue estoppel. To successfully invoke issue estoppel as a defence against the re-raising of a matter, whether through submissions, conduct, or otherwise, the rigorous common law test requires the satisfaction of three constituent elements:

- a. The issue or question must be identical to that previously determined;
- b. There must exist a final order or decision disposing of the issue; and
- c. The proceedings must involve the same parties or their privies

(vide: the leading authority in *Danyluk v. Ainsworth Technologies Inc*, 2001 SCC 44, which is cited in the **Inquiry Record** (Tab 56 [Penner] and Tab 57 [Smith Estate]).

<i>CHAPTER #1, VOLUME #3(B): FINALITY OF THE OIPC’S DETERMINATION ON PARTY STATUS</i>

182. It is a judicial axiom that the controverted issue of the correct and legally mandated respondent, both at first instance and through the regulatory scheme of *FIPPA*, remains the same; it is an intra-proceeding matter involving the same interested party in the LAT. The singular point of divergence hinges upon whether the prior OIPC decision was a final one. A “final decision” is juridically distinct from, and not synonymous with, the “last decision” rendered in a proceeding. The Ontario Court of Appeal (ONCA) in *M.E. v. Ontario (Government)* discerned that a decision affecting a change of parties, or the amendment of pleadings or causes of action, constitutes a final determination, finding, or order. Ergo, the administrative correction effectuated by the OIPC, substituting the LAT for “Tribunals Ontario,” which represented merely the enforcement of a plain reading of *FIPPA* and its attendant regulations, constituted a final decision.

183. This syllogistic extrapolation demonstrates, conclusively, that the “Tribunals Ontario” purported response to the September 29, 2025, designation was a collateral attack on a final determination and was thus rendered null and void.

CHAPTER #1, VOLUME #3(C):THE PRINCIPLES OF FUNCTUS OFFICIO AND AVOIDANCE OF MULTIPLICITY OF PROCEEDINGS

184. Consequently, all issues, alongside any antecedent and subsequent controversies arising therefrom during the Inquiry Phase, must be resolved exclusively by way of a formal order by the Commissioner AFTER the submission of the full evidentiary record (vide: section 54(1) of *FIPPA*).
185. This imperative is not only procedurally required but is also consonant with the maxim that justice must be efficacious and the overarching doctrine of the avoidance of multiplicity of proceedings (or *nemo debet bis vexari pro una et eadem causa*). Until such time as the Commissioner, or her duly authorized delegate, has by formal order adjudicated upon and resolved all issues arising in this OIPC Appeal since the designation of September 29, 2025, the Commissioner is not divested of jurisdiction (non-functus officio). Vide *CBC v. Manitoba*, 2021 SCC 33 (**Inquiry Record**, Tab 58).

CHAPTER #1, VOLUME #3(D):PRECLUSION BY FAILURE TO EXHAUST RECONSIDERATION AS THE INITIAL AVENUE

186. An additional supervening circumstance now militates against the LAT, stemming from the prior confirmation by Ms. Sherwood (Case Lead) that the LAT was indeed the sole and appropriate Respondent. The OIPC Code of Procedure (**Inquiry Record**, Tab 25) denotes that all IPC decisions are final (Rule 15.01). Rule 15.03 permits any person with an interest in the Appeal to formally request reconsideration, though this right is strictly limited to one application per decision or Order.
187. Assuming arguendo that “Tribunals Ontario” possessed the requisite interest in this Appeal, though not having the locus standi of a formal party (section 3 of the OIPC Code of Procedure; **Inquiry Record**, Tab 25), it or the LAT was required to file a formal request for reconsideration within the prescribed twenty-one-day period commencing, at the very latest, on September 29, 2025. The deadline for this action would have occurred well before the **Appellant’s** Tertiary Submissions of October 17, 2025 (**Inquiry Record**, Tab 6).

CHAPTER #1, VOLUME #3(D):JUDICIAL REVIEW AS THE ULTIMATE RECOURSE BUT DISCRETIONARY AND SUBJECT TO THE NON-JUSTICIABILITY DOCTRINES

188. Neither the LAT nor “Tribunals Ontario” availed themselves of this internal avenue. Consequently, their only recourse, subsequent to the expiry of the reconsideration period, would have been an application for judicial review pursuant to the Judicial Review Procedure Act (*JRPA*). Under the *JRPA*, the LAT and/or “Tribunals

Ontario” would have been legally obligated to initiate the application by serving and filing a notice of application for judicial review (Form 68(A)) within the statutory limit of 30 days (section 5(1) of the *JRPA*). This critical jurisdictional date expired on October 29, 2025. Ergo, the LAT and “Tribunals Ontario” are now precluded ab initio from advancing a reconsideration request and are concurrently barred from commencing a *JRPA* Application, the former as of the day subsequent to October 17, 2025, and the latter as of October 29, 2025. While the exhaustion of internal administrative remedies is not a sine qua non prerequisite for the commencement of judicial review proceedings, the Divisional Court has consistently exercised judicial forbearance, refusing to hear an applicant who has demonstrably failed to exhaust such alternative avenues of recourse.

CHAPTER #1, VOLUME #3(E):FINALITY AND THE INTERLOCUTORY PROSCRIPTION

189. The LAT or “Tribunals Ontario” possessed the entitlement, had they duly exercised their OIPC Code of Procedure rights and, failing that, brought a subsequent *JRPA* application, to challenge the OIPC’s determination. The jurisprudential proscription against the review of interlocutory orders would not have been applicable in this context (vide cases cited in **Inquiry Record** at Tab 60 [Metro Ontario Real Estate Limited, 2020 ONSC (Divisional Court) 7002], Tab 61 [*Vochay* at the ONCA in 2012], and Tab 62 [CB Powell at the FCA in 2010]). As the alteration in party status constituted a definitive change from a Non-**FIPPA Institution** to a **FIPPA Institution**—a requirement that the OIPC, as a creature of statute, was bound to enforce—this decision was incontrovertibly final. The exhaustion doctrine would, therefore, have been non-apposite, particularly since “Tribunals Ontario” was not formally included in the legislative language governing the Commissioner’s duty to inform. Pursuant to section 50(3) of *FIPPA*, the Commissioner bears a duty to inform the **Head** of the **Institution** but possesses a mere discretion to inform another **Institution** with “an interest” in the Appeal, including an *MFIPPA Institution*. Moreover, the doctrine of adequate, alternative, and available remedies (the “**AAAR Doctrine**”) would similarly be inapplicable, as the remedies sought by a Non-**Institution** could not legally supersede those of a formal **Institution**.

CHAPTER #1, VOLUME #3(F):CONVERGENCE OF PROCEDURAL DOCTRINES

190. It has been vigorously postulated that the prematurity doctrine and the rule proscribing judicial review of interlocutory decisions are, in their legal effect, effectively idem in toto. The same analogous relationship obtains between the Exhaustion Doctrine and the AAAR Doctrine. Although nuanced distinctions exist at the periphery, they are, de jure, ex necessitate rei, equivalent. The rendering of a final decision, determination, or order obviates any preclusion against judicial review under the prematurity doctrine and the rule against interlocutory review. Similarly, with such a final determination—especially one involving the substitution de

novo of parties that simultaneously precludes a Non-**Institution** from exercising any statutory rights under *FIPPA*—there exists no adequate, alternative, or available route to exhaust.

191. The substitution of one party for another is substantively equivalent to the dismissal of a party from an appeal or the refusal to remove or add a party, and as such, it constitutes a final determination, finding, or order. A finding, determination, decision, or order, irrespective of its nomenclature, remains fundamentally an issue of substance over form.
192. The core issue remains one that transcends mere semantic debate concerning vernacular (e.g., “question” versus “issue”) and is, in fact, an inquiry evasive of the lis between the Parties. It is, moreover, an issue of considerable public importance pertaining to the procedure, party status, practice, and substantive legal issues adjudicated before the OIPC on a retrospective, current, and prospective basis.

CHAPTER #1, VOLUME #3(F)(I): STATUTORY OVERRIDE PROVISIONS

193. It is apodictic that legislative phrasing such as “despite any other provision in this Act” denotes an internal notwithstanding or override provision within the confines of the statute itself (the “Internal Override Provision”). Furthermore, where the **Legislature** employs the formulation “Despite any provision in any other Act, this provision prevails in the event that this provision conflicts with other provisions in another statute,” this constitutes an external paramountcy provision (the “External Override Provision”), mandating legislative interpretation predicated upon the principle of resolving statutory conflict.

CHAPTER #1, VOLUME #4: ANALYSIS OF PEREMPTORY DISCLOSURE PROVISIONS AND INTER-STATUTORY CONFLICTS

THE INTERPLAY OF MANDATORY DISCLOSURE WITHIN THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA)*

A. THE MANDATORY OVERRIDE PURSUANT TO SECTION 11 OF FIPPA

194. The legislative intent, having been definitively codified within section 11 of *FIPPA*, establishes a preemptory disclosure obligation. This mandates that the **Institutional Head** effect the release of documentation to the public or to an aggrieved person when there exist reasonable grounds to believe that a profound peril to the environment, public safety, or public health has manifested. The jurisprudential standard, articulated definitively in *R. v. Kang-Brown*, posits a crucial distinction between a mere “reasonable belief” and the more stringent threshold of “reasonable grounds to believe.” The latter necessitates the provision of a foundation of declared or sworn testimonial evidence to render the conviction reasonably grounded, thereby imposing a considerable and demonstrable evidentiary burden upon the relevant **Institution**.

195. Section 13 of *FIPPA* governs the discretionary non-disclosure of records pertaining to Advice To Government. This permissive exemption is generally invoked concerning recommendations or counsel proffered by either an internal public servant or an external consultant engaged by the government.
196. Crucially, subsection 13(2) of *FIPPA* operates as an override provision internal to this permissive non-disclosure regime. This subsection stipulates a series of requisite conditions under which the **Head** of the **Institution** is enjoined from refusing disclosure, thereby necessitating the compulsory release of documentation to the requestor. These obligations crystallize when the documentation comprises, inter alia, the following constituents:
- a. Factual material;
 - b. A report emanating from a committee affiliated with an **Institution**; or
 - c. The articulated rationale for a final decision, order, or ruling executed by an officer of the **Institution** during, or at the conclusion of, the exercise of discretionary authority conferred by a governing enactment or scheme administered by that **Institution**.
197. This requirement subsists regardless of whether the governing enactment permits an appellate review of the decision, order, or ruling, and irrespective of whether the rationales (i) are contained within an internal **Institutional** memorandum or an epistle addressed by an officer or employee to a named person, or (ii) were conveyed by the officer who rendered the determination or were incorporated by reference into the said final decision, order, or ruling.

II. THE JURISDICTIONAL AMBIGUITY OF ADJUDICATIVE RECORDS

THE DICHOTOMY BETWEEN “MAKING” AND “ISSUING” AN ORDER

198. A compelling issue presents itself concerning the two specific Undisclosed Motion Orders. Sub judice is the preliminary presumption that the Landlord and Tenant Board (LAT) regards these two instruments as Adjudicative Records within the purview of the *Tribunal Adjudicative Records Act, 2019 (TARA)*. Particular attention is directed toward the critical verb “made” employed within the *TARA* statutory framework.
199. The necessity of rendering a determination is paramount regarding the jurisprudential and practical distinction between the making of a definitive order or decision and the subsequent issuance or promulgation of that same instrument to the involved litigants. These two Undisclosed Motion Orders were subsequently referenced within an Index provided by the LAT to the litigant, in a disparate context, during February 2025. This production occurred following the LAT’s acknowledged dereliction of its statutory duty to compile a Record of Proceeding pursuant to section 20 of the Statutory Powers Procedure Act (SPPA). Furthermore,

the characterization of these instruments as “final orders” unequivocally places them outside the exclusionary scope of *FIPPA*, specifically section 65(3.1), which pertains to “draft decisions, draft orders or communications related to draft decisions, draft orders when a person is acting in a quasi-judicial capacity.” Ergo, the threshold inquiry necessitates a definitive ascertainment of whether *TARA* possesses a superior or external override provision, and, consequently, whether a statutory conflict subsists between *TARA* and *FIPPA*.

B. THE STATUTORY CONFLICT MANDATE AND JURISDICTIONAL EXCLUSION

200. Section 7 of *TARA* prescribes the methodology for resolving inter-statutory conflicts:

“Conflict

7 In the event of a conflict between a provision of this Act and a provision of any other Act or a regulation made under another Act, the provision of this Act prevails unless the regulations made under this Act provide otherwise.

201. Moreover, the ambit of *FIPPA* is statutorily circumscribed vis-à-vis adjudicative records, as stipulated in subsection 65(16) of *FIPPA*:

“(16) This Act does not apply to adjudicative records, within the meaning of the *Tribunal Adjudicative Records Act, 2019*, referred to in subsection 2 (1) of that Act.

202. *TARA*, at section 2(2), delineates the definition of Adjudicative Records:

“Adjudicative records

(2) Subject to subsection (3), the following are adjudicative records for the purposes of this Act:

6. A decision or an order made by a tribunal and any reasons for the decision or order.

203. However, the specific subsection referenced in *FIPPA*’s exclusion clause is section 2(1) of *TARA*:

“Adjudicative records public

2 (1) A tribunal shall make those adjudicative records in its possession that relate to proceedings commenced on or after the day this section comes into force available to the public in accordance with this Act, including any rules made under section 3.”

CHAPTER #1, VOLUME #5: THE JURIDICAL DICHOTOMY OF “POSSESSION” VERSUS “CONTROL OR CUSTODY”

204. *FIPPA* employs the terms “control or custody,” whereas *TARA* utilizes the term “possession,” a term which remains undefined within the *TARA* statute. Given the LAT has not promulgated rules under section 3 of

TARA relating to public record availability, the distinction between these two concepts necessitates a precise juridical finding and subsequent determination.

205. The fundamental legal question posited is whether an adjudicative record, though not within the immediate possession of a tribunal, is nonetheless under its control (i.e., retaining the legal prerogative to compel a third party to produce a copy, as explored in *Hale v. Ontario Criminal Code Review Board*). This distinction is profoundly material because the public availability mandate of *TARA* section 2(1) affords access to the general populace, a status fundamentally distinct from that occupied by a party to the proceeding, an intervenor, an amicus curiae, or a third party seeking personal information under *FIPPA*. The latter-mentioned individual is entitled to the personal information pertaining to said individual and occupies a different juridical standing than a member of the public, such as a journalistic entity.
206. Furthermore, should the two Undisclosed Motion Orders be deemed to have been made—a factual predicate contingent upon the complete evidentiary record from the LAT—they would prima facie qualify as Adjudicative Records. However, the applicability of *TARA* becomes immediately suspect if the instruments are not in the LAT’s possession. Should the records be absent from possession (e.g., due to loss or theft) but remain within the LAT’s control (e.g., the legal right to demand restoration or to effect reconstruction of the record), *FIPPA* would retain its applicability, whereas *TARA* would not per se govern. This question of jurisdictional contiguity and overlap, concerning the disparate definitions of record situs, constitutes a matter of paramount public interest necessitating definitive juridical adjudication.

D. THE CONSEQUENCE OF “MAKING” AN ORDER

207. Absent a clear statutory definition concerning the “making” of an order or decision, an inquiry necessarily arises as to whether said act mandates contemporaneous issuance to the parties or is deemed complete upon internal finalization. Since the **Two Undisclosed Motion Orders** are designated as “final,” they are unequivocally not draft instruments, thereby confirming that the exclusionary provision of *FIPPA* subsection 65(3.1) is in casu irrelevant. While subsection 65(3.1) references “quasi-judicial capacity,” *TARA* merely refers to the tribunal member presiding. This might be deemed a distinction without a difference, or an implied equivalence arising from the nomenclature of the Tribunal Adjudicative Records Act. Nonetheless, should “Tribunals Ontario” possess the Adjudicative Records without the concomitant joint possession by the LAT, *FIPPA* would govern the LAT’s obligations regarding the **Undisclosed Motion Orders**. Resolution is evinced for the systematic prosecution of all available avenues of recourse, and the Office of the Information and Privacy Commissioner (OIPC) shall be continuously apprised of the efforts and their resultant evidence, ensuring a comprehensive evidentiary foundation prior to the OIPC’s issuance of its final Determination and Order on all issues articulated herein.

III. THE LEGISLATIVE AND PROTECTIVE NEXUS BETWEEN *TARA* AND THE CROWN LIABILITY AND PROCEEDINGS ACT, 2019

THE 2019 LEGISLATIVE CONTEXT AND THE *TORONTO STAR DECISION*

208. The year 2019 marked a significant legislative juncture, subsequent to the judgment of the Honourable Justice E. Morgan of the Superior Court of Justice (Ontario) in *Toronto Star v. AGO* (2018) (the “Toronto Star Decision”). This decision necessitated amendments to *FIPPA* to address systemic procedural and substantive deficiencies concerning the protracted delays encountered by the public in obtaining records. The subsequent omnibus bill, the Protecting What Matters Most Act, introduced a plethora of amendments and new statutes, including the partial enactment of *TARA*, which represented the **Legislature**’s direct remedial response to the identified issues. The fundamental Charter principles of open court were held to be applicable to administrative tribunals, including adjudicative tribunals such as the LAT.
209. *TARA* was promulgated, in part, as a legislative remedy to the unacceptable delays experienced by litigants and news reporting companies seeking access to Adjudicative Records. The dictum delivered by Justice Morgan, “Justice delayed is justice denied,” served to underscore the critical urgency of this requisite remedial legislative action. Moreover, this foundational principle is substantially buttressed by constitutional jurisprudence affirming that the Charter safeguards the rights of auditors and observers, not merely those of the enunciators.

B. IMMUNITY AND LIABILITY UNDER SECTION 6 OF TARA

210. Section 6 of *TARA* addresses the protection afforded to tribunal personnel:

Protection from personal liability

6 (1) No action or other proceeding may be commenced against a member or an employee of a tribunal for an act or omission done or omitted by the member or the employee in good faith in the execution or intended execution of any duty or power under this Act.

Crown liability

(2) Despite subsection 8 (3) of the Crown Liability and Proceedings Act, 2019, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject.

211. This provision explicitly references a “member” or an “employee” of a tribunal. While “good faith” is acknowledged as an amorphous juridical concept, the high court pronouncements in *Bhasin v. Hrynew* and *C.M. Callow Inc. v. Zollinger* in the contractual commercial context suggest that the absence of good faith (i.e., bad faith) can encompass:
- Mendacium album (White lies);
 - Half-truths; and
 - Calculated silence in the face of contrary knowledge.
212. A compelling *quaere* subsists regarding the potential liability exposure of an individual who is neither officially categorized as a “member” nor an “employee” of the LAT. Given the present uncertainty regarding

the originator of the Undisclosed Motion Orders, this lacuna within the protective statutory scheme is held to warrant meticulous and exhaustive examination.

CHAPTER #1, VOLUME #5: I. FOUNDATIONAL ACCESS REGIME AND PROCEDURAL NULLITY

A. THE ACCESS REQUEST, STATUTORY DESIGNATION, AND DEEMED REFUSAL

213. This appeal, a necessary invocation of the supervisory jurisdiction of the Information and Privacy Commissioner/Ontario (OIPC), originates from a request for access to records initiated pursuant to the foundational framework of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (*FIPPA*). The request was duly directed to the Licence Appeal Tribunal (the LAT), an **Institutional** entity unequivocally established and precisely enumerated as **Institution** No. 68 under the relevant statutory regulations (General, R.R.O. 1990, Reg. 460, s. 1(1), no. 68). The **Appellant** has satisfied all requisite statutory disbursements, fulfilling the pre-conditions for the exercise of access rights under the Act.
214. The **Appellant** formally submitted an Access Request (Access Request #2) to the LAT, requesting thirteen distinct categories of documents (the Thirteen Record Classes) on March 19, 2025. The substantive scope of this request pertained to the procurement of records demonstrably germane to the **Appellant's** prolonged, contested interactions with the LAT and implicated third-party interests, covering the essential temporal span from December 24, 2023, to March 19, 2025 (the General Period). These classes are not mere fishing expeditions; they are designed to expose the internal mechanisms of administrative file handling, the accuracy of **Institutional** representations regarding the deletion of the **Appellant's** electronic file, and the nature of communications between the LAT and the third party (TDI/TD Bank Group) following the commencement of judicial review proceedings.
215. Pursuant to the statutory architecture, section 24(1) of *FIPPA* mandates that the **Head** of the **Institution** must provide a written response (either granting or refusing access) within thirty days of the request being received. The **Institution's** complete non-response—the failure to issue a decision from the legally designated **Head**—culminated in a Deemed Refusal on April 18, 2025, respecting the entirety of the aforementioned record classifications. This procedural failure is the primary jurisdictional basis for the present appeal.
216. The consequences of a Deemed Refusal are not merely administrative formalities; they are legally and functionally equivalent to an outright refusal. Under section 53(2) of *FIPPA*, this shifts the burden of proof entirely and unequivocally onto the **Institution** to defend its non-disclosure before the Commissioner. The **Institution** loses the procedural advantage of having already justified its position in an initial, valid decision. Furthermore, where a Deemed Refusal has occurred, the legal presumption is that the records requested exist. This presumption, established by the **Institution's** failure to comply with s. 24(1), renders any subsequent attempt by the **Institution** to claim non-existence of the records inherently difficult and subjects such a claim

to heightened scrutiny. To rebut the presumption of existence, the **Institution** must provide specific, detailed, and non-conclusory evidence, often in the form of a detailed affidavit from the person conducting the search, outlining the search *parameters*, the specific databases examined, the keywords used, and the temporal limitations applied. The mere assertion that “no records were found” is insufficient to discharge the statutory burden imposed by s. 53(2). The failure to address the request within the statutory timeline is a direct breach of the core principles of timely and open government access that *FIPPA* is designed to uphold, compelling the Commissioner to draw the most adverse inference possible against the **Institution** regarding the existence and relevance of the requested documents. The administrative silence by the LAT, especially in the context of highly sensitive records related to alleged criminal acts by its agents, serves to amplify the public interest in disclosure and severely undermines any future claim of reasonableness in their conduct.

<i>B. THE ULTRA VIRES DOCTRINE, INSTITUTIONAL IDENTITY, AND NULLITY IN ADMINISTRATIVE LAW</i>

217. The administrative trajectory of the request immediately and fundamentally diverged into irregularity and procedural illegality. The initial response tendered to the **Appellant** did not emanate from the **Head** of the Licence Appeal Tribunal, the singular statutorily mandated respondent responsible for exercising the powers and duties under *FIPPA*. Instead, a purported decisional instrument was issued under the imprimatur of the administrative coordinating mechanism known merely as “Tribunals Ontario”. This procedural misstep is not a technical oversight; it is a fundamental administrative law defect.
218. The entity designated as “Tribunals Ontario” is neither a jural entity nor an **Institution** explicitly delineated within the legislative or regulatory ambit of *FIPPA*. It functions only as an administrative coordinator for various tribunals (including the LAT) under the Ministry of the Attorney General and lacks the necessary legal personality to exercise the **Head**’s delegated authority under this specific Act. The **Head** of the LAT is the designated person authorized by the **Legislature** to act on behalf of **Institution** No. 68. Because “Tribunals Ontario” lacks this necessary juristic personality and has not been formally designated, the act of issuing a decision in its name constitutes an ultra vires exercise of power—an action beyond the scope of its lawful authority. This is a monumental procedural error that reaches the threshold of a jurisdictional defect of identity. The doctrine of ultra vires is engaged because the authority to issue a decision under *FIPPA* is a non-delegable statutory power vested solely in the **Head**, and the attempt by “Tribunals Ontario” to assume this function without explicit legislative or regulatory authority is an act of unlawful delegation, thereby infringing the strict principle of statutory authority. The failure to correctly identify the **Institutional Head** responsible for the decision denies the **Appellant** a clear pathway for administrative accountability, rendering the purported decision structurally unsound and incapable of forming a legitimate basis for appeal or review.
219. This defect is so fundamental that it results in a foundational nullity, or void ab initio. As established in the seminal administrative law case of *Crevier v. Attorney General of Quebec*, 2 S.C.R. 220, a tribunal or

administrative body cannot decide its own jurisdiction, nor can an improper exercise of power be validated after the fact. The purported response issued by the unauthorized entity is a legal non-act or vox nihili (a voice of nothing) that cannot be validated or rehabilitated by the OIPC. To accept the “Tribunals Ontario” response would be to tacitly endorse the doctrine of unconstitutional delegation, where the **Head** delegates the core statutory duty to respond to an unnamed, non-statutory umbrella organization. This undermines the strict accountability mechanisms built into *FIPPA*, which relies on the named **Head** being responsible for all decisions regarding access. The OIPC must therefore disregard the purported “Tribunals Ontario” decision and treat the matter as a pure Deemed Refusal where the burden of proof remains entirely unsatisfied by the proper authority, thereby allowing the **Appellant** to proceed with the appeal on the initial jurisdictional footing. The constitutional imperative of administrative justice requires that a public body act within the clear parameters of its legislative grant of authority; the failure to do so converts the purported decision into a legal nullity, which the Commissioner is bound to ignore in favour of the foundational Deemed Refusal.

<i>C. PROCEDURAL FINALITY AND THE DUAL STATUTORY MANDATE</i>

220. A critical antecedent procedural dimension pertains to the Two Undisclosed Motion Orders (July 28, 2024, and August 16, 2024). The substantive issues surrounding the production and disposition of these specific adjudicative records were previously adjudicated upon and conclusively disposed of by the Tribunal itself. The prior binding disposition of this specific controversy is now asserted as an issue barring subsequent re-adjudication before this Commissioner through the well-established common law doctrines of res judicata and issue estoppel, invoking the principle of procedural finality (*Danyluk v. Ainsworth Technologies Inc.*, 2001, 2 S.C.R. 321). The LAT cannot utilize the *FIPPA* process as a means of seeking collateral review of, or providing new justification for, its own prior, final, adjudicative decisions—their proper avenue for disclosure is through the administrative record itself.
221. Moreover, the LAT remains under the distinct and mandatory duty imposed by the lex specialis of the *Tribunal Adjudicative Records Act, 2019 (TARA)*, which requires the Tribunal to furnish adjudicative records, such as Motion Orders, regardless of any *FIPPA* exemption claim. The LAT has persistently neglected or refused to disclose the Two Undisclosed Motion Orders, which constitutes an ongoing and deliberate failure to satisfy its dual statutory obligation concerning public adjudicative records. The mandatory nature of *TARA* is absolute regarding adjudicative records, placing an obligation on the LAT that transcends any discretionary exemption otherwise available under *FIPPA*. The refusal to disclose these fundamental judicial documents not only breaches *TARA* but fundamentally compromises the constitutional mandate of the Open Courts Principle. This principle demands that all judicial and quasi-judicial processes, including the final orders that resolve substantive motions, must be fully accessible to the public, ensuring judicial accountability and transparency. This failure to provide the fundamental records that explain its adjudicative history further

implicates the **Institution** in opacity and a disregard for its fundamental public function of transparency, suggesting a deliberate attempt to shield its prior actions from scrutiny, necessitating an order for disclosure of these records regardless of *FIPPA* or privilege claims. The concurrent application of *FIPPA* and *TARA* means the LAT must satisfy the more onerous disclosure requirement, which in this case is the absolute mandate under *TARA* to make adjudicative records publicly available upon request.

CHAPTER #1, VOLUME #5:

II. THE INIQUITY EXCEPTION, PRIVILEGE, AND PUBLIC INTEREST OVERRIDE

A. THE MANDATORY EXEMPTION OF PERSONAL PRIVACY (S. 21 OF FIPPA) AND REOP

222. The sole mandatory exemption stipulated under *FIPPA* is section 21, concerning Personal Privacy. The **Appellant** argues that the mandatory disclosure cannot be legitimately resisted because the records relate to acts of public misconduct (theft, fraud, obstruction of justice), not matters of private, personal life.
223. The established legal precedent dictates that an individual who perpetrates theft, fraud, and associated unlawful conduct possesses no Reasonable Expectation of Privacy (REOP) regarding records directly linked to that misconduct (vide: *R. v. Van Duong*, 2018 (ONCA)). *FIPPA* privacy protections are not intended to serve as a “cloak for crime or corruption.” The privacy interests of the individuals involved in the misconduct are significantly diminished to the point of being outweighed by the public interest in disclosure, particularly when those individuals were acting in an official capacity or communicating with a public **Institution** (the LAT) about the very matter they were attempting to subvert. The information sought, which includes the names and titles of those involved in the underlying criminal activity and the subsequent cover-up/obstruction, directly falls into the category of official misconduct where privacy expectations are minimal. The public interest in uncovering the complete factual matrix of a sophisticated scheme involving public **Institutions** and criminal acts fundamentally extinguishes any residual privacy claim held by the perpetrators. Furthermore, the continuing and compelling circumstances affecting the **Appellant**’s health and safety—a direct consequence of the loss of identifying documents, the associated fraud, and the ongoing harassment—coupled with the fact that the records relate to the conduct of public business, necessitate disclosure under the public interest dimensions of section 21(4), which allows disclosure where disclosure would clearly benefit public health or safety. The theft and subsequent identity fraud have directly compromised the **Appellant**’s ability to maintain personal and financial security, a direct threat to safety that disclosure is intended to mitigate by exposing the network of individuals involved. The privacy interests of individuals engaged in a coordinated effort to obstruct justice and commit financial crimes cannot override the public safety risk created by their own actions.

B. THE DISCRETIONARY EXEMPTION, LITIGATION PRIVILEGE, AND THE DOMINANT PURPOSE TEST AS A BARRIER TO OBSTRUCTION

224. The pertinent discretionary exemption potentially engaged herein is section 19(1)(a) of *FIPPA*, encompassing solicitor-client privilege and litigation privilege. The LAT may attempt to assert litigation privilege over communications between itself (or its counsel) and the third party (TDI/TD Bank Group) subsequent to the **Appellant’s** perfection of the judicial review application
225. The application of litigation privilege is contingent upon meeting the Dominant Purpose Test (vide: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39). The test requires that the document must have been created for the dominant purpose of preparing for anticipated or existing litigation. This is where the claim of privilege fundamentally fails. It is patently illogical and a fundamental subversion of justice to argue that a record documenting or furthering the felonious deprivation of a potentially opposing party of his ability to prosecute an appeal or judicial review through theft and fraud could be construed as lawfully ‘assisting in the conduct of anticipated litigation.
226. The “dominant purpose” must be a lawful purpose. The purpose of the communications sought (Record Classes #6 to #12) is, by necessity, either (i) to further the unlawful obstruction of the judicial process; or (ii) to discuss the implications of that unlawful obstruction. In neither case can the purpose be deemed dominant in the sense required by *Blank*, because a document’s function must be inherently lawful to warrant the high protection of privilege. A communication whose object is to conceal or perpetuate a fraud, or to actively undermine the rule of law by depriving a litigant of his tools, cannot possess the necessary lawful intent to satisfy the ratio of litigation privilege. The very act of obstructing the judicial process (e.g., through the use of stolen PII to compromise litigation capacity or coordinate the ROP delay) automatically defeats the possibility of a “lawful” dominant purpose. The initial act of theft and the subsequent systematic identity fraud constitute the quintessential acts of subversion that the privilege doctrine cannot countenance. Thus, the claim of litigation privilege fails *ab initio* because the purpose is illegitimate, even before the Iniquity Exception is applied.

C. THE INIQUITY EXCEPTION: A CONDITION SUBSEQUENT DEFEATING PRIVILEGE FOR MALFEASANCE

227. Even if a record were to technically satisfy the Dominant Purpose Test, it remains subject to the *paramount* Iniquity Exception (or the “crime-fraud exception”). This exception operates as a condition subsequent that automatically voids the privilege upon proof that the privileged communication was made in furtherance of an illegal purpose. The principle is ancient and unequivocal: privilege is not a cloak for crime (*O’Rourke v. Darbishire and Others*, 1920 A.C. 581).

228. The **Appellant** asserts that the evidence presented—including the video-documented theft by Mr. Karat, the systematic pattern of identity fraud directly targeting the **Appellant**'s litigation capacity (e.g., changing the phone number, compromising TPL accounts used for research), and the coordinated silence of the TD Bank Group counsel upon definitive identification—establishes a conclusive, uncontroverted *prima facie* case of **Institutional** malfeasance and iniquity. The requisite *prima facie* standard is not proof beyond a reasonable doubt, but a demonstration that there is sufficient evidence to lead a reasonable person to believe that the exception applies. The evidence adduced goes far beyond this standard. The *prima facie* case is met through the convergence of facts: a Tribunal agent commits a theft, followed by targeted identity fraud, coinciding with the Tribunal's own failure to meet its statutory obligations (*JRPA* ROP delay) and is further compounded by the third party's legal counsel actively refusing to acknowledge or investigate the conclusive video evidence of the crime. This interconnected pattern of behaviour is the very type of systemic abuse the exception is designed to remedy.
229. The jurisprudence in *McDermott v McDermott*, 2013 BCSC 534 (CanLII) confirms that the exception extends beyond criminal acts to severe civil torts, such as misfeasance in public office and breach of confidence, both of which are strongly implicated by the LAT's handling of the matter and its failure to file the ROP forthwith despite the *JRPA* mandate. A record that documents the perpetration of such an unlawful act, especially when involving a public **Institution** in an attempt to defeat a party's right to judicial review, is inherently outside the protection of privilege, as the privilege exists only to facilitate lawful legal advice and assistance. The acts of the LAT's counsel (Mr. Boyce) in misleading the Divisional Court regarding the ROP timeline, combined with the LAT's organizational failure to control its agents and meet the forthwith mandate of the *JRPA*, constitutes a strong *prima facie* case of institutional misconduct and, potentially, misfeasance in public office, decisively engaging the Iniquity Exception.

D. THE MANDATORY PUBLIC INTEREST OVERRIDE (S. 23 OF <i>FIPPA</i>) AND SYSTEMIC INTEGRITY

230. The evidence establishes a *prima facie* case of **Institutional** malfeasance and iniquity, which simultaneously triggers the mandatory Public Interest Override under *FIPPA* s. 23. This section dictates that, even if an exemption applies (except s. 21), the **Head** shall disclose the record where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
231. The public interest at stake here is not merely the **Appellant**'s private litigation interest; it is a matter of systemic integrity and public trust. The public interest is multi-layered and overriding:
- Institutional Accountability (Electronic Records): Ensuring the LAT is accountable for the security and integrity of its electronic filing system (Record Classes #1 and #2) and that its official representations regarding file deletion are verifiable.

- b. **Preventing and Exposing Obstruction of Justice and Financial Corruption:** Revealing the extent of communication between the LAT and the third party regarding the ongoing criminal acts, the use of stolen PII to compromise the **Appellant**'s litigation research capacity, and the deliberate failure to file the ROP forthwith (Record Classes #6 to #12). This extends specifically to investigating the allegations of “bribery” and “secret commissions” involving the TD Bank Group’s gratuitous financing of the Karat/Dunk property purchase, which suggests a financial incentive was provided in exchange for the underlying criminal act that facilitated the litigation obstruction; and
 - c. Upholding the Integrity of the Judicial System: The most critical factor—ensuring that a public tribunal is not perceived as knowingly complicit, through its agents and associated third parties, in the criminal subversion of a party’s fundamental right to judicial review.
232. The disclosure of these records is the only means by which the **Appellant** can fully verify the extent of the LAT’s complicity, its failure to control its agents, and the resultant breach of public trust. The gravity of the underlying conduct—the use of theft and fraud to defeat a party in litigation, potentially facilitated by financial misconduct involving a major bank—mandates that the principle of public accountability decisively supplant any claim of privilege. The purpose of the override is precisely to prevent public bodies from using exemptions as a defensive measure to hide evidence of wrongdoing, particularly when that wrongdoing strikes at the heart of justice itself. The public cannot maintain confidence in the LAT if the **Institution** is permitted to conceal records that may demonstrate a coordinated effort with a powerful corporate litigant to engage in criminal acts to undermine a proceeding, especially when those acts are linked to significant financial transactions.

CHAPTER #2: FACTUAL CHRONOLOGY OF THE UNDERLYING LITIGATION AND INSTITUTIONAL MISCONDUCT

A. THE ACCIDENT, INITIAL MISDIRECTION FROM THE SOLE UNDERWRITER TO TDHA BY REFERENCE TO ITS FAX NUMBER AND VOID REPRESENTATION (AUG 2022 – MAY 2024)

233. The chronology of events began when the **Appellant** sustained injuries in an automobile collision on August 31, 2022, where the insured vehicle was underwritten by Security National Insurance Company (SNIC). The **Appellant** informed SNIC of his intention to seek accident benefits, but the initial contact details provided by the insurer were immediately problematic. The **Appellant** was given a fax number, 416.774.3120, which he later discovered in Summer 2024 was exclusively associated with TD Home and Auto (TDHA), not SNIC. This initial misdirection of service established the pattern of corporate conflation that would plague the proceeding.

234. In April 2023, an OCF-18 (Treatment Plan) was partially approved by SNIC, but this approval was transmitted via a former TDHA address in the HCAI system and bore a forged signature of the then claims adjuster, noted as “As per A. Nurse” [sic].
235. This documented act of forgery on a key claims document is the earliest evidence of malfeasance in the file. The reliance on a forged signature in an administrative claim process demonstrates a willingness to engage in document misrepresentation from the earliest stages of the dispute and casts doubt on the authenticity of all subsequent documents. Further procedural confusion occurred in Spring 2023, when the **Appellant** received a fax from an 1.888 number referencing unknown claim details sent from the **Appellant’s** fax, but transmitted to the known erroneous 416.774.3120 TDHA number, demonstrating **Institutional** awareness of the incorrect service mechanism.
236. On December 24, 2023, the **Appellant** initiated the LAT Appeal (pursuant to section 280(2) of the Insurance Act), serving the problematic 416.774.3120 fax number. Despite the **Appellant’s** urgent motions naming the respondent as “TD Insurance Meloche Monnex (SNIC)”—an attempt to bridge the known corporate confusion—CMO Grant, on January 8, 2024, requested denial letters from the **Appellant**. These letters explicitly listed SNIC as the sole denier and provided SNIC’s distinct addresses in Markham and Burlington. Notwithstanding these submissions, the LAT issued its first substantive decision on January 15, 2024, naming TD General Insurance Company (TDGIC) as the sole respondent, thereby fundamentally misidentifying the proper party. This misidentification was critical, as it forced the **Appellant** to litigate against a party that was never legally denying his benefits, leading to a profound miscarriage of administrative justice from the outset.
237. The procedural irregularities intensified on January 23, 2024, when Mr. David Karat, a non-licensee with the Law Society of Ontario (LSO) and a former employee of the TD Group, asserted representation for SNIC (not the named TDGIC) and sought email communication consent. Two days later, non-licensee Karat exclusively signed the SNIC Response, an action demonstrably void ab initio under the Law Society Act and contrary to settled LAT jurisprudence (e.g., Mosa and Dankha). Mr. Karat’s unauthorized assertion of rights of audience for the insurer was a fundamental jurisdictional violation, making the pleading he filed a nullity that the LAT was legally obligated to strike out immediately. Despite Karat’s unauthorized filing for SNIC, Mr. Nieuwland filed a subsequent Declaration of Representative for TDGIC (not SNIC), further cementing the **Institutional** conflation.
238. The **Appellant** immediately objected to TDGIC’s involvement, insisting that SNIC was the only insurer known to him who had filed a pleading. The **Appellant’s** fifth Notice of Motion (NOM #5), seeking to amend the style of cause and require licensed representation for SNIC, was improperly dismissed as a ‘decline to ruled upon’ order by Vice Chair Lake. VCL cited a repealed LAT Rule and failed to address the significant legal issues regarding unauthorized representation. VCL’s subsequent actions raised potential conflicts of interest for the Tribunal, as VCL had been made aware that the **Appellant**, as a director and officer of a company, was subject to adversarial communications with a client of one Ms. Eva Lake, VCL’s undenied

family member. The **Appellant** provided notice to the Tribunal regarding this conflict (NOM #7 regarding breaches of confidence and privacy), but VCL dismissed this motion, then re-inserted herself into the file in October 2024.

B. INSTITUTIONAL ALIGNMENT, GHOSTWRITING, AND THE CAMH THEFT (MAY 2024 – OCT 2024)

239. The **Institutional** defense of the conflated parties continued into the substantive phase of the appeal. One of the records sought in Record Class #3 is dated April 22, 2024, where TDGIC is internally noted as a ‘related party’ despite being the sole named respondent at the time. This internal contradiction reflects the Tribunal’s own inability to maintain proper party identity.
240. At the May 2, 2024, Case Conference (styled McLean v. TDGIC), the **Appellant** formalized his objections, which were eventually successful with NOM #8 (see: Adj. Morissette Decision). Nonetheless, the LAT, in its decision, misstated facts and timelines, claiming Mr. Nieuwland had filed a Response when it was, in fact, the non-licensee Mr. Karat.
241. The **Institutional** defense continued with an affidavit filed by the **Appellant** claiming under oath that someone connected to TDI ghostwrote the decision, leading to a flawed understanding of the ROP and law. A key example cited was Vice Chair Morissette’s (VCM) glaring misstatement of fact and an impossibility of law under *SABS* and *Reg 283*:

“[27]

.....The initial respondent sic , TDGIC, and the current respondent, SNIC accepted priority over the Applicant’s sic insurance policy”.

242. However, the Tribunal in late April 2024 referred in its own ledger (register of proceedings – albeit unclear when that was created per se) to a related respondent in TD General Insurance Company albeit as the sole Respondent at the time. This was emblematic of internal fraud. Ergo, everything from the time of mid January 2024 to thereafter is all subject to the fraud exception to privilege. It is trite law that two insurers cannot accept priority over a policy; priority is only established when an OCF-1 claim is advanced to a First Provisional Insurer in accordance with *Reg 283*. This profound legal error suggested incompetence from an individual at TDI, reinforcing the claim of ghostwriting. The use of a legal argument that defies the fundamental statutory framework of the Insurance Act and its regulations (*Reg 283*) suggests a non-adjudicator drafted the decision, prioritizing a faulty corporate defense narrative over legal accuracy.
243. This pattern of **Institutional** alignment was further highlighted on October 15, 2024, when Vice Chair Lake (VCL) issued a three-page decision dismissing the **Appellant**’s obligatory reconsideration request. VCL ruled that the prior decisions—which involved the non-addition of a party, amendment of pleadings, and determination of substantive rights—were NOT final decisions, determinations, or orders, contrary to

established Court of Appeal jurisprudence (see: *M.E. v. Ontario*, 2021 ONCA). The judicial review potential for a final order on party status is well-settled, and VCL's ruling amounted to an arbitrary denial of the **Appellant's** statutory right to reconsideration. This decision coincided exactly with an organizational move: on the same day, Mr. Papadimitropoulos of the TDI Group issued a letter to the Financial Services Regulatory Authority (FSRA) concerning the proposed fraud reporting guidance rule.

244. The campaign of **Institutional** obstruction soon crossed into direct criminal conduct. On October 25, 2024 (a Friday, a known day of absence for Mr. Karat), the **Appellant** attended physiotherapy and doctor's appointments at CAMH which were known to the LAT and TDI Group. Around 1:11 p.m., the **Appellant** placed his backpack (the McLean Backpack), containing critical identification, financial instruments, and electronic devices, at the long tables in the visitor area before briefly entering the restroom. At 1:11:53 p.m., surveillance footage conclusively demonstrates that Mr. David Karat, the non-licensee who had filed the void response for SNIC, moved directly from the main foyer to the **Appellant's** property, inspecting distinct luggage before absconding with the McLean Backpack at 1:12:37 p.m. The timeline of under 45 seconds between Karat's arrival at the table and his departure with the backpack proves a calculated, pre-planned mission, not a crime of opportunity, and confirms the direct link between a TD Group agent and the theft. The **Appellant** immediately reported the missing backpack, which contained all of his identification and financial cards. The **Appellant** was told by a hostile security guard to not ask about the situation until Monday.

C. IDENTITY FRAUD, FINANCIAL CONSPIRACY, AND LITIGATION OBSTRUCTION (OCT 2024 – JAN 2025)

245. The stolen identification was immediately used to commit sophisticated identity fraud targeting the **Appellant's** litigation and research capacity. Just three days later, on October 28, 2024, at 4:30 p.m., an individual using the McLean ID and a McLean TPL card fraudulently signed a laptop loan agreement (the TPL Fraud Loan Agreement) and borrowed two books at the TPL Fort York branch. This confirmed the direct link between the theft and the commencement of identity fraud.
246. The timing of subsequent events strongly suggests a coordinated, financially motivated conspiracy coinciding with the obstruction of the **Appellant's** rights.
247. November 7, 2024 (Purchase Obligation): Mr. Karat and his spouse, Ms. Julia Dunk (who used the name Ms. Julia Karat in this transaction, despite being a licensed paralegal under the name Dunk, and whose professional name was used in the sale), entered into an agreement of purchase and sale for the 591 Fleetwood Home for approximately 1 million. At this time, they jointly owned the 625 Grandview Home in Oshawa, which was acquired with an initial 98% mortgage and had only four years (48 months) of payments made. Based on the declining balance method and a 2.34% interest rate, the couple had likely accrued only 40,000 to 50,000 in principal equity after all expenses. They were therefore contractually obligated to purchase a

- new 1 million property while possessing negligible equity in their existing home, presenting an immediate financing shortfall.
248. November 8, 2024 (Karat Leave and Fraud): Mr. Karat’s auto-reply indicated he would be away until November 18, 2024. On the same day, an individual utilizing the stolen TPL card reserved passes for the Aga Khan Museum.
249. November 11, 2024 (Coordinated Fraud): Mr. Papadimitropoulos (TDI Group), who resided 300 meters from the TPL Queen Sault Branch, engaged in the unauthorized borrowing of 24 items using the **Appellant’s** stolen TPL card, with the books containing subtle threats or calculated hints. The close physical proximity of a senior TDI Group employee to the location of the fraud, combined with the volume and calculated nature of the materials borrowed, strongly suggests a deliberate, personal involvement in the identity fraud.
250. November 15, 2024 (Litigation and Listing): The **Appellant** filed and served his *JRPA* Application on the LAT and the Respondent Insurance Companies. On the very same day, Mr. Karat and Ms. Dunk (using her correct legal name for the sale) listed the 625 Grandview Home for sale for 599,000. The timing—listing the property on the day the **Appellant** escalated his legal challenge to the Divisional Court—is highly suggestive of a contingency plan related to the theft.
251. Purchaser Conflict of Interest: The apparent agreement of purchase and sale for the 625 Grandview Home involved three **Transferees**: Ms. Dorothy-During Gibbs (a social worker employed by CAMH, the exact location of the theft), Mr. Michael Gibbs, and Mr. Peter Gibbs, whose wife worked at CAMH for 30 years. Mr. Peter Gibbs had decades of experience in the insurance industry, with offices located in the TD Towers. The direct involvement of a CAMH employee—the **Institutional** venue for the theft—as the primary joint-tenant purchaser, further links the financial transactions to the underlying **Institutional** malfeasance.
252. The **Appellant** avers that the simultaneous property transactions and the subsequent financing arrangements constitute Bribery and Secret Commissions.
253. Gratuitous Funding Allegation (Bribery): The 591 Fleetwood Home purchase was consummated on February 6, 2025, with TD Bank acting as the mortgagee for Mr. Karat and Ms. Karat sic
254. The sale of the 625 Grandview Home was finalized four days later, on February 10, 2025, involving the discharge of the existing Scotia mortgage and TD Bank becoming the new mortgagee for the purchasers (the Gibbs family).
255. Because the purchase of the new home (591 Fleetwood) occurred prior to the completion of the sale of the old home (625 Grandview), Mr. Karat and Ms. Dunk did not have the necessary sale proceeds available from the 599,000 listing to fund the new 1 million property purchase. The **Appellant** alleges that TD Bank Group effectively gratuitously funded the new property acquisition via the banking arm of the corporation, arguing this constitutes a “bribery” payment or “secret commission” in exchange for the underlying criminal acts that thwarted the **Appellant’s** legal rights.

256. Furthermore, the sale to the Gibbs family was concluded for approximately 130,000 more than its list price of 599,000 (i.e., approximately 729,000), supporting the claim of undisclosed secret payments or indicia of a corrupt transaction designed to benefit the perpetrators. The use of the fictitious name Ms. Julia Karat [sic] for the purchase of the 591 Fleetwood Home, followed by the use of the correct legal name Ms. Julia Dunk for the sale of the 625 Grandview Home, adds a final layer of potential fraud in the conveyancing process. The highly irregular sequence of the transactions—purchase before sale, massive gratuitous funding, sale significantly over list price to a CAMH-connected buyer—is advanced by the **Appellant** as compelling circumstantial evidence of a corrupt quid pro quo related to the theft and subsequent litigation obstruction.

Organizational Shift:

257. In late January 2025, coinciding with the finalization of these financial arrangements, Mr. Papadimitropoulos (involved in the TPL fraud) formally changed his listed employment from “TD Insurance” to the “TD Bank” legal department on the LSO Directory, further cementing the organizational consolidation into the TD Bank Group at a critical juncture in the *JRPA*.

D. CONTINUATION OF FRAUD AND CONCLUSION OF COMPLICITY (DEC 2024 – MAY 2025)

258. The campaign of obstruction continued into the judicial review phase, focusing intently on the Record of Proceeding (ROP). On December 13, 2024, the **Appellant** filed and paid for the “Certificate of Perfection” for the *JRPA*. Ninety minutes later, an individual attended the TPS Reference Library, committing fraud to obtain a new library card and, crucially, changed the **Appellant**’s phone number to that of CBC investigative journalist Ms. Ouelette. This swift, targeted action demonstrates a deliberate attempt to compromise the **Appellant**’s ability to communicate with media contacts, indicating the perpetrators were actively monitoring the Divisional Court docket. The inference was that the LAT and TDI Group were attempting to monitor or compromise the **Appellant**’s media contacts.

259. The systematic identity fraud continued with further acquisitions of library cards, laptop borrowing, and book/periodical borrowing on December 21, 2024, and December 28, 2024, the latter occurring shortly after the **Appellant** formally raised a conflict issue regarding Mr. Boyce (counsel for the LAT) due to his shared operational location with the impugned decision-makers within SLASTO (Social Justice Tribunals Ontario).

260. Crucially, notwithstanding the statutory mandate under section 10 of the Judicial Review Procedure Act (*JRPA*) for the LAT to forthwith file the ROP, the **Institution** had not filed any responsive materials or the ROP by January 27, 2025. The LAT’s delay—a direct statutory breach of the *JRPA*—was compounded by the LAT Registrar’s admission that they were “still determining how best to compile the ROP” (the LAT Compilation Failure Admission) on late January 2025. The LAT’s failure to compile the Record of Proceeding forthwith is a direct statutory contravention that *paralyzed* the Divisional Court proceedings for

months. This failure to file the ROP forthwith is functionally equivalent to an act of **Institutional** obstruction, serving the same goal as the Karat-TDI theft: defeating the judicial review application by making the procedural requirements impossible to meet. The **Appellant** discontinued the *JRPA* process on March 3, 2025.

261. The **Appellant**'s evidence linking the opposing party to the fraud acts continued to mount. The convergence of handwriting evidence, linking the Papadimitropoulos Anniversary Card, the Forged Nurse Signature Document, and the TPL Fraudulent Loan Agreement, formally adduced in Affidavit #17 on February 26, 2025, established a connection between the TD Group and multiple acts of forgery and fraud.
262. Following the formal filing of Access Request #2 on March 19, 2025, the investigation was centered on the LAT's communication with the now-implicated third party. On March 29, 2025, the **Appellant** filed Affidavit #21, evidencing Mr. Boyce misleading the Court regarding the ROP filing timeline, further cementing the **Institutional** pattern of evasion. Legal counsel for the TD Bank Group (Ms. Johnson) then responded, but their subsequent preliminary inquiry poorly asserted that no credible evidence was provided by the **Appellant** regarding the theft, despite the suspicious organizational switch from TDI (Insurance) to TD Bank (Banking) in their legal representation, suggesting a coordinated defensive strategy.
263. The **Appellant**'s own investigation culminated on May 10, 2025, when he unequivocally identified Mr. David Karat as the perpetrator of the theft and the orchestrator of the subsequent identity fraud. Following the communication of this conclusive evidence to legal counsel for the TD Bank Group (Mr. Russell and Ms. Johnson) on May 7, 2025, both counsel immediately blocked all further communications from the **Appellant**. The failure of the third party's legal counsel to acknowledge or investigate this incontrovertible evidence of criminal conduct by their former employee, and their immediate coordinated defensive response of stonewalling, renders the conclusion that the **Institution** (the LAT, through its entanglement with the third party's agents) has been inextricably linked to the antecedent unlawful conduct self-evident. This deliberate obstruction is the final piece of evidence mandating the disclosure of the requested records under the Public Interest Override to fully expose the **Institutional** malfeasance. The TD Bank Group's refusal to address video evidence of theft by an agent who was centrally involved in the LAT proceeding is a tacit ratification of the criminal conduct, reinforcing the **Appellant**'s necessity to use the OIPC process to force accountability and transparency.

CHAPTER #3: STATEMENT OF ISSUES

264. The following issues, essential to a comprehensive resolution of the matter, are respectfully proffered for determination by the Information and Privacy Commissioner/Ontario (OIPC)

- a. Whether, given the conclusive determination by the OIPC that the **Licence Appeal Tribunal (LAT)** constitutes the singular and exclusive **Respondent Institution** in this appeal, and given the consequential failure of the LAT to seek either a reconsideration of that finding within the stipulated twenty-one (21) day period or to initiate an application for judicial review within the thirty (30) day statutory limitation, the subsequent submission purportedly tendered by “**Tribunals Ontario**” is rendered *void ab initio* and without legal effect, thereby necessitating an Order declaring the contested decision an administrative *nullity* and compelling the **Head** of the LAT to issue a lawful, substantive access determination pursuant to the mandate of the *Freedom of Information and Protection of Privacy Act (FIPPA)*;
- b. What is the precise legal import of the admission—or at least the non-correction thereof—by Counsel, Mr. Wagner (MAG – Civil Law Division – Crown Law Office Civil, 11th Floor, 720 Bay Street, Toronto, Ontario, LSO No. 60318U), that he, as counsel for the Ministry of the Attorney General (MAG), was acting for **Tribunals Ontario** as the “third party records holder” of the contested records sought from the LAT? Is this finding and representation by the MAG of Tribunals Ontario as a records holder juridically **synonymous with the control** of the records at issue sought from the LAT? Does this, *a fortiori*, imply that the LAT retains no residual **control** over records generated within the context of deliberative secrecy or **solicitor-client privilege**? Does this further posit that the LAT is not the client for the purposes of the privilege, but rather that Tribunals Ontario occupies that status, and is such an arrangement reconcilable with the purported *void* response of Tribunals Ontario dated October 14, 2025?;
- c. Does the submission of the legally *void* purported response by **Tribunals Ontario** constitute a flagrant **abuse of process** by the LAT? If the answer is affirmative, what remedies of a preventative and remedial nature ought to be granted to preclude any further perpetration of such abuses of administrative procedure?
- d. Does the demonstrable omission by the **Head of the LAT** to assert personal carriage and direct superintendence over this critical access request constitute a continuing **deemed refusal** under the legislation and, moreover, represent an egregious breach of the fundamental **non-delegability principle** meticulously codified within subsection 50(3) of *FIPPA*?
- e. Has the LAT, by virtue of its failure to adhere to the OIPC’s determination regarding its status as the sole Respondent **Institution** and its subsequent reliance upon the *void ab initio* response, unequivocally **forfeited its entitlement** to participate in this Appeal and discharge the evidentiary burden mandated by *FIPPA*?
- f. Is the LAT, by its presentation of the aforementioned *void* purported response dated October 14, 2025, operating in manifest **breach of the overarching purposes** and legislative *leitmotifs* enshrined in *FIPPA*?

II. Custody, Control, and Evidentiary Burden

The Inquiry Mandate and the *Onus Probandi*

- g. Is the OIPC legally **required to determine**, independent of any assertions or arguments proffered by the LAT, whether the LAT should or **must produce** the records sought across the **thirteen (13) Record Classes**? If this imperative is established, what measures ought to be employed to ensure the **Inquiry Phase** is conducted with requisite **expediency, justice, and cost-effectiveness**?
- h. Does the LAT, at the material time of the request, retain either **custody or control** of some or all of the records encompassed within the **thirteen (13) Record Classes**, notwithstanding the intervening representation that Tribunals Ontario serves as a records holder?
- i. Has Mr. Weir, in his capacity as the **Head of the LAT**, demonstrably acted in **breach of section 10.1** of *FIPPA*, which delineates the duties concerning the creation and retention of records?
- j. In light of the grave allegations of brazen thefts, fraud, and impersonation involving an ADR specialist for the Respondent Insurance Companies (Mr. Karat), coupled with the comparable malfeasance involving the since-terminated and dismissed Mr. Papadimitropoulos, and the *prima facie* partiality demonstrated towards these individuals and Mr. Nieuwland by senior officials, specifically CMO Grant, VC Lake, and VC Morrisette—along with the clandestine sharing of template documentation between the LAT and Respondent Insurance Companies in December 2024—does Mr. Weir incur a **mandatory obligation** to disclose records to the public or persons affected, pursuant to the Public Interest Override, due to such records evidencing a **grave health or safety hazard to the public**? Furthermore, given the totality of these circumstances, is the compelling public interest in the disclosure of the records so decisive that it **outweighs the purpose of any potential exemptions** asserted under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 of *FIPPA*?
- k. Since the OIPC formally designated this Appeal as an **Inquiry (Expedited)** on September 29, 2025, what definitive **timeline** is allotted to the LAT to discharge its **burden of proof** that some or all of the requested records fall unequivocally within one of the specified exemptions enumerated in *FIPPA*?
- l. Given the mandatory duty imposed upon the OIPC under subsection 54(1) of *FIPPA* subsequent to the designation of an Appeal for an Inquiry, what **duration** should the OIPC prescribe for the LAT to **tender its evidentiary submission**? Moreover, considering that Tribunals Ontario has been posited as a records holder involving records sought of the LAT, and that Tribunals Ontario is represented by MAG-employed counsel (Mr. Wagner), what nature of evidence could the LAT possibly submit in these proceedings that would possess material value? Would the LAT, acting through its **Head** under the authority of *FIPPA*, even possess the legal capacity to discharge its

burden under section 53 if the LAT is definitively not the records-holder of documentation pertaining to its own proceedings, appeals, or judicial review applications emanating therefrom?

III. Statutory Interpretation and Interplay of *FIPPA* and *TARA* Undisclosed Orders and the Exhaustion of Statutory Rights

- m. Considering the **Two Undisclosed Motion Orders**, which bear the presumptive characteristic of being *prima facie* **final adjudicative instruments**, do these Orders fall within the purview and ambit of the *Tribunals Adjudicative Records Act, 2019 (TARA)*? Furthermore, what precise legal interpretation ought to be ascribed to the operative word “**made**” in the statutory context of a decision or order executed pursuant to the provisions of *TARA*?
- n. To the extent that subsection 13(1) of *FIPPA* (Cabinet/Board records) is deemed to possess any initial applicability, would its potential exemption be **overridden** by any of the **mandatory requirements for disclosure** stipulated in subsection 13(2)? More specifically, in light of the failure to produce the Two Undisclosed Motion Orders—either herein, under *TARA*, or at the material time—would subsection 13(2)(l) permit the compelled production of any **internal reasons for decision** if the Order itself was devoid of reasons?
- o. What is the precise legal consequence of the LAT’s demonstrable **failure to exercise any of its rights** or obligations pursuant to subsection 24(2) of *FIPPA* (regarding notice to affected third parties)?
- p. What is the precise legal consequence of the LAT’s demonstrable **failure to exercise any of its rights** or obligations pursuant to subsection 25(1) or 25(2) of *FIPPA* (regarding the severing of exempt matter)?
- q. What is the precise legal consequence of the LAT’s demonstrable **failure to seek an extension of time** for a response pursuant to section 27 of *FIPPA*?
- r. What is the precise legal consequence of the LAT’s demonstrable **failure to exercise any of its rights** or obligations in relation to the **thirteen (13) Record Classes** pursuant to section 28 of *FIPPA* (regarding transfer of request)?
- s. Does clause 29(1)(a) of *FIPPA* (the access request response provision) impose a **mandatory requirement** upon an **Institution**, when it invokes the ground “there is no such record,” to specify with precision whether the non-existence pertains to a lack of **custody or control**, or whether the **Institution** possesses custody or control but asserts the records are **exempt from the operation of FIPPA** pursuant to a specific subsection under section 65 of *FIPPA* (inapplicability)?
- t. What is the legal effect of the Commissioner’s decision **not to immediately dismiss** this Appeal pursuant to subsection 50(2.1) of *FIPPA* (grounds for dismissal)?

- u. What is the legal effect of the Commissioner **not having issued permissive notice** to an additional **Institution** under *FIPPA* or *MFIPPA*, or to any other person with a discernible interest in the Appeal, pursuant to subsection 50(3) of *FIPPA*?
- v. What is the precise **interplay and hierarchical relationship** between *FIPPA* and its attendant regulations, the OIPC *Code of Procedure*, and OIPC *Practice Direction #3* subsequent to the designation of an Inquiry by the Commissioner?
- w. Is the LAT currently in **breach of its independent and explicit statutory duty** under the *Tribunals Adjudicative Records Act, 2019 (TARA)* to provide **open access to its adjudicative records**, irrespective of and collateral to the application of any exemptions asserted under *FIPPA*?

IV. Malfeasance, Privilege Abrogation, and Public Interest

The *Iniquity* Exception and Supervisory Oversight

- x. Does the uncontroverted and detailed nature of the allegations—which document the involvement of the LAT and its agents in promoting, concealing, or participating in **criminal conduct and torts**—establish a sufficient and *prima facie* case to invoke the venerable **iniquity exception** to privilege, thereby requiring the **abrogation of any claim of solicitor-client or litigation privilege** over the contested records?
- y. Does the **mandatory Public Interest Override** under section 23 of *FIPPA* apply, given that the public interest in **exposing Institutional malfeasance** and demonstrable impropriety within a quasi-judicial body decisively **outweighs the harm** that might result from the disclosure of records otherwise asserted to be exempt?
- z. Has the **Appellant** tendered **convincing evidence** that a foundational element of illegal purpose has been established, thus engaging the *iniquity* doctrine?
- aa. Has the **Appellant** adduced **evidence *prima facie*** of fraud sufficient to trigger a necessity for review under the *iniquity* exception?
- bb. Whether, to ensure procedural fairness and properly test the *prima facie* case for the **iniquity exception**, the OIPC must conduct a thorough **in camera review** of the records sought before permitting the **Institution** to rely on blanket or generic exemption assertions?

V. Duties of Preservation, Investigation, and Enforcement

Commissioner's *Intervention Ex Proprio Motu*

- cc. Does the OIPC's **supervisory role** and statutory mandate necessitate a definitive finding that the LAT is in **breach of its mandatory obligation** under *FIPPA* s. 10.1 and the *Archives and*

Recordkeeping Act, 2020 to preserve all records relevant to this ongoing dispute, given the gravity of the allegations concerning **Institutional** malfeasance?

- dd. Should the Commissioner exercise her broad **jurisdiction to compel the production** and subsequent **examination of any record** that is in the custody or under the control of the LAT, irrespective of **Parts II and III of FIPPA** or the provisions of any other Act or claim of privilege? Furthermore, should the Commissioner exercise the authority to **enter the premises of the LAT** for the purpose of an investigation into its specific custody or control of the records sought herein?
- ee. Should the Commissioner exercise the statutory jurisdiction to **summon and examine on oath** any person who may possess information germane to the within Inquiry? More specifically, should the Commissioner issue a summons to individuals such as Mr. Karat, Mr. Papadimitropoulos, Mr. Nieuwland, CMO Grant, CMO Ms. Lee, and Mr. Weir?

VI. Delegation and Vicarious Liability

Impermissible Delegation and FIPPA Protections

- ff. In addition to the *void ab initio* nature of the response by Tribunals Ontario, is Ms. Jennifer Janes **disentitled from acting for the LAT** in this matter on the grounds that she is neither a duly licensed paralegal nor a law clerk, nor subject to any of the specific exemptions—such as the single employer exemption—delineated in the relevant *Law Society of Ontario By-Laws*?
- gg. Would subsection 62(2) of *FIPPA* (protection for individuals under direction of the **Head**) offer **statutory protection** to an individual acting under the direction of the **Head** if that person was **not a person acting on behalf of or for the Institution at issue** in the access request and subsequent appeal?
- hh. What is the precise **legal effect** if the **Head** of an **Institution** purports to delegate a power or duty vested in the **Head** to an **officer that is not an officer of the Institution** itself, but rather an “officer” of “**Tribunals Ontario**”? Would such an action amount to an **impermissible delegation** at law, rendering the delegated action *ultra vires*?
- ii. Moreover, what is the legal effect and **interplay** between an **impermissible delegation** by the **Head** to a non-officer of an **Institution**, an officer of a Non-**Institution**, or an officer not of “The **Institution**” with subsections 62(2) and (3) of *FIPPA*? More specifically, would the Crown be **vicariously liable** pursuant to subsection 62(3) of *FIPPA* for any torts committed by a person mentioned in subsection 62(2) of *FIPPA*, if the root cause of the action was an **impermissible and void ab initio delegation of power or duty**?
- jj. What is the **critical legal distinction** between a delegation effected pursuant to subsection 62(1) of *FIPPA* and the provision for protection under subsection 62(2) of *FIPPA*?

VII. Records Disposition and *Issue Estoppel* Archives, Transfer, and Finality of Adjudication

- kk. What is the **legal effect and difference** between a person or organization, other than an *MFIPPA* or *FIPPA Institution*, who **places** a record with the Archives of Ontario, versus an **Institution** that **transfers** a record to the Archives of Ontario pursuant to a requirement of the Archivist? What is the **distinction** at law between “**placing**” and “**transfer**” of a record? More specifically, if a person or organization that is **not** an *M/FIPPA Institution* places a record with the Archives of Ontario, and if the placing involves a mere copy of the record, does that transaction render *FIPPA* inapplicable **even if the Institution at issue still retains custody and/or control** of the placed record?
- ll. Whether the production of the **Two Undisclosed Motion Orders** is barred by the OIPC’s inability to **re-adjudicate a matter** already subject to a final, binding determination under the rigorous doctrine of **issue estoppel**, thereby requiring the OIPC to enforce the original Tribunal Order regarding production, assuming one exists and is valid.

CHAPTER 4: ARGUMENT

A. THE FOUNDATIONAL DEFECT: NULLITY, NON-DELEGATION, AND DEEMED REFUSAL

265. The Licence Appeal Tribunal is a statutorily defined **Institution** under *FIPPA*. The statutory architecture is clear: the **Head of the Institution** is the only person vested with the authority to make and defend access decisions (s. 50(3)). The attempt to substitute this statutory authority with the amorphous administrative collective known as “Tribunals Ontario” is a fatal jurisdictional flaw. The rule of **persona designata** demands that a specific public official, by virtue of their office, must personally execute their statutory duties. The purported response is legally non-existent—a **vox nihili**—because the issuing body possessed no legal capacity to act under *FIPPA*.
266. The OIPC cannot, in good conscience, proceed to adjudicate the merits of the exemptions (s. 26 and s. 29) when the decision applying them originated from an unauthorized source. To do so would be to sanction the **Institution’s** breach of the **non-delegability principle** (*delegatus non potest delegare*) and undermine the strict statutory accountability scheme of *FIPPA*. The only appropriate administrative action is an Order declaring the decision **void ab initio**, thereby restoring the matter to its correct legal status: an **ongoing deemed refusal** by the **Head** of the LAT. This requires a peremptory Order compelling the **Head** of the LAT

to file a proper, lawful response, signed by the designated statutory officer, thus ensuring that the **Appellant** is finally dealing with the correct legal entity.

B. THE DOCTRINE OF PROCEDURAL FINALITY AND ABUSE OF PROCESS

267. The **Appellant** asserts that the production of the **Two Undisclosed Motion Orders** has already been the subject of a final, binding determination in antecedent Tribunal proceedings. The doctrine of **issue estoppel** requires the OIPC, as a reviewing administrative authority, to recognize and enforce this prior conclusive ruling. The three prerequisites for issue estoppel—sameness of issue, finality of decision, and identity of parties—are met concerning these specific adjudicative records.
268. The LAT cannot be permitted to use the *FIPPA* access regime as a mechanism to avoid or collaterally attack its own prior binding adjudicative determinations. This would represent a clear **abuse of process** by the **Institution**, frustrating the principle of procedural finality. Accordingly, the OIPC's mandate is restricted not to *re-adjudicate* the necessity of disclosure, but to *compel* the **Institution** to produce the records as commanded by the original, binding order (or to confirm its non-production based on the same).
269. This procedural mandate is reinforced by the **TARA**, which establishes an independent, affirmative obligation for the LAT to make its adjudicative records public. Regardless of any potential *FIPPA* exemption, a formal Motion Order is a dispositive document central to the **open courts principle** and is subject to the **TARA**'s broad disclosure requirements. The LAT's ongoing failure to furnish these Orders constitutes a breach of the **dual statutory regime**, mandating disclosure.

C. THE CONSTITUTIONAL PUBLIC INTEREST OVERRIDE AND THE INIQUITY EXCEPTION

270. The **Appellant**'s allegations concerning the involvement of LAT agents in promoting criminal conduct (including theft and related malfeasance) and breaches of fiduciary duties establish a **prima facie case** sufficient to invoke the **iniquity exception** to privilege (*Descôteaux v. Mierzewski*). This exception requires the privilege to yield when the communication or record was utilized to **further or constitute an unlawful act**. Given the gravity of the allegations involving a quasi-judicial body, the public interest in exposure and accountability decisively outweighs the harm of disclosing otherwise privileged records.
271. The **Public Interest Override** under *FIPPA* s. 23 is a **mandatory** disclosure provision. The **Appellant** asserts that the disclosure of these records, especially internal communications and the contents of the Orders, is necessary to shed light on the systemic nature of the alleged wrongdoing, a matter of paramount public concern. The OIPC is therefore compelled to conduct a thorough **in camera** review of the contested records to properly test the **prima facie** case. This review is essential to determine the nexus between the records and

the alleged malfeasance. The burden then rests heavily upon the **Institution** to demonstrate why the override does *not* apply—a burden made substantially heavier by the allegations of criminality.

D. THE MANDATORY DUTY OF RECORD PRESERVATION

272. In light of the serious, systemic nature of the alleged wrongdoing, the potential for records to be destroyed, lost, or altered by the **Institution** is a serious concern. The OIPC must, as an immediate, protective measure, invoke the **Institution**'s mandatory duty under *FIPPA* s. 10.1 and the *Archives and Recordkeeping Act* to preserve all relevant records. This immediate order ensures that the **Institution** cannot frustrate the OIPC's investigation by causing the **irretrievable loss** of documentary evidence, a principle affirmed in prior OIPC jurisprudence (See: *Ontario (Municipal Affairs and Housing) (Re)*, 2023 CanLII 95949 (ON IPC), at para 30). This preservation order must encompass all thirteen classes of records to protect the integrity of the review process.
273. The present circumstances furnish an unassailable predicate for the issuance of a mandatory disclosure order. The LAT's manifest non-compliance with the established legal and procedural frameworks of the Act constitutes an unacceptable affront to the legislative imperative of timely access to information, compelling an immediate and decisive intervention by the OIPC. The ensuing submission shall, with exacting precision and jurisprudential rigor, articulate the factual and legal predicates that compel such an order, thereby rendering the requested relief not merely a matter of administrative convenience, but an inevitable corollary of the established facts and a necessary measure to restore the integrity of the information access regime. The **Appellant** postulates that the very legitimacy of the LAT's operations, as a public **Institution** entrusted with quasi-judicial functions, is called into question by its conspicuous and prolonged failure to adhere to these foundational statutory duties. This failure, by its very nature, constitutes an **Institutional** betrayal of the public trust that must be met with a swift and unequivocal judicial response.
274. A dispositive determination on the merits of the access request, with unimpeded access to all personal information records, is the sine qua non for ascertaining whether the LAT possessed and retains the requisite custody and control over the various records identified in the March 20, 2025, access request (the "Access Request") and this attendant Appeal. This is contingent only upon those records manifestly unencumbered by any necessary statutory exemptions, save for a prima facie claim of privilege, the validity and scope of which would be subject to subsequent debate following the production of a privilege log containing brief descriptions of the implicated documents. In the interest of administrative decision making economy and the expeditious administration of justice, even arguendo that the LAT were to advance the contention that section 21(1) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* is at issue, it is demonstrably clear that the application of subsection 21(1)(b) of said Act is warranted. This position is substantiated by both previously tendered evidence and forthcoming submissions, which shall further detail the perfidious

malfeasance of the TDIA Group and its associated current and former individuals. The aforementioned actions, which are both corroborated and documented through various forms of evidence—including video and documentary proof—encompass a broad spectrum of criminal and civil transgressions, inter alia, theft, impersonation, fraud, and falsification of documents. The totality of this corroborative evidence elucidates a pattern of fraudulent conduct which, while shocking, is regrettably unsurprising.

II. THE STATUTORY IMPERATIVE OF TIMELY DISCLOSURE

275. The legislative intent of *FIPPA* constitutes a cornerstone of democratic governance and **Institutional** probity. As articulated with deliberate clarity in section 1 of the Act, its dual purposes 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 (the “*FIPPA* Purposes”).
276. The very essence of these “*FIPPA* Purposes” is inexorably contingent upon the timely receipt of information. An unfulfilled statutory duty to respond, therefore, represents an egregious contravention of these foundational principles. As a matter of axiomatic legal philosophy, “*justitia dilata est justitia negata*.” This maxim is more than a mere truism; it is a profound articulation of a procedural and substantive reality. A delayed response, irrespective of its ostensible causa proxima, effectively abrogates the right of access and transmutes the independent review of government information into a merely academic exercise devoid of practical utility. The right of access becomes a nullity if it can be perpetually deferred by an **Institution’s** inaction. This deliberate or negligent administrative inertia functions as a de facto denial, rendering the statutory framework nugatory and undermining public confidence in a government’s commitment to transparency and accountability. The **Appellant** submits that an **Institution’s** failure to respond within the prescribed period is tantamount to a categorical refusal, and should be treated as such by this esteemed tribunal. A request for information is a temporal imperative; to ignore it is to deny it in the most fundamental sense.

III. JURISPRUDENCE ON “DEEMED REFUSAL”

277. The legal principle of “deemed refusal” is not a novel concept but is, rather, a consistently applied and judicially sanctioned doctrine within the jurisprudence of the OIPC. As demonstrated in a series of precedential orders, including *Ontario (Labour) (Re)*, 2011 CanLII 63499 (ON IPC), and *University Health Network (Re)*, 2017 CanLII 62935 (ON IPC), an **Institution**’s failure to provide a timely and substantive response to a request for records places it in a state of “deemed refusal.” The LAT’s prolonged and conspicuous silence is far more egregious than the circumstances found in any of these precedents, as it has not engaged with the “**Appellant**,” the appeal, or the OIPC’s processes in any manner whatsoever. The collective holdings of these cases provide an unambiguous affirmation that the LAT’s failure to provide a timely and substantive response triggers the OIPC’s authority and its obligation to issue a mandatory order. The LAT was statutorily mandated to issue a response within thirty (30) days of the “**Appellant**’s” request of March 20, 2025, a deadline that expired, without exception, on April 19, 2025. It is a matter of irrefutable record that no response, no acknowledgment, and no form of communication has been received from the LAT in the intervening months. This complete and utter silence, in direct and flagrant contravention of the clear and unambiguous language of the Act, provides irrefutable grounds for the OIPC to proceed with an expedited order under Rule 9.03(g), which explicitly permits the issuance of an order “without hearing further from the Parties.” The term “expedite,” a loanword from the Latin *expedire*—meaning “to make ready or to dispatch”—is, in this specific context, not a mere suggestion but an articulation of an operational necessity. It signifies the imperative of accelerating a process that has been unjustifiably and interminably protracted. The LAT’s conduct presents a patent and indisputable case of “deemed refusal” pursuant to the unambiguous command of section 29(4) of the Act, which dictates: “A **Head** who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.”

IV. ANALYSIS OF THE REQUESTED RECORDS

278. The “**Appellant**’s” request for records is both diverse in its nature and specific in its scope, falling entirely within the LAT’s operational possession and control. The request has been meticulously subdivided into thirteen (13) distinct classes, each designed to elicit a discrete and manageable volume of records. The LAT’s failure to provide a response, or even an index of responsive records, is not merely a breach of its statutory duty but also a tacit admission that it has not conducted a “reasonable search” as mandated by the Act. To further delineate the non-onerous nature of this request, a summary of the sought-after records is provided, demonstrating their ease of retrieval:

- a. Class #1: File Logs and Screenshots: These records, residing in the LAT’s “back end” systems, are electronic logs and screen captures. They are not voluminous, but are a limited series of digital artifacts indicating changes in the “style of cause” or the entry of insurance companies as respondents.

These are demonstrably limited in number and easily retrievable with minimal effort, presenting no rational basis for a failure to produce;

- b. Class #2: Power Outage Records: This class seeks specific records pertaining to a power outage on or around March 30, 2024. The request is for documentation of the incident and the subsequent steps taken to recreate the file. The logical extrapolation is that these are a very small number of records, likely consisting of a singular report or a pair of related documents, whose existence and location should be readily ascertainable.
- c. Class #3: Specific LAT Registrar Documents: This class requests specific documents identified from a LAT Registrar printout from on or around February 26, 2025. These documents, which include two Undisclosed Motion Orders and the denotation of the TDGIC as a related party, are finite in nature and must be in the direct possession and control of the LAT. Their non-production is a fundamental failure of information management.
- d. Class #4: Shuttleworth-type Documents: The records in this class are specific to the LAT proceeding and are analogous to those addressed in *Mary Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 (CanLII). The number of such records is proportional to the number of decisions or orders in the proceeding, making the search for them a straightforward task and obviating any claim of undue burden.
- e. Class #5: Professional Advisers & Legal Counsel: This class requests the names of legal counsel and “Legal Counsel Teams” to the Tribunal and decision-makers. It further requests a list of communications between these parties. The request explicitly indicates a preference for a format similar to an affidavit of documents, confirming its intention to facilitate the process rather than impede it. This information is integral to the transparency of adjudicative proceedings.
- f. Classes #6, #7, #8, and #9: Communications with TD Insurance Group: These classes meticulously delineate specific email and communication records involving various LAT and TDI Group personnel. The requests are limited to a finite time period and are restricted to specific individuals, making them easily searchable within the **Institution**’s digital archives. The conclusions that these records are neither large in number nor difficult to locate are based on the clear parameters of the requests.
- g. Class #10: Notes to Phone Calls: This class requests notes from phone calls between LAT employees and the TDI Group. As licensed professionals are required to maintain some form of call log or notes, these records are presumed to exist and are not expected to be numerous. Their absence would be indicative of a significant procedural deficiency.
- h. Class #11: Non-Email Communications: The request for communications via mobile, smart devices, and messaging software such as WhatsApp and Viber is predicated on the broad definition of

“control” under the Act. This definition grants the public **Institution** the right to request a copy of such a record if it is relevant to the request, thereby making the search entirely feasible.

- i. Class #12: Mr. Weir and Others: This class requests all communications by or to the **Head** of the LAT, Mr. Sean Weir, or any other member of LAT management, that involve the **Appellant**. It is highly unlikely that these records would be voluminous, but they are essential to the **Appellant**’s inquiry and must be produced.
- j. Class #13: Residual Records: This final class is a catch-all, ensuring that any other relevant records that come to the LAT’s attention during a thorough and professional search are also included in the production.

279. The concept of “control” in relation to a public body’s records is expansive. As per the precedent in Canada *Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), a broad, liberal, and purposive approach must be taken. This principle, refined in Ministry of Small Business, Tourism and Culture and the *AGBC v. The Information and Privacy Commissioner of BC and Svend Kjong*, 2000 BCSC 929, holds that a public body has “control” over a record if it possesses the legal right to obtain a copy of the record to respond to a request. The LAT, therefore, has the legal right and corresponding obligation to secure and produce records, including those held by third parties such as “Tribunals Ontario,” should it be found to be a de facto records holder. The failure to exercise this right of “control” is, in itself, a breach of its statutory duty. A crucial distinction must be drawn between the universal applicability of the Charter of Rights and Freedoms to governmental entities and the specific, enumerated application of *FIPPA* to designated “**Institutions**.” While “Tribunals Ontario” functions as an overarching administrative umbrella for thirteen adjudicative tribunals, including the LAT, it is not enumerated as an “**Institution**” within the exhaustive Schedule to R.R.O. 1990, Regulation 460, General. This lacuna in statutory designation carries profound implications for accountability and information governance, as it appears to enable a designated **Institution** (the LAT) to circumvent its explicit statutory obligations by having a non-*FIPPA*-designated entity serve as its de facto “records holder” or “records controller.” The “Tribunals Adjudicative Records Act, 2019” (*TARA*), governs the public availability of certain tribunal records. *TARA* defines “adjudicative records” as those related to a proceeding, such as applications, notices of hearing, written submissions, evidence, decisions, and orders (*TARA*, s. 1(2)). However, it explicitly excludes “personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders” from this definition (*TARA*, s. 1(3)). The LAT’s duty under *TARA* is to make these adjudicative records “available to the public” (*TARA*, s. 2(1)). This is a statutory obligation independent of *FIPPA*. While there is an overlap in the general principle of public access, the majority of the records sought in this request are not “adjudicative records.” The request seeks internal administrative records, communications between the LAT and third parties, and records that fall outside the formal adjudicative process. Therefore, even if the LAT were to claim some of the requested records are

“adjudicative records” and subject to the specific rules and confidentiality provisions of *TARA*, this would not justify its failure to respond to the entirety of the request. The blanket non-response is a failure to meet its duties under both statutes and must be rectified.

V. THE OPEN COURT PRINCIPLE AND ACCESS TO ADJUDICATIVE RECORDS: LIMITED APPLICATION (IF ANY)

280. The public’s right of access to adjudicative records and proceedings constitutes a fundamental tenet of Canadian common law, a principle universally known as the “open court principle.” This doctrine, articulated with authoritative finality by the Supreme Court of Canada in cases such as *McInerney v. MacDonald*, 1992 CanLII 57 (SCC), presumes that all tribunal proceedings are accessible to the public unless a demonstrably valid reason for their closure or the withholding of information is established. The LAT’s silence not only constitutes a flagrant violation of the Act but also fundamentally undermines the democratic rights of persons seeking general records and personal information about themselves. It precludes any and all public scrutiny of the LAT’s operations, thereby concealing the very information necessary for an informed citizenry to hold the **Institution** accountable. The LAT’s manifest inability to maintain a comprehensive, accurate, and readily accessible record of proceedings serves as further irrefutable evidence of its chronic non-compliance with *FIPPA* and its foundational principles of transparency, accessibility, and accountability.

VI. THE EXIGENCY OF EXPEDITED PROCESSES

281. The OIPC’s Practice Direction #13: Expedited Processes, implemented in July 2024, unequivocally establishes a framework for the expedited resolution of issues under appeal. This Practice Direction specifically enumerates “Deemed Refusal,” “Failure to Disclose,” and “Time Extension” appeals as types that will “routinely utilize expedited processes.” The “**Appellant’s**” *FIPPA* appeal falls squarely within these enumerated categories, demanding an immediate and accelerated resolution. The LAT’s non-action for over 180 days—five times the statutory deadline—is a matter of exceptional concern and justifies the most expeditious course of action.
282. The LAT by a void ab initio response by Tribunals Ontario remains in such a state. Justice delayed is justice denied.

VII. GOVERNANCE AND ACCOUNTABILITY

283. The Licence Appeal Tribunal is a public body subject to the provisions of the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sch. 5 (the “*ATAGAA*”). The purpose of this Act, as set out in section 1, is to “ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making.” The Superior Court of Justice (“SCJ”), through Justice Mundhane, has demonstrated it has serious concerns about the LAT’s independence in 2025 when the SCJ and the Ontario Court of Appeal (“ONCA”) already found that it had issues in the decision of Shuttleworth. The conduct of the **Head** of the LAT, by *General Regulation*, is far worse than what transpired in Shuttleworth when he was not the prescribed **Head** of the LAT. The Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sch. 5 (the “*ATAGA*”), serves as the overarching legislative framework dictating the accountability, governance, and appointment processes for adjudicative tribunals in Ontario. Its stated purpose, as articulated in section 1, is to “ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making” (ATAGA, s. 1). This Act defines an “adjudicative tribunal” as an entity that is “prescribed” by regulation (ATAGA, s. 2).

DESIGNATION OF ADJUDICATIVE TRIBUNALS AND CLUSTERS (O. REG. 126/10)

284. O. Reg. 126/10, entitled “Adjudicative Tribunals and Clusters,” is the principal regulation that prescribes entities as “adjudicative tribunals” for the purposes of the ATAGA. Section 1 of O. Reg. 126/10 explicitly lists various agencies, boards, and commissions, including the Human Rights Tribunal of Ontario (Item 19 of Schedule 1), as prescribed adjudicative tribunals. This unequivocally establishes the LAT as a distinct legal entity subject to the ATAGA. Crucially, O. Reg. 126/10 also provides for the designation of clusters of adjudicative tribunals. Section 2 of this Regulation designates certain tribunals as a “cluster” entitled “Tribunals Ontario” (O. Reg. 126/10, s. 2). However, this designation as a “cluster” does not, ipso facto, confer upon “Tribunals Ontario” the status of a distinct legal entity, nor does it elevate it to the level of an “adjudicative tribunal” itself. Rather, it is merely an administrative grouping of existing, prescribed adjudicative tribunals. The regulation consistently refers to the enumerated tribunals within the cluster, not to the cluster itself as a singular adjudicative body. This distinction is fundamental: individual tribunals are legal entities, whereas the cluster is a functional arrangement.

B. ETHICS PLAN - CONTENTS (O. REG. 91/11)

285. The ATAGA mandates that every adjudicative tribunal shall develop an “ethics plan” (ATAGA, s. 6(1)). O. Reg. 91/11, entitled “Ethics Plan - Contents,” prescribes the specific requirements for these plans. Section 1

of O. Reg. 91/11 dictates that an ethics plan must describe practices and procedures for ensuring members are familiar with ethical conduct and political activity requirements, as well as the tribunal’s code of conduct. These obligations are placed squarely upon the individual “adjudicative tribunal,” not upon the “cluster.” This regulatory precision further reinforces the understanding that accountability, including ethical conduct, resides at the level of the individual tribunal, not the overarching, non-legal entity known as “Tribunals Ontario.”

C. DEADLINES RE ACCOUNTABILITY DOCUMENTS (O. REG. 90/11)

286. O. Reg. 90/11, “Deadlines re Accountability Documents,” specifies the timeframes within which adjudicative tribunals and clusters must develop their public and governance accountability documents. While it refers to deadlines for “a cluster” to jointly develop documents (O. Reg. 90/11, s. 2(2)), this does not transform the cluster into a legal person. It merely outlines a collaborative administrative requirement for the constituent tribunals that form the cluster. The primary obligation to develop various accountability documents—such as mandate and mission statements, consultation policies, service standard policies, ethics plans, and member accountability frameworks (ATAGA, ss. 3-7), as well as governance accountability documents like memoranda of understanding, business plans, and annual reports (ATAGA, ss. 11-13)—rests with the individual “adjudicative tribunal” (O. Reg. 90/11, s. 2(1), 3(1)). The cluster mechanism is a means of shared administration, not a transference of legal personality or statutory responsibility from the individual tribunals.

D. APPOINTMENT TO ADJUDICATIVE TRIBUNALS (O. REG. 88/11)

287. Section 14 of the ATAAGA prescribes that the selection process for appointing members to an adjudicative tribunal must be “competitive, merit-based” (ATAGA, s. 14(1)). O. Reg. 88/11, “Appointment to Adjudicative Tribunals,” outlines the public information requirements for recruitment processes (O. Reg. 88/11, s. 1) and specifies circumstances under which the competitive, merit-based selection process may be waived (O. Reg. 88/11, s. 2). Crucially, these provisions consistently refer to the “adjudicative tribunal” as the entity to which members are appointed. While the ATAGA establishes roles such as “executive chair” for a cluster and “associate chairs” for tribunals within a cluster (ATAGA, s. 16), these positions are intrinsically linked to the governance and administration of the individual tribunals. The legal act of appointment is to the “adjudicative tribunal,” underscoring its distinct legal identity. The appointment process and accountability for members remain tethered to the individual tribunals, even when administrative functions are consolidated under a cluster.

288. From a rigorous textual and teleological analysis of the ATAGA and its attendant regulations (O. Reg. 126/10, O. Reg. 91/11, O. Reg. 90/11, O. Reg. 88/11), it is unequivocally evident that “Tribunals Ontario” exists solely as an administrative nomenclature for a cluster of adjudicative tribunals. It is not, per se, a distinct legal entity, corporation, agency, board, or commission prescribed as an “adjudicative tribunal” or an “**Institution**” within the meaning of *FIPPA*. All statutory obligations regarding accountability, governance, and appointments are ultimately vested in the individual, statutorily designated “adjudicative tribunals” that comprise the cluster. Therefore, while “Tribunals Ontario” functions as an administrative grouping for efficiency, it lacks the legal personality to independently possess or control records subject to *FIPPA* in its own right. Any such de facto control subverts the clear legislative intent of *FIPPA*. The LAT is specifically identified as an “adjudicative tribunal” under Ontario Regulation 126/10. The *ATAGAA* and its attendant regulations impose numerous duties and responsibilities upon the LAT. These include, but are not limited to, the creation and publication of a “mandate and mission statement” (s. 3), a “consultation policy” (s. 4), and a “service standard policy” (s. 5). The LAT is also required to develop “governance accountability documents” such as a “memorandum of understanding” (s. 11), a “business plan” (s. 12), and an “annual report” (s. 13). The LAT’s comprehensive failure to respond to the **Appellant**’s request is a direct affront to its duties under the *ATAGAA*. The LAT’s duties and the **Head** of the LAT, by so being prescribed by regulation, are not ‘one and the same’. By failing to be transparent and accountable in its operations, and by not adhering to its service standards and policies, the LAT is acting in a manner inconsistent with the very legislation that governs its existence and defines its purpose from a protection of privacy standpoint. This breach of statutory duty, distinct from but related to its failure under *FIPPA*, further underscores the urgent need for the OIPC’s intervention to compel compliance. The LAT is not merely a passive recipient of requests but an active participant in a system designed for public oversight, and its dereliction of this duty is a matter of serious concern.

VIII. THE TRIBUNALS ADJUDICATIVE RECORDS ACT, 2019 (THE “TARA”)

289. The *Tribunal Adjudicative Records Act, 2019*, S.O. 2019, c. 7, Sch. 60 (*TARA*), governs the public availability of certain tribunal records. The LAT, being an “adjudicative tribunal” (O. Reg 126/10), is governed by the provisions of *TARA*. The distinction between “adjudicative records” and other records held by a tribunal is critical. *TARA* defines “adjudicative records” as those related to a proceeding, such as applications, notices of hearing, written submissions, evidence, decisions, and orders (*TARA*, s. 1(2)). However, it explicitly excludes “personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders” from this definition (*TARA*, s. 1(3)). The LAT’s duty under *TARA* is to make these adjudicative

records “available to the public” (*TARA*, s. 2(1)). This is a statutory obligation independent of *FIPPA*. While there is an overlap in the general principle of public access, the majority of the records sought in this request are not “adjudicative records.” The request seeks internal administrative records, communications between the LAT and third parties, and records that fall outside the formal adjudicative process. Therefore, even if the LAT were to claim some of the requested records are “adjudicative records” and subject to the specific rules and confidentiality provisions of *TARA*, this would not justify its failure to respond to the entirety of the request. The blanket non-response is a failure to meet its duties under both statutes and must be rectified.

X. THE AVOIDANCE OF MULTIPLICITY OF PROCEEDINGS AND THE IMPORTANCE OF DETERMINATIONS FOR MULTIPLE PURPOSES – ALL REQUIRED AS OF SEPTEMBER 29, 2025, UNTIL ALL EVIDENCE HAS BEEN RECEIVED BY THE OIPC (SEE: SECTION 54(1) OF FIPPA)

290. In Canadian law, the principle of the “avoidance of a multiplicity of proceedings” is a core objective of civil and administrative procedure, aiming to prevent the waste of judicial and party resources. It seeks to resolve all related issues and claims among the same parties in a single proceeding wherever possible. The principle holds that it is in the interest of justice for a dispute to be heard in a single forum that is clearly the most appropriate one, rather than allowing separate, often duplicative, lawsuits or hearings to proceed in different venues. This helps to prevent inconsistent verdicts, reduce costs for all parties, and ensure the efficient use of the court or tribunal’s time. The legal doctrine of forum non conveniens is a prime example of this principle in civil courts, where a court may decline jurisdiction if another forum is clearly more suitable to hear the matter. Similarly, in administrative law, this principle guides decisions on whether to stay or consolidate related matters. The principle is especially critical for tribunals, as it directly addresses the user’s point that “justice is not free.” Litigants before tribunals, which often include self-represented individuals, face significant costs in time, legal fees, and emotional stress:

- a. Cost-Effectiveness and Efficiency: By consolidating similar cases or handling related issues informally, a tribunal can hear evidence and submissions once, rather than repeatedly. This reduces the burden on parties and the tribunal itself. For example, if ten individuals are affected by the same administrative error, a single, consolidated hearing is far more efficient than ten separate ones;
- b. Fairness and Consistency: Consolidating proceedings ensures that all affected parties are heard and that the tribunal can reach a single, consistent decision. This prevents the possibility of contradictory rulings on the same set of facts, which would undermine public confidence in the administrative justice system; and
- c. Proportionality: This principle aligns with the broader goal of proportionality in administrative law, which dictates that the process and resources used to resolve a dispute should be commensurate with

the nature of the dispute itself. A full-blown, lengthy hearing may not be necessary for every complaint if a consolidated, streamlined process can achieve a just result.

291. The new privacy breach sections of Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*), particularly section 40.1, are a practical embodiment of the principle of "avoiding a multiplicity of proceedings." The law creates a single, consolidated pathway for dealing with privacy breaches:
- a. Centralized Reporting and Notification: When a privacy breach occurs, the **Head** of the **Institution** must report it to the Information and Privacy Commissioner (IPC) and notify affected individuals. This single act of reporting centralizes the information about the breach with the regulatory body responsible for oversight;
 - b. Centralized Complaint Mechanism: Instead of having to initiate separate legal actions, affected individuals are told they have a right to file a complaint with the IPC. This channels all complaints about a single breach to one administrative body; and
 - c. Efficiency for the IPC: This structured process allows the IPC to investigate all complaints related to a specific breach at once. The Commissioner can conduct a single review of the **Institution's** practices, assess the harm to all affected individuals collectively, and issue a single set of orders to achieve compliance. This avoids the inefficiency of investigating the same incident and **Institutional** practices multiple times.
292. In essence, *FIPPA's* new provisions establish a clear and efficient procedure that minimizes the need for separate, individual complaints or lawsuits. By consolidating the issues at the outset under the oversight of a single Commissioner, the law promotes a fair, expeditious, and cost-effective resolution, preventing a "multiplicity of proceedings" and embodying the principles of modern administrative justice. Again language is important, "The **Head** of an **Institution** shall report to the Commissioner any theft, loss or unauthorized use or disclosure of personal information in the custody or under the control of the **Institution**". The theft, loss or unauthorized use OR disclosure of PII must have been in the custody or under the control of the **Institution**. Herein, the LAT is at issue. *But what about when the LAT did not have control or custody of the PII before its theft or loss? Is the LAT absolved? Such a potential complaint could only be answered by having a final access decision.*

XI. DISTINCTION BETWEEN GENERAL RECORD ACCESS AND PII ACCESS

293. As the erudite Justice Tysoe (as he then was) found in 1998, personal information access is distinct from general information record access:

“It makes imminent sense to have more restrictions on access to general information than on access to personal information. In dealing with general information, the Act must balance the objective of giving the public access to records of public bodies against other legitimate objectives, such as the privacy of personal information of other persons and confidentiality of governmental or business interests. These latter objectives do not generally apply to personal information about the applicant because there are no privacy or confidentiality concerns in releasing to an applicant personal information of that applicant.

(*Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BC SC))

XII. THE LAT MAY NEED TO MAKE OR PRODUCE RECORDS

294. The **Appellant** notes that the definition of “record” under the Act is extremely broad, encompassing

“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**; (document).”

CHAPTER #5: NO REOP FOR A THIEF AND THOSE WHO ASSIST, AID AND ABET THE SAME; AND EXCEPTIONS TO PRIVILEGE

CHAPTER #5(A): NO REOP FOR A THIEF OR THOSE WHO AID AND ABET

295. As our ONCA found in *R. v. Van Duong*, 2018 ONCA 115, there is no reasonable expectation for a thief or thieves, and certainly those that encouraged, facilitated and/or acquiesced to the same:

“[7] Although the application judge found that the **Appellants** had a subjective expectation of privacy, even this seems too generous to the **Appellants**. Allowing the **Appellants** a subjective expectation of privacy, in this instance, would confuse the relevant sense of expectation with desire. “Expectation” can be ambiguous between two meanings, only one of which is relevant to s. 8 analysis. In the first sense, a person has an expectation of privacy where he desires privacy and believes it is unlikely, as a matter of fact, that he will be disturbed. In the second sense, a person has an expectation of privacy where she believes she will be undisturbed because she is entitled to be left undisturbed. In s. 8 jurisprudence, subjective expectation is used in this latter sense. Here, although the **Appellants** had the desire for privacy, Mr. Van Duong’s evidence that he would flee the property if confronted, suggests that the **Appellants** did not have even a subjective expectation of privacy, even though they very much desired to be left alone and went to some considerable trouble to achieve that end.

[8] Even if the **Appellants** had a subjective expectation of privacy, it could not have been objectively reasonable. The application judge did not err in concluding that there can be no reasonable expectation of privacy in circumstances where the **Appellants'** connection to the property is so tenuous."

296. Consequently, the entirety of the correspondence and records concerning the TDI Group Karat Theft must be produced in the custody and control of the LAT along with the 13 classes subject to any review of the veracity and validity of any privileged document as the theft and its participants and the aftermath have become a matter of objective record. The conspicuous absence of a response from the LAT distancing itself from the aforementioned malfeasance and its ensuing aftermath, constitutes a profound and inexplicable dereliction of its duties. An adverse inference must be drawn. The requested relief is an ineluctable conclusion, serving as the necessary corollary to the LAT's pervasive, inexcusable, and systematic inaction. This is the precise outcome quod erat demonstrandum.

CHAPTER 6: ORDERS SOUGHT DISPOSING OF ALL ISSUES

297. The **Appellant**, Kevin A. McLean, respectfully and unequivocally requests that the Information and Privacy Commissioner/Ontario issue a **peremptory** Order or series of Orders against the Licence Appeal Tribunal that effectuate the complete and definitive disposition of all issues raised in the OIPC Proceeding:

I. Substantive Response & Compliance

- Order 1: Deemed Refusal and Curing the Defect The Head of the Licence Appeal Tribunal (LAT) is compelled to immediately file a legally compliant, substantive access decision regarding the original request within five (5) days of the date of this Order, thereby curing the jurisdictional defect arising from the continued state of deemed refusal.
- Order 2: Final Access Decision Deadline The LAT shall issue its first and final access decision, along with supporting evidence, within seven (7) days of the date of this Order. This Order shall be effective from November 10, 2025.
- Order 3: Summons and examining persons und oath and entry into the site of the LAT: to the extent that the LAT does not comply with the *infra* or *supra*, then the Commissioner shall summons the above noted individuals and enter the site of the LAT (wherever that may be at 25 Grosvenor Street, Toronto, Ontario);

II. Record Production & Preservation

- Order 4: Personal Information Disclosure The LAT shall provide copies of all records containing personal information relating to or about the Appellant where the LAT does not contend that any necessary exemptions apply.
- Order 5: Production of Adjudicative Records The Head of the LAT is compelled to immediately produce all adjudicative records requested under the *Tribunals Adjudicative Records Act, 2019 (TARA)*, specifically including the Two Undisclosed Motion Orders, to satisfy its dual statutory obligations.

- Order 6: Public Interest Override & Iniquity Exception The LAT is mandated to produce the contested records pursuant to the Public Interest Override (s. 23) and the iniquity exception, on the finding that the public interest in disclosure of information relating to the alleged promotion of criminal conduct and breaches of fiduciary duties by agents of the LAT decisively outweighs the purpose of any applicable exemption.
- Order 7: Records Preservation The LAT shall immediately take all necessary steps in accordance with section 10.1 and 54(3) of *FIPPA*, and the *Archives and Recordkeeping Act*, to preserve all records relevant to this Appeal, including all thirteen classes of records, to prevent their irretrievable loss.
- Order 8: Comprehensive Index of Records The LAT Institution shall disclose the Sought Records in the form of a comprehensive Index of Records covering the 13 Record Classes by May 30, 2025, or the first date thereafter as decided by the OIPC. The Index shall clearly delineate, via Schedules, between records alleged to be subject to privilege and those that are not, that were in its custody and/or under its control.
- Order 9: Affidavit Requirement for Withholding To the extent the LAT does not produce any records required under the Index of Records (Order 8), the Head of the LAT Institution or their authorized delegate shall provide an affidavit supporting its position, outlining the search methodology and justifications for withholding the records.

III. Further Steps & Relief

- Order 10: Leave for Further Submissions (Initial Review) Upon the Applicant's review of the final access decision (Order 2), the Applicant is granted leave to file additional submissions for further relief under the same OIPC Appeal number.
- Order 11: Leave for Further Submissions (Compliance Review) After the LAT has complied with Orders 6, 7, and 8, the Appellant is granted leave to make further submissions regarding the LAT's compliance, with a limitation of ten (10) pages
- Order 12: any relief that is consistent with the above.

All of which is respectfully submitted on November 4, 2025:



Mr. Kevin A. McLean (BA, JD, CIM)

Appellant

ⁱLearned of by the Appellant by way of Notice of Appeal: Notice of Appeal means a document prepared by the IPC confirming that an Appeal has been filed against an **Institution**'s decision concerning a Request under the Act, and includes the names of the Parties, the IPC's file number, and the **Institution**'s file number (if any).

Tab 1

This declaration was made on September 15, 2025, and it is the first declaration of Mr. Kevin A. McLean in this OIPC proceeding (the “**OIPC Proceeding**”)

OIPC File Number: PA25-00294

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

*Re: Licence Appeal Tribunal (Number 68 **Institution** in the Gen Reg.)*

IN THE MATTER OF an **Appeal**, involving a **Deemed Refusal Decision**, under **Appeal** Number PA25-00294 under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [“*FIPPA*”] and Associated Regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 (“*Reg 459*”) and *General*, RRO 1990, Reg 460 (“*Reg 460*” or “*Gen Reg*”))

In the matter of an Expedited Process **Appeal** before the OIPC under the OIPC’s:

- a. Code of Procedure for Appeals under MFIPPA and FIPPA (the “Code”), specifically Rule 9; and
- b. Practice Directions, specifically **Practice Direction #13**

DECLARATION #1: FOR PURPOSES HEREIN TO THIS OIPC APPEAL, THE PUBLIC INTEREST ISSUES AND SECTION 59(1)(F) OF <i>FIPPA</i>

I, Mr. Kevin A. McLean (BA, JD, CIM), disabled, of Toronto, Ontario, declare the following under the penalty of perjury, pursuant to the *Evidence Act* (Ontario) and knowing any statement herein that is a false statement to be an offence:

1. I declare the following facts to be true. Where I have declared information on belief, I cite the source of my belief.
2. I adopt the definitions from the documents contained in my to be filed motion record created on today’s date (the “**Applicant’s Motion Record**” or “**Motion Record**”). I cross-reference the **Motion Record** herein.
3. I refer to myself as the “Declarant” and “Appellant” at various times herein for ease of reference and for a definitive frame of reference.
4. In consideration of certain personal, medical, and health exigencies necessitating attention in the ensuing weeks, and in light of the protracted nature of the **OIPC Appeal** due to the **LAT**’s non-compliance with *FIPPA* and related statutes, the furnishing of this **Declaration #1** at this juncture has been deemed prudent.

<i>VOLUME #1: PUBLIC INTEREST ISSUES</i>

5. I verily believe that the matter concerning the proper “**Party**” (as defined in the *OIPC Code of Procedure*) is one of transcending public importance, extending beyond the confines of the declarant and the **LAT** and, by extension, the declarant and *TRIBUNALS ONTARIO*. It is verily believed that this issue deliberately evades resolution on the substantive matters specific to these circumstances.
6. Appellant notice is taken of three reported decisions involving *TRIBUNALS ONTARIO*, all of which post-date 2019, when the *TRIBUNALS ONTARIO* entity was constituted:
 - a. *TRIBUNALS ONTARIO (Re)*, 2020 CanLII 31184 (ON IPC), a determination rendered by Valerie Jepson, Adjudicator of the OIPC (note well: this case involved the CFSB) [“Jepson Decision”];
 - b. *TRIBUNALS ONTARIO (Re)*, 2025 CanLII 15246 (ON IPC), a determination rendered by Michael Cusato, Case Lead, of the OIPC (note well: this case pertained to training manuals); and
 - c. *TRIBUNALS ONTARIO (Re)*, 2025 CanLII 54834 (ON IPC), a determination rendered by Asma Mayat, Case Lead of the OIPC (note well: this case involved vaccine-related issues).
 - i. The summary of the latter states: *The appellant requested that TRIBUNALS ONTARIO furnish records pertaining to vaccine passports, vaccine mandates, and exemption grounds. The requester filed an Appeal with the IPC subsequent to the tribunal’s failure to render an access decision within the statutorily prescribed time limit. The decision-maker concurs that the tribunal is deemed to have refused the access request pursuant to section 29(4) of the Act and mandates that the tribunal issue a final access decision by June 20, 2025.*
7. In my humble submission, the Jepson Decision is erroneous, **ex facie**, by virtue of its style of cause, as “*TRIBUNALS ONTARIO*” cannot, in law, be construed as an “**Institution**” under *FIPPA*.
8. While live issues between the declarant and the **LAT** remain, the adjudicator’s attention is respectfully brought to the legal test for the mootness doctrine, as authoritatively articulated by the Supreme Court of Canada in *Borowski*. The *Borowski* decision enumerated three considerations but underscored that the process is not a “mechanical one” at paragraph 363. These three considerations were succinctly summarized by the Court of **Appeal** in *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2021 BCCA 171 at paragraph 19, as follows:
 - a. Whether, notwithstanding the evanescence of the concrete dispute, an adversarial context persists, thereby providing an assurance that the case will be comprehensively argued before the court;
 - b. Whether the principles of judicial economy would be advanced, in some manner, by an adjudication of the case despite the resolution of the concrete dispute; and
 - c. Whether, in adjudicating a moot case, the court would be encroaching upon the legislative sphere rather than functioning as a purely adjudicative body.
9. It is respectfully submitted that irrespective of any potential disappearance of live issues between the declarant and the **LAT**—whether through resolution or an order issued by the OIPC—the paramount issue of whether “*TRIBUNALS ONTARIO*” can be a substituted “**Party**” in place of an “adjudicative tribunal” must be heard and definitively decided.

10. The submissions already filed and duly served upon the **LAT** and its **Head** (as defined in *FIPPA*, section 2) of the **Institution** (as defined in *FIPPA*, section 2), which are contained at Tab #5 and #6 of the **Motion Record**, are hereby reiterated and relied upon.
11. In drawing this Declaration #1 and the **Motion Record**, inclusive of this Declaration #1 and its Exhibits, to the attention of the “**Information and Privacy Commissioner**” (the “**IP Commissioner**”, “**Commissioner**” or “**IPC**”) (as defined in *FIPPA*, section 4(1)), a careful distinction is made between the **IPC** and the office of the **IPC** (the “**OIPC**”). It is noted that the **IPC** is appointed by order of the Legislative Assembly (also defined as the “**Legislature**”) (see: *FIPPA*, section 4(2)). It is also noted that the **IPC** is appointed by the unanimous consent of the **Legislature** and, failing such unanimous consent, an order shall (mandatory and not permissive) only be issued under subsection 4(2) of *FIPPA* if the individual to be appointed (the “**IPC**”) has been selected by unanimous agreement of a panel (which is presumed to be constituted within the **Legislature**) composed of one member of the **Legislature** from each recognized party, chaired by the non-voting Speaker. It is noted that the **IPC** may exercise certain powers, but shall perform the duties (obligations) prescribed by *FIPPA* or any other *Act* (which constitutes a statute and not merely a regulation). This principle shall be cross-referenced to the seminal case of *Julius v. Oxford (Bishop of)*, per Lord Cairns in the *House of Lords*, which has been jurisprudentially adopted to illuminate when a “may” in legislation or rules transforms into a “must.” It is noted that the **Commissioner** shall designate an individual from the employees of the **OIPC** who shall be vested with the powers and duties of the **Commissioner** in the event that the **Commissioner** is:
 - a. Absent; OR
 - b. Unable to discharge the duties of the office (the “**OIPC**” or “**Office**”).
12. It is noted that the **Commissioner** may only delegate to an assistant commissioner or deputy commissioner but is statutorily precluded from delegating the “**power of delegation**” (see: *FIPPA*, section 56). Prior to the commencement of her duties of her **Office**, the **Commissioner** shall take an oath or affirmation that she will:
 - a. Faithfully; AND
 - b. Impartially exercise the functions of the **Office**.
13. “**Faithfully**” is defined as: steadfast in affection or allegiance: loyal; firm in adherence to promises or in observance of duty: conscientious (see: *Merriam-Webster Online Dictionary*).
14. It is noted that a right of access exists to any record in the custody or control of an **Institution** unless that record, or a portion thereof, falls within one of the exemptions under sections 12 to 22 of *FIPPA*; or the **Head** of the **Institution** has reasonable grounds (as predicated upon evidence under oath, affirmation, or

declaration, analogous to *R. v. Kang-Brown* (SCC, 2008), which cited *Hunter v. Southam*, 1984, SCC) for asserting that the request is frivolous or vexatious (see: section 10 of *FIPPA*).

15. The Legislature’s precise phrasing of the article with the noun of “an institution” (see: section 10(1) of *FIPPA*) is noted. It is also noted that the mandate for the preservation of records is a guarantee or an “ensuring” obligation incumbent upon the head of an **Institution**—not the head of “*TRIBUNALS ONTARIO*,” which is not an **Institution** under *FIPPA* or any corresponding regulations (see: section 10.1 of *FIPPA*).
16. It is verily believed that the pilfering of property on October 25, 2024, by Mr. David Karat, an ADR specialist for four distinct insurance companies within the **TDIA Group**, continues to be a circumstance that compromises health and safety. It is respectfully submitted that these are compelling circumstances (see: section 21(1)(b) of *FIPPA*). This point is raised in the event the **LAT** seeks to rely upon, or attempts to rely upon, section 21(1)(b) of *FIPPA*.
17. It is noted that “**compelling**” is defined as: convincing or demanding attention (see: *Merriam-Webster Online Dictionary*).
18. It is noted that “**circumstances**” is defined as: a state of affairs (see: *Merriam-Webster Online Dictionary*).
19. It is again noted that a thief holds no reasonable expectation of privacy (**REOP**) (see: *R. v. Van-Duong*, ONCA). Therefore, there could be no unjustified invasion of personal privacy of another person in relation to any documents concerning the events leading up to the **TDIA Group** theft of property, the theft itself, or its aftermath (see: *FIPPA*, subsection 21(1)(f)).
20. It is noted that the **Access Request** was submitted in strict accordance with section 24(1) of *FIPPA*, as it was made in writing to the **Institution (LAT)**. At the time of the request, it was verily believed, and continues to be verily believed, that the **LAT** exercises control or custody over the records within the 13 **Record Classes** (see: Exhibit “A,” *infra*), and it was explicitly stipulated that the **Access Request** was made under *FIPPA*.
21. It is verily believed that “**sufficient detail**” was furnished to enable an experienced employee of the **LAT** (not “*TRIBUNALS ONTARIO*”), upon the exercise of a reasonable effort, to identify the records within the 13 **Record Classes** (see: *FIPPA*, section 24(1)(b)).
22. It is noted that the prescribed fee was remitted on March 20, 2025 (see: *FIPPA*, section 24(1)(c)). The **LAT** at no time raised any objection to the character of the request (see: section 1.1 of 24 of *FIPPA* and section 27.1 of *FIPPA*) or the sufficiency of its detail (see: section 24(2) of *FIPPA*). There was no instance of the **Access Request** being forwarded to another **Institution** under *FIPPA* (see: *FIPPA*, section 25).
23. The **LAT** failed to comply with section 26 of *FIPPA*, as no written notice under subsection 26(a) of *FIPPA* was received (the “**Deemed Refusal Decision**”). Section 29(4) of *FIPPA* is brought to the fore, which, in reasoned opinion, was triggered on April 20, 2025 (the “**Deemed Refusal Date**”). The **LAT** did not seek an extension of time (see: section 27(1) of *FIPPA*). It is noted that the **Head** of the **LAT** did not exercise any rights under section 28 of *FIPPA*, which, in turn, renders sections 17(1) and 21(1)(f) of *FIPPA* inapplicable.

It is also noted that because the **LAT** failed to comply with section 26 of *FIPPA*, section 29 of *FIPPA* became inapplicable.

24. It is noted that the right of **Appeal** under section 50(1) of *FIPPA* was exercised by reference to section 24(1) of *FIPPA*. No notice was issued under section 28(1) of *FIPPA*, and thus the final paragraph of subsection 50(1) following the word “or” is not applicable.
25. Emphasis is placed on the provision in section 53 of *FIPPA*, which places the burden of proof upon the **Head** of the **LAT** due to the **Deemed Refusal Decision** on the **Deemed Refusal Date**: *Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. F.31, s. 53.*
26. Pursuant to section 54 of *FIPPA*, the issues in this **Appeal** have been raised herein and through the documents and authorities contained in the **Motion Record**.
27. This Declaration #1 is also furnished for the purposes of this OIPC **Appeal**, specifically to address the public interest issues and section 59(1)(f) of *FIPPA*.

VOLUME #3: OIPC CODE OF PROCEDURE

28. It is noted that the *OIPC Code of Procedure* is applicable to all **Appeals** under *FIPPA* and *MFIPPA*. The OIPC **Appeal**, initiated on April 23, 2025, is pursuant to *FIPPA* as it involves a provincial adjudicative tribunal as it relates to its custody and/or control of my personal information and/or general records where my personal information is not at issue per se.
29. It is noted that section 2, “Purpose and Interpretation,” of the *OIPC Code of Procedure*, stipulates that the *Code of Procedure* is subject to *FIPPA* but is to be interpreted broadly in the public interest to secure the most fair, just, and expeditious determination on the merits of the **Appeal** (see: *OIPC Code of Procedure*, section 2.01). The merits of the **Appeal** have not been addressed in any manner, let alone in the most fair, just, and expeditious way.
30. Adherence by myself to the *OIPC Code of Conduct* has been consistently endeavoured. However, in light of the failures and the pervasive “radio silence” from the **OIPC** with respect to this OIPC **Appeal**, notwithstanding its classification as an “**Expedited Appeal**,” attention must be drawn to a central issue of this **Appeal** and the incorrect referencing of “*TRIBUNALS ONTARIO*,” as meticulously documented in the submissions (see: Tabs #5 and #6 of the **Motion Record**) and within this Declaration. A draft order has been prepared, as particularized at Tab #7 of the **Motion Record**.
31. It is noted that “**Adequacy of Decision Appeal**” is not an issue herein, as the **LAT** has not rendered any “access decision” (see: *OIPC Code of Procedure*, section 3.01). It is further noted that a primary issue herein is the “**Deemed Refusal Appeal**” (see: *Rule 3.01 of the OIPC Code of Procedure*). It is noted that an “**Institution**” signifies an organization subject to *FIPPA* (see: *OIPC Code of Procedure*, *Rule 3.01*). It is

verily believed that the **LAT** is subject to *FIPPA*, whereas “*TRIBUNALS ONTARIO*” is not. Consequently, it is verily believed that this constitutes a public interest issue that commands the **OIPC Commissioner’s** attention, review, and a decisive ruling, not merely for this **Appeal** but for all past, current, and future **Appeals** under *FIPPA* where such a matter may arise.

32. It is noted that there are three decisions of OIPC involving “*TRIBUNALS ONTARIO*,” but since “*TRIBUNALS ONTARIO*” is not an **Institution** subject to *FIPPA*, it could not have been properly contained within a “**Notice of Appeal**” (see: *Rule 3.01 of the OIPC Code of Procedure*). The **LAT** did not furnish a “file number.”
33. The “**Access Request**” has been defined as such, but it bears the identical meaning as the definition provided under *OIPC Code of Procedure*, section 3.01. The **Deemed Refusal Decision** of the **LAT** was **Appealed** (see: *OIPC Code of Procedure*, section 4.01) in accordance with, *inter alia*, *Rule 4.03 of the OIPC Code of Procedure*. The **Access Request** (with the statutory fee remitted to the **LAT**) was delivered to the **LAT** on March 20, 2025, and the OIPC **Appeal** was subsequently filed (with the payment of the statutory fee to the OIPC) on April 23, 2025 (see: *Rule 4.05 of the OIPC Code of Procedure*). The OIPC **Appeal** was accepted on or about April 29, 2025, but with the issue of the other party name as particularized in the “**Representations**” (see: *OIPC Code of Procedure, Rule 3.01*; see: Tabs #5 and #6).
34. It is noted that the Registrar, in accordance with section 5.04 of the *OIPC Code of Procedure* and section 11 of the *OIPC Code of Procedure*, is authorized to request and, where necessary, order that copies of the records at issue and/or an Index of Records be produced to the **OIPC** (see: *ibid*, section 5.04). No value is perceived in mediation and, *inter alia*, the window for an early resolution has now elapsed (see: section 7 of the *OIPC Code of Procedure* and section 6.01 in relation to the latter).
35. It is noted that “**Adjudication**” (see: section 8 of *OIPC Code of Procedure*) is not pertinent at this stage. The applicability of Part III, section 8, “**Expedited Process**” under the *OIPC Code of Procedure* is noted, a matter which shall be further addressed by also referencing *OIPC PD #13* (see: *infra*).
36. It is verily believed by me that the issues comprising this OIPC **Appeal** have not been expedited for the evidence herein *infra* and *supra*.
37. The **OIPC** communicated at the commencement of the **Appeal** that it would be advanced through the “**Expedited Process**” (see: *Rule 9.01 of the OIPC Code of Procedure*). It is noted that *Rule 9.03 of the OIPC Code of Procedure* authorizes the **OIPC** to issue an order without receiving further submissions from the Parties. As the **LAT** is the sole other “**Party**” and has absconded with the statutory funds without objection or compliance, it is submitted that, *inter alia*, in light of the nearly 150-day period that has elapsed since the statutory deadline (April 18 or 19, 2025) for the **LAT** to provide an access decision in accordance with *FIPPA*, this **Appeal** is one where the **OIPC** must act. This is predicated on the rule articulated in *Julius v. Lord Bishop of Oxford* ((1880) 5 A.C. 214 at 243), which has been jurisprudentially adopted by the Supreme Court of Canada in various subsequent cases. This principle holds that where a “may” in a statute, regulation, or rule is coupled with a legal right of a decision-maker and a corresponding duty, the “may” becomes a

“must,” as confirmed in *Information Commissioner v. Minister of Employment and Immigration* (respondent), 1986 CanLII 6836.

38. For a direct quotation, the following is tendered from the aforementioned authority: “While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power *when called upon* to do so by a party interested and having the right *to make the application* (*Drysdale v. Dominion Coal Company* ((1904) 34 Can. S.C.R. 328 at 336): Killam J.). Enabling words are *always compulsory* where they are words to *effectuate* a legal right (*Julius v. Lord Bishop of Oxford* ((1880) 5 A.C. 214 at 243): Lord Blackburn).”
39. A petition is also made, in the draft order, that the **OIPC** issue an order without “further hearing” from the **LAT**, compelling the **LAT** to produce the required records to the **IPC** (though not necessarily to myself as the declarant). The **IPC** may examine any record (see: *FIPPA*, definitions) and enter and inspect the premises occupied by the **Institution**—known and defined as the “**LAT**” (see: *section 10.01 of the OIPC Code of Procedure*). An affidavit or declaration in support of any position or action undertaken by the **LAT** (an **Institution**) is also sought (see: *section 10.03 of the OIPC Code of Procedure*).
40. It is recollected that upon delivering the **Access Request** and the monetary quantum for the statutory and prescribed request fee, a degree of confusion existed within the building located at 25 Grosvenor Street, Toronto, Ontario, regarding the appropriate recipient in terms of whom within said building could even receive the Access Request.
41. Apprehension remains that the **LAT** may have committed various breaches of sections of *FIPPA*, including those pertaining to privacy breach notification (see: *FIPPA*, section 40.1 et al). The offenses that are cross-referenced to *FIPPA* and section 11.05 of the *OIPC Code of Procedure* are noted. This is precisely why an order from the **OIPC** without further hearing from the **LAT** is being and continues to be sought (see: *inter alia*, *section 9.03(f) of the OIPC Code of Procedure*).
42. It is noted that the **LAT** was notified of the **OIPC Appeal** in Spring 2025, as Mr. Weir is, by the **General Regulation**, the head of the **LAT**. More than 35 days have elapsed since that time, and it is therefore precluded from applying any new discretionary exemption claims to the 13 **Record Classes** in the **Access Request** (see: *Rule 12.01 of the OIPC Code of Procedure*). The **Appeal** is neither “on hold” nor “abandoned” (see: *Rule 16.01 of the OIPC Code of Procedure*). To the extent that any waiver or variance of procedures under the *OIPC Code of Procedure* is necessitated, it is affirmed that this Declaration #1 and the **Motion Record** are to be construed in accordance with section 17.02 of the *OIPC Code of Procedure*.

43. It is noted that the **OIPC’s Expedited Appeals Team** is comprised of specialized OIPC staff members, denominated as “**Case Leads**,” each of whom has delegated authority—the source of which remains legally ambiguous—to:

- a. Resolve;
- b. Dismiss; or
- c. Issue an order disposing of an **Appeal** utilizing expedited processes

(see: *OIPC PD #13*, section 1).

44. *OIPC PD #13* references a single-person processing model (see: *ibid*).

45. It is noted that the **Expedited Appeals Team** will [shall] employ a process to manage **Appeals** concerning straightforward, preliminary, or procedural issues where there is no potential for an **OIPC** order mandating the disclosure of information or records (see: *ibid*, section 2). The jurisprudence contained in the **Motion Record** under Volume II(C)(IV) concerning “**Deemed Refusals**” is reiterated and relied upon. It is verily believed that the issue of whether an order for disclosure will be issued is contingent upon a final access decision, which is, in turn, subject to the **LAT**’s compliance with *FIPPA* and any orders issued by the **OIPC**.

46. It is noted that the stated objective of the **OIPC’s Expedited Appeals Team** is to expedite the resolution of issues in an efficient and effective manner while preserving fairness and impartiality. It is verily believed, with the greatest respect, that the **OIPC’s Expedited Appeals Team** has, to date, not expedited any resolution, let alone in an effective and efficient manner. It is averred that the process has been unfair and, perhaps, demonstrably partial to the **LAT**.

47. It is noted that the only other party can be the **LAT**, as it is an **Institution** under *FIPPA*, whereas *TRIBUNALS ONTARIO* is not (see: *ibid*, section 9). No “Case Lead” has made any attempt to clarify any issues or to ascertain whether a mutually agreeable resolution is feasible (see: *ibid*, section 13). As such, it is compelled that this Declaration #1 and the **Motion Record** be brought to the attention of the esteemed legislative officer, the **OIPC Commissioner**, Ms. Kosseim. The inapplicability of *OIPC PD #13*, section 14, has also been addressed by its cross-referencing in previous submissions (see: Tab #5, “Initial Submissions”).

48. It is noted that under *OIPC PD #13*, the **Case Lead** may invite submissions from the Appellant, the **Institution**, and/or any other party. As the only parties are the declarant and the **LAT (Institution #68)**, submissions could only have been invited from the **LAT**, as two sets of submissions have already been filed. There has been no request from the **OIPC** for additional information.

VOLUME #5: EXHIBITS “A” TO “C”
VOLUME #5(A): EXHIBIT “A”

49. **Exhibit “A”** Attached hereto and identified as **Exhibit “A”** is a true copy of a comprehensive **Access Request**, which was delivered to the **Licence Appeal Tribunal (“LAT”)** on or about **March 20, 2025**, (see:

Exhibit “A”, pages 2 to 30). An **Access Request** was not submitted to “*TRIBUNALS ONTARIO*,” as “*TRIBUNALS ONTARIO*” was not, and is not, an **Institution** under *FIPPA*, the *General Regulation*, or any other section of “**source law**” (see: *Legislation Act*, section 1).

50. The delivery of the Access Request was accompanied by the statutory fee of five dollars, as substantiated by the subsequent absence of any fee-related objection from the **LAT**. This **Access Request** was submitted in direct response to a series of events and communications that engendered significant concerns regarding the completeness and accuracy of records previously provided by the **LAT** Registrar. Specifically, a “print out” of the alleged Record of Proceeding (“ROP”), furnished on February 26, 2025, raised more inquiries than it resolved due to the conspicuous omission of key documents, including final orders and communications referenced within the file itself. The **Access Request** was intended to rectify these critical deficiencies and ensure the unimpeachable integrity of the record of proceeding but was focused on records, involving my personal information (“PI” or “PII”), outside of the scope of *TARA*.
51. No response to the **Access Request** was forthcoming from the **LAT** within the statutory 30-day period, as mandated by section 10(1) of *FIPPA*, nor has any response been received to the present date.
52. I verily believe that this dereliction of duty constitutes a “**deemed refusal**” under section 29(4) of the *Act*.
53. I verily believe that this profound and persistent failure to satisfy statutory obligations, despite numerous subsequent communications as documented in submissions to the OIPC, is not merely a procedural misstep; it represents a substantive abrogation of a statutory right that underpins the fundamental principles of transparency and accountability.
54. I verily believe that recourse to the **OIPC** was, therefore, an inescapable necessity to compel a response and the ultimate production of the personal information.
55. I verily believe that the **LAT**’s inaction has imposed a significant burden, compelling the allocation of substantial resources and effort to a matter that should have been resolved administratively.
56. As the *Act*’s purpose is to facilitate the right of access to information, I verily believe that the **LAT**’s conduct has served to vitiate this right and deferred justice.
57. I verily believe that this course of conduct is in direct contravention of the principles of administrative law and the quasi-constitutional nature of *FIPPA*.
58. I verily believe that that the **LAT** has engaged in a demonstrable abdication of the **LAT**’s duty to act *in bonam fidem* and with due diligence.

VOLUME #5(B): EXHIBIT “B”

59. On **April 23, 2025**, an **Appeal** of the **LAT**’s “**deemed refusal**” was formally initiated through the completion and submission of the requisite form to the Office of the Information and Privacy Commissioner of Ontario (“**OIPC**”), along with the payment of the required **Appeal** fee of **\$10.00**.

60. A portion of the email confirming this payment and submission is attached hereto and marked as **Exhibit “B”** (see: **Exhibit “B”**, page 32).
61. I verily believe that this prompt initiation of the **Appeal** underscores the gravity and urgency with which this matter is perceived.
62. I verily believe that the right of access and the integrity of the record are considered to be of paramount importance, particularly in light of the partiality of the **LAT** towards the likes of a thief (of **TDIA Group**) who stole my property and refused to return the same.
63. I verily believe that due to the **LAT** and the head of the **LAT**’s silence after some 180 days since the time of the Access Request, the **LAT** and its head were complicit in the same.
64. I verily believe that the filing of this Appeal was not a matter of choice but a necessary measure to safeguard rights, as the **LAT** had provided no indication of its intention to comply with its statutory duties.
65. I verily believe that the **OIPC**, as an independent oversight body, is now charged with the responsibility of compelling compliance.

VOLUME #5(C): EXHIBIT “C”

66. **Exhibit “C”** Attached hereto and identified as **Exhibit “C”** are true copies of correspondence from the **OIPC** and related emails (see: **Exhibit “C”**, pages 34 to 52). This exhibit includes:
- A notice from the **OIPC**, dated **April 29, 2025**, designating the **Appeal** for an “**expedited process**” under *Practice Direction #13* due to its nature;
 - Subsequent communications from **April 2025 to September 2025** between the declarant and both the **OIPC** and the **LAT**. These communications meticulously document the **LAT**’s continued lack of engagement and the persistent efforts to seek a resolution and to secure the preservation of the requested records. The potential for the spoliation of evidence was explicitly raised as a concern. It is considered a fundamental principle of both *FIPPA* and administrative fairness that a public body must not only respond to an **Access Request** but also preserve the responsive records. The **LAT**’s prolonged silence has given rise to a genuine and reasonable apprehension that records may have been expunged, destroyed, or otherwise tampered with, thereby necessitating the **OIPC**’s intervention. The submissions, as attached in **Exhibit “C”**, provide a detailed chronology of events, including the **LAT**’s unresponsiveness and the repeated requests for confirmation that the records would be preserved. This ongoing failure to cooperate with the **OIPC**’s process, as demonstrated by the lack of a substantive response to the **Appeal**, constitutes a further dereliction of duty.

VOLUME #6: THE 13 RECORD CLASSES

67. As enumerated in the **Access Request (Exhibit “A”)**, the following classes of records were sought from the **LAT**, with the objective of obtaining a complete and accurate record of the personal information held by the institution:
- Class #1 - File Logs and Screenshots (Exhibit “A”, page 5):**
 - These records are considered *ad crucem* for the reconstruction of the internal chronological history of the file, including any modifications to the style of cause or the input of insurance

companies as respondents. The integrity of a file, especially one subject to adjudicative oversight, hinges upon a complete and transparent log of all actions taken. The absence of such logs from the initial “print out” creates an insurmountable gap in the record, raising concerns about potential irregularities in the handling of the file. The pursuit of these documents is not merely a procedural formality but a critical exercise in ensuring that the procedural integrity of the case can be verified and that no material facts have been inadvertently or deliberately obscured;

- b. **Class #2 - Power Outage Records (Exhibit “A”, page 6):**
 - i. This class is of particular importance for verifying the reported power outage and the remedial actions taken to restore the file and any lost data, which could potentially account for discrepancies in the records furnished. The veracity of the LAT’s account of this event is central to the ability to repose trust in the completeness of the record. The failure to provide these records casts a significant pall of doubt over the official narrative and may indicate a more systemic issue with data management and contingency planning. The records would either validate the LAT’s claims or expose a fundamental flaw in its record-keeping, thereby providing critical insight into the reliability of the entire file;
- c. **Class #3 - Specific Documents from the LAT Registrar Feb 26 Print Out, including .msg files and undisclosed motion orders (Exhibit “A”, page 6):**
 - i. These specific, referenced documents were not provided in the “print-out” from the LAT, thereby creating a fundamental lacuna in the record. The failure to disclose final orders raises profound questions concerning procedural fairness and the LAT’s statutory duty to provide parties with all adjudicative records. The very essence of a fair hearing is the right of all parties to possess the full record of proceedings, including all orders that have a material effect on the case. The withholding of such records is not merely a technical breach but a substantive violation of the principles of natural justice and procedural equity;
- d. **Class #4 - Shuttleworth-type Documents, which are records related to the decision review process (Exhibit “A”, page 6):**
 - i. An endeavour is made to ascertain whether the LAT’s internal peer and legal review processes, as outlined in the *Shuttleworth* decision, were applied to the decisions in this case, and if so, to review the relevant communications and suggestions. These records are vital for determining whether the adjudicative process was conducted with the requisite degree of internal scrutiny and legal oversight. Access to these documents would allow for a comprehensive examination of the institutional due diligence performed in this matter and could reveal whether any external or internal influence was brought to bear on the adjudicative outcome;
- e. **Class #5 - List of Professional Advisers including Legal Counsel (Exhibit “A”, pages 6-7):**
 - i. The identities of legal counsel and their communications with decision-makers are considered essential for assessing potential conflicts of interest and ensuring the integrity of the process, particularly with respect to Mr. Jesse Aaron Boyce. The principle of *audi alteram partem*—the right to be heard—is meaningless without a clear understanding of all the actors involved and their potential biases. The disclosure of this information is a prerequisite for a fair and transparent process;
- f. **Class #6 - LAT and TDIA Group Records Involving the Declarant (Exhibit “A”, page 7):**
 - i. A request has been made for all communications between the LAT and representatives of the **TDIA Group** where the declarant was not copied, which are necessary to comprehend the full scope of interactions and to determine if any improper conduct transpired. The existence of such un-copied communications raises a significant specter of procedural impropriety and potentially a breach of the fundamental duty of administrative bodies to conduct their affairs in an open and transparent manner. The records are indispensable for a full and fair inquiry into the possibility of a prejudicial *ex parte* communication;
- g. **Class #7 - LAT CRO’s and TDIA Group communications (Exhibit “A”, page 7):**

- i. This class of records is intended to capture communications between **LAT** Case Resolution Officers and individuals associated with the **TDIA Group**. These communications are of particular interest as they may contain informal, yet crucial, exchanges that could shed light on the nature of the relationship between the adjudicative body and the involved parties;
- h. **Class #8 - LAT CRO and TDIA Group** communications where the declarant was not copied (**Exhibit “A”**, page 7):
 - i. This is a more targeted request to uncover any un-copied communications between the **LAT**’s Case Management Officers and the **TDIA Group**. This specificity is crucial for identifying any clandestine channels of communication that might have subverted the formal adjudicative process;
- i. **Class #9 - Communications between Mr. Boyce and Mr. Nieuwland (Exhibit “A”, page 8):**
 - i. These communications are of particular interest due to the roles of both individuals and a belief that communications may have occurred outside of proper channels. The search for these records is premised on the principle that the actions of all individuals involved in an adjudicative process must be subject to scrutiny to ensure the integrity of the system as a whole;
- j. **Class #10 - Notes to Phone Calls between the LAT and TDIA Group individuals (Exhibit “A”, page 8):**
 - i. This request pertains to any and all notes related to phone conversations, which can contain crucial details not captured in electronic mail. While electronic communications are often the focus of such requests, the importance of notes and records of verbal conversations cannot be understated. They can often contain candid and unvarnished details that are essential for a complete understanding of a matter;
- k. **Class #11 - Non-email Communications via mobile devices (Exhibit “A”, page 9):**
 - i. Confirmation is sought as to whether government-issued mobile devices were utilized for communications, and if so, to obtain those records, as they fall within the definition of “**control**” under *FIPPA*. The evolution of communication technology necessitates that the definition of a “record” be interpreted broadly to include all forms of communication, regardless of the medium. The potential for critical information to exist on these devices mandates that they be subject to the same disclosure obligations as traditional records;
- l. **Class #12 - Communications by or to Mr. Sean Weir or other LAT management involving the declarant (Exhibit “A”, page 9):**
 - i. This class of records aims to determine the level of management involvement and oversight in the case, particularly given the potential for a conflict of interest related to Mr. Weir’s former law firm. The presence of such communications would be indicative of a high level of institutional interest in the matter, and their content could reveal whether the process was conducted with the requisite impartiality. The pursuit of these records is a necessary step to ensure that the adjudicative process was not tainted by any external influence or personal bias; and
- m. **Class #13 - Residual records not otherwise specified (Exhibit “A”, page 9):**
 - i. This is a residual class to ensure the production of any other relevant personal information records, thereby promoting the spirit of transparency and full disclosure. This final class serves as a catch-all provision, ensuring that the full breadth of the declarant’s personal information is obtained. Its inclusion demonstrates a commitment to the foundational principle of *FIPPA*—that individuals have a right of access to their personal information held by public bodies.

68. This Declaration #1 is tendered for no improper purpose on this date, September 15, 2025, and in steadfast support of the relief contained in the submissions.



Digitally signed by Kevin McLean
 Date: 2025.09.15 08:51:10 -04'00'
 Adobe Acrobat version:
 2025.001.20693

Mr. Mr. Kevin A. McLean (BA, JD, CIM)

DOB: March 25, 1983

Driver's Licence: M16514331830325

Exhibit “A”

Reply to the attention of: Mr. Kevin A. McLean (B.A., J.D., CIM) (he/him)
Email: mrkevinalexandermcleanbajdcim@gmail.com

March 2025

Further to the January 2025 Access Request from the above noted email

Dictated in part with voice recognition software – kindly excuse any errors

Private and Confidential (EXCLUSIVELY FOR PURPOSES RELATED TO FIPPA AND JANUARY 2025 ACCESS REQUEST – NOT TO BE DISCLOSED BUT FOR LAWFUL PURPOSES RELATED TO FIPPA AND THIS JANUARY 2025 ACCESS REQUEST)

VIA HAND DELIVERY (MAY BE FOLLOWED VIA EMAIL)

Hard Copy version does not have hyperlinks

To:
Licence Appeal Tribunal
15 Grosvenor Street
Toronto, Ontario

Attention: head of the Licence Appeal Tribunal

Attention: Privacy Division and Privacy Manager

Attention: Ms. Jennifer (last name unknown) (defined as “Ms. Jennifer” or “Jennifer”)

Your file number: TDB

Type of document: access request (January 2025 at first instance) with five-dollar fee

Short title of the parties to the access partnership: Mr. McLean and the Licence Appeal Tribunal (FIPPA Access Privacy Division)

Party (sender): Requestor

Re: my comprehensive access request pursuant to, inter alia, section 24 and 47 (if applicable) of FIPPA – further to my emails – highly particularized and narrowed in parts but broadened in other parts – regarding documents or records relating to the record of proceeding in the LAT file 23-015662/AABS (the “LAT Proceeding”) during the ROP Temporal Period

Re #2: confirmation – only requesting few documents from the ROP during the ROP Temporal Period: documents number therein

Re #3: broadening of access request to the following documents generally

Dear Sirs/Mesdames/Other Gender Neutral Pronouns:

<i>VOLUME #1: INTRODUCTION</i>

1. I write regarding the above. I adopt the definitions from the emails between myself and the LAT *FIPPA* Division, and they have the same meaning herein unless otherwise noted.
2. “**Requested Time Period**” means the time period from December 24, 2023, to January 31, 2025.
3. I reserve the right to formalize and amend any errors herein. I attempt to return from a relatively serious accident on March 5, 2024, albeit not involving any motor vehicles. I am having some serious dental issues as my face hit the pavement. I apologize in advance for any administrative, grammar or spelling errors. If I do amend, including an e-copy of this letter, with hyperlinking and bookmarking, I will highlight the amendments of the same.
4. Since we last communicated, and I apologize for the delay as I was unfortunately hit by an e-scooter in the evening of March 5, 2025, and had to attend the emergency room at a local hospital. As such, I had been recovering since that time. I am somewhat better so I have had some assistance with the drafting of the same but the contents and thoughts remain mine. In any event, this access request and records sought, personal information in nature, remain urgent and of extreme importance to me involving that which involves my rights to benefits from the First Insurer along with ensuring that my health and safety are adequately protected. In this regard, I am also ensuring that I have done all that I can do to exhaust all potential avenues to obtain records, inspect the same and determine if I need to protect myself.
5. I thank you for your responses previously via email and requested redirection to the **LAT Registrar**. While it bore some fruit per se, the delays and lack of transparency were not readily apparent. As noted in email, I obtained an alleged “print out” from the LAT on February 26, 2025, (the “**LAT ROP Print-Out**”) the of the alleged records that compiled the record of proceeding (the “ROP”) from the **ROP Temporal Period**. However, it raised more questions than answers. As such, oversight of the LAT *FIPPA* Division, bound by the requirements under *FIPPA* and its interpretative, persuasive and binding jurisprudence that specifically cites sections of *FIPPA* or otherwise, is required in any event.
6. Detachment and objectivity are required.

7. It is indisputable on the evidence that my suspicions turned to reasonable belief to reasonable grounds to believe to near certainties that this LAT had a vendetta and malice towards me. In this regard, one of my great nemeses involving my 11-year war involving my former regulatory body in the LSBC was that of the law firm of the BLG LLP. Current executive director of the Tribunals Ontario is that of Mr. Sean Weir who was the national managing partner of BLG LLP from 2001 to 2018. I reference some of my seminal decisions and you will see that BLG was not only involved in various stages therein in a role of purported independent supervising solicitor and independent adjudicator. However, I came to learn later that BLG LLP took the position that its client was listed at the LSBC and it would not even allow me to view its invoices for its work performed (by way of partner at BLG LLP (Vancouver office) in Mr. Robert Deane, KC).
8. I then learned that there was an unlawful RAM dump of my CPU (see: NOM #8 of the Applicant on "Costs"), alien to that of what was authorized by the LSBC (albeit challenged on many levels and successful on many levels and then ultimately successful by way of the LPA being repealed to the New LPA in nearly the exact form I had requested formally in the BCSC) on June 3 and/or 4, 2014, at my private, confidential and privileged law office in Vancouver, BC. I then later learned in
9. While I do not intend to impugn the character or integrity of Mr. Weir, it is not a remote potential that Mr. Weir remains in contact with many of the lawyers, paralegals and staff at BLG LLP. I do not fault him for doing so but it is important that I know of the same to further protect myself. However, I had one specific lawyer who was the 'chief risk officer' of BLG LLP at the time engage in threatening conduct towards me in July 2022. I was able to overcome the same with the benefit of the BLG LLP PIPEDA department and its esteemed privacy officers in Montreal, Quebec. I was thankful for the same. However, there was certainly some 'bad blood' created by said chief risk officer.
10. In this regard and again exclusively to assist your LAT *FIPPA* Division with its anticipated conclusion that I am correct that I am entitled to a wide and broad scope of requested records even where there may be an initial position taken by LAT or the individual who acted in the scope of his or her authorities with the LAT that the records are subject to privilege, would constitute an unreasonable invasion of privacy of their privacy and/or it would create some unreasonable safety risk to said individuals.
11. I wish to make clear herein that I can confirm like I did with CAMH and TPL that I would not and did not make any complaints to law enforcement. While many with those public bodies, without naming any names, were most astonished as to why, I had my confidential reasons for not doing so. However, the main one that was not confidential is that I do my adversarial work in the civil sense. I do not need to ever waste taxpayer dollars on criminal investigations for that type of unauthorized and fraudulent conduct. I also remain of the view that it is best to fix one's problems and to not delay any civil proceedings or potential civil proceedings with a criminal charge or otherwise.
12. I confirm the same herein albeit I doubt that any conduct would rise to that level. I raise this point in light of the aforementioned but to immediately dispel any potential that the

LAT and various individuals could or would posit that providing with the personal information records, or part of those records (subject to any lawful redactions), to myself would put their health and safety at risk (i.e. the potential of a quasi-criminal charge or criminal charge). I would say that said position would not be reasonable in any event.

13. Moreover, there is nothing about potential civil liability or requirements to comply with the law that could be seen as a ‘threat’ to the health and safety of an individual. Moreover with a reasonable or objective person test, nothing could be construed as a reasonable threat regarding the same.
14. I will be comprehensive herein out of an abundance of caution and by way of some learning experiences from my access requests and appeals (now concluded) involving CAMH (see: infra for relevant particulars herein) and The Toronto Public Library (see: infra for particulars). In relation to the beneficial learning experiences, I found some by ‘trial and error’ that by recasting or, at first instance, making an access request that was specific and particularized, with its legal bases, along with a forward-looking element allowed for a streamlined appeal and, in one instance, a nearly immediate resolution between myself and the public body. I cannot delve into the details per se of the same and I do not cite the same for the truth of their contents but the timing of delivering the same could not be more apropos.
15. I am also sending the enclosed five dollars via hand delivery or mail along with this letter as I appreciate technological errors that can occur and to ensure that I do not need to unnecessarily follow-up, whilst welcoming any follow-ups from your privacy department of the LAT via email, you will have a singular document, cross-referenced to the relevant components of the email access request, to rely upon. To the extent your division disagrees with my legal bases and the anticipated records to be received on or before 30 calendar days of receipt of this letter with the five-dollar application fee,
16. As I had noted with those public institutions and to some extent in my emails, which triggered the retention of the information in record form request or to be created depending on what is learned in your search,
17. I repeat and rely upon the relevant contents of the access request minus the need for each and every document from the record of proceeding in the LAT Proceeding as I have reviewed the printout from the **LAT Registrar** and I am aware of the majority of the documents therein but for the following:
 - a. The documents ending in file type of: “.msg”;
 - b. The denotation of the related party of “TD General Insurance Company” on April 22, 2024;
 - c. The undisclosed motion order on or around July 27, 2024; and
 - d. The undisclosed motion order on or around August 16, 2024.

18. There were a variety of documents contained therein that are unknown to me. Ergo, I am requesting those documents or records from you so I can obtain copies of the same.'
19. Moreover, the printout raises more questions than answers, and, as such, my access request of the LAT is not one and the same with the request for the ROP from the ROP Temporal Period.

VOLUME #2: INCLUSION OF DOCUMENTS

20. I shall be referring to the following documents by inclusion herein (in part or in whole) and/or by inclusion via email:
 - a. Tab #1: select pages from my index that I created;
 - b. Tab #2: select pages from the LAT Registrar Print Out;
 - c. Tab #3: CAMH images in redacted form;
 - d. Tab #4: TPL chart of unauthorized activities; and
 - e. Tab #5: Unauthorized completing of a form denoted as "TPL laptop and equipment borrowing form"; and
 - f. Tab #6: Notices of Appearance by the LAT and three insurance companies in the TDI Group on the dates therein (see: November 27, 2024, and December 3, 2024, respectively).
21. Some, if not all, of the above noted documents are already known to the LAT *FIPPA* Division.
22. I apologize in this regard for a little bit of a foggy memory as I was concussed by my accident, via e-scooter from behind, on March 5, 2025, and I am to avoid light from screens as much as possible.

VOLUME #3: My specified and particularized request for access to copies of records via email to the above noted email

23. Ergo, I am requesting the following records from the LAT/AABS division from the following period of December 24, 2023, to January 31, 2025, which I delineate into the following groups or classes of documents:

A. CLASS #1: FILE LOGS, SCREENSHOTS (INCLUDING ANY PREVIOUS VERSIONS (SEE: CLASS #3 REGARDING 'POWER OUTAGE')

- i. the file logs and screenshots from whatever "back end" of the LAT/AABS division including but not limited to:
- ii. record indicating the style of cause and when it changed (if at all);
- iii. when any insurance companies were input as the respondents into said portal or back-end;
 1. Conclusion: not a large number of records. Perhaps, a few records.

B. CLASS #2: POWER OUTAGE RECORDS

- i. the date and records when there was an apparent power outage on or around March 30, 2024, and the steps taken, inclusive of records, to recreate the file and any lost records from that period;
 - 1. Conclusion: not a large number of records. Perhaps one or two records.

C. CLASS #3: SPECIFIC DOCUMENTS FROM THE LAT REGISTRAR FEB 26 PRINT OUT

- i. specific documents from the **LAT Registrar** the records involving the following from the LAT print out from on or around February 26, 2025
- ii. the denotation of the TDGIC as a related party on April 22, 2024 (on or around);
- iii. the undisclosed motion order from July 27, 2024;
- iv. the undisclosed motion order from August 16, 2024;
- v. the document that include .msg as follows in said index.
 - 1. Conclusion: not a large number of records and must be in the possession and control of the LAT.

D. CLASS #4 – THE SHUTTLEWORTH (SEE: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII), <<https://canlii.ca/t/hsm3q>>) TYPE DOCUMENTS:

- i. records, specific to the LAT Proceeding, which are in the nature of the types of documents that were present in the Shuttleworth decision. In this regard, I reference the components of the decisions in *Shuttleworth vs. Licence Appeal Tribunal* (see: paragraph 24);
 - 1. Conclusion: not a large number of records as it is simply in relation to each decision or order, whether that four-step process was followed.

E. CLASS #5: LIST OF PROFESSIONAL ADVISERS INCLUDING LEGAL COUNSEL (IN-HOUSE I.E. LAT IN-HOUSE OR SLASTO IN-HOUSE LEGAL COUNSEL LIKE MR. BOYCE):

- i. The name of any legal counsel, inclusive of a lawyer licensee or paralegal licensee along with their legal assistants (de facto, de jure, actual or implied) (defined hereinafter as “Legal Counsel” or “Legal Counsel Team”), to the Tribunal and any decision makers in the LAT Proceeding (denoted as 23-015662/AABS) and a list (not necessarily the documents of themselves) of any and all communications between the following:
 - 1. Legal counsel and any decision maker;
 - 2. Legal counsel and the Tribunal;

3. The Tribunal and any legal counsel;
 - a. In this regard, I would be most grateful, which I believe would be helpful to both of us, in a form similar to that of an LOD or affidavit of documents in the ONSC;
 - i. Conclusion: not a large number of records and must already be in the easily accessible possession and control like those in the ROP index created by Mr. McLean. To the extent they are not, they would need to be easily cross-referenced.

f. Class #6: LAT AND TDI GROUP RECORDS INVOLVING MYSELF:

- i. Any and all communications between the LAT and the tdiadr@tdinsurance.com including Mr. Andrew Papadimitropoulos or any agents of TD by said vocational emails or personal emails where I am NOT copied from December 24, 2023, to January 31, 2025;
 1. Conclusion: not a large number of records and easily searchable.

G. CLASS #7: LAT CRO'S AND TDI GROUP:

- i. Any and all communications involving the email of josh.grant@ontario.ca and any individual associated with TD Insurance group (the "TDI Group");
 1. Conclusion: not a large number of records and easily searchable.

h. Class #8: LAT CRO and TDI Group (where I was not copied):

- i. Any and all communications between the LAT and Mr. Andrew Papadimitropoulos about or relating to myself between December 24, 2023, and January 31, 2025;
 1. Conclusion: not a large number of records (hopefully).

I. CLASS #9: LAT (MR. BOYCE AND HIS ASSISTANTS) AND TDI (MR. NIEUWLAND AND HIS ASSISTANTS INCLUDING ANY COLLEAGUES):

- i. Any communications between Mr. Boyce and Mr. Nieuwland (see: emails) between December 24, 2023, and January 31, 2025;
 1. Conclusion: unlikely to be a large number of records but certainly the LAT provided Mr. Nieuwland or for his attention a copy of an NOA for him to fill out, and sign on or around December 3, 2024;

J. CLASS #10: NOTES TO PHONE CALLS:

- i. any notes to phone calls between the LAT and any individuals of, agents to, or employees of TDI Group during the requested time period;

1. Conclusion: not a large number of records. It is unclear if staff members at the LAT other than lawyers and paralegals engage the same. The LSO does require some level of note taking for phone calls involving their licensees:

K. CLASS #11: NON-EMAIL COMMUNICATIONS VIA MOBILE, SMART PHONES OR SMART DEVICES VIA TEXT, WHATSAPP, VIBER OR ANY OTHER MESSAGING SOFTWARE:

- i. any communications, including e-communications via mobile, smart device devices, tablets et al in any other medium but for email between the LAT and TDI Group, including TD Bank (see: Mr. Papadimitropoulos new employer and address for delivery of documents on the LSO Directory);
 1. Conclusion: only the experienced employee will know whether LAT employees (and potentially consultants) have government issued mobile and smart devices. If they do, the definition of ‘control’ is the right of the public institution *TO REQUEST TO MAKE A COPY of the record*;

L. CLASS #12: MR. WEIR AND OTHERS INVOLVING MYSELF:

- i. any and all communications by or to Mr. Sean Weir or any other individual with the management of LAT with any other persons besides myself that involve me from the Requested Time Period (see: Mr. _____):
- ii. Conclusion: unlikely to be a large number of records but some including any decisions to not release records or to specifically denote certain records as sensitive and/or with differing levels of authorization to access the same;

m. Class #13: Residual

- i. Any other records not exactly specified regarding the above but in the spirit of the same that come to your attention when conducting your search and processing of the same.

VOLUME #4: The <i>Shuttleworth</i> Process (2018 and 2019 decisions)

24. I note the following from the ONSC Divisional Court in Shuttleworth at the following paragraphs:

“The Decision Review Process

[24] In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT. The stated reason was to maximize the quality of the tribunal’s decisions. The peer review process has not been adopted formally. No written policy was provided but counsel swore that, “generally, the LAT decision review process for final decisions is, and at all material times in this case was” as follows:

First, there is peer review: After drafting a decision, an adjudicator is expected to send the decision for peer review by the Duty Vice-Chair. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.

Second, there is legal review: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.

Third, there is a second peer review by the executive chair: “In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – the Legal Services Unit will send the decision to the Executive chair for her review. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review.”

Fourth, there is a review by the file’s case management officer: The case management officerⁱ acts as an intake officer and primary point of contact for the parties. This review involves examining the decision’s format, correcting grammatical and spelling errors, and ensuring that the template and parties’ names are correct. [Emphasis added.]

[25] The absence of a written policy is significant. The [ATAGAA](#) contains a very formal process to ensure the accountability of tribunal members and officers both internally and to the public. [Sections 7](#) and [8](#) of ATAGAA read as follows:

Member accountability framework

7 (1) Every adjudicative tribunal shall develop a member accountability framework.

Contents

(2) The member accountability framework must contain,

- (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
- (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
- (c) a code of conduct for the members of the tribunal; and

(d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. [2009, c. 33](#), Sched. 5, s. 7 (2).

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister.

Publication, Amendment and Review of Public Accountability Documents
Publication of public accountability documents

8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[26] No documents were provided to outline LAT's review process nor were we advised that the process had been adopted and published in accordance with the statutory process designed to protect and enhance accountability as provided by the statute.

[27] According to counsel for the LAT, ... those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. To the extent that a reviewer's comments might relate to the facts or evidence, they are simply intended to clarify the author's findings. The reviewer functions simply as an editor. Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result. In this sense, the LAT's decision review process recognizes that an adjudicator assigned to hear and determine a matter is completely independent to render whatever determination he or she sees fit. Again, the reviewer functions simply as an editor. The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it. If an adjudicator declined to participate in process, there is no means to prevent him or her from releasing the decisions without further comment or discussion.

25. As the LAT is a quasi-judicial body, its conduct must mirror that of the courts in Ontario when it comes to transparency, openness and honesty.

VOLUME #4: The Privilege List and the underlying documents: one of the presumed disputes regarding access

26. By way of courtesy, I appreciate that the LAT is likely going to contend that any document in a list of privileged documents are semi-eponymously privileged. I would disagree at first

instance for a variety of reasons. However, I need not speculate. As such, I will simply request a list of the documents as follows:

- a. Author (sender);
- b. Recipient;
- c. Date;
- d. Type of document; and
- e. Short description of document.

VOLUME #4(A): Mr. Boyce

- 27. I have reasonable grounds to believe that one of the legal counsel was that of Mr. Jesse Aaron Boyce.
- 28. For some background in this regard, Mr. Boyce, as you know, became declared counsel to the LAT in the JRPA Proceeding at a time unknown to me. However, he became known to me on or around November 27, 2024.
- 29. Mr. Nieuwland on behalf of the three insurance companies (TDHA, SNIC and TDGIC) filed an NOA on December 3, 2024.

VOLUME #4(B): Legal Bases regarding whether privilege (litigation privilege, solicitor-client or settlement privilege) exists

- 30. Trusting the LAT is well-known with the legal tests for the same, they do not bear much in the way of repeating per se but for the basic principles.
- 31. In *Goldman Sachs & Co. v. Sessions*, 2000 BCSC 67 (CanLII), <<https://canlii.ca/t/52qg>>, the BCSC stated the obvious:

[12] I cannot agree with Mr. Nathanson. The burden of establishing privilege rests on the party who asserts privilege. Communications between client and lawyer are not privileged simply on the basis of the status of the parties. Only communications made to Ms. Litt for **the purpose of seeking legal advice** or made by her to provide advice in her professional capacity as a lawyer are privileged.

- 32. It is trite that in-house counsel, whether to the LAT during the LAT Proceeding or to the LAT during the JRPA Proceeding, are tempered depending on whether an in-house lawyer was truly acting in his legal capacity or acting more in an investigative role. In my Amended JRPA Proceeding, which was preceded by the NOCQ (March 4, 2025), I have alleged therein (and will beyond) that the likes of those involved in the theft and subsequent unauthorized conduct were under a high degree of control from the LAT.

VOLUME #4(C): The exceptions to privilege

33. The exceptions to privilege are as follows:
- a. Waiver;
 - i. Implicit;
 - ii. Explicit;
 - b. Conduct;
 - c. Future crimesⁱⁱ;
 - d. Non-criminal breaches of the law; and
 - e. it is necessary to protect public safety.ⁱⁱⁱ
34. In relation to subparagraph 34(d), I note the following case at the following paragraphs: *McDermott v McDermott*, [2013 BCSC 534 \(CanLII\)](#), 46 BCLR (5th) 121 at [paras 72 to 73](#). This exception applies not just to communications that are "necessarily criminal in nature", it may also apply to communications in relation to any "unlawful conduct" that "causes injury to the legal rights of other citizens", which includes "breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty.
35. Administrative bodies have a duty of fairness to the public. This is particularly apposite when they are an extension of the MAG and/or have a memorandum with the MAG that requires it to be uphold certain duties.
36. It is trite that the conduct of the LAT, perhaps at the misguidance of one of the TDIG insurance companies through the likes of Mr. Papadimitropoulos, Mr. Karat and/or Mr. Nieuwland et al, caused it to be askew from the outset.
37. However, the documents in the index, created by myself after receipt of the February 26, 2025, print out, demonstrate a pattern of breaching its duty of good faith to me along with various statutes including section 20 of the SPPA and section 10 of the LATA.
38. In the same style of cause as the above but in the year of 1999, the BCSC addressed the exceptions to solicitor-client privilege in the civil context:

[20] The defendants' burden is described in *Pax Management Ltd. v. C.I.B.C.* (1987), [1987 CanLII 153 \(BC CA\)](#), 14 B.C.L.R. (2d) 257 (C.A.) at pp. 265-66, where Wallace J.A., speaking for the Court, adopted the reasoning of Viscount Finlay in *O'Rourke v. Darbishire*, *supra*, at p. 604, that there must be more than a mere allegation — there must be "something to give colour to the charge", that is, "some prima facie evidence that it has some foundation in fact." He identified the proper approach in this passage:

I have concluded that the plaintiffs have specifically pleaded fraudulent misrepresentation and that the surrounding circumstances, as revealed by the affidavits filed in support of the application, satisfy me that the claim is honestly advanced and has sufficient credence to justify exercising the Court's discretion to disallow the privilege so that all relevant material is before the Court when resolving this very serious allegation.

[21] Accordingly, it is not necessary for the court to weigh conflicting evidence and to make findings of fact on an application such as this. Rather, the court must examine the applicant's case in the light shed by all of the evidence and the surrounding circumstances to determine if it "gives colour to the charge."

[22] Before it can be determined whether the defendants have given colour to the charge here, it is necessary to consider the submission made by Mr. Nathanson, for the plaintiffs, that the defendants have not pled a cause of action for abuse of process in their counterclaim.

39. The BCSC went further at paragraph 30 to explain what is meant by colour to the charge:

[30] The showing of colour to the charge is not sufficient, in itself, to justify setting aside the privilege, however. If that threshold is crossed, the Court must then inspect the communications in camera to determine the legitimacy of the claim of privilege: *Middelkamp v. Fraser Valley Real Estate Board*, [1992 CanLII 2241 \(BC CA\)](#), [1993] 1 W.W.R. 436 (B.C.C.A.) at para. 6.

[31] There will, therefore, be an order that the plaintiffs produce the documents described in the notice of motion to the court for inspection.

[32] This conclusion does not engage the risks that concerned Goff J. that the whole basis of privilege will be endangered and that persons will be prevented from seeking legitimate legal advice: *Crescent Farms*, *supra*, at p. 565. That concern is met by the requirement that the privilege will apply unless the recipient of the professional legal communication obtained it for a wrongful purpose: see *R. v. Campbell*, *supra*, at paras. 58-59, and by the requirement that the communication be inspected by the chambers judge before production will be ordered."

40. If the position of the LAT Privacy Division is that those requested records must be reviewed by the OIPC in camera, then kindly advise as soon as you know of the same.
41. As noted, I will provide the further documents via email due to their size including those already known to the LAT and those not known to the LAT.

42. I have already provided affidavits in the JRPA Proceeding regarding the same. I may have an additional affidavit to you for these purposes herein or specified herein. The honesty of my claims therein and future claims are indisputable. Whether I am correct or not is a matter of access to the Requested Personal Information Records.
43. Moreover, in light of the wildly undisciplined and unauthorized conduct by the likes of an agent of the LAT, at least at various times, in forging my signature, engaging in fraudulent misrepresentation et al, without any disavowing of the same by the LAT through Mr. Boyce, public safety remains at risk.
44. While TD Insurance Group appears to have dismissed Mr. Papadimitropoulos, his email remains active @tdinsurance.com as does his new email of @td.com. Therefore, it appears some steps have been taken by TD Insurance but it is certainly not enough. The LAT as part of or a division of MAG cannot sit idle. It needs to be fully transparent in all respects even to confirm if documents or records have been deleted or destroyed.

VOLUME #5: Legal Bases: <i>FIPPA</i>

VOLUME #5(A): Settled Legal Principles from the authorities

45. I commence with the obvious and that is the definition and interpretation of personal information.
46. The general legal principles are:
 - a. **Procedure:** access applicants (“**Access Applicants**”) versus complainants against **Public Body** (“**Public Body Complainants**”): **Access Applicants** make requests pursuant to a right of general records or personal information records, and then review requests or appeals (depending on provincial nomenclature) under *FIPPA* leading to potential inquiries (not investigations) and/or orders under relevant statutory sections;
 - b. The **COMMISSIONER** has the additional powers to “reviews” or “appeal” under *FIPPA* ensure *FIPPA Purposes* are guaranteed achieved by making orders described under various sections;
 - c. **Public Body Complainants** make complaints which lead to investigations and the **COMMISSIONER** may make orders under relevant statutory sections
 - d. **Access to Information Rights – Purpose – *Facilitate Democracy*:** the overarching purpose of access to information rights (“Information Rights”) is to *facilitate democracy* by ensuring that citizens have *the information* required to participate meaningfully in the democratic process;
 - e. **Privacy Rights – Purpose:** privacy rights are designed to protect the privacy of individuals with respect to **Personal Information** held by government institutions

and to provide individuals with a right of access to that information; (d): **Privacy Act (federal and provincial): quasi-constitutional^{iv}**;

- f. (e): **Exceptions from an individual applicant's access rights – interpreted narrowly**: In *Lavigne v. Canada (Office of the COMMISSIONER of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted *narrowly*, with any doubt resolved in favour of preserving the right;
 - g. (f): **Burden of proof**: the burden of persuasion on the person *asserting the exception* (at paras. 30-31). (*Lavigne*); (g): **Privacy Rights only compromised when there is a compelling state interest for doing so**: in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a **fundamental value^v** in modern democracies and is enshrined in ss. 7 and 8 of the *Charter*; and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66, 71);
 - h. (i) **Competing values**: the operation of *FIPPA* to balance the competing values of privacy and access is a matter which the **COMMISSIONER** is tasked with overseeing;
 - i. (j) **“Compliance” and “duty”**: these are not permissive or directive but rather mandatory word choices by the Legislature that require a public body or public institution to comply with the same. It cannot choose when it wishes to comply with its legal duties or not;
 - j. (l) **Discretionary exceptions - even if access is technically protected under a limited exception – public interest is paramount**;
 - k. (m) In Order 02-38^{vi}, at para. 149, I affirmed once again that the head of a **Public Body** *should* always consider the public interest in disclosure of information that is *technically protected* from disclosure and cited some of the relevant factors in considering the public interest in disclosure.
 - l. **COMMISSIONER**, as an independent officer of the legislature, has a variety of means at his or her disposal.
 - m. **Even where orders not made**: findings still have “teeth” and must be complied with.
47. The OPCC, FCC and FCA has interpreted personal information to be the following at this endnote.^{vii}
48. Records are defined as the following:

“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; (“document”)

49. Subsection (b) in the definition of “record” is similar to a provision under BC *FIPPA* which requires the public body to create a record and even create applications to make the same where such records are not immediately accessible.
50. Being forced to learn *FIPPA* and *MFIPPA* as a result of the October 25 CAMI Theft and the unauthorized TPL conduct from October 28, 2024, to present has provided a silver lining or benefit on an individual and collective level. It allowed me, being used to the BC *FIPPA*, to provide my positions in advance and on a preemptive basis which I and the public bodies so involved found helpful and truncated the time regarding the same.
51. My briefing of *FIPPA* was and is as follows.
52. The *Freedom of Information and Protection of Privacy Act* (R.S.O. 1990, CHAPTER F.31) aims to balance the public's right to access information held by institutions with the need to protect individual privacy. It establishes a framework for accessing records under the control of institutions, ensuring that information is available to the public while limiting exemptions to specific and necessary cases. The Act also mandates independent review of government disclosure decisions to maintain transparency and accountability (section 1).
53. The Act applies to various institutions, including ministries, hospitals, and educational institutions, and outlines the roles and responsibilities of the Information and Privacy Commissioner. The Commissioner is tasked with overseeing compliance, handling appeals, and ensuring that institutions adhere to the Act's provisions regarding the collection, use, and disclosure of personal information (sections 2, 4, and 5).
54. The legislation details procedures for requesting access to records, including timelines for responses and conditions under which access may be denied. It also specifies exemptions for certain types of records, such as those related to law enforcement, solicitor-client privilege, and Cabinet deliberations. Additionally, the Act provides guidelines for the protection of personal information, including its collection, retention, and disposal (sections 10, 12, 19, and 40).
55. The Act includes provisions for appeals and reviews, allowing individuals to challenge decisions made by institutions regarding access to information. It also outlines the powers of the Commissioner to conduct inquiries and issue orders to ensure compliance. The legislation is designed to promote transparency, accountability, and the protection of personal privacy within Ontario's public sector (sections 50, 52, and 54).
56. The Act was last amended in 2024 and is consolidated from January 29, 2025, to the e-Laws currency date.

Outline of the seminal legislative sections to this January 2025 Access Request

Purposes (section 1)

- 57. Establishes the Act's objectives to provide public access to information and protect individual privacy regarding personal information held by institutions.
- 58. The Legislature's stated purpose is supplemented, bolstered and solidified by the common law principles found by the ONCA and SCC.
- 59. The obvious potential dispute will be what records are privileged, including the type of privilege, and whether there are any exemptions to the claim of privilege. However, the names of the lawyers, paralegals and/or staff are not privileged in of themselves.

Limited Application Re Assembly (section 1.1)

- 60. Specifies the Act's limited application to the Assembly, focusing on reviewable expenses and personal information of Opposition leaders and their staff.
- 61. This subsection is inapplicable to my January 2025 Access Request.

Definitions (section 2)

- 62. Provides definitions for key terms used throughout the Act, such as "institution," "personal information," and "record." Those are noted and defined above.

Part I — Administration (sections 3–9)

- 63. Outlines the roles of the responsible minister and the Information and Privacy Commissioner, including appointment, powers, duties, and office administration.

Part II — Freedom of Information (sections 10–36.1)

- 64. Details the right of access to records, exemptions, access procedures, and information to be published or made available by institutions.
- 65. As I am only seeking personal information of myself and personal health information (where applicable), the presumption is that I am entitled to said personal information.
- 66. The burden is on the LAT to prove why a narrow exemption would apply to any of the classes of documents or documents within those classes. The burden is a heavy one and not easily displaced.

67. Of course, solicitor-client privilege has been somewhat constitutionalized. However, where the communications are not for the purposes of the client seeking advice from in-house tribunal counsel, then such privilege does not exist.
68. Whether the dominant purpose of the communication was the contemplation or the actuality of litigation will have to be inspected by reference to a list in this regard. There is no dispute that Mr. Boyce and Mr. Nieuwland or a proxy or agent (de facto, de jure or purported one) have communicated without my involvement.
69. Section 10 of *FIPPA* is worth repeating herein:
- 10** (1) Subject to subsections (1.1) and 69 (2), 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,
- (a) the record or the part of the record falls within one of the exemptions under [sections 12 to 22](#); or
 - (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. 1996, c. 1, Sched. K, s. 1; [2010, c. 25, s. 24 \(6\)](#); [2019, c. 7, Sched. 31, s. 1 \(1](#)
70. There is nothing frivolous about this request or in any way vexatious as has been self-evident from the royal runaround that has occurred with the LAT registrar and it apparently sincere apologies. Unfortunately with the trust broken and my life, health, liberty and security being affected by the conduct of certain individuals in the TDI Group (now some at TD Bank Group by what appears to have been a dismissal of some individuals like Mr. Papadimitropoulos), the exceptions are not available to the LAT but for potentially bona fide and lawful solicitor-client communications. As I cannot prove or disprove (i.e. not prove a negative), I will need to inspect the list of documents and he inputs therein under the above noted categories to determine if I need to continue with my initial assertion that no privilege would attach to any of the listed but not disclosed as it relates to the contents of those listed documents therein (if that is the case).
71. If certain parts of documents are determined by lawful discretion to be subject to an exception (lawful) but the other part of the document does not, kindly disclose the same and the reasons for why part of said document may have been served (see: section 10(2) of *FIPPA*).
72. I note the general requirement of preservation by the Legislature (see: 10.1 of *FIPPA*).
73. I note that section 13 of *FIPPA* may be relied upon the LAT with respect to potential advice provided by an in-house counsel or retained consultant by LAT. It is naturally permissive so balancing would be required therein.
74. I note the exceptions under section 13(2) which will apply to all factual material and anything in relation to reasons for decision or orders including the Undisclosed Motion

Orders or any other undisclosed motion orders or reasons for decision which are not encapsulated by the LAT Registrar Print Out (February 26,2025).

75. Sections 14 to 16 of *FIPPA* are irrelevant so I need not address them.
76. In relation to section 17 of *FIPPA*, I am not seeking, when referencing the class of documents that relates to logs or back-end of the electronic database of the LAT in relation to the LAT Proceeding, any trade secrets or confidential information. As provided by the LAT Registrar with respect to the "Print Out", there is even disclosure therein of the alleged URL that was utilized to access the same. I am, of course, solely concerned in the authenticity of the back end of the portal for the LAT for access by case managers and point-in-time references, supported by authentic documents,
77. Section 18 of *FIPPA* cannot have any relevance as there is nothing that could be injurious to the Government of Ontario by said disclosure.
78. Section 18.1 of *FIPPA* would not apply to the LAT as it is not an educational institution, hospital or governing body (i.e. the LSO, the College of Physicians and Surgeons or the College of Chartered Accountants).
79. In relation to where some but not all of the Requested Personal Information Records may be subject to withholding or non-disclosure of some or all of the same, it is section 19(a) of *FIPPA* that would be at issue. I note when referencing some, it would not be a large amount per se due to the classes of documents that are some 13 headings and sub-headings.
80. Of course, where the Tribunal is not the client per se but communications in the form of records or records to be made involve the Tribunal and other persons not namely a legal advisor (in-house or consultant) (i.e. a communication between Mr. Boyce and Mr. Nieuwland or Mr. Boyce and Mr. Papadimitropoulos).
81. On first blush, it would appear that the only time that section 21 of *FIPPA* could be at issue is when the client, as privilege is the right of the client, objects to the same involving lawful and permissible communications between a solicitor and a client and a client seeking advice from its solicitor(s). However, the word "individual" is used and not that of a "person" so it is not applicable.
82. In citing the above about the current causes of action against the LAT and relief sought against it in the JRPA Proceeding and potentially by extension in other future claims or offshoots of the same, I am also relying upon the exception to the exception where there is the potential but I say not possible at first instance unjustified invasion of another individuals' privacy. This exception to the exception or factor where a section 21(1) issues arise is denoted as:

22(2)(d): the personal information is relevant to a fair determination of rights affecting the person who made the request

83. There is an unfortunate history of the Tribunal not complying with its statutory duties at first instance like section 20 of the SPPA and section 10 of the LATA, and then at the JRPA Proceeding under section 10 of the JRPA. Insult to injury has occurred with the delinquent, unprofessional and unreliable communications from the LAT after the redirection by Ms. Jennifer of the LAT *FIPPA* Division.
84. In relation to the other factors under section 21(2) of *FIPPA*, I have copied and pasted the same:
- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
 - (b) access to the personal information may promote public health and safety;
 - (c) access to the personal information will promote informed choice in the purchase of goods and services;
 - (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
 - (f) the personal information is highly sensitive;
 - (g) the personal information is unlikely to be accurate or reliable;
 - (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
 - (i) the disclosure may unfairly damage the reputation of any person referred to in the record. R.S.O. 1990, c. F.31, s. 21 (2).
85. Again, only when there will be an unjustified invasion of another individual's privacy will the LAT be REQUIRED to not disclose some of the Requested Personal Information Records to me. Ergo, where there is discretion, then such discretion must be exercised lawfully and in accordance with the presumption that I am entitled to access to my personal information.
86. All of the factors above are in my favour and resoundingly so.

Part III — Protection of Individual Privacy (sections 37–49)

87. Covers the collection, retention, use, and disclosure of personal information, including personal information banks and rights of access and correction.
88. It is trite that the LAT is not a bank but it is within the MAG but not technically the MAG. In this regard, I refer to the memorandum between LAT and the AGO.

Part III.1 — Data Integration (sections 49.1–49.15)

89. Addresses data integration units, the collection and use of personal information, and the role of the Commissioner in reviewing practices.

Part IV — Appeal (sections 50–56)

90. Provides the right to appeal decisions regarding access to records, outlines the appeal process, and details the Commissioner's powers during inquiries.
91. As noted, I have exercised appellate rights previously by submitting and paying the appeal fee to the OIPC BC.

Part V — General (sections 57–70)

92. Includes provisions on fees, whistleblowing, the Commissioner's annual report, powers and duties, and regulations, as well as the Act's application and exceptions.

VOLUME #8: Legal Bases: open court principle and the importance of the record of proceeding in relation to judicial review

93. As all privacy and access statutes, whether provincial or federal, are quasi-constitutional statutes, and I as noted *supra*, filed and served a notice of constitutional question on March 4, 2025, and an amended JRPA Application on March 5, 2025, the below law is most relevant, at least, for context purposes in your search, processing and disclosure to me of the Requested Personal Information Records.
94. The relief sought therein was exclusively against or in relation to the LAT.
95. The legal bases regarding the same are as follows.
1. Content of the record: The content of the record for an application for judicial review is defined by the Judicial Review Procedure Act, R.S.O. 1990, c. J-1, *SPPA*, and by the Rules of Civil Procedure.
 2. Process to trigger Tribunal's obligations: The process begins with the notice of application: r. 68.01(1). Upon being served with the notice of application for judicial review, the decision-maker is required by s. 10 of the Judicial Review Procedure Act, to forthwith file with the Divisional Court "the record of the proceedings in which the decision was made". The "record" is not defined by the Act: *Payne*, at paragraph 160 (see: paragraph 34);
 3. Full and accurate record: An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court: *Payne* at paragraph 161 (see: paragraph 35);

4. Court is entitled to the **Record Of Proceeding** pursuant to statute (see: section 10 of the *JRPA*);
5. An applicant is entitled to the **Record Of Proceeding** pursuant to inherent jurisdiction: The reason for the Applicant being entitled to the same is not grounded in the statutory sections but the ONSC Divisional Court's inherent jurisdiction: *Payne* at [paragraph 161](#) (sentence 2
6. As early as 1952, Lord Denning in *R. v. Medical Appeal Tribunal ex p. Gilmore*, [1957] 1 Q.B. 574 at 583 (C.A.) found the following as a basis the common law and/or equitable powers of the English courts upon which our common law and courts of equity are founded "The court has always had power to order an inferior tribunal to complete the record ... [A] tribunal could defeat a writ of certiorari unless the courts could order them to complete or correct an imperfect record. So the courts have the power to give such an order
7. The ONCA adopted the same in 2000 in its decision in *Payne* at paragraph 161 where it also cited other jurisprudence.
8. A statutory body subject to judicial review cannot immunize itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court." (see: (see: paragraph 161 of *Payne* (ONCA)).
9. The erudite justices in *Rol-Land Farms Limited* for the Divisional Court in 2008 reaffirmed the legal precedent that the temporal period for which documents, evidence, and decisions must be included in the forthwith filing by an administrative decision maker with the ONSC Div. Ct. at paragraphs 37 and 38: As indicated in an oral ruling during the hearing, volume 3 of the **Record Of Proceedings** is not admissible. [Section 10](#) of the *JRPA* requires a tribunal to file its **Record Of Proceedings** when served with an application for judicial review of a decision. It is the **Record Of Proceedings** relating to the particular decision that is to be filed, as is clear from the words of s. 10; and thus, the content of volume 3 is not properly part of the record required to be filed pursuant to s. 10 of the *JRPA*, as it post-dates the decisions under review."
10. While entitled – the dangers of not bringing a motion: Ergo, pursuant to [s. 10](#) of the *Judicial Review Procedure Act*, it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example *K.D. v. Peel Children's Aid Society*, [2017 ONSC 7392](#) (Div. Ct.) at paras. [16-17](#)). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review: *Reflection Productions v. Ontario Media Dev. Corp.*, 2022 ONSC 64, the ONSC Div. Ct (as per MORAWETZ C.J., VARPIO, KRISTJANSON JJ.

96. openness to the public is the "authentic hallmark of judicial as distinct from administrative procedure". (see: paragraph 40 of *Toronto Star*). The LAT is a public institution, albeit funded by the insurance industry, that is conducting adjudicative matters.
97. Just as justice delayed can be justice denied, so reportage delayed can be reportage denied (see: paragraph 67 of *Toronto Star*).
98. The leading case regarding the "open court principle" and "adjudicative records" is that of the ONSC in *Toronto Star v. AG Ontario*, 2018 ONSC 2586. In that case, the *Toronto Star* was entitled to "Adjudicative Records" as a member of the media or journalism sector.
99. Ms. Jennifer was correct to note that I was entitled to the requested adjudicative records from the LAT Registrar but it took longer than 30 days to even provide the simulacrum of records that it did. As such, my confidence and trust are completely eradicated on a permanent level. I frankly do not trust whatever it provides me as being full, accurate and complete. While I do and did appreciate the reference and redirection, the LAT, by way of its staff in non-FIPPA capacities cannot be trusted to the degree that I need for that to have been an alternative route. In light of the distrust that it created by its waffling timelines by reference to the LAT Registrar which was consistent with the misconduct of Mr. Boyce on its behalf in the JRPA Proceeding, I, at the very least, need some levels of checks and balances or a frame of reference regarding the same.
100. The open court principle is one of the hallmarks of a democratic society . . . [and] is inextricably tied to the rights guaranteed by s. 2(b) of the Charter (see: paragraph 54 of *Toronto Star*).
101. This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions . . . [to] act consistently with the Charter and its values". This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of Charter guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it". (see: paragraph 55 of *Toronto Star*).
102. It is important to keep in mind that freedom of expression "protects listeners as well as speakers" (see: paragraph 56 of *Toronto Star*).
103. Naturally, my standing and privacy rights are much wider because I am only seeking records that relate to or about myself and that relate to or about (however tangentially to the LAT Proceeding.
104. As such, I am on stronger footing than the *Toronto Star* in *Toronto Star*.
105. Statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice": *Southam Inc v Canada (Minister of Employment and Immigration)*, [1987] FCJ no 658 (QL). The legitimacy of such tribunals' authority requires

that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public: *Germain v Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106.

106. Tribunals like the LAT conduct administrative hearings governed by the *Statutory Powers Procedure Act* ("SPPA") are required to be open to the public. In principle, therefore, it is uncontroversial that "[t]he 'open court' principle" -- at least in some version -- "is a cornerstone of accountability for decision-making tribunals and courts" (see: paragraph 6 of *Toronto Star*).
107. The Supreme Court of Canada has stated that "[a]ll law and law-makers that touch the people must conform to [the Charter]. Tribunals and commissions charged with deciding legal issues are no exception." (see: *Toronto Star*, paragraph 14).
108. The open court principle, which is inextricably tied to the rights guaranteed by s. 2(b) of the Charter, applies to administrative tribunals as well as to courts

VOLUME #7: Conclusion

109. Kindly respond via email henceforth.
110. As noted under section 23 of *FIPPA*, none of any of the potential exemptions could have any merit because of the following:

23 An exemption from disclosure of a record under [sections 13, 15, 15.1, 17, 18, 20, 21](#) and [21.1](#) does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. R.S.O. 1990, c. F.31, s. 23; 1997, c. 41, s. 118 (2); [2017, c. 8](#), Sched. 13, s. 3.
111. The facts and evidence, which I have sworn, are unprecedented and the public safety issue and public interest issues in the disclosure of the record to myself clearly outweigh the purpose of any of the potential exemptions (if applicable).
112. What I found in my recent appeals with the OIPC was that by having such a document provided at first instance, it allowed for the OIPC to review the nature of my appeal in expedient fashion while causing the other public body(ies) to consent to a settlement (confidential of course). In this manner, I was most pleased as I was able to inform the OIPC immediately that we did not require its resources.
113. Ironically, the positions of one of the public body's immediately changed once it knew that I had filed and paid for an OIPC appeal through the portal. Perhaps, said public institution was relying on the being "overly cautious" aspects and did not think I would appeal. As this matter is even more urgent than my other access requests, I can confirm as a courtesy that if there is not full, transparent, accurate and complete disclosure of the Requested

Personal Information Records (see: *supra*), albeit not many per se overall, then I will appeal immediately. I will even appeal if there is an attempt to seek an extension of time.

114. I shall presume that you do not have any need for clarification of the nature of the requests made and they are sufficiently particularized herein and previously where applicable.
115. I appreciate your time is valuable and finite so I will await unless I hear from you otherwise to hear from you on or before the expiry of the 30 calendar days.
116. As I consider this as an extremely serious matter involving my safety and public safety and it remains most concerning that the LAT has somehow teamed up with the likes of an insurance company at least at the JRPA Proceeding level, I would be most grateful if this access request was prioritized.
117. I intend to keep the truth of the contents of this communications and any receipt of such communications, subject to the permissibility of utilizing records for lawful purposes, as confidential. If you feel otherwise, kindly advise.
118. As a parting note, I wish to emphasize that Mr. Papadimitropoulos is the ex-husband of my former spouse Ms. Nicole Artopoulos and he is highly dangerous, volatile, unhinged and clearly out of control. His conduct in impersonating me with my identification that was stolen on October 25, 2024, and forging my signature albeit with the initials of “A”, “N” and “P” demonstrates his recklessness. I still stay that the LAT had a high degree of control or authority, at least by instructions, over him. In that regard, I say he is easily influenced, malleable and insecure such that he would engage in this conduct albeit under unlawful instructions and authorization from the likes of an in-house counsel of LAT.
119. The concerns about Mr. Boyce are plenty considering he removed his physical address and employer after I raised a conflict-of-interest issue involving himself and the insurance companies in the JRPA Application (i.e. when he was a vice chair or adjudicator, he decided in favour of those insurance companies at a clip of 14-0-1). Moreover, Mr. Boyce has engaged in misleading myself and others regarding the record of proceeding and when the Tribunal would produce the same. No such statutory option was open to the Tribunal (see: section 10 of the JPRA). I have sworn that he has not denied any of my beliefs, allegations and impugment of him with respect to conduct that demonstrates conduct contrary to the common law, statutes and regulations.
120. By way of courtesy notice, when I know I am right at law, I persist until the end while exhausting all avenues. I made the most unlikely candidate to take on the LSBC’s unconstitutional statutory and regulatory regime but I could not sit idle when it engaged in what I thought was only forensic copying of my hard drive in June 2014 but later discovered to be the most egregious breach of a professional’s privacy rights along with his clients by usage of a tool in DumpIt that does not copy the “RAM”, which cannot be copied. How I was successful to the extent I was without that seminal piece of information, undisclosed in fraudulent fashion by the LSBC and its purportedly esteemed counsel (now

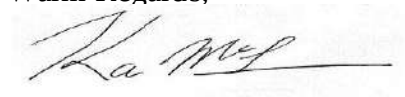
one of which is a judge of the BCSC) but I owed it to other lawyers (past, present and future) to challenge the same.

121. I yet again became the most unlikely candidate to challenge the LAT's conduct herein but in the oddest of ways, I was the perfect candidate to be rear-ended at high velocity. It is now known to me that elements of the car accident were planned and deliberate.
122. There are some serious issues with certain employees of the LAT including but not limited to former employees like Ms. Therese Reilly and current employees like that of Mr. Boyce, Ms. Lake and Ms. Morrisette. Vice Chair Morrisette's history of criminal and unlawful conduct (albeit not charged by the RCMP when she intentionally and repeatedly breached The Lobbyist Act (Canada) when she was an employee of the Canadian Red Cross after being an employee of the Ministry of Health (federal)) is most concerning to me and should be to the public.
123. I solely advanced my rights and she clearly issued decisions or orders without providing me with copies of the same. I look forward to receiving copies of not only those Undisclosed Motion Orders.
124. I can see why Mr. Boyce did not want to put the ROP from the ROP Temporal Period to me but that makes it intentional misconduct on his behalf and binding the LAT.
125. You, of course, at liberty to review my NOCQ and Amended JRPA Proceeding from the likes of Mr. Boyce as the Tribunal was served with those documents on March 4 and 5, 2025 respectively.
126. If we end up in the appeal process, I will ask for an expedited hearing of the issues (not known now) due to the public interest issues at play and my health and safety remaining at risk. While this must be an access partnership, if we have to engage in an adversarial process such as that (if it is such), then it will be because a lack of compliance by the LAT.
127. I always like to leave the door open for resolutions between myself and others. As such, should the likes of Mr. Weir or an assigned counsel by him for the Tribunal in this regard and globally wish to resolve the issues identified herein and any potential issues so arising, including that which is pleaded (and before the ONSC Divisional Court), you have my email. If you wish to have a sit-down in person, kindly name the time and place. In the spirit of full disclosure, many say that I am quite self-assured and confident in my ability to "win" in litigation. I do not see it that way. Rather, I see it as life has treated me too well and I got way more than I deserve in life. I owe it to every marginalized, disadvantaged, struggling injured person that has been before the LAT and may have been subject to similar type conduct that I endured to advance all matters to conclusion or by way of settlement.
128. With respect to any resolution or settlement of these issues, there will need to confirmation to me, albeit confidentially, in a binding proposed document that the LAT has addressed these issues of breaches of privacy and/or breaches of the above noted principles. The mere

shock of myself when I went through that “print out” from the LAT Registrar on February 26, 2024, remains palpable. Honestly, “orders” that are not disclosed and then being lied by the LAT. If I am the only individual who has experienced the same, then I will chalk it up as being “public enemy number one” of the lawyers in BC and here. Again, I was the victim of the worst privacy breach in Canadian history involving a professional and a regulatory body but I appreciate that the likes of the lawyers that were involved in the same at the time of the RAM Dump and thereafter believe that I somehow caused damage to their reputation and firm names by advancing PIPEDA requests inclusive of Mr. Weir’s former firm where he reached the obscenely high level of managing partner. They would be wrong or playing the “victim”. It was me, as a single individual, had to make some 250 plus privacy requests of various organizations implicated by a record I received from LSBC counsel in October 2021 which was anything but only the records and information from a RAM Dump.

129. By direct reference and communications with the other two public bodies involving some of the events herein, not by active involvement, find me to be quite reasonable on all fronts. I believe you will feel the same if we have candid and confidential discussion. My goal is not to embarrass or put the LAT under some high degree of embarrassment but the more time that passes, it simply means that I will have to prepare to advance the same. As I am at about 40 percent of where I used to be, it requires much planning in advance. Kindly note the same in the event you know (as I do not know have the custody and control of records at issue) a way to resolve the same without wasting resources of the LAT Privacy Division and potentially the OIPC (ON) and others.
130. Of course, if I receive an affidavit, sworn under the penalty of perjury by a knowledgeable representative of LAT that it has searched for the above records and all of the conduct engaged in by the likes of agents of TD Insurance Group (various insurance companies therein) were solely at their own direction or direction of insurance companies without any knowledge of the LAT, then you will have my immediate written apology for such belief and allegations and withdrawal of various aspects of this access request. However, I do not hear from you in a reasonable time, I will have to presume that I am correct in substance
131. I thank you for efforts and discharging the duties of the division in accordance with the rule of law. I thank you in advance for your anticipated compliance with *FIPPA* and other laws and the common law which remain binding upon it.
132. Yours truly

Warm Regards,



Mr. Kevin A. McLean (B.A., J.D., CIM)^{viii}

Requestor

Enclosures by hard copy

1. Five dollars for the five-dollar application fee

Further enclosures by email: referenced above

ⁱErgo, the requests of the LAT involving the CRO's at various times. As there was an issue involving the correct respondent party at various times, the initial input into the LAT database is most germane and required to be produced.

ⁱⁱIf that arises in your search, I await the results of the same. I, of course, am only seeking personal information so such future crimes would have to continue to relate to me. I still do not have access or control of my property stolen on October 25, 2024, and any relief from the unauthorized conduct thereafter, including the return of the property utilized thereafter including the return of proprietary items like my passport, TPL library card, credit cards, banking cards, health card et al. I have alleged and continue to allege that the LAT, through the likes of one Mr. Boyce and others at the LAT or SLASTO, instructed, unauthorized approved or acquiesced to the unlawful conduct at various times.

ⁱⁱⁱ*Smith v Jones*, 1999 CanLII 674 (SCC), [1999] 1 SCR 455, per Cory J, at para 26 and later ("...society recognizes that the safety of the public is of such importance that in appropriate circumstances it will warrant setting aside solicitor-client privilege.")

^{iv}Justice Tysoe in 1998 referenced the decision of *Dyment* in *Mazhero*. "The protection section 8 provides for privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. As such, section 8 protects a sphere of *individual autonomy* within which people have the right "to be let alone" and on which the state cannot *intrude* without permission^{iv} (*R. v. Ahmad*, [2020 SCC 11] at paragraph 38). "Section 8 protects people, not places, against unjustified intrusions on their privacy interests (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 159; *R. v. Gomboc*, [2010] 3 S.C.R. 211 at paragraphs 17, 75). "The values underlying the privacy interest protected by section 8 are dignity, integrity and autonomy (*R. v. Plant*, [1993] 3 S.C.R. 281 at page 292. "The courts have defined "search" for section 8 purposes as any state activity that *interferes* with a reasonable expectation of privacy. This can include looking for things that are tangible or intangible, such as **spoken words**^{iv} and **electronic data** (*R. v. Morelli*, [2010] 1 S.C.R. 253), or scents (*Evans* at paragraphs 12-21; *R. v. Kokesch*, [1990] 3 S.C.R. 3). A "seizure" for section 8 purposes is the "taking of a thing from a person by a public authority without that person's consent" (*R. v. Dyment*, [1988] 2 S.C.R. 417 at 431; *R. v. Colarusso*, [1994] 1 S.C.R. 20 at 58; *R. v. Law*, [2002] 1 S.C.R. 227 at paragraph 15). This includes situations in which a person is required to produce a thing (including information) pursuant to a state compulsion (*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at 642; *Mills* (1999) at paragraph 77; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at page 34; see also *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425). The power to **make copies** of documents is analogous to a requirement for production of documents and constitutes a seizure within section 8 (*Comité paritaire* at page 439). In order to constitute a "seizure", a "taking" by the state *need not* be directly from the person whose rights are affected. For example, where a medical professional obtains a bodily sample for medical purposes, disclosure of the sample to police will amount to a "seizure" (*Dyment*; *R. v. Dersch*, [1993] 3 S.C.R. 768; *Colarusso* at page 56). This is so whether the sample is provided pursuant to a police demand, request, or whether it is provided voluntarily. The fact that a person who has acquired lawful *possession* of information for their **own purposes** voluntarily discloses **THE INFORMATION** to the state does not vest in the state a delegated or derivative power to appropriate that information for the purposes of a criminal investigation (*R. v. Cole*, [2012] 3 S.C.R. 34 at paragraph 67). "The section 8 protection against seizure does not apply to government

action merely because those actions interfere with *property* rights. Rather, “there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation” (*Quebec (Attorney General) v. Larocche*, [2002] 3 S.C.R. 708 at paragraph 53). “Where the state has seized records, the Supreme Court has indicated that **disclosure** of those records to individuals outside of those to whom, or for purposes other than for which, they were *originally divulged* may interfere with a reasonable expectation of privacy (*Mills* (1999) at paragraph 108; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390 at paragraphs 28-30, 39-43; see also *Wakeling* at paragraphs 91-96 *per* McLachlin C.J. and paragraphs 122-125 *per* Karakatsanis J., dissenting; but see *Wakeling* at paragraphs 32-40 where Moldaver J. appears to endorse a plain meaning interpretation of s. 8 that would not generally capture the disclosure of information by the state).”

“In fostering the underlying values of dignity, integrity and autonomy, it is fitting that section 8 of the *Charter* should seek to protect a biographical core of **Personal Information** which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual (*Plant* at 293). Informational privacy has been defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling* at paragraph 23; see also *Patrick, Gomboc, Cole, A.M.*) Informational privacy includes at least *three* conceptually distinct, though overlapping, understandings of what privacy is: privacy as secrecy; privacy as control and privacy as anonymity. Privacy as secrecy encompasses the expectation that information disclosed in confidence will be held *in trust* and confidence by those to whom it is disclosed. Privacy also encompasses a wider notion of control over, access to, and use of information. This aspect of privacy “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit” (*Spencer* at paragraph 40). Privacy as anonymity permits individuals to act in public places but to preserve freedom from identification and surveillance. This conception of privacy is particularly important in the context of Internet usage (*Spencer* at paragraphs 41-43). Because the Internet has exponentially increased both the quality and quantity of information that is stored about Internet users, and because users cannot fully control or even be fully aware of who may observe a pattern of online activity, it is by remaining anonymous that the user can in large measure be assured that the activity remains private (*Spencer* at paragraph 46). Privacy concerns in relation to information are at their strongest where aspects of an **individual’s identity are at stake**, such as in the context of information “about one’s lifestyle, intimate relations or political or religious opinions” (*Mills* (1999) at paragraph 81; *Thomson Newspapers* at 517; *Branch* at paragraph 62).” Privacy is a normative rather than descriptive standard (*Tessling*, paragraph 42; *R. v. Jarvis*, 2019 SCC 10 at paragraph 68).” “Privacy as secrecy encompasses the expectation that information disclosed in confidence will be held *in trust* and confidence by those to whom it is disclosed”. Privacy is not an all or nothing right. It encompasses the reasonable expectation that private information will remain **Confidential** to the persons to whom and restricted to the purposes for which it was divulged (*Mills* (1999) at paragraph 108; *Dyment* at page 429; *Colarusso* at page 71). Accordingly, a person may have a *residual* and continuing privacy interest protecting against the subsequent use or disclosure — and potentially retention — of information that has been divulged for a specific or limited purpose (*Law* at paragraph 23; *Dyment* at pages 432-435; *Mills* (1999) at paragraph 94; *R. v. Dore* (2002), 166 C.C.C. (3d) 225 (Ont. C.A.); *Wakeling* at paragraph 39). A person normally does not retain a reasonable expectation of privacy with respect to *property* or things, including informational content that have been voluntarily abandoned. The determination of whether a thing has been abandoned — *i.e.*, whether a person has relinquished a privacy interest in it — will have to be determined on the particular facts of the case.

^vProtection of privacy is a fundamental value

^{vi}See: Office of the Premier and Executive Council Operations and Ministry of Skills Development and Labour, Re, 2002 CanLII 42472 (BC IPC):

^{vii}https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_02/

^{viii}I trust this Honourable Divisional Court that I am not your “average” lay litigant and I am the same Kevin McLean who challenged and sued the LSBC and some LSBC defendants in 2014 and has undergone a ten-year saga. While I will not comment on that which is confidential or without prejudice, this Divisional Court will inevitably see in the “record of proceeding” a reference to some unfortunate and unlawful conduct (defined as “Concealed RAM Dump”) and I included the same as “things are not always what they seem” from the outside and Mr. Nieuwland albeit on behalf of TDGIC put my character at issue.

Exhibit “B”

Appeal under FIPPA or MFIPPA



noreply@ontario.ca

Wed, Apr
23, 4:38 PM

to me

Hello,

This email confirms that we have received your appeal. Thank you for your submission.

Kindly note the following details of your appeal:

Reference Number: 20250423163714995

Payment Confirmation Number: 32534289

Payment Amount: \$10.00

Date Submitted: April 23, 2025 at 04:37 PM

Appeal under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*.

Please note that it may take up to two business days before your appeal form undergoes an initial review.

****Note: This is an automatically generated email, please do not reply****

Exhibit “C”



Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

NOTICE OF APPEAL – EXPEDITED PROCESS

Our Appeal Number:	PA25-00294
Appellant's Name:	Kevin McLean
Name of Institution:	Tribunals Ontario

DATE: April 29, 2025

TO: Kevin McLean
775 King Street West
Unit 410
Toronto, ON M5V 2K3

VIA EMAIL to mrkevinalexandermcleanbajdcim@gmail.com



Tribunal Services Department
2 Bloor Street East
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Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
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Canada M4W 1A8

Tel/Tél : (416) 326-3333
1 (800) 387-0073
TTY/ATS : (416) 325-7539
Web : www.ipc.on.ca

NOTICE OF APPEAL – EXPEDITED PROCESS

This is to confirm that, pursuant to section 50 of the *Freedom of Information and Protection of Privacy Act*, an appeal from a decision made by the Tribunals Ontario was filed by Kevin McLean. This file has been opened as the following type: **Deemed Refusal**. Given the nature of this appeal, the IPC has decided to move this appeal through an expedited process, in accordance with [*Practice Direction 13: Expedited Processes*](#). This appeal is being assigned to the Expedited Team, where a Case Lead will contact the parties shortly.

The IPC is committed to working with parties to reach a mutually agreeable resolution of the issues raised in an appeal through an informal dispute resolution process conducted by the Case Lead. If a mutually agreeable resolution is not possible, or the Case Lead determines that such a resolution is unlikely, the Case Lead may dismiss the appeal or conduct an inquiry and issue an order dealing with the issues raised in the appeal.

Before deciding whether to dismiss an appeal without conducting an inquiry, the Case Lead may invite submissions from the parties. If an appeal is dismissed without conducting an inquiry, the Case Lead will give the parties written notice with reasons.

If an inquiry is commenced, the parties are sent a Notice of Expedited Inquiry, in a manner deemed appropriate by the Case Lead.

Please acknowledge receipt of all correspondence received from the IPC. The expedited processes will use shortened timelines and strict adherence to deadlines.

All communications, including those forming part of any attempt to informally resolve the appeal, may be relied upon by the Case Lead in deciding the appeal. If the Case Lead determines that this appeal is no longer suitable for being expedited, it may be re-assigned to another department at the IPC and the parties will be notified of their new contact.

To avoid delay, it is essential that you provide us with your current contact information. When contacting our office, please refer to **Appeal PA25-00294**.

If you have not already done so, please forward the following to the IPC upon receipt of this notice:

- The respondent's file number (if not listed above);
- The request and the respondent's decision letter; and
- Any correspondence relating to the request or to the respondent's decision-making process.

DO NOT SEND RECORDS BY EMAIL. Copies of access requests, decisions and other correspondence can be sent by email.

You might be contacted by our office, as part of our efforts to evaluate the services we provide to the public.



Kevin McLean <mrkevinaalexandermcleanbajdcim@gmail.com>

Notice of Appeal - IPC File # PA25-00294

5 messages

Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Tue, Apr 29, 2025 at 4:28 PM

To: "mrkevinaalexandermcleanbajdcim@gmail.com" <mrkevinaalexandermcleanbajdcim@gmail.com>

Good afternoon Kevin,

Enclosed is a Notice of Appeal regarding the above file number.

This appeal is being assigned to the Expedited Team, where once assigned, the Case Lead will contact both parties to discuss the appeal.

Sincerely,



Sheila Ahmadi

Program Assistant / chargé de programme

Intake Department / Service de traitement des demandes

Information and Privacy Commissioner of Ontario

Commissaire à l'information et à la protection de la vie privée de l'[Ontario](#)

[2 Bloor Street East](#) / 2 rue Bloor Est

Suite 1400

Toronto, Ontario M4W 1A8

Toronto area / région de Toronto: 416-326-3333

Toll free / sans frais: 1-800-387-0073

TTY: 416-325-7539

sheila.ahmadi@ipc.on.ca

www.ipc.on.ca



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For more information, please contact us during our hours of operations from 9:00 am – 5:00 pm, Monday to Friday, by emailing info@ipc.on.ca or calling 1-800-387-0073.

You can also visit our website and file your appeal online at www.ipc.on.ca.

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Pour plus d'informations, veuillez nous contacter pendant nos heures d'ouverture de

9 h à 17 h, du lundi au vendredi, en envoyant un courriel à info@ipc.on.ca ou en composant le 1-800-387-0073.

Vous pouvez également consulter notre site Web et déposer votre appel en ligne à l'adresse www.cipvp.ca.

AVIS DE CONFIDENTIALITÉ : Le présent courriel et ses pièces jointes sont destinés à la personne ou à l'institution à laquelle ils sont adressés, et il est interdit de les distribuer, de les copier ou de les divulguer à des personnes non autorisées. Ils peuvent contenir des renseignements confidentiels ou personnels assujettis aux lois applicables de l'Ontario. Si vous avez reçu le présent courriel par erreur, veuillez m'en informer immédiatement au numéro de téléphone susmentionné et ne pas l'imprimer, le copier, le distribuer, ni le divulguer. Merci de votre collaboration.



2025.04.29 - Notice of Appeal to Appellant - Expedited - PA25-00294.pdf
159K

Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>
To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Thu, May 1, 2025 at 4:10 PM

Thank you Ms. Ahmadi. I apologize for the delay in my response as I was undergoing some medical examinations and treatments arising out of an accident recently but I have received clearance through MRIs and doctors that I can return to this type of activity. I greatly appreciate the reference to the expedited request regarding the same. Wishing you well in the interim.

[Quoted text hidden]

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

DISCLAIMER

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>
To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Tue, May 6, 2025 at 1:47 PM

Dear LAT FIPPA Division and Mr. Weir:

Apologies as I hit send too quickly but the authorities are attached herein for your ease of reference and convenience.

[Quoted text hidden]

3 attachments



CAMH_UNREDACTED PHOTOS_MAY_4_2025 DATED_FROM OCTOBER_25_2024.pdf
728K



GMAIL--1.PDF
121K



Email#2 for OIPC.pdf
296K

Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>
To: Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>

Fri, May 9, 2025 at 10:46 AM

Hello Kevin,

Thank you for the information, I will add those to your file.

Once a Case Lead is assigned to your file, they will contact you for more information.

Kind Regards,

[Quoted text hidden]

From: Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>

Sent: May 6, 2025 1:47 PM

To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Subject: Re: Notice of Appeal - IPC File # PA25-00294

You don't often get email from mrkevinalexandermcleanbajdcim@gmail.com. [Learn why this is important](#)

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

DISCLAIMER

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>
To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Fri, May 9, 2025 at 2:52 PM

Thank you so much Ms. Ahmadi. You have been wonderful. I did correspond with the LAT and Mr. Weir to see if there was any movement and noted the recent decision of *Derenzis et al v. His Majesty the King et al*, 2025 ONSC 2761 which cited one of the decisions of your esteemed OIPC. I have not read that decision yet but I informed the LAT that I would read that decision as well but at the very least it provides a starting ground for some recent case law involving similar type issues. I will continue to apprise myself with the rules of procedure particularly the hyperlinked expedited you sent so I am well prepared. Thanks and have a great weekend!

[Quoted text hidden]



Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>

PA25-00294: Initial Submissions of the Appellant under an Expedited Appeal Process

Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>

To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>

Cc: Info IPC <info@ipc.on.ca>, Valerie.silva@ipc.on.ca, "Access.TO-TDO (MAG)" <Access.TO-TDO@ontario.ca>, sean.weir@ontario.ca

September 3, 2025

VIA ELECTRONIC MAIL

PRIVATE AND CONFIDENTIAL

EXCLUSIVELY FOR PURPOSES HEREIN

TO:

The Office of the Information and Privacy Commissioner of Ontario (the "OIPC")
2 Bloor Street East, Suite 1400
Toronto, ON M4W 1A8

ATTENTION:

OIPC Registrar and Case Lead for this Appeal including Manager of the Expedited Appeals Team

Via email: info@ipc.on.caVia email: sheila.Ahmadi@ipc.on.caVia email: Valerie.silva@ipc.on.ca

COPIES TO:

Licence Appeal Tribunal (LAT)

Institution number in the General Regulation: LAT is institution #68

Apparent Privacy Division email for the LAT: Access.TO-TDO@ontario.ca

AND TO:

Mr. Sean Weir, sean.weir@ontario.caRE: File No. PA25-00294 - Licence Appeal Tribunal, Appeal Under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

Introduction

The present communication is intended to serve as formal confirmation of the receipt of the automated reply from Ms. Ahmadi, which has been appended hereto, a professional redirection necessitated by her absence.

This correspondence is tendered on grounds of lawful authority, and all prior communications pertaining to the material facts and legal principles are hereby reiterated and through subsequent communications, whether internal or external. All definitions articulated in preceding correspondence are adopted herein where applicable. Strict and *Privacy Act* ("FIPPA"), its attendant regulations, the OIPC's *Code of Procedure*, and the relevant OIPC practice directions is presumed.

The Compulsory Nature of Discretionary Powers

The OIPC, which is respectfully and duly obligated to hear and decide the relief being sought in the instant matter, is confronted with a circumstance wherein the expedite in fact, mandated. By way of a pertinent example, the precedent established in *Julius v. Oxford (Bishop Of)*, as articulated by Lord Cairns, has been axiomatically embraced one century. The jurisprudential principle derived therefrom serves to delineate the circumstances under which a discretionary "may" is to be construed as a compulsory whenever the object of the power is to effectuate a legal right." This principle is particularly germane to circumstances in which an official is granted application or motion. It is demonstrable from the extant record of proceeding that a motion for relief was propounded through, *inter alia*, the two sets of submissions. Alt caution was exercised. Given that health and security remain demonstrably imperiled, a fact supported by compelling evidence, the orders sought must be granted in a protracted delays which have been at issue.

Systemic Problems and the Derenzis Precedent (more forceful herein)

A systemic issue is likewise present at the nexus of the present appeal. For purposes of ease of reference and convenience, a pertinent excerpt has been reproduced from wherein the Honourable Justice Mundane addresses a motion under *Rule 30.10* of the *Rules of Civil Procedure*, as initiated by the plaintiffs and moving parties in the Supreme Court of Ontario.

The Plaintiff, Lucia Derenzis, brings a motion pursuant to *Rule 30.10* of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for production of records held by the Licence Appeal Tribunal and draft decisions (the "notes and drafts"), and more than 400 emails between adjudicators, counsel and staff (the "emails"). The LAT created the records during its administration of the Gore Mutual Insurance Company ("the Insurer").

Because the records contain her personal information, Derenzis first requested them from the LAT directly. The LAT refused to provide them, asserting deliberative secrecy to the Information and Privacy Commissioner for Ontario ("IPCO"). The LAT would not disclose the records to the IPCO for their review. While the IPCO refused to order evidence" to determine whether the emails were also subject to deliberative secrecy. The IPCO ordered the LAT "to issue an access decision" with respect to the emails. In Derenzis. The IPCO's decision is now under review by the Divisional Court.

The use of the present tense of the verb "to contain" by Justice Mandhane is considered particularly noteworthy.

Privilege and the Undisclosed Records

An assertion of solicitor-client privilege and deliberative secrecy may be endeavored by the LAT in relation to its communications with the persons designated within each have been sought. However, as has been documented in the aforementioned *Derenzis* decision, the LAT did refuse to disclose the records to the OIPC for its review. The regulations, inclusive of *TARA*, did not mandate the release of "notes and drafts" pursuant to *section 65 (3.1) of FIPPA*, which stipulates that:

“This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person wh

As both the OIPC and the LAT possess cognizance of the relevant dates pertaining to draft decisions and draft orders, which are demonstrably irrelevant to the present “I decisions and orders that were present in a quasi-compiled, yet deficient, register of proceedings which have neither been observed nor provided (nota bene: beyond the the LAT has possession of the same which it did not in February 2025). Reference and definition of “Two Undisclosed Motion Orders” (or “Two Undisclosed Motion Dec

Furthermore, the scope of the present Appeal is not restricted to electronic mail transmissions, but encompasses all records exchanged between adjudicators (e.g., Ms (notably Ms. Lee, who supplanted the former case manager, Mr. Josh Grant, under circumstances that require scrutiny). The records also include exchanges with non-L/ Street, Toronto, but external to that specific office.

Expedited Resolution and the Delays

With the utmost deference, it is a fundamental jurisprudential principle that a denial of justice is constituted by an undue delay, particularly when such a delay pertains justice is not to be perceived as a mere gratuity. While strategic maneuvering involving “drag, stall, and delay” and “playing for time” may be considered effective litig issue transpired during a period in which it was mandated to function as an independent adjudicative quasi-judicial tribunal. While this status affords the inapplicability decision, those records which are undisclosed yet referenced in an index are not afforded a similar exclusion from the purview of *FIPPA*. Furthermore, the records perta sequencing of events is, in a manner of speaking, irrefutably self-evident, thus indicating the suspicious nature of the timeline.

Although Ms. Derenzis has challenged the independence of the LAT, a position that aligns with the perception that such independence is nonexistent due to systemic issue Mutual Insurance Company was substituted unilaterally by the LAT for a different insurance company like that which occurred with me (see: initial unilateral and unlaw his own misrepresentations and those propagated by an individual who has misappropriated property, namely, Mr. David Karat, a known adjuster and alternative disput insurance company (as defined as “First Insurer” under *Reg 283*).

Conclusion

In a manner analogous to any claim of solicitor-client privilege, it is incumbent upon the party asserting the privilege to facilitate an assessment of its validity by providin the LAT may presumably adopt a stance consistent with its position in *Derenzis v. Gore Mutual et al*, a final access decision is urgently required in the instant matter. submitted to the LAT and the statutory and prescribed fee was remitted.

It has been 139 days since I remitted payment to the OIPC.

It was promptly and correctly determined to be an expedited appeal. If this new practice direction #13 is to have any “teeth”, then the orders sought must be granted withou

It is trusted that the OIPC will proceed in a manner that is in full compliance with *FIPPA*, its attendant regulations, and its practice direction #13. Particular emphasis : process that comports with the rules of natural justice and administrative fairness. The receipt of an issued order that is substantively consistent with the draft order providi

If I can be of further assistance, please let me know at your earliest convenience. I will otherwise presume that the provided data above and attachment is sufficiently and c

Yours truly,

/Mr. Kevin A. McLean (BA, JD, CIM)

Mr. Kevin A. McLean (BA, JD, CIM)

Appendix

Thank you for your email. Please note that I am out of office September 3-4, 2025 and will return on Friday September 5, 2025. For urgent matters, please contact Norma

Footnote 1:

article by the law firm of “Homes Stewart Von Antal LLP” in Vancouver, BC titled “Logical Consequences – when “must” means “may and “may” means must” citing t (H.L.) per Lord Carrins;

On Tue, Sep 2, 2025 at 10:26 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

Subject: SUBMISSION OF DRAFT ORDER FOR CONSIDERATION - APPEAL NO. PA25-00294 - McLean v. LAT (Expedited Appeal)

VIA EMAIL

TO: The Office of the Information and Privacy Commissioner of Ontario (the “OIPC”) 2 Bloor Street East, Suite 1400 Toronto, ON M4W 1A8 Via email: info@ipc.on.ca Via email: sheila.Ahm and Case Lead for this Appeal including Manager of the Expedited Appeals Team

COPIES TO: Licence Appeal Tribunal (LAT)

Privacy Division email :Access.TO-TDO (MAG)" <Access.TO-TDO@ontario.ca

Mr. Sean Weir,

sean.weir@ontario.ca

OIPC Tribunal file no: PA25-00294

Institution number in the General Regulation: LAT is institution #68 Type of document: email

Short title of proceeding: McLean v. LAT Sender: Mr. Kevin A. McLean (B.A., J.D., CIM) Re: Submission of a Draft Order for the OIPC's Consideration and Issuance in the contex

Date: September 2, 2025

This communication, inclusive of the appended draft Order, is hereby tendered as a definitive submission for the immediate and deliberate consideration of this Office. The matter, identified designated for an expedited resolution process pursuant to the procedural mandates established within the OIPC's Code of Procedure and its attendant Practice Direction #13. The present 20, 2025, to the Licence Appeal Tribunal (LAT), an institution designated under Section 1 of Regulation 460 of the Act. This request, which was for records containing the Appellant's person beyond the statutory thirty-day period for an institutional reply. This protracted silence, a manifest failure to adhere to the Act's requirements, constitutes a legal fiction recognized as a “deer adjudicate the ensuing appeal.

It is posited that the Licence Appeal Tribunal (LAT) has failed in its statutory obligation to issue a final written access decision concerning an access request dated March 20, 2025, a derelic legislative framework and a fundamental non-compliance with the provisions of FIPPA. The complete absence of any representation from the head of the LAT, either in a compliant manner vexatious nature of the request, inexorably leads to the conclusion that the Appellant's application for information is to be considered a serious and meritorious one. The burden of proof to c institution, a burden which has not been discharged in the present matter, thereby reinforcing the imperative for an expeditious resolution.

The attached draft Order, the contents of which are a direct reflection of the submitted record and the Appellant's contentions—none of which have been challenged by the LAT—seeks a cc compel the LAT to adhere to its legal obligations in a prompt and expeditious manner, consistent with the foundational principles of the Act. The procedural posture of this appeal, characteri for a prolonged inquiry into the substantive merits of any exemptions and renders the matter eminently suitable for resolution through an expedited inquiry, in concordance with Practice Dire

The requested directives within the draft Order include:

1. The issuance of a final, written access decision from the LAT within a period of seven (7) days.
2. The concurrent provision of all non-exempt records, or portions thereof, containing personal information. The disclosure of such records is predicated upon the principle that a persor principle which is of particular relevance in this matter.
3. The production of a comprehensive Index of Records, as mandated by the Code of Procedure. This Index shall meticulously delineate each record and, for any records or portions w under FIPPA, in order to afford the Appellant and this Office a transparent basis for any refusal.
4. The submission of the final decision and the aforementioned index to the OIPC Expedited Appeals Team within seven (7) days for the purpose of compliance verification, a measure
5. The Appellant's retention of the right to submit additional commentary upon receipt and review of the LAT's final access decision and the corresponding Index of Records, thereby pre
6. The Appellant's liberty to seek the enforcement of this order by any lawful means should the LAT fail to comply with the same.

In consideration of the nature of the appeal and the protracted non-compliance by the LAT, it is respectfully submitted that the issuance of an Order is both warranted and necessary to ensu

Thank you in advance and I hope all had an enjoyable and safe recent long weekend.

Respectfully submitted,

Kevin A. McLean Appellant File No. PA25-00294

On Thu, Aug 21, 2025 at 4:05 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

August 21, 2025

VIA EMAIL

TO:

The Office of the Information and
Privacy Commissioner of Ontario (the "OIPC")
2 Bloor Street East,
Suite 1400
Toronto, ON
M4W 1A8
Via email: info@ipc.on.ca
Via email: sheila.Ahmadi@ipc.on.ca
Via email: Valerie.silva@ipc.on.ca
Attention: OIPC Registrar and Case Lead for this Appeal including Manager of the Expedited Appeals Team

Tribunal file no: PA25-00294
Institution number in the General Regulation: LAT is institution #68
Type of document: email
Short title of proceeding: McLean v. LAT
Sender: Mr. McLean (B.A., J.D., CIM)

Re: SECONDARY SUBMISSIONS IN LIGHT OF THE LACK OF AN EXPEDITED PROCEEDING TO DATE AND NON-COMPLIANCE BY THE LAT

Dear OIPC (copied to the LAT privacy email (at least the only one known) and Mr. Weir, head of the LAT by prescribed General regulation pursuant to *FIPPA*):

This correspondence serves to formally transmit the Appellant's Supplementary and Current Submissions/Representations, which are herewith enclosed for your diligenc tendered in light of the protracted, conspicuous, and profoundly unsettling non-compliance by the Licence Appeal Tribunal (the "LAT"), a public institution that l statutory obligations under the *Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31* ("*FIPPA*"). The exigency of this matter is not merely a j uphold the foundational tenets of democratic governance and institutional probity. This submission was meticulously crafted to articulate the ineluctable conclusion also the sole remaining recourse to preserve the integrity of the information access regime and to restore public confidence in an institution entrusted with qu characterized by a complete lack of engagement or communication, constitutes a systemic failure that threatens to subvert the very purposes for which the Act wa demands a swift and unequivocal response from this esteemed Office. This failure to act is not merely a procedural misstep, but a substantive denial of a statutory righ transparency and accountability.

As detailed with exacting precision in the enclosed document, the gravity of the LAT's protracted silence cannot be overstated, for it strikes at the very heart of the l posits, *justitia dilata est justitia negata*—a principle that is more than a mere truism; it is a profound articulation of a procedural and substantive reality that is partic ostensible *causa proxima*, effectively abrogates the right of access and transmutes the independent review of government information into a merely academic exercise can be perpetually deferred by an institution's inaction. This deliberate or negligent administrative inertia functions as a *de facto* denial, rendering the statutory framew commitment to transparency and accountability. The foundational purposes of *FIPPA*, as elucidated on **Page 3, Paragraph 6**, are rendered entirely nugatory by the ir The LAT's inaction, now extending well beyond the statutory deadline, constitutes an unequivocal "deemed refusal," a doctrine with a robust and consistently applie **Paragraph 5**. This manifest and unmitigated non-compliance, which is far more egregious than circumstances found in any of the cited precedents, provides irrefut *Procedure*. The operational necessity to "expedite" this process, a loanword from the Latin *expedire* meaning "to make ready or to dispatch," signifies the im interminably protracted. The LAT's conduct presents a patent and indisputable case of "deemed refusal" pursuant to the unambiguous command of section 29(4) of the shall be deemed to have given notice of refusal.

The Appellant's request, as comprehensively outlined in **Page 5, Paragraph 8**, is both diverse in its nature and scrupulously precise in its scope, falling entirely within complete failure to produce a single record, or even an index of responsive records, is not merely a breach of statutory duty but also serves as a tacit admission that a ' performed. A reasonable search is a fundamental component of the institutional duty to assist a requester, and the complete non-response in this case is a clear indic easily retrievable records, such as those related to file logs, power outages, and specific communications, renders any claim of undue burden or difficulty patently evidence of a systemic failure of information management that must be addressed with decisive action. The request for records, meticulously subdivided into distinct engage all the more inexplicable. For instance, the request for a limited number of electronic logs (Class #1) or a singular report on a power outage (Class #2) shou

documents constitutes a fundamental failure of information management and a flagrant disregard for the principles of transparency. It is, therefore, incumbent upon inherent and codified authority to restore the sanctity of the Act and to compel the LAT to discharge its fundamental obligations.

For the aforementioned reasons, and as a direct corollary of the LAT's profound, persistent, and systematic failure, the Appellant respectfully and emphatically seeks and complete absence of a response from the institution renders any further deliberation superfluous and would serve only to perpetuate an unjustifiable delay, thereby undermining the public's confidence in the administrative justice system. The facts, as presented, are self-evident and demand a swift and definitive resolution. It would be to engage in a ritualistic adherence to form over substance, a course of action that would be contrary to the principles of administrative efficiency and the Appellant's position that the issuance of an order in the spirit of existing jurisprudence, but with the necessary modifications to address the singular facts of this Appeal only logical and proportionate response. The requested relief, serving as the ineluctable conclusion to the LAT's pervasive and inexcusable inaction, is a matter of access to information. LAT's conduct presents a blatant and unacceptable disregard for the foundational principles of transparency and accountability that underpin the Act, and it is therefore the integrity of this process. The requested peremptory order is the precise outcome *quod erat demonstrandum*.

My best to all,

/Mr. Kevin A. McLean (BA, JD, CIM)

Mr. Kevin A. McLean (B.A., J.D., CIM)

On Mon, May 26, 2025 at 4:00 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

Thanks so much Ms. Ahmadi. I wanted to make sure that I was doing all I could do to help my cause and demonstrate my attention to detail and the continued urgency.

(PS. I extended my apologies to the BC Privacy Commissioner's office due to that "brain fog" error. Apologies to your office as well.)

On Mon, May 26, 2025 at 9:54 AM Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca> wrote:

Hello Kevin,

The documents you provided were added to your file.

Once a case lead is assigned to your file, we will contact you to discuss the appeal.

Kind Regards,



Sheila Ahmadi

Program Assistant / chargé de programme

Intake Department / Service de traitement des demandes

Information and Privacy Commissioner of Ontario

Commissaire à l'information et à la protection de la vie privée de l'Ontario

2 Bloor Street East / 2 rue Bloor Est

Suite 1400

Toronto, Ontario M4W 1A8

Toronto area / région de Toronto: 416-326-3333

Toll free / sans frais: 1-800-387-0073

TTY: 416-325-7539

sheila.ahmadi@ipc.on.ca

www.ipc.on.ca



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For more information, please contact us during our hours of operations from 9:00 am – 5:00 pm, Monday to Friday, by emailing info@ipc.on.ca or calling 1-800-387-0073.

You can also visit our website and file your appeal online at www.ipc.on.ca.

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Pour plus d'informations, veuillez nous contacter pendant nos heures d'ouverture de

9 h à 17 h, du lundi au vendredi, en envoyant un courriel à info@ipc.on.ca ou en composant le 1-800-387-0073.

Vous pouvez également consulter notre site Web et déposer votre appel en ligne à l'adresse www.cipvp.ca.

AVIS DE CONFIDENTIALITÉ : Le présent courriel et ses pièces jointes sont destinés à la personne ou à l'institution à laquelle ils sont adressés, et il est interdit de les divulguer. Ils peuvent contenir des renseignements confidentiels ou personnels assujettis aux lois applicables de l'Ontario. Si vous avez reçu le présent courriel par erreur, veuillez ne pas l'imprimer, le copier, le distribuer, ni le divulguer. Merci de votre collaboration.

From: Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com>
Sent: May 23, 2025 6:46 PM
To: Sheila Ahmadi <Sheila.Ahmadi@ipc.on.ca>; Info IPC <info@ipc.on.ca>
Cc: Access.TO-TDO (MAG) <Access.TO-TDO@ontario.ca>; sean.weir@ontario.ca
Subject: Re: PA25-00294: Initial Submissions of the Appellant under an Expedited Appeal Process

Dear All: I apologize as I had the incorrect email for the OIPC (ON) and incorrectly put the email for the OIPC (BC). It has since been removed. Apologies to all for the same. I have now included the correct email. I will await to hear from the OIPC (ON) and Ms. Ahmadi. Thank you.

On Fri, May 23, 2025 at 6:33 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

Dear OIPC Ontario and Ms. Ahmadi (copied to the LAT and its Head):

1. I received the email below and did not read until now (i.e. I missed it while I was filing the above and contemporaneously serving the LAT and its Head).
2. Thank you for the email but the file number is that of the OIPC (Ontario) so it is correctly directed – to the extent that I can understand it as it vacillates between the OIPC (Ontario) and the OIPC (BC).
3. I will await to hear from the OIPC (Ontario) (Ms. Ahmadi is the current contact) at its earliest convenience.

Appendix

Info-OIPC

to me

[]

Good afternoon, Kevin,

Thank you for your email.

It appears you are trying to reach the Office of the Information and Privacy Commissioner of Ontario.

We note this is not the correct email to reach this public body.

No further action will be taken by the Office of Information and Privacy Commissioner of BC at this time.

Best regards,

Intake Team

On Fri, May 23, 2025 at 5:04 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

May 23, 2025

VIA EMAIL

-

TO:

The Office of the Information and Privacy Commissioner of Ontario (the "OIPC")

2 Bloor Street East,
Suite 1400
Toronto, ON
M4W 1A8

Via email: info@ipc.on.ca

Via email: sheila.Ahmadi@ipc.on.ca

Attention: OIPC Registrar and Case Lead for this Appeal

Tribunal file no: PA25-00294

Institution number in the General Regulation: LAT is institution #68

Type of document: email

Short title of proceeding: *McLean v. LAT*

Sender: Mr. McLean (B.A., J.D., CIM)

Re: Affidavits in support of initial submissions to the oipc

-

Re: Affidavits of myself in the jtpa proceeding enumerated as #24, #25, and #26

Dear Sirs/Mesdames/Other Gender Neutral Pronouns:

1. I am writing regarding the above.
2. With that segue, I enclose the final affidavits relied upon the Initial Submissions denoted above with self-explanatory file titles therein.
3. Thank you kindly for your attention to the same. Have a great weekend to all. I trust this was of assistance in moving this expedited appeal forward and for whomever the Ca preservation directions can be issued as I am deeply concerned that documents may have been deleted with chance for recovery or will be deleted. I await the OIPC's stance on this issue

(Copied to: the LAT email for access request and Mr. Weir (Executive Chair of the LAT))

On Fri, May 23, 2025 at 4:55 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

May 23, 2025

VIA EMAIL

-

TO:

The Office of the Information and Privacy Commissioner of Ontario (the "OIPC")

2 Bloor Street East,
Suite 1400
Toronto, ON
M4W 1A8

Via email: info@ipc.on.ca

Via email: sheila.Ahmadi@ipc.on.ca

Attention: OIPC Registrar and Case Lead for this Appeal

Tribunal file no: PA25-00294

Institution number in the General Regulation: LAT is institution #68

Type of document: email

Short title of proceeding: *McLean v. LAT*

Sender: Mr. McLean (B.A., J.D., CIM)

Re: Affidavits in support of initial submissions to the oipc

-

Re: Affidavits of myself #16 and #18 from the JRPA Proceeding

Dear Sirs/Mesdames/Other Gender Neutral Pronouns:

1. I am writing regarding the above.
2. With that segue, I enclose the following affidavits with a brief description in each of their file titles:
 - a. Affidavit #16 of myself in the JRPA Proceeding (February 14, 2025): which involved the LAT Registrar admitting it was still determining how best to compile the records.
 - b. Affidavit #18 of myself (March 3, 2025): this included what the LAT Registrar produced to me which I described as the "LAT ROP Print Out" (not an index) which I provided.
3. As affidavit #18 is large in size, I will provide the other affidavits in a subsequent email thread.
4. It is within affidavit #18 for the OIPC decision maker that he or she will see my reference to the Undisclosed Motion Orders (Final) in Summer of 2024. The reference on A documents" but apparently those form part of the 'adjudicative records' according to the LAT. There are documents missing from the same.
5. As noted below in the Appendix, the URL is that of SLASTO but these recent decisions from Derenzis indicate that Tribunals Ontario (not SLASTO or the LAT) are the 'record and why the LAT struggles to such a degree with its record management.
6. Thank you kindly for your attention to the same.

(Copied to: the LAT email for access request and Mr. Weir (Executive Chair of the LAT))

Appendix: the apparent URL that the LAT Registrar was utilizing to print out the documents from the ROP

[https://intra.caseload.aabs.slasto.gov.on.ca/mycaseload/PrintHandler.aspx?d=lvDocumentForCase&xface_lang=A&user_id=200486&case_id=202677&l=View Case \(23-015662/AABS\)](https://intra.caseload.aabs.slasto.gov.on.ca/mycaseload/PrintHandler.aspx?d=lvDocumentForCase&xface_lang=A&user_id=200486&case_id=202677&l=View Case (23-015662/AABS))

On Fri, May 23, 2025 at 4:42 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

May 23, 2025

VIA EMAIL

-

TO:

The Office of the Information and Privacy Commissioner of Ontario (the "OIPC")

2 Bloor Street East,
Suite 1400
Toronto, ON
M4W 1A8

Via email: info@ipc.on.ca

Via email: sheila.Ahmadi@ipc.on.ca

Attention: OIPC Registrar and Case Lead for this Appeal

Tribunal file no: PA25-00294

Institution number in the General Regulation: LAT is institution #68

Type of document: email

Short title of proceeding: *McLean v. LAT*

Sender: Mr. McLean (B.A., J.D., CIM)

Re: Affidavits in support of initial submissions to the oipc

-

Re: Affidavits #2, #4, #7 and #8 from the JRPA Proceeding in Support of the Initial Submissions

Dear Sirs/Mesdames/Other Gender Neutral Pronouns:

1. I am writing regarding the above.
2. As promised, I will be including a variety of already filed and served affidavits in the JRPA Proceeding that are cross-referenced in my initial submissions attached above.
3. To assist the case lead with the issues and the OIPC ensuring that the sought records are preserved along with ensuring that the importance of the LAT forthwith attending aspects of each affidavit. Certainly, not all aspects of each affidavit are relevant but they provide crucial and determinative evidence, with time stamps, as to various events at v: property. When I considered what it truly was, it was a step, with notice to the LAT and TDI Group (the three Respondent Insurance Companies), in anticipation of litigation t objective in many aspects. I presume that the relating and surrounding records had their dominant purpose of a step in preparation of potential litigation as per my notice to the LA
4. Quite obviously, the OIPC's decision in *Derenzis* has some parallels to this one but for the more egregious acts of the LAT in its denoting of TDGIC as a related party on A 'msg documents" that remain unproduced and undisclosed.
5. While obvious as well, never in the history of any tribunal (at least by my research) has a tribunal bent over backwards for unlawful conduct of a party, the presumed sophist of Mr. Papadimitropoulos and then his later dismissal from TDI, albeit suspiciously timed (see: end of January 2025 or early February 2025), continued without upholding the rule
6. As such, some of the principles of law in *Derenzis* are applicable and some of the finding therein as well but for the exclusion of 'draft decisions and notes' of adjudicat adjudicators and vice chairs at the LAT. I take dead aim in the civil and regulatory sense of the word that he was an advisor to some of the adjudicators and vice chairs. At the ve

am aware of the decision of Goodis involving this OIPC, the OIPC is on a different footing and status to that of the LAT. The latter is a quasi-judicial tribunal whereas the OIP policy bent. The distinctions have legal differences that preclude the likes of a Mr. Boyce for the LAT engaging in defending the merits of decisions.

7. I welcome the LAT proving me wrong in relation to my evidence with belief but it will be required to do that which it has not done and that is swear evidence under oath.
8. In the spirit of the continued urgency while remaining measured, I will be relying on the principles of *McInerney v. Macdonald* (1992 (SCC)).
9. With that segue, I enclose the following affidavits with a brief description in each of their file titles:
 - a. Affidavit #2 of myself (December 30, 2024): which involved Mr. Boyce of the LAT being put on notice of potential conflict issues, the cases of Goodis, Ontario En et al;
 - b. Affidavit #4 of myself in the JRPA Proceeding (January 18, 2025): demonstrating that Mr. Boyce removed his address from the LSO directory after I put him on noti
 - c. Affidavit #7 of myself in the JRPA Proceeding (January 27, 2025): evidence that Mr. Papadimitropoulos (Mr. Karat's supervisor and mentor) was engaged in the compared to other pictorial evidence independently obtained;
 - d. Affidavit #8 of myself in the JRPA Proceeding (January 27, 2025): the CAMH redacted images and the TPL Unauthorized Chart.
10. As you will see from the initial submissions, upon provision of the same, Mr. Papadimitropoulos was shortly thereafter relieved of his duties at TDI and the AGO withdrew. 1 Chart.
11. I will caution the LAT before it represents to myself and the OIPC that certain documents do not exist, I am in the process of obtaining more from other sources.
12. Thank you kindly for your attention to the same.

(Copied to: the LAT email for access request and Mr. Weir (Executive Chair of the LAT))

On Fri, May 23, 2025 at 3:30 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

May 23, 2025

VIA EMAIL

-

TO:

The Office of the Information and Privacy Commissioner of Ontario (the "OIPC")

2 Bloor Street East,
Suite 1400
Toronto, ON
M4W 1A8

Via email: info@ipc.on.ca

Via email: sheila.Ahmadi@ipc.on.ca

Attention: OIPC Registrar and Case Lead for this Appeal

Tribunal file no: PA25-00294

Institution number in the General Regulation: LAT is institution #68

Type of document: email

Short title of proceeding: *McLean v. LAT*

Sender: Mr. McLean (B.A., J.D., CIM)

Re: INITIAL SUBMISSIONS SEEKING ORDERS THEREIN ON AN IMMEDIATE (PRESERVATION), INTERIM AND FINAL BASIS (WHERE APPLICABLE)

Dear Sirs/Mesdames/Other Gender Neutral Pronouns:

1. I am writing regarding the above.

- 2. In light of the fraud and theft committed upon me by Mr. Karat of TDI at first instance on October 25, 2024, and thereafter, in part, in 2024 and into 2025, which render submissions to the evidence (which will be provided after this email) for the above immediate, interim and final orders.
- 3. My evidence remains that the LAT at its highest had a high degree of control over TDI, Mr. Karat and Mr. Papadimitropoulos in the initial theft and further fraudulent acts has records that will be instrumental in taking active steps to unwind those fraudulent and unlawful acts along with protecting myself on a health and safety level. Moreover, failing to comply with its obligations under FIPPA is that it approved of the conduct involving the TDI Karat Theft as there was a clear benefit to it.
- 4. As it is now 35 days since the time the LAT was required to comply with FIPPA and my reading of the *Code of Procedure* and the relevant *Practice Directions* is that it. However, after 35 days have expired, that right has been foreclosed.
- 5. All that remains is the OIPC ordering the LAT to comply with its FIPPA obligations and ensuring that the objects of FIPPA are obtained.
- 6. I will marshal all of my other matters involving collateral proceedings forward but I would be most grateful if the OIPC could prioritize this already Expedited Appeals letter from the OIPC along with the ordering of the LAT to at the very least provide a list of records at issue for review.
- 7. Obviously, everything changed with my May 4, 2025, discovery of Mr. Karat as the initial thief and caused the likes of Mr. Russell (CEO of TD Insurance) and managing OPCC to demonstrate that I did all I could do to resolve the same outside of the PIPEDA process or by general and broad potential resolution. I would have bet against me un-
- 8. I have no objections to the LAT providing any responsive submissions to mine but it should be on a reasonably forthwith basis. (Mr. Weir, KC, where do you stand with res
- 9. I trust that this was of assistance to the OIPC to respect its finite yet valuable resources. I will ensure that the affidavits provided are cross-referenced, bookmarked in a sing
- 10. Thank you kindly for your attention to the same.

(Copied to: the LAST email for access requests and Mr. Weir (Executive Chair of the LAT))

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)
Chartered Investment Manager
E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

DISCLAIMER

- 1. The content of this email is confidential and intended for the recipient specified in message only. It is strictly forbidden to share consent of the sender. If you received this message by mistake, please reply to this message and follow with its deletion, so that
- 2. Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors i

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My best regards to you,

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Chartered Investment Manager

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Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

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My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

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--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

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My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or s*

Tab 2

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Re: The Licence Appeal Tribunal ([Number 68 Institution](#) in the *Gen Reg.*)

IN THE MATTER OF an Appeal,¹ involving a Deemed Refusal Decision,² under Appeal Number PA25-00294³ under the *Freedom of Information and Protection of Privacy Act*, [RSO 1990, c F.31](#) [*FIPPA*] and Associated Regulations (see: *Disposal of Personal Information*, [RRO 1990, Reg 459](#) (“Reg 459”) and *General*, [RRO 1990, Reg 460](#) (“Reg 460” or “Gen Reg”))

IN THE MATTER OF an Appeal involving applicability and consideration of the below statutes other than *FIPPA*

In the matter of an Expedited Process⁴ appeal before the OIPC under the OIPC’s:

- a. [Code of Procedure for appeals under MFIPPA and FIPPA](#) (the “[Code](#)”), specifically Rule 9 and
- b. Practice Directions, specifically [Practice Direction #13](#)

Re: INITIAL SUBMISSIONS OR REPRESENTATIONS⁵ OF THE APPLICANT

REQUESTOR/APPELLANT

Mr. Kevin A. McLean (B.A., J.D. CIM)
 410-775 KING STREET WEST
 TORONTO, ONTARIO
 M5V 2K3
 Email:
MRKEVINALEXANDERMCLEANBAJDCIM@GMAIL.COM

LICENSED APPEAL TRIBUNAL

Address:
 15 Grosvenor St Ground Floor,
 Toronto, ON
 M7A 2G6
 Email: Access.TO-TDO@ontario.ca

AND TO:

Head of Public Institution

Mr. Sean Weir
 Executive Chair of the LAT
 25 Grosvenor St.,
 19th Floor
 Toronto, Ontario
 M7A 1R1
 Email: sean.weir@ontario.ca

FILED WITH THE FOLLOWING INSTITUTION:

The Office of the Information and Privacy Commissioner of Ontario (the “OIPC”)

2 Bloor Street East,

Suite 1400

Toronto, ON

M4W 1A8

Via email: info@ipc.on.ca

AND TO:

Any Interested Persons (by way of forwarding by the OIPC and/or by the Appellant at first instance for lawful purposes and not prohibited by *FIPPA*)

1. The Appellant requested 13 classes of records (the “**13 Record Classes**”) in his March 19, 2025 access request to the LAT (the “**Access Request #2**”). The LAT was deemed to refuse access to all of the **13 Record Classes** on April 18, 2025 (the “**Deemed Refusal**”). “Personal Information” (“**PII**”) is recorded information about an identifiable individual. **PII** does NOT include the name, title, contact, information or designation of an individual that identifies the individual in a business, professional or official capacity.⁶ The Commissioner can only dismiss an appeal immediately if the NOA pursuant to [FIPPA](#) does not present a reasonable⁷ basis for concluding that the record or the **PII** to which the notice relates **exists**.⁸
2. *Ergo*, if the **Institution** fails to respond within 30 days, it would be legally impossible for the Commissioner to issue an immediate dismissal as the records are deemed to exist. The burden of proof is on the **Institution Head**.⁹ The IPC’s Expedited Appeals Team has authority (a) Resolve; (b) Dismiss; or (c) Issue, an order. The Appellant seeks the orders *infra* on a expedited basis as there is no power to dismiss.¹⁰
3. There is only one mandatory exemption under [FIPPA](#) which is section 21 which is “**Personal Privacy**” which is inapplicable.¹¹ Assuming *arguendo* it was applicable, there could not be an ‘invasion’ of personal privacy for records that relate to a theft of this Appellant’s property. As a thief has no reasonable expectation of privacy (“**REOP**”) (see: *R. v. Van Duong*, [2018 \(ONCA\)](#)), the relatable records are disclosable as there could be neither an ‘invasion’ nor an ‘unjustified invasion’ of the *personal privacy* of those that authored or received said records. Moreover, there are ongoing compelling circumstances affecting the health and safety of the Appellant and the last known addresses of all individuals so implicated are known.¹²
4. The *discretionary exemption* at issue could only involve [section 19\(1\)\(a\)](#) of [FIPPA](#) which is “solicitor-client privilege” which involves “litigation privilege”. The Appellant concedes that the misconduct of Mr. David Karat of TD Insurance group (“**TDI**”) was in anticipation of an appeal or review proceeding before the ONSC so all records after the Appellant confirmed on or around October 21, 2024¹³, that he would bring a statutory appeal or judicial review of the decision of the Vice Chair Morissette (“**VCM**”) decisions (September 13, 2024) and reconsideration decision of Vice Chair Lake (“**VCL**”) of October 15, 2024, would have been in *anticipation* of an appeal or review proceeding. The Appellant does not dispute that the **dominant purpose**

of recorded communications between the *cast of characters* would have been the preparation of the anticipation of a potential litigation (i.e. a review of the LAT's incorrect and unlawful conduct). However, that would not make the records at the various times subject to litigation privilege as per the second branch of the legal test: (2) the dominant purpose for creating the document was: (i) to obtain legal advice; or (ii) to assist in the conduct of anticipated litigation. Mr. Karat and TDI could have sought legal advice from any of the lawyers at the LAT or TDI Group or external counsel regarding the potential consequences of the potential theft, how best to protect Mr. Karat and avoid any disclosure by CAMH to a demand or *FIPPA* request (i.e. wear hat, glasses, long sleeves, and a **Keffiyeh** scarf (i.e. include a religious affiliation as that is "**PII**"). However, those records are subject to the crime, fraud and unlawful conduct exceptions (see: *infra*).

5. In *Smith v. Jones*, [1999 CanLII 674 \(SCC\)](#), quoted by Rosenberg J.A. in *Chrusz*, at p.369 made clear that any recognized exceptions to solicitor-client privilege would also apply to litigation privilege.
6. *Could a record that evidences depriving a potentially opposing party of his ability to file an appeal or judicial review and/or conduct the anticipated proceeding at his best ability fall under 'to assist in the conduct of anticipated litigation'?* It would certainly assist and it did but it would fall under the unlawful acts exception denoted *infra* in [McDermott](#) citing *O'Rourke v. Darbishire and Others* [1920], A.C. 581, at p. 604. Ergo, whether first classified as privileged (solicitor-client or litigation) is of no consequence as it would be disallowed in each instance (record by record). Regarding the legal test for displacing solicitor-client privilege, the case of *McDermott v McDermott*, [2013 BCSC 534 \(CanLII\)](#) at [paragraphs 72 to 73](#), indicates that the exception applies **not only** to necessarily criminal conduct but **also to** unlawful conduct causing injury to the legal rights of others, including breaches of regulatory statutes, contracts, torts, and other breaches of duty.¹⁴ Neither the words of 'custody' or 'control' are defined under [FIPPA](#) but the case of *Ontario Criminal Code Review Board v. Hale*, [1999 CanLII 3805 \(ONCA\)](#) [["CRB"](#)] has provided the necessary legal tests for the same. In [CRB](#), the ONCA affirmed the decision of the ONSC which affirmed the decision of the OIPC which found that even if the backup tapes were **not** part of the official record, said Board had **control** over them because they were created solely to fulfill the Board's mandate. Any board cannot avoid its statutory obligations under [FIPPA](#) by delegating record-keeping to independent contractors without ensuring access to all materials created for its purposes (see: para [35](#)). In [Criminal Review Board](#), the

ONCA relied on federal court decision in *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), [1995 CanLII 3574 \(FCA\)](#) leaving the notion of control to be unlimited.¹⁵ Moreover, the definition of [record](#) includes the duty of an Institution to not only create the record sought but to create software and applications to create the same.

7. [Canada Post Corp](#) was cited with approval by Dorgan J. in *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640¹⁶, a case involving an application under *FIPPA* (BC) for the production of notes made by a school counselor during counseling sessions with the children.¹⁷ Simply put, ‘control’ is the **right** (of an Institution) **to make** a demand on another person to produce the record sought.¹⁸
8. The “**13 Record Classes**” all include access to personal information (“**PII**”)¹⁹ of the Appellant and relate to specific times from December 24, 2023, to March 19, 2025 (the “**General Period**”). Classes #1 and #2 relate to verifying the accuracy, through access to relevant **PII** records, of a representation by the LAT’s CMO (Mr. Josh Grant) (“**Former CMO Grant**”) on March 30, 2024, that the deletion of the **Parties** LAT file number of 23-015662/AABS from the SLASTO e-filing system (“**E-Filing Portal**”)²⁰ was due to a ‘power outage’. **Class #3 Records** seek specific records from a printout, excluding disclosure of the underlying records themselves, from the LAT Registrar on February 26, 2025 (the “**LAT Index Print Out**”), including “**Two Undisclosed Final Motion Orders**”, and unknown documents including “.msg”. **Class #4** seeks records specific to the **LAT Proceeding** in relation to whether the [Shuttleworth](#) four-step process was being followed. **Record Class #5** seeks a list of professional advisers, including in-house legal counsel to the LAT in the **LAT Proceeding**. **Record Classes #6 to #12** all seek **PII Records**, particularly communications²¹ that did not involve the Appellant on an audioconference or copied on written correspondence, between the LAT and TDI, LAT and the TD Bank Group, specifically Mr. Papadimitropoulos after being relieved of his TDI employment duties, and LAT (Mr. Weir) and third parties^{22 23 24}.

Volume #2: Brief Background

9. The Appellant was injured in a car accident on August 31, 2022, where he was rear-ended at high speed. Security National Insurance Company (“**SNIC**”) underwrote the insured vehicle. The Appellant informed SNIC of his intention to seek accident benefits, but its provided contact details that were, at least, incorrect by way of an incorrect fax number ([416.774.3120](#)). In Summer 2024, the Appellant discovered that the fax

number provided was for [TDHA](#), not SNIC. Some benefits were received, but their source was unclear. In April 2023, an OCF-18 was partially approved by SNIC using a former **TDHA** address in HCAI (not by delivery) and a forged signature of the then claims adjuster (“As per A. Nurse” [sic]). In Spring 2023, the Appellant received a fax from a 1.888 fax number indicating unknown claim details from the Appellant’s fax to SNIC but by to the [416.774.3120](#). On December 24, 2023, the Appellant filed an LAT Appeal pursuant to section 280(2) of the *Insurance Act*, serving the [416.774.3120](#) fax number. The Appellant's urgent motions named "TD Insurance Meloche Monnex (SNIC)" as the respondent. On January 8, 2024, **CMO Grant** requested denial letters from the Appellant, which listed SNIC addresses in Markham and Burlington²⁵ and SNIC as the sole denier of certain benefits. Despite these submissions, the LAT initially issued a decision to those three motions on January 15, 2024, naming **TD General Insurance Company** (“TDGIC”) as the sole respondent. On January 23, 2024, Mr. Karat, a non-licensee with the LSO, stated he represented **SNIC** (not TDGIC) and sought email communication consent. Subsequently, non-licensee Karat, on January 25, 2024, exclusively signed the **SNIC Response** contrary to the *Law Society Act* and LSO By-Laws along with the decisions of the LAT in *Mosa* and *Dankha*. Mr. Nieuwland was away from January 24 to 29, 2024, but then filed a declaration of representative for TDGIC (not SNIC). The Appellant objected to TDGIC being involved and insisted SNIC was the only insurance company he knew of and that filed a pleading although Mr. Karat’s filing for SNIC was void ab initio. A NOM #5 to amend the style of cause and require licensed legal representation for SNIC was ‘decline to ruled upon’ by Vice Chair Lake, who had initially issued TDGIC in January 2024.²⁶ VCL’s potential conflict of interest arose because the Appellant, as a director and officer of the company input in the OCF-2, was subject to some adversarial communications between it and a client of one Ms. Eva Lake, the undenied family member of Vice Chair Lake. Notice was provided to the Tribunal regarding the same.²⁷ However, it did not stop VCL from reinserting herself in October 2024.

10. One of the records sought in Class #3 is the record dated April 22, 2024, where TDGIC is noted as a ‘related party’ although it was the sole respondent at the time. Both things cannot be true.
11. There were objections to Mr. Karat (SNIC) and Mr. Nieuwland (TDGIC) at the May 2, 2024, case conference identified as *McLean v. TDGIC* involving: (i) Mr. Karat’s practice of law and provision of legal services without a license while misrepresenting his membership with LSUC on LinkedIn since 2014, (ii) Mr.

Nieuwland acting for an unknown respondent relevant to the facts of the LAT Proceeding; and (iii) the Tribunal's involvement in the misconduct. During that conference, Mr. Nieuwland made two statements: (i) SNIC and TDGIC were 'one and the same'; and (ii) unilateral changing of respondents was routinely practiced by him. Upon review of the FSRA website and case law, the FSRA confirmed via paid for certificates of service that SNIC (FSRA #397) and TDGIC (FSRA #353) were **not** 'one and the same'. Mr. Nieuwland had acted for SNIC, not TDGIC, in previous decisions.

12. The Appellant brought NOM #8 relying on section 21.1 of the *SPPA*. Despite opposing the switch from TDGIC to SNIC, Mr. Nieuwland did not oppose it after the FSRA became involved. NOM #8 was successful (see: Adj. Morissette Decision). Nonetheless, the LAT misstated facts and timelines, claiming Mr. Nieuwland had filed a Response when it was Mr. Karat as if the LAT was so conflicted that it was 'bending over backwards' for itself and TDI. This led to another motion under section 21.1 of the *SPPA* to correct the record. In late June 2024, Mr. Nieuwland filed a DOR for SNIC without withdrawing as counsel for TDGIC.²⁸
13. Following demands made in accordance with the specific *LAT Rule* to a third party (TDGIC), the Appellant filed a motion on July 9, 2024, requesting the production of relevant documents. The Appellant subsequently checked the status with the LAT in late July 2024 and received a response from a different CMO, indicating Mr. Grant had been relieved of his duties, that did not assist. The Appellant submitted a motion (NOM #14) seeking a determination that TDHA was the First Insurer under *Reg 283*, citing unequivocal then freshly discovered evidence including the fax number [416.774.3120](tel:416.774.3120) exclusively associated with TDHA along with the HCAI evidence that the initial address therein was associated with TDHA. Additionally, the Appellant filed NOM #15 primarily for procedural orders related to NOM #14, with an additional legal finding related to HCAI, and NOM #16 concerning SNIC. August 2024 passed without further communication from the LAT. However, **Two Undisclosed Motion Orders** appeared in the LAT's printout of filed records, claiming to be final orders ("**Undisclosed Final Motion Orders**").
14. On September 12, 2024, the LAT issued a notice of hearing order regarding NOM #16 (*McLean v. SNIC*), providing SNIC's physical address in Burlington instead of Markham, as SNIC had initially misrepresented its physical address as well. The accurate fax number for SNIC in Burlington was in the 905 area code, contrasting the erroneously provided 416.774.3120 number. On September 13, 2024, VC Morissette issued

purported decisions regarding NOM #13 to #15, despite the absence of submissions from the involved third parties which was required by *LAT Rules*. The Appellant identified 27 factual errors in relation to the record of proceedings ("**ROP**") and addressed these through another motion, which included issues of backdating.²⁹

15. The Appellant claims under oath that someone connected to TDI ghostwrote the decision, leading to a flawed understanding of the ROP and law. For example, VCM made the following glaring misstatement of fact and impossible of law under *SABS* and *Reg 283*: "[27] The initial respondent [sic], TDGIC, and the current respondent, **SNIC** accepted priority over the **Applicant's** [sic] insurance policy". It is trite that two insurance companies cannot accept priority over an 'insurance policy' but only when a claim is advanced by an OCF-1 that has been provided to an injured person in accordance with *Reg 283*, and then faxed to one insurer (the "**First Provisional Insurer**"). Only an individual at TDI, who is either no longer working there or without requisite legal competency, could make such a glaring misstatement of law.
16. On October 15, 2024, VCL issued a three-page decision dismissing the Appellant's obligatory reconsideration request on the basis that VCM's decision to not add a party, amend pleadings and cause of action along with effective substantive rights of the Parties were NOT final decision, determination or orders when they were (see: *M.E. v. Ontario*, 2021 ONCA). On the same day, Mr. Papadimitropoulos of TDI Group issued a letter to FSRA about the proposed fraud reporting guidance rule.³⁰
17. On Friday, October 25, 2024, the appellant attended physiotherapy and doctor's appointments in the morning which was known to the LAT and TDI. If Mr. Karat were away from the office, it was on Fridays. The appellant placed his backpack ("**McLean Backpack**") and other luggage at the long tables in the visitor area of CAMH around 1:11 p.m., as to not bring the same into the restroom area. At **1:11:53 p.m.**, Mr. Karat moved directly from the main foyer of CAMH, with the apparent benefit of knowing when Mr. McLean entered the restrooms, of CAMH to the **McLean Property**, inspected the distinct McLean black luggage for certain items, and then took the **McLean Backpack** at 1:12:37 p.m., exiting through the main foyer. The appellant returned a few minutes later to find the **McLean Backpack** missing, and it has not been found since along with all of its identification, financial cards, *et al* were used and continued to be in unauthorized fashion.³¹

18. On October 28, 2024, at 4:30 p.m., an individual using a **McLean ID** and McLean TPL card fraudulently signed a laptop loan agreement with TPL (Fort York branch) in the Appellant's name (the “**TPL Fraud Loan Agreement**”). Said individual also borrowed two books with the Appellant's TPL library card.
19. Mr. Nieuwland was out of office from October 30 to November 7, 2024, and Mr. Karat was out from November 8 to 18, 2024.³²
20. On Friday, **November 8, 2024**, an individual fraudulently made a reservation at the Aga Khan Museum (an Ismaili Muslim museum) using the Appellant's TPL card. Mr. Karat was wearing a Keffiyeh (supporting Muslims in Palestine) scarf some two weeks prior. The Appellant was notified by the TPL via email on November 8, 2024, regarding his confirmed reservation tickets. Subsequently, on Monday, November 11, 2024, **24 items** were checked out at the TPL Queen Saulters Branch under the Appellant's name. Mr. Papadimitropoulos resided 300 metres from the Queen Saulters Branch.
21. On Friday, November 15, 2024, the Appellant filed and served his **JRPA Application** on the LAT and the Respondent Insurance Companies. On the same date, Mr. Karat listed his property for sale at 625 Grandview Street, Oshawa, Ontario. Due to the incident involving the Aga Khan Museum and unauthorized borrowing of books, the Appellant addressed the cancellation of his TPL library card on November 16, 2024. The Appellant discovered the misconduct related to books on October 28 and November 11, 2024, but not the **Fraud TPL Loan Agreement**. Despite the requirement to file an NOA promptly, neither the LAT nor the Respondent Insurance Companies complied. On November 27, 2024³³, Mr. Boyce submitted an **NOA** on behalf of the LAT. The Appellant notified AGO counsel and copied the ONSC (Div. Ct.) regarding issues involving fraud and theft. Mr. Boyce tried to *triage out* from the Court while the Appellant argued that since the Respondent Insurance Companies had not filed an NOA, Mr. Nieuwland need not be copied. Nevertheless, Mr. Boyce fervently pushed for Mr. Nieuwland's inclusion, appearing to act as if they were aligned. On December 3, 2024, Mr. Nieuwland, representing those Respondent Insurance Companies, filed and served an NOA, which matched the identical font, spacing, and sizing of the **LAT NOA** from form to backsheet.
22. On December 6, 2024, Mr. Karat purported to comply with the LAT order concerning NOM #16 upon SNIC, in partial favour of the Appellant, by providing documents required by SNIC, but titled his email inaccurately as “McLean v. TDGI [sic]”. The Appellant challenged him on the same but he did not respond.

23. On December 10, the Appellant filed and served his Factum for the JRPA Proceeding.
24. On December 13, 2024, the Appellant filed and paid for the “**Certificate of Perfection**”. 90 minutes later, an individual attended the **TPS Reference Library** on December 13, 2024, committing fraud by impersonating the Appellant to obtain a new library card and changed the Appellant’s phone number to that of CBC investigative journalist Ms. Ouelette. The inference was that the LAT and TDI Group were stunned how the Appellant was preserving without his electronic devices, wallet, and identification.
25. Further impersonation and fraud occurred on December 21, 2024, at the **TPL Fort York Branch**, involving the acquisition of a *fourth library card*, laptop borrowing, and book/periodical borrowing after the Appellant requested Form 68(B) (i.e. setting date of the JRPA Application) from the ONSC Div. Ct. Registrar. Additional fraudulent activities took place on December 28, 2024, again at the **TPL Fort York Branch** after the Appellant informed Mr. Boyce that he could not act for the LAT or it had to be very limited in scope as per decisions like *Ontario Energy Board*. On December 30, 2024, the Appellant raised a conflict issue regarding Mr. Boyce, noting he worked from the same location for SLASTO as the impugned decision-makers.³⁴
26. On January 8, 2025, the Appellant, while beyond the scope herein, raised a concern regarding a justice who had integrated herself, somehow miraculously out of the 93 justices of the ONSC (Toronto region) into the JRPA proceeding for case management, given her prior role as counsel to Mr. Papadimitropoulos as a client at her former law firm considering his role as the SABS manager for the entire TDI Group³⁵. On January 13, 2025, the Respondents did not file responsive factums and application records, contravening *Rule 68.04(4)*. Subsequently, on January 16, 2025, the Appellant submitted COI recusal request involving the questioned justice. On January 17, 2025, an incident occurred where **29 books** were fraudulently renewed through **TPL Answerline** remotely.
27. On January 23, 2025, the Appellant made his initial motion requesting production of the ROP during the **ROP Temporal Period** which was required as a result of **the Karat TDI Theft**. Two days later, on January 25, 2025, the Appellant submitted an access request under *PIPEDA* to four automotive insurance companies in the TDI Group concerning conduct post-October 25 theft, including potential holding of **PII** and PHI,

unauthorized access, and disclosure of the Appellant's information. It is now the subject of an OPCC complaint.

28. By January 27, 2025, the LAT had not filed any responsive materials nor the ROP as required by section 10 of the *JRPA*. On the same day, the Appellant presented Affidavit #7 in the *JRPA* Proceeding, providing visual proof the forged Ms. Nurse's quasi-signature on April 20, 2023, was similar to an anniversary card that Mr. Papadimitropoulos had penned some 7 years earlier (the "**Anniversary Card**") along with **redacted** CAMH theft images and **TPL Unauthorized Chart**. Three days later, Mr. Papadimitropoulos *ceased employment* with TDI.³⁶
29. It should be noted that the impugned decisions subject to judicial review - albeit necessarily expanded upon by new evidence and facts arising from discovery of the culprit of the theft and LAT's tie to the same by NOCQ, Amended JRPA and to be filed motion to unwind fraudulent steps and acts or omissions — were not opposed at the Tribunal level by Mr. Nieuwland for TDGIC, SNIC, and/or TDHA. Following receipt of Affidavit #8 from the Appellant, AGO counsel withdrew.
30. In late January 2025, the Appellant initiated this Access Request #2 from LAT for the record of proceedings. Ms. Jennifer, a policy analyst within LAT's privacy division, redirected the Appellant to the LAT Registrar.³⁷ The Appellant requested a copy of the record of proceeding ("**ROP**") from the LAT Registrar, which it took nearly ten days to merely respond, stating they were still determining *how best to compile* the ROP ("**LAT Compilation Failure Admission**"). On January 31, 2025, the Appellant filed NOM #2 with the Divisional Court and served LAT. By February 11, 2025, the LAT had failed to file the ROP and responsive forms, affidavits, and submissions to NOM #1 and #2.
31. While away from Toronto from February 15, 2025, for personal reasons, for approximately nine days, the Appellant received further records from TPL revealing the **TPL Fraudulent Loan Agreement**. Comparing the handwriting showed obvious similarities with the **Papadimitropoulos Anniversary Card** and **Forged Nurse Signature Document** and the aforementioned **TPL Fraudulent Loan Agreement**. On February 26, 2025, the Appellant filed Affidavit #17, including the **TPL Fraudulent Loan Agreement**. Late February, the Appellant formalized **Access Request #2**. After the LAT Registrar provided a purported printout of filed records, but not the underlying records on February 26, 2025, the Appellant indexed these records and filed

Affidavit #18 on March 3, 2025. The process was with the LAT Registrar for the ROP was discontinued because it was futile.

32. On March 4, 2025, the Appellant filed an NOCQ regarding LAT's breaches of sections 2(b), 7, and 8 of the *Charter*. On March 5, 2025, he filed an Amended JRPA Application. He asserted, inter alia, that LAT had significant control over post-October 25, 2024 misconduct, consistent with its misleading the Appellant and Court about the forthwith filing requirement the ROP as required by section 10 of the *JRPA*.
33. In the evening of March 5, 2025, the Appellant was hit by an e-scooter and attended the emergency room, notifying parties in the *JRPA* Proceeding at four a.m. from the emergency room.
34. Once medically cleared, the Appellant paid for Access Request #2 on March 19, 2025. On March 29, 2025, the Appellant demanded Mr. Papadimitropoulos, copied to Mr. Russell, return his stolen property. While the Appellant suspected Mr. Karat may have been involved, he only had credible evidence in relation to Mr. Papadimitropoulos by handwriting examples and other third party confidential information.
35. Legal counsel (Ms. Johnson) from TD Bank Group responded promptly, asking the Appellant to communicate exclusively through her while she investigated the issues.
36. On March 29, 2025, the Appellant filed Affidavit #21 in the *JRPA* proceeding, evidencing matters including Mr. Boyce misleading the Court about, inter alia, the Appellant waiving LAT's requirement to forthwith file the ROP when he did not. In April 2025, Ms. Johnson's undisclosed *preliminary inquiry* concluded that neither Mr. Papadimitropoulos was holding or held nor TDI was holding or held the Applicant's property from the October 25 theft. The Appellant disagreed, noting Mr. Papadimitropoulos' conduct at the material times would still bind TDI despite the suspicious switch from TDI to TD Bank. Regarding TD Bank's involvement in the theft, Ms. Johnson stated TD Bank had not held (but implicitly may have been holding i.e. notionally) the Appellant's property, poorly asserting no *credible evidence* was provided by the Appellant.
37. On April 14, 2025, the Appellant made a *PIPEDA* request to TD Bank. Although a curious *postmaster response* indicated failed delivery to td.executiveforwarded@td.com, the Appellant had not sent an email to that address in his sent email. Bizarrely, the response originated from @tdsecurities.com. After testing other emails, the Appellant determined ongoing secretive communications between domains was the likely culprit in light of Mr. Papadimitropoulos having an active TD Securities email despite never being employed by it.

38. The Appellant appealed to OIPC on April 23, 2025, and the OIPC on April 29, 2025, initiated an expedited process under *Code and Practice Direction #13*.
39. On May 4, 2025, the Appellant miraculously and serendipitously managed to un-redact previously inaccessible information of the thief from the CAMH unredacted images in those records through serendipity and skill. Further investigation from May 4, 2025, until approximately May 10, 2025, unequivocally identified Mr. David Karat as the thief. On May 5, 2025, the Appellant submitted a second access request to CAMH, confirming Mr. Karat's name, email address, mobile phone number, recent public images, and last known address. On May 7, 2025, after the Appellant provided CAMH with unredacted images and Mr. Karat's LinkedIn photo, obtained through an individual connected with Mr. Karat on LinkedIn, Mr. Russell and Ms. Johnson **blocked** the Appellant's, which they had not done previously.

Volume #3: Legal Bases

40. While the **LAT** has been in existence since 1999, prior to 2016, AABS matters were handled by the Financial Services Commission of Ontario ("**FSCO**"). Since that time, the **LAT** has faced numerous public perception issues,³⁸ including cases like [Shuttleworth](#)³⁹ and former VC Therese Reilly saga⁴⁰, as well as an ongoing investigation by the Ontario Trial Lawyer's Association ("**OTLA**")^{41 42}. More recently, the decision of *Derenzis* (v. Gore Mutual and the third party of Tribunals Ontario) by Justice Mandhane of the ONSC, released on May 5, 2025, implied criticism of the **Institutional Head** (Mr. Weir) for reporting a lawyer to the LSO for professional misconduct related to filing documents for a catastrophic impairment claim of his client. "Holder" implies "custody" and "control". Tribunals Ontario and the LAT are not 'one and the same'. Analytical precision dictates that each of those institutions under Tribunals Ontario, pursuant to subsection 2(1) of [FIPPA](#), falls under the definition of an "**Institution**". For access requests, the email address is Access.TO-TDO@ontario.ca but that alone raises the question, when combined with *Derenzis*, *as to whether it should be?* The answer must be in the negative. Filing procedures vary among tribunals, with HRT0 accepting filings via email or mail, LTB having an online portal, and **LAT** utilizing an e-filing system. The *Legislation Act*, particularly Part IV, requires a certain manner of interpretation of [FIPPA](#) and the relevant regulations. If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental

powers are included: section 78 of the *Leg Act*. Powers that are conferred on a person may be exercised, and duties that are imposed on a person shall be performed, whenever the occasion requires: s. 79 of the *Leg Act*.

41. The **occasion is now** after this LAT Institution is acting without respect for the Legislature and its obligations.

The foundational principles involving privacy and access statutes in our country are outlined in the Appellant's March 19, 2025, perfected access request (the "**Access Request**").⁴³ The **LAT** is in violation of each of the foundational principles from our ONCA⁴⁴ and SCC that have evolved and shaped our common law. The "**Open court principle**" is a cornerstone of accountability for decision-making for courts and tribunals.⁴⁵ The **LAT** must comply with the *Charter*, particularly section 2(b) ('freedom of expression'), 7 and 8 herein. Section 2(b) of the *Charter* protects listeners as well as speakers (see: *Toronto Star*, para. 56).⁴⁶

42. In the context of an individual seeking their **PII**, the objects of [FIPPA](#) align with the *Charter* rights of the individual; most specifically section 7 and 8 of the *Charter*. Ergo, [FIPPA](#) and the relevant regulations must be interpreted as remedying the intentional, inexplicable and unrepentant contraventions of [FIPPA](#). Every **Head** shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected.⁴⁷ An **Institution** that uses personal information shall retain the information for at least one year after use, except if an individual consents or it relates to credit card information.⁴⁸ Pursuant to *Reg 459*⁴⁹, section 3, "Where **personal information** is in the custody or under the control of an institution, no **person** shall destroy it without the authorization of the head." Every **Head** shall ensure its documented reasonable preservation measures respecting records in its control or custody are in accordance with any **Institution** applicable requirements, rules or policies under [FIPPA](#) or otherwise.

43. Information and Privacy Commissioner (the "**Commissioner**") is a legislative officer of the Assembly.⁵⁰

Subject to records being 'data integration records', every person (which includes a corporation) has a right of access to a record (part or all) in the: (i) control; or (ii) custody, of an **Institution** unless the Record falls within one of the statutory exemptions (see: 12 to 22); or (ii) the **Institution Head** is of the opinion on reasonable⁵¹ grounds (not merely reasonably belief)⁵² that the **Access Request** is: (i) frivolous; or (ii) vexatious.⁵³ Neither an access decision nor any such opinion was provide by the Institution Head (Mr. Weir).

Even where an **Institution** receives an **Access Request** for a record that contains information (not **PII**) that

falls within one of the statutorily disclosure exemptions, the **Head** shall disclose as much of the record as can be reasonably severed (the “**Unredacted Portion**”) without disclosing the information that falls under one of the exemptions (the “**Severing Provision**”).^{54 55}

44. In *Derenzis*, the Plaintiff appealed the **LAT**'s refusal to disclose records related to her applications. The OIPC ordered the **LAT** to issue an access decision regarding certain emails, which demonstrates a pattern of delay by **LAT**, but *upheld* the **LAT**'s **refusal** to release adjudicators' notes and draft decisions. As per the **LAT Print Out** after the **LAT Compilation Failure Admission** there were no ‘draft decisions or notes’ referenced therein. The Appellant has sought access to **Undisclosed Motion Orders** in relation to unknown motions but on dates when nothing was received yet they say ‘**final**’ [not draft].⁵⁶ The OIPC’s decision is under review by the Divisional Court (paras 2-3). While some records were protected by deliberative secrecy, the secrecy gave way because Ms. Derenzis has demonstrated concerns about a breach of natural justice (see: paragraph 6). This Appeal contains far more egregious misconduct than *Derenzis*. It would be quite one thing if Mr. Karat was the thief but **not** involved in the **LAT** Proceeding. Oddly, he was more involved than the lawyer licensee Mr. Nieuwland in that he unlawfully executed the SNIC Response (January 2024), and was the individual purporting to comply with orders in December 2024. Ms. Derenzis demonstrated valid reasons for such concerns, including instances where the **LAT**'s executive chair (Mr. Weir) *intervened inappropriately* in her applications (paras 25-35). Justice Manshane found that the records were relevant to that issue because they are directly related to the adjudicative and administrative processing of her claim by the **LAT**, including the **interactions** between adjudicators, counsel, staff, and associate, vice, and executive chairs (see: paragraph 21).

VOLUME #4: SECTION 29(4) OF *FIPPA* AND JURISPRUDENCE

45. In *University Health Network (Re)*, [2017 CanLII 62935](#) (ON IPC), a request was submitted to the UHN.⁵⁷ A requester submitted an appeal to the OIPC indicating that the UHN was in a “deemed refusal” situation. This OIPC order concurred and UHN was ordered to provide an access decision **without** recourse to a time extension. To verify compliance, UHN was to provide the IPC with a copy of the decision letter no later than **September 22, 2017**. In *Ontario (Labour) (Re)*, [2011 CanLII 63499](#) (ON IPC), on August 12, 2011, the

Ministry of Labour issued an interim decision and fee estimate to the requester, more than 30 days after receiving the request. The ministry was of the view the interim decision and fee estimate was issued within the 30 day timeframe imposed by *FIPPA* as it had to clarify the request prior to issuing the decision. The order stated that the request was **clear** and the efforts of the ministry are not consistent with the clarification envisioned by section 24(2) of the Act. As such, the ministry was found to be in a deemed refusal situation pursuant to section 29(4) of the Act, and was ordered to issue a final access decision within one week of the date of the order, without any further time extension.⁵⁸In *Ontario (Environment and Climate Change) (Re)*, [2015 CanLII 76939](#) (ON IPC), the relevant Ministry the received a request for access to information relating to a third party's named wind energy project proposal. The Ministry decided to grant access to some records or parts of records, and denied access to others based on the discretionary exemption in section 19(a) (solicitor-client privilege) of the Act. As the ministry acknowledged that the records at pages 197, 670, 688-690 and 691-692 were responsive to the request, and the Ministry did not issue a decision to the requester, specifically regarding those records within the 30 day statutory requirement pursuant to section 26 of the Act, the Ministry was in a **deemed refusal situation** pursuant to section 29(4) of the Act.⁵⁹In *The Ministry of Municipal Affairs and Housing* (the "**Greenbelt Decision**") the said "Housing Ministry" received a request for access to records relating to the **withdrawals of land** from the **Greenbelt Plan**⁶⁰. The Housing Ministry's delay was indicative of intentionally withholding records that would subject government to necessary transparency and exercising of democratic rights.⁶¹External independent events in the non-adversarial processes militated in favour of moving the appeal into adjudication; specifically, in light of the Auditor General's observations in her Special Report on "*Changes to the Greenbelt*", the appeal file was moved to the adjudication stage. In an interim order, the OIPC adjudicator found that the Auditor General's observations regarding the use of **personal email accounts** by political staff and their record retention practices, provided reasonable grounds for the belief that records responsive to the appellant's request *may* be **irretrievably lost** or **destroyed**. Accordingly, the adjudicator ordered the ministry to take steps to secure the preservation and recovery of responsive records within its custody or control.⁶²

46. Unlike some of the above jurisprudence, there is no issue in this herein Appeal of the **LAT** requesting fees.

Also, there is no issue of the **LAT** seeking clarification of the **Access Request #2**. The standard is often for

the IPC to issue an order that the defaulting **Institution** to issue a decision within seven days. However, in this scenario, when measured against the Open Court Principle in relation to the adjudicative records at issue, the Appellant's *Charter* rights at issue, along with the ONGOING theft of the Appellant's property, wherein the **LAT** had already absolved and sanitized his unlawful conduct many times over from January 2024 and onwards, there are reasonable grounds to believe that the **LAT** has records relating to or about the Appellant that affects his life, liberty and security. The intentional delays by the LAT are similar to that of the *Greenbelt Decision* that caused the OIPC to have reasonable grounds to believe that the Institution *may* have deleted or irretrievably lost records that are subject to this **Access Request #2**.

VOLUME #5: SOLICITOR-CLIENT PRIVILEGE

47. The issue of whether Mr. Karat and TDI were acting as *agents* of the LAT appears to be a significant point that requires clarification. Determining this relationship without oversight, at least by the OIPC regarding the LAT's involvement, is challenging. While the Appellant's affidavit evidence sworn evidence based on belief, potentially invoking the 'best evidence rule' and the adverse inference doctrine, definitively proving or disproving this at this stage is difficult for the Appellant. It should not be done *in the dark*. A fair determination of his rights requires record disclosure.
48. In-house counsel may have varied roles, and not all their activities fall under legal counsel activities. The LAT has a litany of in-house counsel as does TDI albeit under the business name "TD Insurance Staff Legal". The mere status of the parties as client and lawyer does not automatically confer a blanket of privilege. Consequently, this Appellant is entitled to records regarding discussions that may have occurred leading up to and following October 25, 2024, between the LAT and TDI Group concerning the alleged theft of property, unlawful conduct, potential conspiratorial agreements, and/or tacit approval of such activities (as referenced in *Goldman Sachs & Co. v. Sessions*, [2000 BCSC 67](#), paragraph 12). Providing a list of privileged communications in *open court* does not, in itself, constitute a waiver of privilege or an intrusion upon the relationship between solicitor and client. Who the counsel have been is not a matter of privilege whether the counsel is declared or not. Concerns have arisen regarding potential partiality and bias of the LAT towards the **Respondent Insurance Companies** in other matters and including the

Appellant with specific reference herein to Mr. Boyce.⁶³ Moreover, the obvious inference is that the LAT had a high degree of control over TDI and Mr. Karat in the **Karat TDI Theft**. The LAT had done many ‘favours’ to the TDI Group and Mr. Karat and there was an implied ‘quid pro quo’ between the LAT and TDI. If the LAT was involved, even tangentially or by remaining silent upon receiving related records (regardless of whether via government or personal emails, similar to the **Greenbelt Decision**), governmental transparency and accountability necessitate immediate preservation and production. To the extent that a record is a communication between a public institution (LAT) and a non-public institution (TDI), those records are not subject to any form of privilege because TDI cannot be the client of the LAT and the LAT cannot be the client of TDI. The Appellant’s affidavits sworn at various times since December 2024, with are material relied upon herein and provided with these submissions, with external objective evidence CAMH and TPL add clear ‘colour to the charge’.

VOLUME #6: INITIAL CONCLUSION AND IMMEDIATE AND INTERIM ORDERS SOUGHT

49. The Appellant seeks the following orders at this stage of the OIPC Proceeding:

- a. **Order #1:** An Immediate Order or direction that the **LAT** shall take all steps in accordance with section 10.1 and 54(3) of *FIPPA*, and *Archives and Recordkeeping Act* to preserve all records so that they are not irretrievably lost⁶⁴;
- b. **Order #2:** An **Interim Order**⁶⁵ that the **LAT Institution** discloses the **Sought Records**, in the form of an Index of Records,⁶⁶ with delineation by *Schedules* for those records that it alleges are not subject to any form of privilege versus those that are, and that were in custody and/or under control of it, by May 30, 2025 or first date thereafter as decided by the OIPC⁶⁷;
- c. **Order #3:** An **Interim Order** that to the extent that the **LAT** does not produce some of the above records in the form of an *Index of Records*, an affidavit from the **LAT Institution** to support its position taken or an action undertaken by an **Institution**;
- d. **Order #4:** An Order, that after the **LAT** was complied with the above orders that the Appellant is granted leave to make further submissions regarding the same limited to ten pages double spaced; and
- e. **Order #5:** Any other orders that are consistent with the above and in favour of the Appellant.

50. It is what makes our privacy statutes and privacy commissioners, along with their staff, so deserving of praise.

In this country, a body like the *soon to be defunct* LSBC and its purportedly esteemed counsel can mislead a member of its society, its own ‘tribunal’, the superior and appellate courts of BC, the SCC and the OIPC (BC) for nearly seven years but FIPPA (BC) authorized, after he had defeated the LSBC at the OIPC (BC) in its attempt to deny him to seeking his personal information records⁶⁸, him to seek further records in 2021. In late 2021, the Appellant was able to conclusively determine with the LSBC’s authorized response to him

regarding conduct (criminal conduct like the TDI Karat Theft albeit with the dumping of RAM absent any judicial authorization to do so) which it failed to plead and inform the aforementioned courts and tribunals of the same despite the Court ordering it to produce and list documents relevant to the proceedings. In essence, our privacy and information tribunals provide a safeguard to obtain that which even the most nefarious of characters do not list and produce in a court proceeding or attempt to and do avoid (at times) their obligations as purported protecters of the public interest and their counsel as ‘officers of the court’. It is a scary thought on many levels but thankfully, unlike the USA and its states, we have privacy legislation that allows access to not only general records but those records of a personal information nature that can be obtained through these channels on a provincial and federal level depending on the institution or organization. Appendices #4 to #8 were in the ROP during the ROP Temporal Period before the LAT as of June 17, 2024. The Appellant repeatedly represented publicly the current composition of the LSBC could not exist due to, inter alia, a lack of independence and oversight. He was correct in courts but did not know how correct he was but as per the Legislature amending the *Legal Profession Act* to the *Legal Professions Act* exactly in the areas he so sought in court proceedings effectively putting an end to the LSBC’s reign of terror in breaching members’ *Charter* rights. The LAT, with the Tribunals Ontario as the record holder, cannot continue either. The soon to be defunct LSBC and the LAT share some obvious common acts of misconduct including not disclosing that which they did, playing the ‘victim’ when faced with disclosure, engaging in *ad hominem* attacks as opposed to face the merits. Perhaps, the LAT can show that it is different. Only time will tell.

51. It is the problem with committing fraudulent acts like the LSBC’s Concealed RAM Dump and the TDI Karat Theft, it provides an illusory short term gain but long term consequences. It is why our [SCC](#) found in 1978, adopting Lord Denning’s decisions in England, that ‘***Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever***’. Whether the LAT was so involved in the above seems inferentially obvious but our Legislature does not require the Appellant to rely on inferences. Ergo, the orders sought must follow. All of which is respectfully submitted on May 23, 2025



EXPLANATORY NOTE

SCHEDULE 2

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

The Schedule amends the Freedom of Information and Protection of Privacy Act. Here are some highlights:

1. The definition of “information practices” is added to subsection 2 (1).
2. Section 34 is amended to, among other things, add a requirement for the annual report of a head of an institution to specify the number of thefts, losses or unauthorized uses or disclosures of personal information reported to the Commissioner during the year.
3. Section 38 is amended to add a requirement to assess various things before collecting personal information and to require the head of an institution to implement steps to prevent or reduce the likelihood of a theft, loss or unauthorized use or disclosure of personal information from occurring and to mitigate the risks to individuals in the event of such an occurrence. A new subsection 38 (5) requires that assessments be updated before making any significant change to the purpose for which personal information is used or disclosed.
4. A new subsection 40 (5) requires the head of an institution to take steps to ensure that personal information in the custody or under the control of the institution is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the information are protected against **unauthorized** copying, modification or disposal.
5. A new section 40.1 requires that the head of an institution notify the Commissioner and the affected individual in the case of any theft, loss or unauthorized use or disclosure of the individual’s personal information if there is a real risk of significant harm to the individual or if any other prescribed circumstances exist. Factors relevant to determining a real risk of significant harm are set out in subsection 40.1 (7).
6. A new section 49.0.1 authorizes the Commissioner to conduct a review of the information practices of an institution if the Commissioner has received a complaint under subsection 40.1 (4) or has other reason to believe that the requirements of Part III are not being complied with.
7. Subsection 55 (1) is amended to provide that information may be disclosed for a prescribed purpose.
8. A new section 57.1 requires the Commissioner to keep confidential the identity of a person who has notified the Commissioner of a contravention or potential contravention of the Act or regulations.
9. Subsection 58 (2) is amended to require that the Commissioner’s annual report to the Speaker of the Assembly provide for the number of complaints received by the Commissioner in respect to the information practices of institutions and the number of reviews conducted under section 49.0.1
10. Section 59 is amended to authorize the Commissioner to, subject to some limitations, consult with a law enforcement officer or any person who, under an Act of Canada or of another province or territory of Canada, has powers, duties and functions similar to those of the Commissioner with respect to the protection of personal information.

11. Section 65.1 is amended to add more information to the definition of “customer service information” and to authorize a service provider organization that collects customer service information to, with the consent of the individual, retain and use the information for the purposes of providing any designated service to the individual.

Assumed Name**Law Society Number**

21180N

Class of Licence Definitions

Lawyer (L1)

Real Estate Insured [†]

No

Status Definitions

Not Practising Law - Employed

Business Name

MAG - Policy Division - Tribunals Ontario

Business Address

25 Grosvenor St., 19th Floor

Executive Chair

Toronto, Ontario M7A 1R1

Phone

1 437 249 3446

Email Address

sean.weir@ontario.ca

Trusteeships

None

Current Practice Restrictions

None

Current Regulatory Proceedings

None

Regulatory History

None

Appendix #3: Rule 9.03 of the Code of Procedure

Rule 9.03

For Appeals utilizing an Expedited Process, the IPC may abbreviate its usual processes and procedures, including (without limitation) by: (a) having a single decision-maker attempt to find a mutually agreeable resolution to the issues between the Parties, dismiss the Appeal, or issue an Order; (b) shortening timelines for submissions and responses by the Parties; (c) strictly adhering to established deadlines; (d) conducting fixed-day informal dispute resolution; (e) conducting an oral Inquiry; (f) relying on affidavit evidence of the Parties; or (g) issuing an Order without hearing further from the Parties

McLean v. Law Society of British Columbia, 2015 BCSC 1431

[93] Accordingly, I am of the view it is appropriate to grant the orders sought in paragraphs 7 and 8 of the May 13, 2015 application. I am making the following orders:

1. The plaintiff is not required to produce his personal phone to the Law Society pursuant to the Rule 4-43 order, and
2. Restraining the Law Society from entering or attempting to enter the plaintiff's residence pursuant to that order.

Appendix #5 : Decision of The Honourable Mr. Justice Grauer as he then was (all in the same court file cited by Nieuwland in his nullity motion filing on behalf of TDGIC on April 11, 2024)

McLean v Law Society of British Columbia, 2017 BCSC 987

4.1.2 Mr. McLean's application for summary judgment

[65] As I see it, and as the Court of Appeal intimated, it is important to distinguish between the different questions that arise from Mr. McLean's claim.

[66] The first question is whether the Law Society exceeded its statutory jurisdiction when it granted the investigation order; in other words, was the order ultra vires the Law Society? If so, it must be set aside.

[67] The second question is whether, assuming that it had jurisdiction to grant the order, the Law Society nevertheless acted improperly in the manner in which it granted the order, giving rise to procedural unfairness, so that the order must be set aside and, presumably, remitted to the Chair of the Discipline Committee. On this aspect, Mr. McLean relies upon: the failure of Mr. Riddell to give reasons for his decision to grant the order; the absence of information under oath to support the decision; the fact that the order was granted without notice to Mr. McLean; the absence of procedural safeguards (such as would, for instance, be available in an application for an Anton Pillar order, to which Mr. McLean likens the investigation order); and the conflict of interest that arises from what Mr. McLean terms a solicitor-client relationship that existed between Mr. Bussanich and Mr. Riddell.

[68] If either of those two questions were resolved in favour of Mr. McLean, then it would follow that the steps taken by the Law Society in carrying out the order were unlawful. The question of consent becomes immaterial.

[69] The third question is whether, assuming that the Law Society had jurisdiction to grant the order and did not act improperly in doing so, the Law Society nevertheless carried out the order in a manner that constitutes an unreasonable search and seizure. This turns primarily on the question of consent.

[70] The third question is one that could indeed be the subject of a civil action for damages, but I am satisfied that it is not one that can be decided on this application. This is because I would be obliged to weigh the evidence concerning whether and to what extent Mr. McLean consented to the investigation of his records and the copying of his computer contents.

Appendix #6: Filed NOA by the LSBC in April 2017

(Tribunal at liberty to obtain a copy of the same)

The filing by the LSBC in S-1410056 on April 2017

[23] On the morning of June 4, 2014, the plaintiff emailed Mr. Bussanich again and stated that his office was wide open for the Law Society to investigate. The plaintiff provided Mr. Bussanich with the password to his computer and stated that the investigators were at liberty to copy any documents they wanted

[24] On June 4, 2014, the investigators attended again at the plaintiffs office. The investigators took two forensic copies of the HARD DRIVE on the plaintiff's office computer. They also took copies of paper files provided by the plaintiff.

[25] Nobody from the LSBC reviewed the **HARD DRIVE** until the conclusion of a process set out in the Rule 4-43 order for the adjudication of the plaintiffs request that certain documents be excluded from review. As it turned out, the plaintiff initiated but did not pursue the exclusion request and an independent adjudicator eventually dismissed the request.

[26] The plaintiff did not provide to the investigators all the records they requested. He was cited for failing to comply with the Rule 4-43 order.

Appendix #7: LSBC compelled to provide access to the Appellant of the “Concealed RAM Dump”

Menu Lockhart-RAM letter-wit. x

All tools Edit Convert Fill & Sign Find text or tools



**NATHANSON,
SCHACHTER &
THOMPSON LLP**

File: 10009-39
Reply to: Julia K. Lockhart
Email: jlockhart@nst.ca
Direct Line: 778-943-1481

25 October 2021

Kevin McLean
Unknown Address

VIA EMAIL

mclean@searchandseizure.ca

Dear Mr. McLean:

Re: Copy of RAM Capture

We are writing to respond to the request you confirmed on October 8, 2021 under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") on the Law Society of British Columbia.

Further to that request for a copy of the RAM capture made from your computer in June 2014, I enclose a [link](#) to download that file.

Under section 52 of the FIPPA, you may apply to the Information and Privacy Commissioner for a review of the Law Society's response to your request. You have 30 business days to request a review by writing to the Office of the Information and Privacy Commissioner at the contact information provided below.

If you wish to request a review under section 52, please provide the Commissioner's office with the following information:

1. Your name, address and telephone number;
2. A copy of your request;
3. A copy of this letter; and
4. The specific reasons for requesting a review.

The Office of the Information and Privacy Commissioner can be reached at the contact information provided below:

Office of the Information and Privacy

750 - 900 Howe Street, Vancouver, BC V6Z 2M4 T: 604.682.8840 nst.ca
01300581900560192

Karen L.H. Castel
Helen A. Chiswell, Q.C., F.C.A.
Heather L. Day
Erin L. Haines
R. Randall Hanks, Q.C., F.C.A.
Julia E. Loven
Julia K. Lockhart
Karen D. Loe
James C. Macneil, Q.C.
Iain B. Nicholson, Q.C.
M. Colleen O'Brien, Q.C.
James P. Poirer
Brian J. Roush
Julia M. Scobie
Stephen S. Schuchman, Q.C.
Heidi K. Sengul
Kurtis E. Strong
Archie A. Thompson (B.C.)
*Devotee Law Corporation

Windows Type here to search

Distinction between forensic copying and RAM dumps in the event the Tribunal is unaware as it took the Appellant months with forensic experts to understand the distinction between the “hard drive” and “RAM” and what a “RAM Dump” entailed when measured against forensic copying. (nota bene: the issues of the LSBC attempting to enter the Appellant’s home are now moot by the passage and proclamation of “Royal Assent” of Bill 21 (also known as the “*Legal Professions Act*, SBC 2024 c. ____)) (nota bene: should the Tribunal wish to have further details, the Appellant can provide on a confidential basis.)

RAM Dumps:

- (i) Memory is not storage;
 - (ii) Not magnetic;
 - (iii) Volatile;
 - (iv) RAM cannot be copied;
 - (v) Native Images from RAM dumps are not Forensically Verifiable
- a RAM DUMP and RAM CANNOT be COPIED due to the:
- a. Usage of CPU before Dump;
 - b. Volatile Memory in constant flux
 - c. Creating a RAM DUMP changes the evidence – no write BLOCK
 - d. Imaged CANNOT be validated.

Endnotes

¹means a proceeding in which the IPC is asked to review a decision of an Institution concerning a Request under the Act (see: Code of Procedure of the OIPC)

²Deemed Refusal Appeal means an Appeal in which the sole issue is whether the Institution has responded to a Request within the time frame required by the Act.

³Learned of by the Appellant by way of Notice of Appeal: Notice of Appeal means a document prepared by the IPC confirming that an Appeal has been filed against an Institution's decision concerning a Request under the Act, and includes the names of the Parties, the IPC's file number, and the Institution's file number (if any).

⁴Expedited Process means a single-person processing model that seeks to expedite the resolution of select types of Appeals in an efficient and effective manner, either by way of informal resolution or Inquiry

⁵See: language in the Practice Direction #13, for example, at sections 17 to 20

⁶**Business identity information, etc. Subsection 2(3):** (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. [2006, c. 34](#), Sched. C, s. 2.

⁷Objection person test

⁸See: *FIPPA*, ss. 50 (2.1)

⁹*FIPPA*, s. 53

¹⁰the appeal as per [section 6.01](#) and 8.03 of the [Code of Procedure](#) as there are issues to adjudicate or settle, the records must (deemed) be in the control or custody of the **LAT Institution**.

¹¹As the **Institution** has not claimed any exemption, this section does not arise at first instance. Moreover, in light of the **Karat TDI Theft** on October 25, 2024, communications between the **LAT** and **TDI** inclusive of Mr. Papadimitropoulos, Mr. Karat and Mr. Nieuwland *et al*, as they relate to that theft and thereafter could never be an unjustified invasion of privacy by disclosure of records that contained PII (i.e. about or relating to the Appellant; and one record can contain personal information about more than one person). Disclosure would not be a legally equivalent with the apocalyptic connotation of 'invasion'. It would be justified as per the Applicant's *Charter* and *FIPPA* rights. Moreover, there is no **REOP** for a thief (see: *R. v. Van Duong*, 2018 (ONCA)). It is herein also where the "Assiduous Inquirer" principle arises in relation to the Karat TDI Theft. Even concerning civil liability, subsequent possessors of confidential information are also held liable jointly and severally with the initial unlawful possessor (see: *Lac Minerals* and *No Limit Sportswear*). If there is any body that requires some public scrutiny, it is the **LAT** with Mr. Weir at the helm of the **LAT**. Public health and safety are at the forefront. Access to this information will prompt informed choice in purchase of goods and services from various insurance companies by those that drive automobiles in Ontario (i.e. which insurance company). The PII is relevant to a fair determination of rights affecting the person who made the request. There is no pecuniary harm per se to those of the **LAT** being required to produce and disclose those sought records in that regard because they would not fall under solicitor-client privilege. To the extent that the OIPC Exp. Appeals Team would find that some of the records at issue are denoted by the **LAT** as privilege records, the Appellant peremptory challenges the same on the basis of the OIPC legal test for privileged records.

¹²The Appellant, to assist his own cause, will seek the prior written consent of those implicated individuals.

¹³On or around October 21, 2024, the appellant notified the LAT and various insurance companies of his intent to apply for judicial review or file a statutory appeal. The statutory appeal may have required the appellant to file within 15 days of October 15, 2024, which was Wednesday, October 30, 2024. On Friday, October 25, 2024, TDI acted in relation to an alleged theft, possibly attempting to protect itself and the LAT from public scrutiny. During this period, the LAT did not comply with providing access to records requested in the Applicant Access Request #1 (September 5, 2024).

¹⁴The denial of privilege in such circumstances is **not** based on waiver by the client, express or implied, but simply on the policy basis that the benefits of maintaining the privilege are outweighed by the benefits to be derived, in cases where **fraud** is a genuine issue, from full disclosure of all circumstances relevant to resolving that issue including those circumstances contained in documents which are usually protected from disclosure by reason of the solicitor/client privilege.

¹⁵"The notion of control referred to in [the [Act](#)] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "*de jure*" and "*de facto*" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government."

¹⁶Vancouver Registry No. A962846; July 8, 1999, Madam Justice Dorgan

¹⁷Dorgan J. held that the statute, which also provides for access to "any record in the custody or under the control" of a public body, was broad enough to encompass these documents. The counselor in that case argued, as did the stenographer in this case, that the notes were simply an aide memoire which she was not required to make, over which she had custody and control, and which she stored at her home. The court, however, found that the notes were under the control of the School Board because the counselor, as an employee, was required to write reports on the children she counseled and that requirement implicitly involves the keeping of notes. Although the facts of the instant case are not identical, similar reasoning applies.

¹⁸Minister of Small Business, Tourism and Culture et al v. The Information and Privacy Commissioner of the Province of British Columbia et al, [2000 BCSC 929](#) at [paragraph 16](#) (“[16] The Commissioner accepted that in order for a public body to have control over a record, the public body must have a legal right to obtain a copy of the record.”)

¹⁹as the information is or about the Appellant in or relation to a LAT proceeding involving himself and what should have been one insurance company but devolved differently (the “LAT Proceeding”) and proceedings taken therefrom

²⁰<http://www.slasto-tsapno.gov.on.ca/lat-tamp/en/automobile-accident-benefits-service/forms/>

²¹<http://www.slasto-tsapno.gov.on.ca/lat-tamp/en/automobile-accident-benefits-service/forms/>

²²**Record Class #6** seeks records between the LAT and TDI Group involving the Appellant when he was not copied (i.e. ex parte to him). **Record Class #7** is more specific in that it seeks communications between the LAT CMO of Mr. Josh Grant by his eponymous email (not LAT Registrar email) and the TDI Group. Mr. Grant was relieved of his duties relating to the LAT Proceeding at some point in the summer of 2024. **Record Class #8** is more specific in that it seeks communications between the LAT and Mr. Papadimitropoulos from the **Temporal Period**. **Record Class #9** seeks records between LAT (Mr. Boyce of the SLASTO and his principals or agents) and TDI Group (Mr. Nieuwland and his principals and gents) where he was not a party to those communications. **Record Class #10** and **#11** seeks notes to phone calls between the LAT and TDI Group, and non-emails communications where the Appellant was not a party to those communications. **Record Class #12** seeks communications involving the Executive Chair of the LAT in Mr. Weir, KC, and others involving the Appellant. **Class #13** is a residual category that encapsulates the likes of records involving the **Karat TDI Theft** (see: *infra*).

²³To the extent that the LAT took the delinquent position that Class #5 records were undisclosed per se by solicitor-client privilege, it would be incorrect as the Appellant is merely seeking a list of professional advisers. Moreover, to the extent that Mr. Weir’s communications with others, who were legal counsel to the Tribunal, were alleged to be covered by solicitor-client privilege, then the Appellant is entitled to a list of the communications by brief description to assess and challenge the purported solicitor-client privilege.

²⁴Residually, the Appellant respectfully submits that to the extent that solicitor-client privilege is verifiable and objectively reasonable in relation to certain records that many, if not all, will cause their privileged status to be disallowed due to the crime, future crimes, unlawful conduct and tort exceptions at common law.

²⁵SNIC changed

²⁶VCL cited a repealed LAT Rule, without addressing the LAT authorities of *Dankha* and *Mosa* regarding ADR individuals, and that such an issue could be discussed at a case conference. The Appellant moved quickly with a reconsideration request which was denied by Vice Chair Logan. Only a party could attend a case conference pursuant to section 5 of the SPPA.

²⁷The Appellant filed NOM #7 concerning breaches of confidence and privacy arising from the contravention of the clear language in the standard form OCF-1. VCL also dismissed it, *despite* being aware of a conflict of interest relating to herself.

²⁸This negated privilege over all documents involving SNIC and TDGIC. in *Horowitz v. Rothstein and Mercantile Exporters Limited* (1955), 1955 CanLII 567 (BC CA), 16 W.W.R. (N.S.) 620, 621 (B.C.C.A.). The ruling established that where a law firm acts as a common solicitor for multiple parties, it cannot maintain privilege for one party in the event of conflicting interests

²⁹VCM claimed that the ‘decision’ was on September 6, 2024, but it was dated at the bottom on September 12, 2024, but not issued until September 13, 2024.

³⁰

Attached is TD Insurance feedback on FRS Guidance

TDI - Final - Feedback on FRS Guidance dated Oct

152024.pdf

(see: Affidavit #8 in the JRPA Proceeding, Exhibit “A”, page 10 (January 27th, 2025))

³¹The Appellant asked the innocent bystanders if they say any person and they denied the same. The Appellant interacted with CAMH security who was oddly nowhere to be found immediately. CAMH provided the contact information for CAMH (head of security) in Mr. Behrooz. The Appellant emailed him from a public computer but he did not respond. The Appellant attended the CAMH security room³¹ later for them to obtain the video evidence. They asked him to return later that evening but there was a stabbing in the 100 Stokes avenue building that rendered it closed to the public. The Appellant returned on the weekends to inquire but the weekend security guards were apparently unaware of the same but one security guard became hostile with the Appellant and told him not to ask about the situation until Monday.

³²Affidavit #26 of the Appellant in JRPA Proceeding, Exhibit, page 150

³³The timing is ironic considering the LAT and TDI Group (Respondent Insurance Companies) were served but nonetheless there was an Intake form being addressed that week

³⁴See: Affidavit #2 in the JRPA Proceeding

³⁵ See: Affidavit #3 in the JRPA Proceeding (Jan 8, 2024)

³⁶The Appellant claims that Mr. Papadimitropoulos was accountable for Mr. Karat’s misconduct vis-à-vis LSA and LSO By-Laws within TDI Group and relevant insurance companies; however, the Appellant believes the LAT exercised a high degree of control over TDI, Messers Papadimitropoulos and Karat generally, the initial theft and subsequent conduct.

³⁷See: Affidavit #7, Exhibit “B”, pages 54 to 61

³⁸“I have not seen this level of obvious blatant politicization, especially with senior appointments, in my 30 years in both the Ontario and federal governments,” said Gary Yee, a former chair of three Ontario tribunals. Yee was not alone in his assessment of Tribunals Ontario latest appointees. In 2020, Toronto Star Ontario politics columnist Martin Regg criticized Weir’s appointment to executive chair after an Attorney General spokesperson told him Weir faced “no outside competition” for the role. Mr. Weir apparently took a hiatus from being a

lawyer from 2018 to 2020 when he had a failed run for political office in 2018 to 2020. “Tribunals conduct hearings, make decisions and resolve disputes on a wide variety of issues,” reads the press release from the Ministry of the Attorney General, also noting that tribunals “operate independently of the government. However, the oddity is that all of the Tribunal vice chair, adjudicators and employees of the **LAT** utilize the same email domain as that of the AGO. Moreover, it is difficult to follow the logic of the AGO in that there is an MOU between the AGO and the **LAT** regarding protection of privacy and access to records.

³⁹See: *Mary Shuttleworth v. Licence Appeal Tribunal*, [2018 ONSC 3790](#); and *Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, [2019 ONCA 518](#) (CanLII)

⁴⁰⁴⁰Ms. Reilly’s reply to the bias allegation a frightening one: “Reilly has told media her decisions in the insurance cases were fact-based and untainted by bias. She claims **LAT** disclosure procedures should be tightened up to prevent any appearance of bias.” In effect, an experienced Vice Chair of the Tribunal’s position is that the public should not know of a “conditional offer” of employment with an insurance company where she inevitably worked for a period thereafter (i.e. avoid these “disclosures” and have less transparency). The prejudice experienced by these injured person is denoted in a case like *Nagesu v Traders General Insurance Company*, 2024 CanLII 23453 (ON **LAT**) where Associate Chair had to cancel the decisions of former adjudicator Ms. Reilly. The position of Aviva is perhaps even more concerning: “Aviva Canada said it was unaware Reilly was involved in insurance cases for **LAT** after ‘the insurer’ hired her.” It is rather disingenuous or intentionally misleading considering it was a “conditional offer of employment” and, of course, Vice Chair Reilly could not be involved in insurance cases for **LAT** after the hiring.

Upon investigation by the **LAT**, it was, in fact, only four decisions wherein Vice Chair Reilly had issued decisions after her acceptance of an offer of conditional employment.

⁴¹OTLA: “The association cited “disturbing trends” drawn from an inHEALTH analysis”. OTLA noted that the success rate for insured **Applicants** bringing their disputes to **LAT** has *fallen over the years*, with just 10% getting a win in 2023 compared to 2017’s 33%. “Our members have voiced concerns that the **LAT**’s process is overly rigid, is fraught with procedural unfairness, and fails to accommodate requests, even when both parties agree. This also raises important questions about the qualifications and training of **LAT** adjudicators,” Purewal said. “The **LAT** is an arm of our justice system. Injured Ontario citizens should feel confident that they are getting a fair hearing, and that justice is being done. Unfortunately, with the recent declining trends in success rates for **Applicants** and the overwhelming success of insurers is raising significant questions for our membership.”

⁴²*Shuttleworth* at the ONSC and [ONCA](#) demonstrated concerns about the **LAT**’s internal communications during the decision making process, which were revealed through a *FIPPA* request by Ms. *Shuttleworth* after an anonymous whistleblower, raising questions about independence. Despite this, the **LAT** represents itself as a quasi-judicial tribunal. After *Shuttleworth*, former Vice Chair Therese Reilly accepted a job offer from Aviva Insurance Group while working at the **LAT**, engaging in decision-making in favor of Aviva in **LAT** proceedings. Her decisions were later reconsidered due to discovered bias but naturally the damage was already done.

⁴³Briefly, they are: (i) access to information (“**ATI**”) rights facilitate democracy and participation; (ii) protect individuals’ personal information (“**PII**”) regarding collection, use, access and disclosure (“**CUAD**”), and such legislation is quasi-constitutional; (iii) exceptions to ATI must be interpreted narrowly and favor access to the requestor; (iv) the burden of proof lies with the institution asserting the exception; (v) privacy rights can only be compromised for compelling institutional interest⁴³; (vii) terms like “shall,” “compliance,” and “duty” are mandatory and cannot be overridden by the statutorily created tribunals or commissioners; (viii) the Commissioner, an independent officer of the Legislative Assembly, is not elected.

⁴⁴See: *Cash Converters (ONCA)*

⁴⁵See: Toronto Star at paragraph 6; cross-referenced to Affidavit #1 of the Applicant herein, page 21, paragraph 14

⁴⁶While on July 1, 2025, *FIPPA* will have provisions under section 40 that will mirror BC’s privacy breach notification requirements and that of *PIPEDA*, the responsibilities of the head of the **LAT** (Mr. Weir) have been entrenched under *FIPPA* and the Gen Reg. An Act and any regulation made by the LGIC shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects (see: *Leg Act.*, ss. 64(1) and (2)).

⁴⁷R.R.O. 1990, Reg. 460, [s. 4 \(1\)](#).

⁴⁸<https://canlii.ca/t/tgj#sec5>

⁴⁹R.R.O. 1990, Reg. 459, s. 3.

⁵⁰**Information and Privacy Commissioner**

4 (1) There shall be an Information and Privacy Commissioner who is an officer of the Assembly. [2018, c. 17](#), Sched. 19, s. 2

⁵¹Objective person test

⁵²Connotes sworn evidence (see: *R. v. Kang-Brown*; and *Southam*)

⁵³See: section 10(1) and (1.1) while cross referencing ss. 69(2) of *FIPPA* which relates to hospitals before 2007.

⁵⁴See: *FIPPA*, ss. 10(2)

⁵⁵Contextualizing from the recent decision in *Derenzis*, the undisclosed records will provide insight into which individuals are providing that advice to which decision makers and who is the client and who is the lawyer. This is consistent with the ‘.msg’ records with many of them never received by the Parties to the **LAT Proceeding**.

⁵⁶It is that kind of submission in the aforementioned sentence that has made the Appellant question whether he was writing something that was fact or fiction, and double check if that ‘actually happened’. Sadly, it did.

⁵⁷The UHN issued an interim decision with a fee estimate of \$4400 on November 16, 2016. The requester then narrowed the scope of his request resulting in a revised fee estimate that was issued by the UHN on December 20, 2016. On January 26, 2017, the requester paid a 50% deposit of the \$2,430 estimated fee. Since that date, a final decision regarding access to the requested records has **not** been issued by UHN

⁵⁸A 49-part request was submitted to the Ministry of Community Safety and Correctional Services for records relating to the actions of the Ontario Provincial Police in relation to specific Mohawk protests that occurred in June 2007 and April 2008. The ministry denied access to the records, decisions were appealed and put on hold pending the completion of the related prosecutions. Once the prosecutions had been completed, the adjudicator directed the ministry to issue new decision letters. The ministry failed to issue new decision letters as directed. This order relates to 13 of the requests for which the ministry failed to issue new decision letters as directed. The ministry is in a deemed refusal situation pursuant to section 29(4) of the Act with respect to 13 of the original 49 requests. In this decision, the ministry was ordered to issue final decision letters regarding the 13 outstanding requests without recourse to further time extensions.

⁵⁹The IPC also found that there were no exceptional circumstances present to justify the delay: paragraph 56.

⁶⁰(i.e. those lands that the Ontario government represented would remain untouched and not subject to any interference let alone development and building by powerful corporations).

⁶¹For example, a duly empowered voter may change their vote for the incumbent government based on conduct so involved and/or the lack of oversight by the Premier and his government.

⁶²pursuant to section 10.1 of the *Act* and the *Archives and Recordkeeping Act, 2006*.

⁶³noting Mr. Boyce's 14-0-1 decision involving the Respondent Insurance Companies against injured persons when he was a LAT vice-chair.

Moreover, Mr. Boyce's significant activity in the **JRPA Proceeding** and obvious clandestine *ex parte* communications with Mr. Nieuwland and agents at various times leads to the obvious inference that communications between the LAT and TDI occurred during the LAT Proceeding without the Appellant copied therein.

⁶⁴See: Ontario (Municipal Affairs and Housing) (Re), 2023 CanLII 95949 (ON IPC), at para 30

⁶⁵Order means a decision of an Adjudicator or other delegated decisionmaker of the IPC disposing of some or all of the issues in an Appeal or making procedural determinations binding on one or more Parties (see: Code of Procedure of the oIPC)

⁶⁶Index of Records means the documentation provided by an Institution when responding to a Request under the Act or when providing information to the IPC during an Appeal, and which includes: • the name, type or description of each responsive record; • the creation date of the record; • whether the record was or is to be disclosed in whole or in part, or entirely withheld; and • the exemption that has been claimed for each withheld record or part

- i. ⁶⁷Class #1 and #2 Records;
- ii. Class #3 Records: (i) April 22, 2024, record itself and any records relating to the same; (ii) the Undisclosed Motion Order of July 287, 2024; and (iii) the Undisclosed Motion Order from August 16, 2024; and (iv) all records that contain ".msg";
- iii. Class #4 Records: the *Shuttleworth* and *Derenzis* type records involving the policy as to how records and information, which is PII of the Applicant (about or relating to);
- iv. Class #5 Records: Professional Advisors List to any of the **LAT** decision makers involved in the **LAT** Appeal;
- v. Class #6 Records: **LAT** and **TDI** Records involving the Appellant from December 24, 2023, to the time of the Access Request where the Appellant was not copied;
 1. Class #7 Records: **LAT** CRO Mr. Josh Grant and **TDI** Group communications where the Appellant was not copied;
 2. Class #8 Records: **LAT** and Mr. Papadimitropoulos where the Appellant was not copied;
- vi. Class #9 Records: **LAT** records involving Mr. Boyce, the counsel in the JRPA Proceeding and perhaps previously to the **LAT**, and **TDI** Group (Mr. Nieuwland, his assistants and any others that work with or in relation to him involving the Appellant's matters);
- vii. Class #10 Records: notes to phone calls between the **LAT** and **TDI** Group during the requested time period which is December 24, 2023 to March 19, 2025;
- viii. Class #11 Records:
- ix. Class #12 Records: any and all communications by or to Mr. Sea Weir or any other individuals in the management of **LAT** with any other persons beside the Appellant that involve the Requested Time Period; and
- x. Class #13 Residual: now relates to the theft by Mr. Karat of **TDI** and by **TDI** on October 25, 2024, and the role, influence and authority of the **LAT** over Mr. Karat and **TDI** at the time and thereafter.

⁶⁸*Law Society of British Columbia* (Re), 2018 BCIPC 37 (author was the successful unnamed respondent therein);

Tab 3

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Re: The Licence Appeal Tribunal (Number 68 Institution in the Gen Reg.)

IN THE MATTER OF an Appeal,ⁱ involving a Deemed Refusal Decision,ⁱⁱ under Appeal Number PA25-00294ⁱⁱⁱ under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*“FIPPA”*] and Associated Regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 (*“Reg 459”*) and *General*, RRO 1990, Reg 460 (*“Reg 460”* or *“Gen Reg”*))

IN THE MATTER OF an Appeal involving applicability and consideration of the below statutes other than *FIPPA*

- In the matter of an Expedited Process^{iv} appeal before the **OIPC** under the **OIPC’s**:
- a. *Code of Procedure* for appeals under *MFIPPA* and *FIPPA* (the *“Code”*), specifically Rule 9 and
 - b. **Practice Directions**, specifically **Practice Direction #13**

Primary Subject: SUPPLEMENTARY AND CURRENT SUBMISSIONS/REPRESENTATIONS OF THE APPELLANT

Subject #2: SEEKING AN ORDER WITHOUT FURTHER HEARING FROM THE RESPONDENT PUBLIC INSTITUTION WHO HAS FAILED TO COMPLY WITH *FIPPA* FOR 150 DAYS (five times the statutory deadline)

Subject #3: REQUEST FOR A PEREMPTORY ORDER WITHOUT A HEARING AGAINST THE RESPONDENT PUBLIC INSTITUTION FOR NON-COMPLIANCE WITH STATUTORY OBLIGATIONS; AND ANCILLARY, PRE-EMPTIVE MATTERS

REQUESTOR/APPELLANT Mr. Kevin A. McLean (B.A., J.D. CIM) 410-775 KING STREET WEST TORONTO, ONTARIO M5V 2K3 Email: <u>MRKEVINALEXANDERMCLEANBAJDCIM@GMAIL.COM</u>	LICENSE APPEAL TRIBUNAL Address: 15 Grosvenor St Ground Floor, Toronto, ON M7A 2G6 Email: <u>Access.TO-TDO@ontario.ca</u> AND TO: Head of Public Institution Mr. Sean Weir Executive Chair of the LAT 25 Grosvenor St., 19th Floor Toronto, Ontario M7A 1R1

Filed with:

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I. INTRODUCTION AND OVERVIEW

1. These submissions are respectfully presented to the Office of the Information and Privacy Commissioner/Ontario (“*OIPC*”) and, with a copy to the Licence Appeal Tribunal (the “*LAT*”) in this Appeal of singular and profound importance. This matter not only implicates the statutory rights of the “Appellant,” which are inextricably linked to the fundamental tenets of a transparent and accountable public administration, but also presents a profound challenge to the foundational principles of administrative justice, procedural fairness, and institutional probity. The egregious and protracted failure of the LAT to fulfill its statutory obligations under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (“*FIPPA*” or the “*Act*”), is a dereliction of duty that mandates the immediate issuance of a peremptory and definitive order without further deliberation or hearing, thereby obviating the necessity of an extended, and demonstrably fruitless, inquiry. The LAT’s inaction is not a mere procedural lapse or an administrative oversight; it is a pervasive and systemic dereliction of duty that threatens to subvert the very purposes for which the *Act* was enacted and undermines the public's confidence in the integrity of governmental bodies.
2. The present circumstances furnish an unassailable predicate for the issuance of a mandatory disclosure order. The LAT's manifest non-compliance with the established legal and procedural frameworks of the *Act* constitutes an unacceptable affront to the legislative imperative of timely access to information, compelling an immediate and decisive intervention by the *OIPC*. The ensuing submission shall, with exacting precision and jurisprudential rigor, articulate the factual and legal predicates that compel such an order, thereby

rendering the requested relief not merely a matter of administrative convenience, but an inevitable corollary of the established facts and a necessary measure to restore the integrity of the information access regime. The **Appellant** postulates that the very legitimacy of the LAT's operations, as a public institution entrusted with quasi-judicial functions, is called into question by its conspicuous and prolonged failure to adhere to these foundational statutory duties. This failure, by its very nature, constitutes an institutional betrayal of the public trust that must be met with a swift and unequivocal judicial response.

3. A dispositive determination on the merits of the access request, with unimpeded access to all personal information records, is the *sine qua non* for ascertaining whether the LAT possessed and retains the requisite custody and control over the various records identified in the March 20, 2025, access request (the “Access Request”) and this attendant Appeal. This is contingent only upon those records manifestly unencumbered by any necessary statutory exemptions, save for a *prima facie* claim of privilege, the validity and scope of which would be subject to subsequent debate following the production of a privilege log containing brief descriptions of the implicated documents.
4. In the interest of administrative decision making economy and the expeditious administration of justice, even *arguendo* that the LAT were to advance the contention that section 21(1) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* is at issue, it is demonstrably clear that the application of subsection 21(1)(b) of said Act is warranted. This position is substantiated by both previously tendered evidence and forthcoming submissions, which shall further detail the perfidious malfeasance of the TDIA Group and its associated current and former individuals. The aforementioned actions, which are both corroborated and documented through various forms of evidence—including video and documentary proof—encompass a broad spectrum of criminal and civil transgressions, *inter alia*, theft, impersonation, fraud, and falsification of documents. The totality of this corroborative evidence elucidates a pattern of fraudulent conduct which, while shocking, is regrettably unsurprising.
5. This secondary submission is to be read in conjunction with the Appellant’s first submission.

II. THE STATUTORY IMPERATIVE OF TIMELY DISCLOSURE

6. The legislative intent of *FIPPA* constitutes a cornerstone of democratic governance and institutional probity. As articulated with deliberate clarity in section 1 of the *Act*, its dual purposes 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 (the “**FIPPA Purposes**”).

7. The very essence of these “**FIPPA Purposes**” is inexorably contingent upon the timely receipt of information. An unfulfilled statutory duty to respond, therefore, represents an egregious contravention of these foundational principles. As a matter of axiomatic legal philosophy, “*justitia dilata est justitia negata*.” This maxim is more than a mere truism; it is a profound articulation of a procedural and substantive reality. A delayed response, irrespective of its ostensible *causa proxima*, effectively abrogates the right of access and transmutes the independent review of government information into a merely academic exercise devoid of practical utility. The right of access becomes a nullity if it can be perpetually deferred by an institution’s inaction. This deliberate or negligent administrative inertia functions as a *de facto* denial, rendering the statutory framework nugatory and undermining public confidence in a government’s commitment to transparency and accountability. The **Appellant** submits that an institution’s failure to respond within the prescribed period is tantamount to a categorical refusal, and should be treated as such by this esteemed tribunal. A request for information is a temporal imperative; to ignore it is to deny it in the most fundamental sense.

III. JURISPRUDENCE ON “DEEMED REFUSAL”

5. The legal principle of “**deemed refusal**” is not a novel concept but is, rather, a consistently applied and judicially sanctioned doctrine within the jurisprudence of the *OIPC*. As demonstrated in a series of precedential orders, including *Ontario (Labour) (Re)*, 2011 CanLII 63499 (ON IPC), and *University Health Network (Re)*, 2017 CanLII 62935 (ON IPC), an institution’s failure to provide a timely and substantive response to a request for records places it in a state of “**deemed refusal**.” The LAT’s prolonged and conspicuous silence is far more egregious than the circumstances found in any of these precedents, as it has not engaged with the “Appellant,” the appeal, or the *OIPC*’s processes in any manner whatsoever. The collective holdings of these cases provide an unambiguous affirmation that the LAT’s failure to provide a timely and substantive response triggers the *OIPC*’s authority and its obligation to issue a mandatory order. The LAT was statutorily mandated to issue a response within thirty (30) days of the “Appellant’s” request of March 20, 2025, a deadline that expired, without exception, on April 19, 2025. It is a matter of irrefutable record that no response, no acknowledgment, and no form of communication has been received from the LAT in the intervening months. This complete and utter silence, in direct and flagrant contravention of the clear and unambiguous language of the *Act*, provides irrefutable grounds for the *OIPC* to proceed with an expedited order under Rule 9.03(g), which explicitly permits the issuance of an order “**without hearing further from the Parties**.” The term “**expedite**,” a loanword from the Latin *expedire*—meaning “to make ready or to dispatch”—is, in this specific context, not a mere suggestion but an articulation of an operational necessity. It signifies the imperative of accelerating a process that has been unjustifiably and interminably protracted.

The LAT's conduct presents a patent and indisputable case of “**deemed refusal**” pursuant to the unambiguous command of section 29(4) of the *Act*, which dictates:

“A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.”

IV. ANALYSIS OF THE REQUESTED RECORDS

8. The “**Appellant's**” request for records is both diverse in its nature and specific in its scope, falling entirely within the LAT's operational possession and control. The request has been meticulously subdivided into thirteen (13) distinct classes, each designed to elicit a discrete and manageable volume of records. The LAT's failure to provide a response, or even an index of responsive records, is not merely a breach of its statutory duty but also a tacit admission that it has not conducted a “**reasonable search**” as mandated by the *Act*. To further delineate the non-onerous nature of this request, a summary of the sought-after records is provided, demonstrating their ease of retrieval:
 - a. **Class #1: File Logs and Screenshots:** These records, residing in the LAT's “back end” systems, are electronic logs and screen captures. They are not voluminous, but are a limited series of digital artifacts indicating changes in the “style of cause” or the entry of insurance companies as respondents. These are demonstrably limited in number and easily retrievable with minimal effort, presenting no rational basis for a failure to produce.
 - b. **Class #2: Power Outage Records:** This class seeks specific records pertaining to a power outage on or around March 30, 2024. The request is for documentation of the incident and the subsequent steps taken to recreate the file. The logical extrapolation is that these are a very small number of records, likely consisting of a singular report or a pair of related documents, whose existence and location should be readily ascertainable.
 - c. **Class #3: Specific LAT Registrar Documents:** This class requests specific documents identified from a LAT Registrar printout from on or around February 26, 2025. These documents, which include two Undisclosed Motion Orders and the denotation of the TDGIC as a related party, are finite in nature and must be in the direct possession and control of the LAT. Their non-production is a fundamental failure of information management.
 - d. **Class #4: Shuttleworth-type Documents:** The records in this class are specific to the LAT proceeding and are analogous to those addressed in *Mary Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 (CanLII). The number of such records is proportional to the number of decisions or orders in the proceeding, making the search for them a straightforward task and obviating any claim of undue burden.
 - e. **Class #5: Professional Advisers & Legal Counsel:** This class requests the names of legal counsel and “Legal Counsel Teams” to the Tribunal and decision-makers. It further requests a list of communications between these parties. The request explicitly indicates a preference for a format similar to an affidavit of documents, confirming its intention to facilitate the process rather than impede it. This information is integral to the transparency of adjudicative proceedings.
 - f. **Classes #6, #7, #8, and #9: Communications with TD Insurance Group:** These classes meticulously delineate specific email and communication records involving various LAT and TDI Group personnel. The requests are limited to a finite time period and are restricted to specific individuals, making them easily searchable within the institution's digital archives. The conclusions

that these records are neither large in number nor difficult to locate are based on the clear parameters of the requests.

- g. **Class #10: Notes to Phone Calls:** This class requests notes from phone calls between LAT employees and the TDI Group. As licensed professionals are required to maintain some form of call log or notes, these records are presumed to exist and are not expected to be numerous. Their absence would be indicative of a significant procedural deficiency.
- h. **Class #11: Non-Email Communications:** The request for communications via mobile, smart devices, and messaging software such as WhatsApp and Viber is predicated on the broad definition of “**control**” under the *Act*. This definition grants the public institution the right to request a copy of such a record if it is relevant to the request, thereby making the search entirely feasible.
- i. **Class #12: Mr. Weir and Others:** This class requests all communications by or to the head of the LAT, Mr. Sean Weir, or any other member of LAT management, that involve the Appellant. It is highly unlikely that these records would be voluminous, but they are essential to the appellant's inquiry and must be produced.
- j. **Class #13: Residual Records:** This final class is a catch-all, ensuring that any other relevant records that come to the LAT's attention during a thorough and professional search are also included in the production.

9. The concept of “**control**” in relation to a public body's records is expansive. As per the precedent in *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), a broad, liberal, and purposive approach must be taken. This principle, refined in *Ministry of Small Business, Tourism and Culture and the AGBC v. The Information and Privacy Commissioner of BC and Svend Kjong*, 2000 BCSC 929, holds that a public body has “**control**” over a record if it possesses the legal right to obtain a copy of the record to respond to a request. The LAT, therefore, has the legal right and corresponding obligation to secure and produce records, including those held by third parties such as “**Tribunals Ontario**,” should it be found to be a *de facto* records holder. The failure to exercise this right of “**control**” is, in itself, a breach of its statutory duty. A crucial distinction must be drawn between the universal applicability of the *Charter of Rights and Freedoms* to governmental entities and the specific, enumerated application of *FIPPA* to designated “**institutions**.” While “**Tribunals Ontario**” functions as an overarching administrative umbrella for thirteen adjudicative tribunals, including the LAT, it is not enumerated as an “**institution**” within the exhaustive Schedule to R.R.O. 1990, Regulation 460, General. This lacuna in statutory designation carries profound implications for accountability and information governance, as it appears to enable a designated institution (the LAT) to circumvent its explicit statutory obligations by having a non-*FIPPA*-designated entity serve as its *de facto* “**records holder**” or “**records controller**.” The “*Tribunals Adjudicative Records Act*, 2019” (*TARA*), governs the public availability of certain tribunal records. *TARA* defines “**adjudicative records**” as those related to a proceeding, such as applications, notices of hearing, written submissions, evidence, decisions, and orders (*TARA*, s. 1(2)). However, it explicitly excludes “**personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders**” from this definition (*TARA*, s. 1(3)). The LAT's duty under *TARA* is to make these **adjudicative records** “available to the public” (*TARA*, s. 2(1)). This is a statutory obligation independent of *FIPPA*. While there is an overlap in the general principle of public access, the majority of the records sought in this request are not “**adjudicative records**.” The request

seeks internal administrative records, communications between the LAT and third parties, and records that fall outside the formal adjudicative process. Therefore, even if the LAT were to claim some of the requested records are “**adjudicative records**” and subject to the specific rules and confidentiality provisions of *TARA*, this would not justify its failure to respond to the entirety of the request. The blanket non-response is a failure to meet its duties under both statutes and must be rectified.

V. THE OPEN COURT PRINCIPLE AND ACCESS TO ADJUDICATIVE RECORDS: Limited Application (if any)

12. The public's right of access to adjudicative records and proceedings constitutes a fundamental tenet of Canadian common law, a principle universally known as the “**open court principle**.” This doctrine, articulated with authoritative finality by the Supreme Court of Canada in cases such as *McInerney v. MacDonald*, 1992 CanLII 57 (SCC), presumes that all tribunal proceedings are accessible to the public unless a demonstrably valid reason for their closure or the withholding of information is established. The LAT's silence not only constitutes a flagrant violation of the *Act* but also fundamentally undermines the democratic rights of persons seeking general records and personal information about themselves. It precludes any and all public scrutiny of the LAT's operations, thereby concealing the very information necessary for an informed citizenry to hold the institution accountable. The LAT's manifest inability to maintain a comprehensive, accurate, and readily accessible record of proceedings serves as further irrefutable evidence of its chronic non-compliance with *FIPPA* and its foundational principles of transparency, accessibility, and accountability.

VI. THE EXIGENCY OF EXPEDITED PROCESSES

13. The *OIPC's Practice Direction #13: Expedited Processes*, implemented in July 2024, unequivocally establishes a framework for the expedited resolution of issues under appeal. This Practice Direction specifically enumerates “**Deemed Refusal**,” “**Failure to Disclose**,” and “**Time Extension**” appeals as types that will “**routinely utilize expedited processes**.” The “Appellant's” *FIPPA* appeal falls squarely within these enumerated categories, demanding an immediate and accelerated resolution. The LAT's non-action for over 150 days—five times the statutory deadline—is a matter of exceptional concern and justifies the most expeditious course of action.

VII. GOVERNANCE AND ACCOUNTABILITY

14. The Licence Appeal Tribunal is a public body subject to the provisions of the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sch. 5 (the “*ATAGAA*”). The purpose of this *Act*, as set out in section 1, is to “ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making.” The Superior Court of Justice (“*SCJ*”), through Justice Mundhane, has demonstrated it has serious concerns about the LAT's

independence in 2025 when the *SCJ* and the Ontario Court of Appeal (“*ONCA*”) already found that it had issues in the decision of *Shuttleworth*. The conduct of the head of the LAT, by General Regulation, is far worse than what transpired in *Shuttleworth* when he was not the prescribed head of the LAT. The *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sch. 5 (the “*ATAGA*”), serves as the overarching legislative framework dictating the accountability, governance, and appointment processes for **adjudicative tribunals** in Ontario. Its stated purpose, as articulated in section 1, is to “ensure that **adjudicative tribunals** are accountable, transparent and efficient in their operations while remaining independent in their decision-making” (*ATAGA*, s. 1). This *Act* defines an “**adjudicative tribunal**” as an entity that is “prescribed” by regulation (*ATAGA*, s. 2).

1. Designation of Adjudicative Tribunals and Clusters (*O. Reg. 126/10*)

15. *O. Reg. 126/10*, entitled “Adjudicative Tribunals and Clusters,” is the principal regulation that prescribes entities as “**adjudicative tribunals**” for the purposes of the *ATAGA*. Section 1 of *O. Reg. 126/10* explicitly lists various agencies, boards, and commissions, including the Human Rights Tribunal of Ontario (Item 19 of Schedule 1), as prescribed **adjudicative tribunals**. This unequivocally establishes the LAT as a distinct legal entity subject to the *ATAGA*. Crucially, *O. Reg. 126/10* also provides for the designation of **clusters of adjudicative tribunals**. Section 2 of this Regulation designates certain tribunals as a “**cluster**” entitled “**Tribunals Ontario**” (*O. Reg. 126/10*, s. 2). However, this designation as a “**cluster**” does not, *ipso facto*, confer upon “**Tribunals Ontario**” the status of a distinct legal entity, nor does it elevate it to the level of an “**adjudicative tribunal**” itself. Rather, it is merely an administrative grouping of existing, prescribed **adjudicative tribunals**. The regulation consistently refers to the enumerated tribunals within the cluster, not to the cluster itself as a singular adjudicative body. This distinction is fundamental: individual tribunals are legal entities, whereas the cluster is a functional arrangement.

B. Ethics Plan - Contents (*O. Reg. 91/11*)

16. The *ATAGA* mandates that every **adjudicative tribunal** shall develop an “**ethics plan**” (*ATAGA*, s. 6(1)). *O. Reg. 91/11*, entitled “Ethics Plan - Contents,” prescribes the specific requirements for these plans. Section 1 of *O. Reg. 91/11* dictates that an **ethics plan** must describe practices and procedures for ensuring members are familiar with ethical conduct and political activity requirements, as well as the tribunal's code of conduct. These obligations are placed squarely upon the individual “**adjudicative tribunal**,” not upon the “**cluster**.” This regulatory precision further reinforces the understanding that accountability, including ethical conduct, resides at the level of the individual tribunal, not the overarching, non-legal entity known as “**Tribunals Ontario**.”

C. Deadlines Re Accountability Documents (*O. Reg. 90/11*)

17. *O. Reg. 90/11*, “Deadlines re Accountability Documents,” specifies the timeframes within which **adjudicative tribunals** and **clusters** must develop their public and governance accountability documents. While it refers to deadlines for “a **cluster**” to jointly develop documents (*O. Reg. 90/11*, s. 2(2)), this does not transform the **cluster** into a legal person. It merely outlines a collaborative administrative requirement for the constituent tribunals that form the **cluster**. The primary obligation to develop various accountability documents—such as mandate and mission statements, consultation policies, service standard policies, **ethics plans**, and member accountability frameworks (*ATAGA*, ss. 3-7), as well as governance accountability documents like memoranda of understanding, business plans, and annual reports (*ATAGA*, ss. 11-13)—rests with the individual “**adjudicative tribunal**” (*O. Reg. 90/11*, s. 2(1), 3(1)). The **cluster** mechanism is a means of shared administration, not a transference of legal personality or statutory responsibility from the individual tribunals.

D. Appointment to Adjudicative Tribunals (*O. Reg. 88/11*)

18. Section 14 of the *ATAAGA* prescribes that the selection process for appointing members to an **adjudicative tribunal** must be “**competitive, merit-based**” (*ATAGA*, s. 14(1)). *O. Reg. 88/11*, “Appointment to Adjudicative Tribunals,” outlines the public information requirements for recruitment processes (*O. Reg. 88/11*, s. 1) and specifies circumstances under which the **competitive, merit-based** selection process may be waived (*O. Reg. 88/11*, s. 2). Crucially, these provisions consistently refer to the “**adjudicative tribunal**” as the entity to which members are appointed. While the *ATAGA* establishes roles such as “executive chair” for a cluster and “associate chairs” for tribunals within a **cluster** (*ATAGA*, s. 16), these positions are intrinsically linked to the governance and administration of the individual tribunals. The legal act of appointment is to the “**adjudicative tribunal**,” underscoring its distinct legal identity. The appointment process and accountability for members remain tethered to the individual tribunals, even when administrative functions are consolidated under a **cluster**.

E. Conclusion Regarding Tribunals Ontario's Legal Status

19. From a rigorous textual and teleological analysis of the *ATAGA* and its attendant regulations (*O. Reg. 126/10*, *O. Reg. 91/11*, *O. Reg. 90/11*, *O. Reg. 88/11*), it is unequivocally evident that “**Tribunals Ontario**” exists solely as an administrative nomenclature for a **cluster** of **adjudicative tribunals**. It is not, *per se*, a distinct legal entity, corporation, agency, board, or commission prescribed as an “**adjudicative tribunal**” or an “**institution**” within the meaning of *FIPPA*. All statutory obligations regarding accountability, governance, and appointments are ultimately vested in the individual, statutorily designated “**adjudicative tribunals**” that comprise the **cluster**. Therefore, while “**Tribunals Ontario**” functions as an administrative grouping for efficiency, it lacks the legal personality to independently possess or control records subject to *FIPPA* in its own right. Any such *de facto* control subverts the clear legislative intent of *FIPPA*. The LAT is specifically

identified as an “**adjudicative tribunal**” under *Ontario Regulation 126/10*. The *ATAGAA* and its attendant regulations impose numerous duties and responsibilities upon the LAT. These include, but are not limited to, the creation and publication of a “mandate and mission statement” (s. 3), a “consultation policy” (s. 4), and a “service standard policy” (s. 5). The LAT is also required to develop “governance accountability documents” such as a “memorandum of understanding” (s. 11), a “business plan” (s. 12), and an “annual report” (s. 13). The LAT's comprehensive failure to respond to the Appellant's request is a direct affront to its duties under the *ATAGAA*. The LAT's duties and the head of the LAT, by so being prescribed by regulation, are not ‘one and the same’. By failing to be transparent and accountable in its operations, and by not adhering to its service standards and policies, the LAT is acting in a manner inconsistent with the very legislation that governs its existence and defines its purpose from a protection of privacy standpoint. This breach of statutory duty, distinct from but related to its failure under *FIPPA*, further underscores the urgent need for the *OIPC's* intervention to compel compliance. The LAT is not merely a passive recipient of requests but an active participant in a system designed for public oversight, and its dereliction of this duty is a matter of serious concern.

VIII. THE TRIBUNALS ADJUDICATIVE RECORDS ACT, 2019 (the “*TARA*”)

20. The *Tribunal Adjudicative Records Act*, 2019, S.O. 2019, c. 7, Sch. 60 (*TARA*), governs the public availability of certain tribunal records. The LAT, being an “**adjudicative tribunal**” (*O. Reg 126/10*), is governed by the provisions of *TARA*. The distinction between “**adjudicative records**” and other records held by a tribunal is critical. *TARA* defines “**adjudicative records**” as those related to a proceeding, such as applications, notices of hearing, written submissions, evidence, decisions, and orders (*TARA*, s. 1(2)). However, it explicitly excludes “**personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders**” from this definition (*TARA*, s. 1(3)). The LAT's duty under *TARA* is to make these **adjudicative records** “available to the public” (*TARA*, s. 2(1)). This is a statutory obligation independent of *FIPPA*. While there is an overlap in the general principle of public access, the majority of the records sought in this request are not “**adjudicative records**.” The request seeks internal administrative records, communications between the LAT and third parties, and records that fall outside the formal adjudicative process. Therefore, even if the LAT were to claim some of the requested records are “**adjudicative records**” and subject to the specific rules and confidentiality provisions of *TARA*, this would not justify its failure to respond to the entirety of the request. The blanket non-response is a failure to meet its duties under both statutes and must be rectified.

IX. THE REQUEST FOR A PEREMPTORY ORDER

21. Given the extensive, persistent, and unmitigated non-compliance by the LAT, as evidenced by its complete and uncommunicated failure to provide any response whatsoever since the submission of the access request

on March 20, 2025, it is respectfully submitted that the *OIPC* should issue a peremptory and mandatory order compelling the LAT to produce a full and complete response. The requested documents, with the exception of any legitimately and explicitly exempt portions, should be released forthwith and without any further administrative or procedural obfuscation. The LAT's conduct demonstrates a blatant and unacceptable disregard for the foundational principles of transparency and accountability that underpin the *Act*. Such behavior not only frustrates the statutory rights of the requester but also undermines public confidence in the institution's integrity and adherence to the rule of law. It is therefore incumbent upon the *OIPC*, as the ultimate arbiter of these matters, to exercise its inherent and codified authority to restore the integrity of this process and the sanctity of the *Act*.

X. THE AVOIDANCE OF MULTIPLICITY OF PROCEEDINGS AND THE IMPORTANCE OF DETERMINATIONS FOR MULTIPLE PURPOSES

22. In Canadian law, the principle of the “avoidance of a multiplicity of proceedings” is a core objective of civil and administrative procedure, aiming to prevent the waste of judicial and party resources. It seeks to resolve all related issues and claims among the same parties in a single proceeding wherever possible. The principle holds that it is in the interest of justice for a dispute to be heard in a single forum that is clearly the most appropriate one, rather than allowing separate, often duplicative, lawsuits or hearings to proceed in different venues. This helps to prevent inconsistent verdicts, reduce costs for all parties, and ensure the efficient use of the court or tribunal's time. The legal doctrine of *forum non conveniens* is a prime example of this principle in civil courts, where a court may decline jurisdiction if another forum is clearly more suitable to hear the matter. Similarly, in administrative law, this principle guides decisions on whether to stay or consolidate related matters. The principle is especially critical for tribunals, as it directly addresses the user's point that “justice is not free.” Litigants before tribunals, which often include self-represented individuals, face significant costs in time, legal fees, and emotional stress:

1. **Cost-Effectiveness and Efficiency:** By consolidating similar cases or handling related issues informally, a tribunal can hear evidence and submissions once, rather than repeatedly. This reduces the burden on parties and the tribunal itself. For example, if ten individuals are affected by the same administrative error, a single, consolidated hearing is far more efficient than ten separate ones.
2. **Fairness and Consistency:** Consolidating proceedings ensures that all affected parties are heard and that the tribunal can reach a single, consistent decision. This prevents the possibility of contradictory rulings on the same set of facts, which would undermine public confidence in the administrative justice system; **and**
3. **Proportionality:** This principle aligns with the broader goal of proportionality in administrative law, which dictates that the process and resources used to resolve a dispute should be commensurate with the nature of the dispute itself. A full-blown, lengthy hearing may not be necessary for every complaint if a consolidated, streamlined process can achieve a just result.

23. The new privacy breach sections of Ontario's *Freedom of Information and Protection of Privacy Act (FIPPA)*, particularly section 40.1, are a practical embodiment of the principle of “avoiding a multiplicity of proceedings.” The law creates a single, consolidated pathway for dealing with privacy breaches:

1. **Centralized Reporting and Notification:** When a privacy breach occurs, the head of the institution must report it to the Information and Privacy Commissioner (*IPC*) and notify affected individuals. This single act of reporting centralizes the information about the breach with the regulatory body responsible for oversight;
2. **Centralized Complaint Mechanism:** Instead of having to initiate separate legal actions, affected individuals are told they have a right to file a complaint with the *IPC*. This channels all complaints about a single breach to one administrative body; and
3. **Efficiency for the IPC:** This structured process allows the *IPC* to investigate all complaints related to a specific breach at once. The Commissioner can conduct a single review of the institution's practices, assess the harm to all affected individuals collectively, and issue a single set of orders to achieve compliance. This avoids the inefficiency of investigating the same incident and institutional practices multiple times.

24. In essence, *FIPPA*'s new provisions establish a clear and efficient procedure that minimizes the need for separate, individual complaints or lawsuits. By consolidating the issues at the outset under the oversight of a single Commissioner, the law promotes a fair, expeditious, and cost-effective resolution, preventing a “multiplicity of proceedings” and embodying the principles of modern administrative justice. Again language is important, “The head of an institution shall report to the Commissioner any theft, loss or unauthorized use or disclosure of personal information in the custody or under the control of the institution”. The theft, loss or unauthorized use OR disclosure of PII must have been in the custody or under the control of the institution. Herein, the LAT is at issue. But what about when the LAT did not have control or custody of the PII before its theft or loss? Is the LAT absolved? Such a potential complaint could only be answered by having a final access decision.

XI. DISTINCTION BETWEEN GENERAL RECORD ACCESS AND PII ACCESS

25. As the erudite Justice Tysoe (as he then was) found in 1998, personal information access is distinct from general information record access:

It makes imminent sense to have more restrictions on access to general information than on access to personal information. In dealing with general information, the Act must balance the objective of giving the public access to records of public bodies against other legitimate objectives, such as the privacy of personal information of other persons and confidentiality of governmental or business interests. These latter objectives do not generally apply to personal information about the applicant because there are no privacy or confidentiality concerns in releasing to an applicant personal information of that applicant.

(*Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BC SC))

XII. THE LAT MAY NEED TO MAKE OR PRODUCE RECORDS

26. The Appellant notes that the definition of “record” under the Act is extremely broad, encompassing

“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; (document).”

XIII. THE IPC'S NEW EXPEDITED PROCESS

27. The IPC has launched a new expedited process to resolve certain access appeals and complaints more quickly, so parties can get to resolution sooner. The expedited process applies to certain types of access to information appeals under the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. Certain types of access to personal information complaints under the *Personal Health Information Protection Act (PHIPA)* and Part X of the *Child, Youth and Family Services Act (CYFSA)* are also eligible for this new expedited process. Several file types could be streamlined as part of this new process. Examples include files where the sole issue(s) being raised involve:

1. The adequacy of the institution's decision in response to an access request.
2. Whether an institution is deemed to have refused access due to its failure to provide a response within the statutory timeline.
3. Whether the institution failed to disclose records it has agreed to disclose.
4. Contestations about the amount of fees charged, or requests for fee waivers.
5. Whether the institution has conducted a reasonable search for the requested records.
6. Time extensions.

XIV: Orders Sought without further hearing from the LAT

28. The standard form of an order issued by the Information and Privacy Commissioner in a deemed refusal case has two main components:

a. **A directive to the institution:**

- i. This first part of the order explicitly instructs the institution to issue a **final access decision** to the appellant regarding the records. This must be done in accordance with the Act and usually includes a specific deadline. The order often specifies that the institution cannot use any further time extensions under section 27 of the Act.

1. *Example from the cases:* "I order the ministry to issue a final access decision to the appellant regarding access to the records in accordance with the Act without recourse to any further time extensions, no later than Tuesday, October 11, 2011." (see: 2011 CanLII 63499)

- o **A directive to verify compliance:** The second part of the order mandates that the institution provide a copy of the decision letter to the IPC by the same deadline to verify that the order has been followed.

1. *Example from the cases:* "In order to verify compliance with Provision 1 of this order, I order the ministry to provide me with a copy of the decision letter referred to in Provision 1 no later than Tuesday, October 11, 2011." (from 2011 CanLII 63499)

29. This two-part structure ensures that the institution not only corrects its original failure but also provides evidence of its compliance to the Commissioner's office.

30. The Appellant seeks orders in that substance and spirit with some necessary modifications:

- a. An Order that the LAT issue a first and final access decision within 7 days of Thursday, August 21, 2025;
- b. An Order that the LAT provide copies of documents containing personal information relating to or about the Appellant where it does not contend that there any necessary exemptions;
- c. An Order that the LAT provide a copy of its decision to the OIPC by no later than Thursday, August 28, 2025;
- d. Upon review of the final access decision, the Applicant has leave to file additional submissions for additional relief under the same OIPC Appeal number herein; and
- e. Any other consequential relief regarding the above.

31. As our ONCA found in *R. v. Van Duong*, 2018 ONCA 115, there is no reasonable expectation for a thief or thieves, and certainly those that encouraged, facilitated and/or acquiesced to the same:

"[7] Although the application judge found that the appellants had a subjective expectation of privacy, even this seems too generous to the appellants. Allowing the appellants a subjective expectation of privacy, in this instance, would confuse the relevant sense of expectation with desire. "Expectation" can be ambiguous between two meanings, only one of which is relevant to s. 8 analysis. In the first sense, a person has an expectation of privacy where he desires privacy and believes it is unlikely, as a matter of fact, that he will be disturbed. In the second sense, a person has an expectation of privacy where she believes she will be undisturbed because she is *entitled* to be left undisturbed. In s. 8 jurisprudence, subjective expectation is used in this latter sense. Here, although the appellants had the desire for privacy, Mr. Van Duong's evidence that he would flee the property if confronted, suggests that the appellants did not have even a subjective expectation of privacy, even though they very much desired to be left alone and went to some considerable trouble to achieve that end.

[8] Even if the appellants had a subjective expectation of privacy, it could not have been objectively reasonable. The application judge did not err in concluding that there can be no reasonable expectation of privacy in circumstances where the appellants' connection to the property is so tenuous."

32. Consequently, the entirety of the correspondence and records concerning the TDI Group Karat Theft must be produced in the custody and control of the LAT along with the 13 classes subject to any review of the veracity and validity of any privileged document as the theft and its participants and the aftermath have become a matter of objective record. The conspicuous absence of a response from the LAT distancing itself from the aforementioned malfeasance and its ensuing aftermath, constitutes a profound and inexplicable dereliction of its duties. An adverse inference must be drawn. The requested relief is an ineluctable

conclusion, serving as the necessary corollary to the LAT's pervasive, inexcusable, and systematic inaction. This is the precise outcome **quod erat demonstrandum**.

33. Subject to any cross-referencing of evidence, sworn or otherwise, hyperlinking, bookmarking et al, the Appellant that the relief must be granted forthwith and nunc pro tunc (where applicable).

Respectfully Submitted to the OIPC on August 21, 2025

Mr. Kevin A. McLean

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McLean

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APPENDICES

1. *McInerney v. MacDonald*, 1992 CanLII 57 (SCC): A foundational Supreme Court of Canada decision establishing a patient's right of access to their medical records based on a fiduciary duty and beneficial interest in the information, which can be analogized to a citizen's right to public information.
2. *Ontario (Labour) (Re)*, 2011 CanLII 63499 (ON IPC): A key decision demonstrating that an institution's failure to issue a final decision within the statutory period, without a valid reason, constitutes a “**deemed refusal**.”
3. *University Health Network (Re)*, 2017 CanLII 62935 (ON IPC): A case highlighting that an institution's behavior that undermines the *Act's* purpose, such as failing to issue a decision after a fee was paid, places it in a “**deemed refusal**” situation.
4. *University of Ottawa (Re)*, 2012 CanLII 2818 (ON IPC): A precedent establishing that improperly closing a request file, even with an explanation, is a failure to meet statutory obligations.
5. *Ontario (Environment, Conservation and Parks) (Re)*, 2023 CanLII 12585 (ON IPC): A recent decision where persistent failure to respond to a request, despite repeated contact from the *OIPC*, warranted a finding of “**deemed refusal**” and the imposition of a mandatory order.
6. *Ontario (Environment and Climate Change) (Re)*, 2017 CanLII 81639 (ON IPC): A case where a ministry's failure to issue a final decision after claiming a time extension resulted in a deemed refusal.
7. *Ontario Agency for Health Protection and Promotion*, 2021 CanLII 63767 (ON IPC): An adjudicator found that a failure to provide a specific length of time for an extension was a breach of statutory obligations.
8. *Ontario (Community Safety and Correctional Services) (Re)*, 2013 CanLII 10443 (ON IPC): An institution was found in a “**deemed refusal**” situation for its repeated failure to provide decisions within prescribed timeframes.
9. *Ontario (Public Guardian and Trustee) (Re)*, 2017 CanLII 6298 (ON IPC): A case illustrating the rare exception where a request was deemed “frivolous and vexatious” and a limit was imposed on the number of active requests.
10. *Ontario (Community Safety and Correctional Services) (Re)*, 2015 CanLII 38828 (ON IPC): A case that deals with the application of exemptions and the duty to sever records.
11. *Ontario (Environment and Climate Change) (Re)*, 2015 CanLII 76939 (ON IPC): This case involved the disclosure of some records and a directive to issue a decision on the remaining responsive records.
12. *Mary Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 (CanLII): A decision from the Ontario Superior Court of Justice that raised concerns about the LAT's independence and procedural fairness.
13. *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA): An important Federal Court of Appeal decision establishing a broad and purposive approach to the interpretation of “control” under access to information legislation.
14. *Ministry of Small Business, Tourism and Culture and the AGBC v. The Information and Privacy Commissioner of BC and Svend Kjong*, 2000 BCSC 929: This case refined the concept of “control,” holding that a public body has control over a record if it possesses the legal right to obtain a copy.
15. *Toronto Star Newspapers Ltd. v. Attorney General of Ontario*, 2018 ONSC 2586: A pivotal decision that found *FIPPA's* presumption against the disclosure of personal information in adjudicative records to be an unconstitutional infringement of the “**open court principle**.”
16. *Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BC SC): A case that makes a clear distinction between the right of access to general information and the right of access to personal information, noting that the latter has fewer justifiable restrictions.

APPENDIX B: LEGISLATION

- *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31
- *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sch. 5
- *Tribunals Adjudicative Records Act*, 2019, S.O. 2019, c. 7, Sch. 60
- *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5
- *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22
- *Rules of Practice and Procedure of the OIPC*
- *Practice Direction #13: Expedited Processes of the OIPC*
- *O. Reg. 126/10*
- *O. Reg. 91/11*
- *O. Reg. 90/11*
- *O. Reg. 88/11*
- *O. Reg. 211/19*

McInerney v. MacDonald, 1992 CanLII 57 (SCC)

Case Background: This seminal case addressed a patient's right of access to their medical records. The appellant, a physician, refused to release reports from other doctors in the patient's file, arguing they were not her property.

Holding: The Supreme Court of Canada unanimously affirmed the patient's right to access and copy all information in her medical file. The Court established that the physician-patient relationship is fiduciary, creating a duty of loyalty, confidentiality, and disclosure. While the physical record belongs to the physician, the information itself is the patient's property in a fundamental sense. The Court placed the onus on the physician to justify any refusal to disclose, which could only be done on “**compelling grounds**” such as potential harm to the patient or a third party. The Court also placed a “**superintending jurisdiction**” on the courts to ensure the physician's discretion is not exercised arbitrarily.

Legal Principle Extrapolated: The decision establishes a robust principle of access to information based on a beneficial interest. This principle can be analogized to the relationship between a citizen and a public institution, where the institution holds information in a fiduciary-like capacity for the benefit of the public.

Summary of “Deemed Refusal” Jurisprudence

- ***Ministry of Labour (Re)***, 2011 CanLII 63499 (ON IPC): An institution's failure to issue a final decision within the statutory period, without a valid reason, constitutes a “**deemed refusal**.” The adjudicator found that a request was clear and did not require clarification, compelling a disclosure order.
- ***University of Ottawa (Re)***, 2012 CanLII 2818 (ON IPC): The act of improperly closing a request file, even with an explanation, is a failure to meet statutory obligations. An order was issued to compel the institution to process the request.
- ***Ontario (Environment, Conservation and Parks) (Re)***, 2023 CanLII 12585 (ON IPC): Persistent failure to respond to a request, despite repeated contact from the *OIPC*, warrants a finding of “**deemed refusal**” and the imposition of a mandatory order.
- ***University Health Network (Re)***, 2017 CanLII 62935 (ON IPC): An institution's behavior that undermines the *Act's* purpose, such as failing to issue a decision after a fee was paid, places it in a “**deemed refusal**” situation. The conduct in this case was deemed a dereliction of statutory duty.

ⁱmeans a proceeding in which the IPC is asked to review a decision of an Institution concerning a Request under the Act (see: Code of Procedure of the OIPC)

ⁱⁱDeemed Refusal Appeal means an Appeal in which the sole issue is whether the Institution has responded to a Request within the time frame required by the Act. While not the sole issue, it must be determined what records the LAT controls and/or has custody at the time of request. This can only be determined by receipt of an access decision by the LAT.

ⁱⁱⁱLearned of by the Appellant by way of Notice of Appeal: Notice of Appeal means a document prepared by the IPC confirming that an Appeal has been filed against an Institution's decision concerning a Request under the Act, and includes the names of the Parties, the IPC's file number, and the Institution's file number (if any).

^{iv}Expedited Process means a single-person processing model that seeks to expedite the resolution of select types of Appeals in an efficient and effective manner, either by way of informal resolution or Inquiry

Tab 4

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

BETWEEN:

Mr. Kevin A. McLean

APPELLANT

AND:

LICENCE APPEAL TRIBUNAL

RESPONDENT

Re: The Licence Appeal Tribunal (Number 68 Institution in the Gen Reg.)

IN THE MATTER OF an Appeal, *involving a Deemed Refusal Decision*, under Appeal Number PA25-00294 under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (“*FIPPA*” or the “*Act*”) and Associated Regulations (see: *Disposal of Personal Information*, R.R.O. 1990, Reg. 459 (“*Reg. 459*”) and *General*, R.R.O. 1990, Reg. 460 (“*Reg. 460*”)).

IN THE MATTER OF an Appeal involving the applicability and consideration of other statutes, including but not limited to, the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, S.O. 2009, c. 33, Sch. 5 (“*ATAGAA*”) and the *Tribunals Adjudicative Records Act*, 2019, S.O. 2019, c. 7, Sch. 60 (“*TARA*”).

In the matter of an Expedited Process appeal before the OIPC under the OIPC's:

- a. *Code of Procedure for appeals* under MFIPPA and FIPPA (the “*Code*”), specifically *Rule 9*; and
- b. *Practice Directions*, specifically *Practice Direction #13*.

ORDERS OF THE INFORMATION AND PRIVACY COMMISSIONER

BACKGROUND

This expedited appeal originates from a formal access request submitted by the Appellant on March 20, 2025, to the Licence Appeal Tribunal (“LAT”), an entity designated as an institution pursuant to *s. 1 of Regulation 460* of the *Act*. The request pertained to records containing the Appellant’s personal information, a category of information for which a direct right of access is explicitly afforded to individuals under the statutory framework of the *Act*. As of the date of this Order, the LAT has not issued a final access decision to the Appellant, a protracted delay which has persisted for an extended period of time beyond the thirty-day limit prescribed by the statute for an institutional response. Pursuant to *section 29(4) of FIPPA*, this prolonged and manifest failure to provide a timely decision constitutes a legal fiction known as a “deemed refusal,” thereby vesting this Office with jurisdiction to hear the ensuing appeal.

This matter is proceeding under the expedited processes of the Office of the Information and Privacy Commissioner (“OIPC”), as delineated within *Practice Direction #13* (“Expedited Processes”). Comprehensive submissions and supporting evidence have been provided by the Appellant, a circumstance that has facilitated a thorough and expedient review. Upon due consideration of the record, it has been determined by the OIPC that this appeal, characterized as a “Deemed Refusal” matter, is eminently suitable for resolution through an expedited inquiry. This determination is predicated upon the very nature of a deemed refusal, which, by its definition, indicates a complete lack of compliance by the institution and obviates the need for a protracted inquiry into the substantive merits of any exemptions, consistent with *Practice Direction #13, section 5(b)*.

Upon a comprehensive and meticulous review of the filed and served record, it is the considered determination of this Office that the LAT has demonstrably failed to fulfill its statutory obligations under the *Act* by not providing a final access decision within the prescribed timeframe, as required by *section 26* of the *Act*, or at any time thereafter. This failure is not merely a procedural oversight but constitutes a fundamental dereliction of the institutional duty to respond to access requests in a manner that is both timely and compliant with the foundational principles of the statute.

The foundational mandate of this Office, as articulated within *section 1* of the *Freedom of Information and Protection of Privacy Act* (R.S.O. 1990, c. F.31), is to administer a statute that provides a right of access to information under the control of institutions. This mandate is guided by several paramount principles that underpin the transparency and accountability of public bodies. These principles include, *inter alia*, that (i) information should be available to the public, thus fostering an informed citizenry; (ii) necessary exemptions from the right of access should be limited and specific, thereby preventing institutions from employing broad, discretionary prohibitions on disclosure; and (iii) decisions on the disclosure of government information should be reviewed independently of government, a provision that ensures impartiality and serves as a crucial check on institutional power. Concomitantly, the *Act* is administered to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a concomitant right of access to that information.

Furthermore, subject to *subsections 10 (1.1)* and *69 (2)*, which are not germane to the matter at hand, a person possesses a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls squarely within one of the narrowly construed exemptions under *sections 12 to 22*; or (b) the head of the institution is of the considered opinion, upon demonstrable and reasonable grounds, that the request for access is frivolous or vexatious. The burden of proof to demonstrate the applicability of an exemption or the vexatious nature of a request rests squarely upon the institution, a burden which has not been discharged in the present matter.

No representation has been made by the head of the LAT in any compliant manner or at all, that any of the records sought by the Appellant fall within an exemption or that the head was of the opinion, on any grounds let alone reasonable grounds, that the request was frivolous or vexatious. The complete absence of such a representation has led to the inexorable conclusion that the Appellant’s March 20, 2025, access request is deemed *prima facie* to be a serious and meritorious application for information.

In consideration of the alleged larceny perpetrated against the Appellant by an individual identified as Mr. David Karat, an Alternative Dispute Resolution specialist for four insurance companies within the TDIA Group, on October 25, 2024, an act which was inherently adversarial to the Appellant by its very nature, and which occurred under circumstances and at a time which engender suspicion, there exist reasonable and probable grounds to believe that the head was compelled to release the information. This obligation arises from the public interest override provision of the *Act* (*section 11 (1)*), which stipulates that a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health, or safety hazard to the public. While not a conventional public health hazard, the erosion of public trust in a public institution, particularly in the context of an alleged criminal act involving a party directly related to its operations, constitutes a consequential hazard to the integrity of the public body. The public interest necessitates disclosure, as any instance wherein an individual is the object of such an act and the LAT is required to be independent, fair, open, and honest, the perception of a reasonable apprehension of

bias becomes a consequential issue that mandates the prioritization of such an access request. Whether this information was known at the time of the access request or within the thirty-day statutory window is of no consequence; the LAT had a positive obligation to assuage concerns or remedy the situation by engaging in the compliance that it initially failed to provide.

Although solicitor-client privilege, inclusive of litigation privilege, has not been afforded constitutionalization status, such privilege can be waived or, in exceptional circumstances, disregarded when records involve breaches of law, including torts and, most certainly, criminal conduct. The legal principle of the "crime-fraud" exception to privilege provides a well-established precedent for the abrogation of this protection when it is employed to facilitate or conceal illicit activities. This is not to suggest that the LAT was engaged in such conduct, but rather that it may possess records, particularly those that involve the personal information of the Appellant, that will be of material assistance to him in the recovery of his stolen property and personal information. No provision within this Order is intended to mandate the breach of solicitor-client privilege; instead, it is intended to require a final access decision from the LAT, a decision which must be made in a manner consistent with the principles of the *Act*.

Concurrence is expressed by the OIPC with the Appellant's submissions, which place substantial reliance upon *R. v. Van Duong (ONCA)*, and a finding is made that there exists no reasonable expectation of privacy for a perpetrator of larceny concerning an individual's property and personal information. This principle is a cornerstone of privacy jurisprudence, which dictates that a person cannot maintain an expectation of privacy in contraband or the fruits of a crime. The LAT is thus directed to bear this principle in mind when rendering its final access decision, and to ensure that its determination is made in a manner that is both transparent and consistent with the fundamental tenets of the *Act*.

ORDERS

In light of the foregoing, and in accordance with the authority vested in the Commissioner under *FIPPA* and the *OIPC's Code of Procedure*, it is hereby **ORDERED** that the Licence Appeal Tribunal, as the Respondent, shall take the following actions:

1. **Final Access Decision:** The LAT shall, within seven (7) days of the date of this Order, issue a final, written access decision to the Appellant regarding his request dated March 20, 2025. This decision must comply with the requirements of section 29 of *FIPPA* and shall not be subject to any further time extensions or attempts at a purported time exemption;
2. **Disclosure of Non-Exempt Records:** Concurrently with the issuance of its final access decision, the LAT shall provide the Appellant with copies of all records or portions of records containing his personal information to which no exemptions under *FIPPA* apply.
3. **Index of Records:** The LAT shall include a comprehensive Index of Records as part of its final access decision. The Index must clearly delineate each record, indicate which records or portions of records have been disclosed, and for any records or portions withheld, specify the particular exemption(s) claimed under *FIPPA* as the basis for refusal. This is in accordance with the Code of Procedure.
4. **Compliance Verification:** The LAT shall, no later than seven (7) days from the date of this Order, provide a copy of its final access decision and the corresponding Index of Records to the OIPC Expedited Appeals Team to verify compliance with this Order;
5. **Leave to File Further Submissions:** The Appellant is hereby granted leave to file additional submissions with the OIPC, under this Appeal File Number (PA25-00294), upon receipt and review of the LAT's final access decision and the accompanying Index of Records; and
6. **Enforcement of this order:** the Appellant is at liberty to seek enforcement of the orders above by any lawful means should the LAT not comply with the same.

Dated this _____ day of Sept, 2025

Ms. Kelley Sherwood

Case Lead,

Expedited Appeals Team

Information and Privacy Commissioner of Ontario

Tab 5



Tribunals Ontario

15 Grosvenor Street, Ground Floor
Toronto, ON M7A 2G6
Email: Access.TO-TDO@ontario.ca

Tribunaux décisionnels Ontario

15, rue Grosvenor, rez-de-chaussée
Toronto (Ontario) M7A 2G6
Courriel: Access.TO-TDO@ontario.ca

October 14, 2025

Kevin McLean
410-775 King Street West
Toronto, Ontario
M5V 2K3

Via Email: mrkevinalexandermcleanbajdcim@gmail.com

Dear Kevin McLean:

**Re: Licence Appeal Tribunal Access Request
LAT-25-009-F
PA25-00294**

This letter is in response to your request under the *Freedom of Information and Protection of Privacy Act* R.S.O., 1990, c. F.31 (*FIPPA*) received on March 18, 2025, for access to information from the Licence Appeal Tribunal (LAT) of Tribunals Ontario.

In your 50-page request, you asked for copies of internal correspondence and records related to your LAT application file, 23-015662/AABS *Kevin McLean vs. Security National Insurance Company*, for the time period of December 24, 2023, to January 31, 2025.

Access Decision

Pursuant to section 62(1) of *FIPPA*, the delegated decision maker for this decision is James Tanel, Executive Advisor to the Executive Director of Tribunals Ontario.

Adjudicative Records

With respect to the sections of your request that relate to copies of records from your application file, 23-015662/AABS, please note that as a party to this application, you are not required to request these records under *FIPPA*. Records included in your LAT application are not subject to *FIPPA*, they are adjudicative records subject to the *Tribunals Adjudicative Records Act, 2019*, S.O., 2019, c. 7, Sched.60 (*TARA*).

We were advised by the LAT that you requested copies of your entire application file on February 5, 2025. The LAT compiled the corresponding adjudicative records and sent them to you on February 28, 2025, via the "Sensitive Content Management Service" (SCM) because the file size was too large to send by email. As you didn't acknowledge the email from the LAT or accept their invite to download the records from the SCM, they sent you a follow up email and SCM invitation on April 24, 2025. Again, no response was received by the LAT, so out of an abundance of caution, they saved copies of the adjudicative records on two encrypted USB keys and sent them to your home address via courier (Purolator) on May 1, 2025. The Purolator waybill showed proof of delivery on May 2, 2025, however, the package containing the USB keys was returned to our office by mail on May 13, 2025.

Although the requested adjudicative records from your application file are subject to *TARA* and fall outside the scope of *FIPPA*, our office has confirmed with the LAT that they will send you a third invitation to the SCM on October 14, 2025, so that you can download these records.

With respect to the sections of your request for records specific to your application file in the nature of the type of documents referenced in certain passages of the Divisional Court decision in *Shuttleworth v. Licence Appeal Tribunal*, you provided excerpts from a court decision referencing legal and peer review of adjudicative decisions and a written policy regarding the same. Access is granted to the Tribunals Ontario Guidelines for Reasons Review and Decision Quality Standards (<https://tribunalsontario.ca/documents/TO/TO%20Guidelines%20for%20Reasons%20Review%20and%20Decision%20Quality%20Standards%20-%20EN.html>), which were in place at the time period relevant to your application file.

Regarding your request for the remaining internal communication about your application, we can confirm that there are several categories of internal emails relating to your appeal that are responsive to your request:

1. communications between counsel and adjudicators;
2. communication between adjudicators;
3. communications between staff and
4. communications between staff and adjudicators.

Access is denied to these categories of emails under section 19 of *FIPPA* (solicitor-client privilege) with respect to records related to the seeking and provision of legal advice.

Access is also denied to these categories of emails pursuant to subsection 65(3.1) of *FIPPA*, as draft decisions and communications related to draft decisions are excluded from *FIPPA*.

Appeal Process

You may request the Information and Privacy Commissioner to review this decision within thirty days from the date of this letter. You can do so by filing an appeal online at www.ipc.on.ca. The appeal fee is \$25. Alternatively, appeals can still be mailed with a cheque or money order payable to "Minister of Finance" to: Registrar, Information and Privacy Commissioner of Ontario, 2 Bloor Street East, Suite 1400, Toronto, ON, M4W 1A8. If you decide to appeal, you should provide a copy of your original request to the IPC along with your appeal.

Sincerely,



Jennifer Janes
Senior Policy Advisor, FOI
Access to Records and Information Office
Tribunals Ontario

cc: Kelley Sherwood, Case Lead, Information and Privacy Commissioner of Ontario
kelly.sherwood@ipc.on.ca

Tab 6

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

*Re: The Licence Appeal Tribunal (Number 68 **Institution** in the Gen Reg.)*

IN THE MATTER OF an Appeal,ⁱ involving a Deemed Refusal Decision,ⁱⁱ under Appeal Number PA25-00294ⁱⁱⁱ under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*“FIPPA”*] and Associated Regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 (*“Reg 459”*) and *General*, RRO 1990, Reg 460 (*“Reg 460”* or *“Gen Reg”*))

IN THE MATTER OF an Appeal involving applicability and consideration of the below statutes other than *FIPPA*

In the matter of an Expedited Process^{iv} appeal before the OIPC under the OIPC’s:

- a. Code of Procedure for appeals under MFIPPA and FIPPA (the *“Code”*), specifically Rule 9; and
- b. Practice Directions, specifically **Practice Direction #13**

Tertiary Submissions of the Appellant

Subject: void ab initio and unauthorized purported response under FIPPA by a non-Institution

FACTUM OF THE APPELLANT

I. OVERVIEW AND RELIEF SOUGHT

1. This appeal addresses the patent procedural and jurisdictional failure of the Respondent Institution, the Licence Appeal Tribunal (hereinafter the *“LAT”*), to discharge its *de jure* statutory obligation under *FIPPA* to issue a compliant access decision. A purported determination was instead transmitted on the letterhead of Tribunals Ontario (Decision Letter), an administrative emanation which is utterly *non grata* within the prescribed regulatory framework delineated by the Act. This unauthorized response is indicative of a profound institutional malaise and an untenable disregard for the precise, mandatory mechanisms established by the Legislature.
2. The fundamental premise of this submission is not merely a contestation regarding the substantive denial of access; rather, the **gravamen** of this appeal pertains to the fundamental, irremediable defect inherent in the instrument of denial itself, which axiomatically renders it a nullity (*void ab initio*). The Decision Letter,

having been issued by an entity without delegated authority under the *General Regulation*, is a legal nonentity and must be disregarded *in toto* by this Commissioner.

3. Consequently, given that the prescribed temporal exigency for the issuance of a compliant access determination has been exhaustively traversed and has long since elapsed, the Appellant, Mr. Kevin A. McLean, is now incontrovertibly entitled to a peremptory Order from the Commissioner. Such an Order must compel the immediate and comprehensive disclosure of each and every record originally solicited, thereby rectifying the Institution's profound institutional failure, which, as articulated in prior submissions, has now persisted for over **150 days** (*Appellant's Submissions - Order without hearing from Respondent - Appellant - Mr McLean - 21-Aug-2025.pdf*, Subject #2), representing five times the statutory deadline for a response. The Institution's inaction demonstrates a sustained administrative dereliction.
4. The cumulative procedural and substantive failures detailed herein constitute an egregious affront to the core principles of access legislation, necessitating the most decisive and efficacious intervention available to the Commissioner under the statutory scheme. The institutional conduct of the LAT has effectively stymied the Appellant's right of access, compelling the Commissioner to exercise the full extent of the remedial mandate to prevent the triumph of procedural obfuscation over substantive rights.
5. The Appellant respectfully seeks an Order from the Commissioner:
 - a. Declaring the purported access decision dated October 14, 2025 (the "Decision Letter") as void ab initio and entirely without legal force or effect;
 - b. Confirming that the LAT has failed to participate de jure in this access request process, resulting in a sustained deemed refusal;
 - c. Issuing a peremptory Order compelling the LAT to disclose to the Appellant, within seven (7) days of the date of the Order, all records pertaining to the Appellant's request, including but not limited to the 13 stipulated Record Classes and the two Undisclosed Motion Orders; and,

d. Granting such further and other relief as is deemed appropriate and necessary to effectuate the remedial purposes of the Act in these peculiar circumstances.

II. JURISDICTION AND STATUTORY FRAMEWORK

6. This proceeding is properly before the Commissioner pursuant to the jurisdiction conferred by sections 50 and 54 of *FIPPA*. The statutory command enshrined in section 54 is particularly germane, stipulating that subsequent to the reception of all evidence and arguments pertaining to an inquiry, the Commissioner **shall** make an Order disposing of the issues raised by the appeal. This mandate is an imperative, not a suggestion, and crystallizes the Commissioner's duty to provide a definitive resolution.

§\text{Order } 54(1) \text{ 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.}§§

7. The breadth of the Commissioner's authority is expansive, as the Order may incorporate any terms and conditions deemed appropriate, subject to the overarching dictates of the Act (*FIPPA*, s. 54(3)). This includes the inherent power to impose a definitive, punitive remedy, such as the full disclosure of records, when the Institution's non-compliance has reached a level of administrative dereliction that defeats the statutory purpose. The Institutional conduct at bar, characterized by an extended period of non-compliance and the issuance of an *ultra vires* decision, is analogous to the failure discussed in *University Health Network (Re)*, 2017 CanLII 62935 (ON IPC), where the lack of compliance was explicitly deemed a dereliction of statutory duty (*Appellant's Submissions - Order without hearing from Respondent - Appellant - Mr McLean - 21-Aug-2025.pdf*, p. 1, citing IPC case law on dereliction of statutory duty).

8. The Institution's failure to act within the prescribed timeline, coupled with the submission of a jurisdictionally defective response, effectively mandates the Commissioner to render a finding *in absentia* regarding the necessary administrative prerequisites for the appeal's substantive commencement. The LAT's protracted inaction is tantamount to an express refusal to participate in the statutory process, thereby forfeiting its right to subsequent full participation in the inquiry phase.

III. FACTS PERTINENT TO THE INSTANT APPEAL

A. The Original Access Request and Context

9. On March 18, 2025, the Appellant, Mr. Kevin A. McLean, duly submitted an access request under *FIPPA* to the LAT (Decision Letter, p. 1). The submission was exceptionally detailed and bespoke, encompassing internal correspondence and records specifically delineated by **13 distinct Record Classes** relating to the Appellant's LAT file (Motion Record, Tab *X*, p. *Y*). This request was not a generalized inquiry but a highly specific and targeted search for records related to a file identified as *23-015662/AABS Kevin McLean vs. Security National Insurance Company* (Decision Letter, p. 1).
10. The specificity of this request placed an unambiguous, affirmative obligation upon the Institution to conduct an exhaustive and meticulous search for records pertaining to each of the 13 Record Classes, followed by a segmented analysis of any potential exemptions. The precision of the Appellant's request afforded the Institution no latitude for generalized or incomplete response; a comprehensive, class-by-class determination was a mandatory prerequisite for statutory compliance.

B. The Defective Access Determination and the Doctrine of *Ultra Vires*

11. The LAT is designated as the singular "Institution" under the *General Regulation, R.R.O. 1990, Reg. 460* (cited as Number 68 in the Gen Reg: *Appellant's Submissions - Order without hearing from Respondent - Appellant - Mr McLean - 21-Aug-2025.pdf*, Re: p. 1), and is the only entity statutorily empowered to issue an access determination. This authority resides with the Head or their duly authorized delegate within the LAT itself. This statutory power is non-delegable to entities external to the designated Institution; the principle of *delegatus non potest delegare* is here of decisive application, signifying that delegated authority cannot be further sub-delegated without express statutory provision.
12. Notwithstanding this unambiguous statutory and regulatory mandate, the Appellant received the Decision Letter, dated October 14, 2025, concerning *LAT-25-009-F (PA25-00294)*. This Decision Letter was issued exclusively upon the letterhead of **Tribunals Ontario** and was authored by Jennifer Janes, Senior Policy Advisor, FOI, of the Access to Records and Information Office of **Tribunals Ontario** (Decision Letter, p. 1). The designation of the delegated decision maker as James Tanel, Executive Advisor to the Executive

Director of Tribunals Ontario (Decision Letter, p. 1), further confirms the improper source of the decision, as the delegation must flow from the Head of the LAT, not the Executive Director of the umbrella organization.

13. It is patently evident that Tribunals Ontario is not, *de jure*, the Licence Appeal Tribunal. *Ergo*, Tribunals Ontario is neither the named Institution nor has it been legally designated as an "Institution" for the purposes of *FIPPA* via the *General Regulation*. This is not a matter of administrative convenience or departmental reorganization; it strikes at the very root of fundamental *vires*, compromising the transparency chain the Act seeks to establish by identifying accountable public bodies.
14. The inevitable and inexorable **syllogism** is as follows: A *FIPPA* decision must originate from a designated Institution; Tribunals Ontario is not the designated Institution; therefore, the decision issued by Tribunals Ontario is null and void. This jurisdictional **lacuna** is fatal to the purported Decision Letter.
15. Consequently, the Decision Letter, having emanated from an unauthorized administrative emanation that lacks the requisite capacity to render a determination under *FIPPA*, constitutes a formal and jurisdictional nullity. The instrument is, *ipso facto*, **void ab initio** and is entirely bereft of legal force and effect. To afford it any recognition would be to condone an unauthorized delegation of a statutory power, a doctrine repugnant to administrative law and destructive of the statutory scheme's clarity.
16. This unauthorized issuance constitutes a flagrant breach of the procedural direction provided by Ms. Kelley Sherwood, Case Lead (Decision Letter, p. 2, cc), as the only permissible response is one originating from the Institution itself, the LAT, thereby sustaining the conclusion that the LAT has failed to execute its primary statutory duty. This failure, compounded by the delay, demonstrates a wilful disregard for the regulatory environment.

C. Failure to Address All Record Classes: A Substantive Defect

17. Moreover, even assuming *arguendo*, and contrary to the Appellant's primary contention, that the Tribunals Ontario correspondence was *somehow* permissible—an assertion vehemently denied and vigorously resisted—the Decision Letter patently fails to address the totality of the access request. This constitutes a

profound, standalone substantive defect. The doctrine of severability cannot redeem an administrative determination that is, by its very nature, fundamentally incomplete.

18. The Decision Letter articulates a determination concerning merely four generalized categories of internal emails: "communications between counsel and adjudicators," "communication between adjudicators," "communications between staff," and "communications between staff and adjudicators," invoking sections 19 (solicitor-client privilege) and 65(3.1) (draft decisions) of *FIPPA* (Decision Letter, p. 1). This is a partial and inadequate response, addressing only a small, self-selected subset of the requested information.
19. The Decision Letter utterly fails to articulate a specific determination with respect to the remaining **13 Record Classes** enumerated in the Appellant's meticulously drafted original request. There is no confirmation of whether a search for these classes was ever performed, whether the records exist, or which, if any, statutory exemptions are purportedly applicable to them. This omission leaves the Appellant, Mr. Kevin A. McLean, in a state of prejudicial ambiguity regarding the vast majority of the solicited information.
20. As such, the Decision Letter is substantively incomplete, defective, and represents a partial deemed refusal concerning the majority of the information sought. This absence of a comprehensive administrative record precludes the Appellant from formulating an effective challenge to the undisclosed records, thereby obstructing the entire appeal process and necessitating a firm remedial Order from the Commissioner.

IV. ISSUES AND ARGUMENT

A. The Jurisdictional *Lacuna*: The Invalidity of the Purported Access Determination

21. The issue before the Commissioner is one of fundamental statutory compliance and the prohibition against unauthorized delegation. A determination under *FIPPA* must be issued by the "head" of the Institution. The Institution, the LAT, did not issue this decision. The chain of accountability requires that the LAT, specifically identified in the *General Regulation*, take official responsibility for the decision.
22. Tribunals Ontario, lacking the designation as a *FIPPA* Institution, possessed no statutory authority to proffer an access determination. Its action constitutes an *ultra vires* act that the Commissioner cannot sanction without undermining the structural integrity of the Act. To ratify this action would create a dangerous

administrative precedent, allowing institutions to dilute accountability by issuing decisions through non-designated umbrella organizations.

23. This jurisdictional transgression is not a mere technical deficiency; it represents a failure of the mandatory statutory mechanism designed to ensure transparency and ministerial accountability. The purported decision is, therefore, an administrative cipher—a document that exists factually but holds no legal status or consequence, much like a judgment issued by a body that has exceeded its constitutional mandate.
24. *Ergo*, the LAT, the only Institution legally capable of participation in the access determination phase, has systematically failed to execute its statutory duty. This procedural negligence, manifesting as an unauthorized delegation, requires a firm and corrective response that confirms the nullity of the Decision Letter and the sustained status of **deemed refusal**.

B. The Substantive Failure to Address All Record Classes and the Breach of Search Duty

25. The affirmative duty incumbent upon an Institution is to render a comprehensive determination concerning every record solicited. The Decision Letter neglects to address the vast majority of the solicited records, failing to articulate whether such records exist, and if existing, which statutory exemptions, if any, are applicable. This silence is deafening and cannot be cured by the generalized exemptions cited.
26. This pervasive substantive deficit mandates that the LAT must issue an access decision that addresses, *in extenso*, the status of all 13 Record Classes. The current deficiency evidences a clear lack of diligence and a failure to conduct a proper and comprehensive search as required by the *FIPPA* scheme. This constitutes a **second, simultaneous procedural failure**: not only did an unauthorized entity issue the decision, but that decision was also substantively incomplete.
27. The Institution is not at liberty to selectively address components of a request while ignoring others. Such a practice transforms the legislative right of access into a discretionary, *ad hoc* administrative favour. The Appellant's precise request demanded precision in return; the Institution's generalized and partial response is an unacceptable administrative evasion.

C. The Operation of *FIPPA*, Section 54: The Incumbency of Peremptory Disclosure

28. The prescribed temporal windows for the issuance of both an initial access determination and a subsequent, compliant determination have been exhaustively traversed and have long since elapsed. The Institution has had ample opportunity to remedy its defective response, yet has failed to do so, demonstrating a persistent and deliberate lack of good faith in the access process.
29. The Respondent Institution's failure to issue a compliant decision, and its resort to an extra-statutory entity (*id est*, Tribunals Ontario) to issue a defective instrument of denial, constitutes a *de facto* refusal to participate in the process mandated by *FIPPA*. This egregious administrative conduct warrants the severest statutory consequence, as it frustrates the Appellant's right to appeal a *lawful* decision.
30. The resulting procedural **vires** dictates that the only equitable and efficacious remedy available under section 54 of *FIPPA* is an Order for the full disclosure of the records requested. When the administrative process fails so profoundly—through both jurisdictional defect and substantive omission—the Appellant should not be further penalized by the imposition of additional, protracted procedural steps. The Commissioner must intervene decisively to prevent further institutional delay and the erosion of public trust in the access regime.
31. The only logical **extrapolation** of this institutional failure is the conclusion that the Institution has knowingly disregarded its obligations, or alternatively, that the records contain no information that would warrant the application of an exemption, hence the dilatory and defective response. The burden of proof now shifts irrevocably to the LAT to demonstrate that any further withholding is justifiable, a demonstration that should be summarily rejected given the Institution's demonstrated non-compliance.
32. It is manifest that the LAT either does not possess a copy of the access request or has not conducted a meticulous review thereof. Consequently, to ensure the integrity of the *FIPPA* regime and to remedy the cumulative institutional delay and failure, it is incumbent upon the Commissioner to issue a peremptory Order for the immediate production of all records, as requested in the Supplementary Submissions (*Appellant's Submissions - Order without hearing from Respondent - Appellant - Mr McLean - 21-Aug-2025.pdf*, Subject #3). The time for granting the Institution a second, compliant opportunity to respond has long since passed, and the remedy must now be full disclosure.

V. CONCLUSION AND REQUESTED ORDERS (IN ADDITION TO PREVIOUS)

33. The Decision Letter is an *ultra vires* document emanating from an administrative entity that lacks the authority to act. The LAT has failed to meet the threshold for participation and has thereby defaulted on its statutory duty. The prescribed temporal limits are exhausted. The cumulative failures constitute a breakdown of the statutory process which warrants an immediate and definitive resolution.
34. The Appellant, Mr. Kevin A. McLean, respectfully reiterates that the Commissioner shall be obliged, pursuant to the remedial authority of *FIPPA* section 54, to grant the relief sought in paragraph 5, directing the immediate and comprehensive disclosure of all records solicited in the original request. The time for administrative compliance has passed, and only a peremptory Order for disclosure will serve the ends of justice and the foundational legislative intent of the Act. The Appellant reserves the right to rely on this correspondence for any lawful purposes.

MR. KEVIN A. MCLEAN

/s/ Mr. Kevin A. McLean (BA, JD, CIM)

Toronto, Ontario

October 17, 2025

ⁱmeans a proceeding in which the IPC is asked to review a decision of an Institution concerning a Request under the Act (see: Code of Procedure of the OIPC)

ⁱⁱDeemed Refusal Appeal means an Appeal in which the sole issue is whether the Institution has responded to a Request within the time frame required by the Act.

ⁱⁱⁱLearned of by the Appellant by way of Notice of Appeal: Notice of Appeal means a document prepared by the IPC confirming that an Appeal has been filed against an Institution's decision concerning a Request under the Act, and includes the names of the Parties, the IPC's file number, and the Institution's file number (if any).

^{iv}Expedited Process means a single-person processing model that seeks to expedite the resolution of select types of Appeals in an efficient and effective manner, either by way of informal resolution or Inquiry

TAB 7

Electronic Submission Checklist

*Submitting To: Automobile Accident Benefits Service (AABS)

*Submission Date: 10/27/2025



*Case Title: McLean v. Security National Insurance Company (forme

Case Number: 23-015662/AABS

Contact Information

*Submission By: Applicant

If Other, please specify:

Address:

Phone #: (647) 370-9354

Fax #:

Email : mrkevinalexandermcleanbajdcim@gmail.com

Submissions

*File Name(s)	*Brief Description(s)
2M_-_Motion_Order_20190710	Final.2024-07-24_15_04_56.docx
2M_-_Motion_Order_....	2M_-_Motion_Order-20190710_-_Final.2024-08-16_13-26-16.docx

Requirements (Please review Requirements Guideline)	Yes	No	N/A
1. Combine copies of submissions and evidence into a single PDF document	☐	☒	
2. Include page numbers , hyperlinks and bookmarks within PDF document	☐	☐	
3. OCR PDF to make text searchable	☐	☒	
4. If applicable, combine photos into the PDF document	☐	☐	☒
5. If applicable, convert videos to .AVI format	☐	☐	☒

Send confirmation to other party before submitting with SCM

Additional Information

The first document was referenced in an index provided by the LAT which referenced a time of 2024-072-24 at 3:04 p.m.

The second document was referenced in an index provided by the LAT which referenced a time of 2024-08-16 at 1:26 p.m.

Please provide via email or the SCM portal as I already have an account prior to your invitation but thank you nonetheless.

TAB 8

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31

Current version: in force since 2025-07-01

Link to the latest version ⓘ: <https://canlii.ca/t/2d9>

Stable link to this version ⓘ: <https://canlii.ca/t/56js9>

Citation to this version: Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31, <<https://canlii.ca/t/56js9>> retrieved on 2025-10-27

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Freedom of Information and Protection of Privacy Act

R.S.O. 1990, CHAPTER F.31

Consolidation Period: From July 1, 2025 to the e-Laws currency date.

Last amendment: [2024, c. 24](#), Sched. 2.

Purposes

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. R.S.O. 1990, c. F.31, s. 1.

Limited application re Assembly

1.1 (1) This Act applies to the Assembly, but only in respect of records of reviewable expenses of the Opposition leaders and the persons employed in their offices and in respect of the personal information contained in those records. [2002, c. 34](#), Sched. B, s. 2.

Same

(2) [Sections 11, 31, 32, 33, 34, 36, 44, 45](#) and [46](#) do not apply with respect to the Assembly. [2002, c. 34](#), Sched. B, s. 2.

Definitions

(3) In this section,

“Opposition leader” has the same meaning as in [section 1](#) of the *Cabinet Ministers’ and Opposition Leaders’ Expenses Review and Accountability Act, 2002*; (“chef d’un parti de l’opposition”)

“reviewable expense” means a reviewable expense as described in [section 3](#) of the *Cabinet Ministers’ and Opposition Leaders’ Expenses Review and Accountability Act, 2002*. (“dépense sujette à examen”) [2002, c. 34](#), Sched. B, s. 2.

Definitions

2 (1) In this Act,

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, including by adoption; (“proche parent”)

“ecclesiastical records” means the operational, administrative and theological records, including records relating to the practice of faith, of a church or other religious organization; (“documents ecclésiastiques”)

“educational institution” means an institution that is a college of applied arts and technology or a university; (“établissement d’enseignement”)

“head”, in respect of an institution, means,

(0.a) in the case of the Assembly, the Speaker,

(a) in the case of a ministry, the minister of the Crown who presides over the ministry,

(a.1) in the case of a public hospital, the chair of the board of the hospital,

(a.2) in the case of a private hospital, the superintendent,

(a.3) in the case of the University of Ottawa Heart Institute/Institut de cardiologie de l’Université d’Ottawa, the Chair of the board, and

(b) in the case of any other institution, the person designated as head of that institution in the regulations; (“personne responsable”)

“hospital” means,

(a) a public hospital,

(b) a private hospital, and

(c) the University of Ottawa Heart Institute/Institut de cardiologie de l’Université d’Ottawa; (“hôpital”)

“Information and Privacy Commissioner” and “Commissioner” mean the Commissioner appointed under [subsection 4 \(2\)](#); (“commissaire à l’information et à la protection de la vie privée”, “commissaire”)

“information practices” means the practices and procedures of an institution for actions in relation to personal information, including,

(a) when, how and the purposes for which the institution collects, uses, modifies, discloses, retains or disposes of personal information, and

(b) the administrative, technical and physical safeguards and practices that the institution maintains with respect to protecting the information; (“pratiques relatives aux renseignements”)

“institution” means,

(0.a) the Assembly,

(a) a ministry of the Government of Ontario,

(a.1) a service provider organization within the meaning of [section 17.1](#) of the [Ministry of Government Services Act](#),

(a.2) a hospital, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b); ("exécution de la loi")

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")

"personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name

or an identifying number or particular assigned to the individual; (“banque de renseignements personnels”)

“private hospital” means a private hospital within the meaning of the *Private Hospitals Act*; (“hôpital privé”)

“public hospital” means a hospital within the meaning of the *Public Hospitals Act*; (“hôpital public”)

“recognized party” has the same meaning as in [subsection 62 \(5\)](#) of the *Legislative Assembly Act*; (“parti reconnu”)

“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; (“document”)

“regulations” means the regulations made under this Act; (“règlements”)

“responsible minister” means the minister of the Crown who is designated by order of the Lieutenant Governor in Council under [section 3](#); (“ministre responsable”)

“spouse” means,

(a) a spouse as defined in [section 1](#) of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”) R.S.O. 1990, c. F.31, s. 2 (1); [2002, c. 34](#), Sched. B, s. 3; [2005, c. 28](#), Sched. F, s. 1 (1, 3); [2006, c. 19](#), Sched. N, s. 1 (1); [2006, c. 34](#), Sched. C, s. 1; 2006, c. 34, Sched. F, s. 1 (1); [2010, c. 25, s. 24](#) (1-5); [2016, c. 23, s. 49](#) (1); [2018, c. 17](#), Sched. 19, s. 1; [2021, c. 4](#), Sched. 11, s. 11; [2024, c. 24](#), Sched. 2, s. 1.

Personal information

(2) Personal information does not include information about an individual who has been dead for more than thirty years. R.S.O. 1990, c. F.31, s. 2 (2).

Business identity information, etc.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. [2006, c. 34](#), Sched. C, s. 2.

Same

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling. [2006, c. 34](#), Sched. C, s. 2.

PART I ADMINISTRATION

Responsible minister

3 The Lieutenant Governor in Council may by order designate a minister of the Crown to be the responsible minister for the purposes of this Act. R.S.O. 1990, c. F.31, s. 3.

Information and Privacy Commissioner

4 (1) There shall be an Information and Privacy Commissioner who is an officer of the Assembly. [2018, c. 17](#), Sched. 19, s. 2.

Appointment

(2) The Assembly shall, by order, appoint the Information and Privacy Commissioner. [2018, c. 17](#), Sched. 19, s. 2.

Selection by panel

(3) Unless decided otherwise by unanimous consent of the Assembly, an order shall be made under subsection (2) only if the person to be appointed has been selected by unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member. [2018, c. 17](#), Sched. 19, s. 2.

Powers and duties

(3.1) The Commissioner may exercise the powers and shall perform the duties prescribed by this or any other Act. [2018, c. 17](#), Sched. 19, s. 2.

Assistant Commissioners

(4) From the officers of the Commissioner's staff, the Commissioner shall appoint one or two Assistant Commissioners and may appoint an Assistant Commissioner for Personal Health Information. 2004, c. 3, Sched. A, s. 81 (1).

Term of office

5 (1) The Commissioner shall hold office for a term of five years and may be reappointed for one further term of five years. 2018, c. 17, Sched. 19, s. 3.

Selection by panel

(2) Subsection 4 (3) applies with respect to a reappointment under subsection (1) of this section. 2018, c. 17, Sched. 19, s. 3.

Continuation in office

(3) By order of the Assembly, the Commissioner may continue to hold office after expiry of his or her term of office until a temporary Commissioner is appointed under section 7.2 or until a successor is appointed. 2018, c. 17, Sched. 19, s. 3.

Transition

(4) The Commissioner in office immediately before the day the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent is deemed to be in the first term of his or her appointment and shall continue to hold office for the remainder of the term. 2018, c. 17, Sched. 19, s. 3.

Removal or suspension

6 (1) The Assembly may, by order passed by a vote of at least two thirds of the members of the Assembly, remove or suspend the Commissioner from office for cause. 2018, c. 17, Sched. 19, s. 3.

Suspension if Assembly not in session

(2) If the Assembly is not in session, the Board of Internal Economy may on unanimous agreement suspend the Commissioner for cause. 2018, c. 17, Sched. 19, s. 3.

Duration of suspension

(3) A suspension under subsection (1) continues until revoked by order of the Assembly or until the Commissioner is removed from office pursuant to

subsection (1). [2018, c. 17](#), Sched. 19, s. 3.

Same

(4) Unless the Board of Internal Economy revokes the suspension before the next sitting of the Assembly, a suspension under subsection (2) continues until revoked by order of the Assembly or until the Commissioner is removed from office pursuant to subsection (1). [2018, c. 17](#), Sched. 19, s. 3.

Same

(5) Despite subsection (4), no suspension imposed under subsection (2) continues past the 20th sessional day of the next sitting of the Assembly. [2018, c. 17](#), Sched. 19, s. 3.

Report to Assembly

(6) The Board of Internal Economy shall report to the Assembly any action taken under subsections (2) and (4) at the earliest opportunity of the next sitting of the Assembly. [2018, c. 17](#), Sched. 19, s. 3.

Meaning of “not in session”

(7) For the purposes of this section and [sections 7.2](#) and [7.4](#), the Assembly is not in session when it is,

- (a) prorogued; or
- (b) adjourned for an indefinite period or to a day that is more than seven days after the date on which the Assembly was adjourned. [2018, c. 17](#), Sched. 19, s. 3.

Salary and benefits

7 (1) The Board of Internal Economy shall determine the salary and benefits of the Commissioner. [2018, c. 17](#), Sched. 19, s. 3.

Pension plan

(2) Subject to subsections (3) and (4), the Commissioner is a member of the Public Service Pension Plan. [2018, c. 17](#), Sched. 19, s. 3.

Notice re pension plan

(3) Within 60 days after his or her appointment takes effect, the Commissioner may notify the Speaker in writing that he or she elects not to be a member of the Public Service Pension Plan. [2018, c. 17](#), Sched. 19, s. 3.

Same

(4) If the Commissioner gives notice of their election to the Speaker in accordance with subsection (3), the election is irrevocable and is deemed to have taken effect when the appointment took effect. [2018, c. 17](#), Sched. 19, s. 3.

Expenses

(5) Subject to the approval of the Board of Internal Economy, the Commissioner is entitled to be reimbursed for reasonable expenses that he or she incurs in respect of anything done under this Act. [2018, c. 17](#), Sched. 19, s. 3.

Transition

(6) The salary and expenses of the Commissioner in office immediately before the day the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent continue to be determined in accordance with [subsections 6 \(1\) to \(3\)](#) of this Act, as they read immediately before that day, for the remainder of the Commissioner's term of office. [2018, c. 17](#), Sched. 19, s. 3.

Designation by Commissioner

7.1 (1) The Commissioner shall designate an individual from among the employees of the office of the Commissioner who shall have the powers and duties of the Commissioner if the Commissioner is absent or unable to fulfil the duties of his or her office or if the office becomes vacant. [2018, c. 17](#), Sched. 19, s. 3.

Designation in writing

(2) A designation under subsection (1) shall be in writing to the Speaker. [2018, c. 17](#), Sched. 19, s. 3.

Powers and duties

(3) The individual designated under subsection (1) shall have the powers and duties of the Commissioner unless a temporary Commissioner is appointed under [section 7.2](#). [2018, c. 17](#), Sched. 19, s. 3.

Salary

(4) The Board of Internal Economy may increase the salary of an individual who assumes the powers and duties of the Commissioner under subsection

(1) in such circumstances as the Board considers appropriate. 2018, c. 17, Sched. 19, s. 3.

Removal or suspension

(5) Section 6 applies in respect of an individual who assumes the powers and duties of the Commissioner under subsection (1). 2018, c. 17, Sched. 19, s. 3.

Temporary Commissioner

7.2 (1) If the Commissioner is unable to fulfil the duties of his or her office or the office becomes vacant, the Assembly may, by order, appoint a temporary Commissioner. 2018, c. 17, Sched. 19, s. 3.

Same, conditions

- (2) An order shall be made under subsection (1) only if,
- (a) the Commissioner,
 - (i) has not made a designation under subsection 7.1 (1), or
 - (ii) has made a designation under subsection 7.1 (1), but,
 - (A) the Commissioner has been removed or suspended under section 6, or
 - (B) the person designated is unable or unwilling to act or has been removed or suspended under section 6; and
 - (b) unless decided otherwise by unanimous consent of the Assembly, the person to be appointed has been selected by unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member. 2018, c. 17, Sched. 19, s. 3.

Appointment if Assembly not in session

(3) If, while the Assembly is not in session, the Commissioner is unable to fulfil the duties of his or her office or the office becomes vacant, the Board of Internal Economy may appoint a temporary Commissioner. 2018, c. 17, Sched. 19, s. 3.

Same

(4) Clause (2) (a) applies with respect to an appointment under subsection (3). 2018, c. 17, Sched. 19, s. 3.

Powers, salary and benefits

(5) A temporary Commissioner shall have the powers and duties of the Commissioner and shall be paid a salary and benefits determined by the Board of Internal Economy and, subject to the approval of the Board, be reimbursed for reasonable expenses that he or she incurs in respect of anything done under this Act. 2018, c. 17, Sched. 19, s. 3.

Duration of office

- (6) A temporary Commissioner shall hold office until,
- (a) the Commissioner is able to fulfil the duties of the office, where the appointment resulted from the Commissioner being unable to do so;
 - (b) where the appointment resulted from a suspension of the Commissioner, the suspension is revoked by order of the Assembly, by the Board of Internal Economy under subsection 6 (4) or by operation of subsection 6 (5);
 - (c) the Assembly appoints a different temporary Commissioner under subsection (1); or
 - (d) the Assembly appoints a Commissioner under section 4. 2018, c. 17, Sched. 19, s. 3.

Subsequent appointment not prohibited

7.3 A person who continues his or her first term as Commissioner under subsection 5 (3) or who is appointed as an Assistant Commissioner or temporary Commissioner is not prohibited from a subsequent appointment as Commissioner under section 4 and, in the case of such an appointment, the previous time in office does not count toward the term of office set out in subsection 5 (1). 2018, c. 17, Sched. 19, s. 3.

Restrictions re other work, etc.

7.4 (1) The Commissioner shall not be a member of the Assembly and shall not, without prior approval by the Assembly, or by the Board of Internal Economy when the Assembly is not in session, hold any other office or employment. 2018, c. 17, Sched. 19, s. 3.

Exception

(2) Despite subsection (1), the Commissioner may hold more than one office to which he or she has been appointed by the Assembly or the Board of Internal Economy. 2018, c. 17, Sched. 19, s. 3.

Oath of office

7.5 (1) Before beginning the duties of his or her office, the Commissioner shall take an oath or affirmation that he or she will faithfully and impartially exercise the functions of the office. [2018, c. 17](#), Sched. 19, s. 3.

Same

(2) The Speaker or the Clerk of the Assembly shall administer the oath or affirmation. [2018, c. 17](#), Sched. 19, s. 3.

Nature of office

7.6 (1) The Commissioner holds office for a fixed term. [2018, c. 17](#), Sched. 19, s. 3.

Notice not required

(2) No notice to the Commissioner is required before the expiry of the Commissioner's term of office. [2018, c. 17](#), Sched. 19, s. 3.

Protection from liability

7.7 (1) No cause of action arises, no proceeding may be brought and no remedy is available or damages, costs or compensation payable in connection with any amendment made by Schedule 19 to the [Restoring Trust, Transparency and Accountability Act, 2018](#) to this Act or anything done or not done in accordance with those amendments. [2018, c. 17](#), Sched. 19, s. 3.

Same

(2) Subsection (1) applies whether the cause of action on which a proceeding is based arose before or after the day that subsection comes into force. [2018, c. 17](#), Sched. 19, s. 3.

Proceedings set aside

(3) Any proceeding referred to in subsection (1) commenced before the day that subsection comes into force is deemed to have been dismissed, without costs, on that day. [2018, c. 17](#), Sched. 19, s. 3.

Staff

8 (1) Subject to the approval of the Board of Internal Economy, the Commissioner may employ mediators and any other officers and employees the Commissioner considers necessary for the efficient operation of the office

and may determine their salary and remuneration and terms and conditions of employment. R.S.O. 1990, c. F.31, s. 8 (1); 2018, c. 17, Sched. 19, s. 4.

Benefits

(2) The benefits determined under Part III of the *Public Service of Ontario Act, 2006* with respect to the following matters for public servants employed under that Part to work in a ministry, other than in a minister's office, who are not within a bargaining unit apply to the employees of the office of the Commissioner:

1. Cumulative vacation and sick leave credits for regular attendance and payments in respect of such credits.
2. Plans for group life insurance, medical-surgical insurance or long-term income protection.
3. The granting of leaves of absence. 2006, c. 35, Sched. C, s. 47 (2).

Same

(2.1) For the purposes of subsection (2), if a benefit applicable to an employee of the office of the Commissioner is contingent on the exercise of a discretionary power or the performance of a discretionary function, the power may be exercised or the function may be performed by the Commissioner or any person authorized in writing by the Commissioner. 2006, c. 35, Sched. C, s. 47 (2).

Public Service Pension Plan

(3) The Commissioner shall be deemed to have been designated by the Lieutenant Governor in Council under the *Public Service Pension Act* as a commission whose permanent and probationary staff are required to be members of the Public Service Pension Plan. R.S.O. 1990, c. F.31, s. 8 (3).

Financial

Premises and supplies

9 (1) The Commissioner may lease any premises and acquire any equipment and supplies necessary for the efficient operation of the office of the Commissioner. R.S.O. 1990, c. F.31, s. 9 (1).

Audit

(2) The accounts and financial transactions of the office of the Commissioner shall be audited annually by the Auditor General. R.S.O. 1990, c. F.31,

PART II FREEDOM OF INFORMATION

ACCESS TO RECORDS

Right of access

10 (1) Subject to subsections (1.1) and 69 (2), 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,

(a) the record or the part of the record falls within one of the exemptions under [sections 12 to 22](#); or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. 1996, c. 1, Sched. K, s. 1; [2010, c. 25, s. 24 \(6\)](#); [2019, c. 7, Sched. 31, s. 1 \(1\)](#).

Part III.1 records

(1.1) Subsection (1) does not apply to personal information collected under Part III.1 (Data Integration) or to records produced from that information under that Part that are not de-identified. [2019, c. 7, Sched. 31, s. 1 \(2\)](#).

Severability of record

(2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under [sections 12 to 22](#) and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1996, c. 1, Sched. K, s. 1.

Measures to ensure preservation of records

10.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution. [2014, c. 13, Sched. 6, s. 1](#).

Obligation to disclose

11 (1) Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public. R.S.O. 1990, c. F.31, s. 11 (1).

Notice

(2) Before disclosing a record under subsection (1), the head shall cause notice to be given to any person to whom the information in the record relates, if it is practicable to do so. R.S.O. 1990, c. F.31, s. 11 (2).

Contents of notice

(3) The notice shall contain,

- (a) a statement that the head intends to release a record or a part of a record that may affect the interests of the person;
- (b) a description of the contents of the record or part that relate to the person; and
- (c) a statement that if the person makes representations forthwith to the head as to why the record or part thereof should not be disclosed, those representations will be considered by the head. R.S.O. 1990, c. F.31, s. 11 (3).

Representations

(4) A person who is given notice under subsection (2) may make representations forthwith to the head concerning why the record or part should not be disclosed. R.S.O. 1990, c. F.31, s. 11 (4).

EXEMPTIONS

Cabinet records

12 (1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

(c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;

(d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and

(f) draft legislation or regulations. R.S.O. 1990, c. F.31, s. 12 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,

(a) the record is more than twenty years old; or

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given. R.S.O. 1990, c. F.31, s. 12 (2).

Advice to government

13 (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution. R.S.O. 1990, c. F.31, s. 13 (1).

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator, whether or not the valuator is an officer of the institution;

(d) an environmental impact statement or similar record;

- (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;
 - (f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;
 - (g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;
 - (h) a report containing the results of field research undertaken before the formulation of a policy proposal;
 - (i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;
 - (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
 - (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
 - (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
 - (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
 - (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.
- R.S.O. 1990, c. F.31, s. 13 (2).

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. R.S.O. 1990, c. F.31, s. 13 (3); 2016, c. 5, Sched. 10, s. 1.

Law enforcement

14 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
- (f) deprive a person of the right to a fair trial or impartial adjudication;
- (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
- (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
- (j) facilitate the escape from custody of a person who is under lawful detention;
- (k) jeopardize the security of a centre for lawful detention; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime. R.S.O. 1990, c. F.31, s. 14 (1); 2002, c. 18, Sched. K, s. 1 (1); 2019, c. 7, Sched. 31, s. 2.

Idem

- (2) A head may refuse to disclose a record,
- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
 - (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
 - (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
 - (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.
- R.S.O. 1990, c. F.31, s. 14 (2); [2002, c. 18](#), Sched. K, s. 1 (2).

Refusal to confirm or deny existence of record

- (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply. R.S.O. 1990, c. F.31, s. 14 (3).

Exception

- (4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario. R.S.O. 1990, c. F.31, s. 14 (4).

Idem

- (5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections. R.S.O. 1990, c. F.31, s. 14 (5).

Civil Remedies Act, 2001

14.1 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the [Civil Remedies Act, 2001](#), conduct a proceeding under that Act or enforce an order made under

that Act. [2001, c. 28, s. 22 \(1\)](#); [2002, c. 18, Sched. K, s. 2](#); [2007, c. 13, s. 43 \(1\)](#).

Prohibiting Profiting from Recounting Crimes Act, 2002

14.2 A head may refuse to disclose a record and may refuse to confirm or deny the existence of a record if disclosure of the record could reasonably be expected to interfere with the ability of the Attorney General to determine whether a proceeding should be commenced under the [Prohibiting Profiting from Recounting Crimes Act, 2002](#), conduct a proceeding under that Act or enforce an order made under that Act. [2002, c. 2, ss. 15 \(1\), 19 \(4\)](#); [2002, c. 18, Sched. K, s. 3](#).

Relations with other governments

15 A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or
- (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 15; [2002, c. 18, Sched. K, s. 4](#); [2024, c. 24, Sched. 2, s. 2](#).

Relations with Aboriginal communities

15.1 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of relations between an Aboriginal community and the Government of Ontario or an institution; or
- (b) reveal information received in confidence from an Aboriginal community by an institution. [2017, c. 8, Sched. 13, s. 1](#).

Definition

(2) In this section,

“Aboriginal community” means,

- (a) a band within the meaning of the [Indian Act](#) (Canada),

(b) an Aboriginal organization or community that is negotiating or has negotiated with the Government of Canada or the Government of Ontario on matters relating to,

(i) Aboriginal or treaty rights under [section 35](#) of the *Constitution Act, 1982*, or

(ii) a treaty, land claim or self-government agreement, and

(c) any other Aboriginal organization or community prescribed by the regulations. [2017, c. 8](#), Sched. 13, s. 1.

Defence

16 A head may refuse to disclose a record where the disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism and shall not disclose any such record without the prior approval of the Executive Council. R.S.O. 1990, c. F.31, s. 16; [2002, c. 18](#), Sched. K, s. 5.

Third party information

17 (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute. R.S.O. 1990, c. F.31, s. 17 (1); [2002, c. 18](#), Sched. K, s. 6; [2017, c. 8](#), Sched. 13, s. 2.

Tax information

(2) A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax

liability or collecting a tax. R.S.O. 1990, c. F.31, s. 17 (2).

Consent to disclosure

(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure. R.S.O. 1990, c. F.31, s. 17 (3).

Economic and other interests of Ontario

18 (1) A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;
- (h) information relating to specific tests or testing procedures or techniques that are to be used for an educational purpose, if disclosure could reasonably be expected to prejudice the use or results of the tests or testing procedures or techniques;
- (i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved;

(j) information provided in confidence to, or records prepared with the expectation of confidentiality by, a hospital committee to assess or evaluate the quality of health care and directly related programs and services provided by a hospital, if the assessment or evaluation is for the purpose of improving that care and the programs and services. R.S.O. 1990, c. F.31, s. 18 (1); 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, s. 7; 2005, c. 28, Sched. F, s. 2; 2011, c. 9, Sched. 15, s. 1.

Exception

(2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,

- (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
- (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing. R.S.O. 1990, c. F.31, s. 18 (2).

Information with respect to closed meetings

18.1 (1) A head may refuse to disclose a record that reveals the substance of deliberations of a meeting of the governing body or a committee of the governing body of an educational institution or a hospital if a statute authorizes holding the meeting in the absence of the public and the subject-matter of the meeting,

- (a) is a draft of a by-law, resolution or legislation; or
- (b) is litigation or possible litigation. 2005, c. 28, Sched. F, s. 3; 2010, c. 25, s. 24 (7).

Exception

(2) Despite subsection (1), the head shall not refuse to disclose a record under subsection (1) if,

- (a) the information is not held confidentially;
- (b) the subject-matter of the deliberations has been considered in a meeting open to the public; or
- (c) the record is more than 20 years old. 2005, c. 28, Sched. F, s. 3.

Application of Act

(3) The exemption in subsection (1) is in addition to any other exemptions in this Act. [2005, c. 28](#), Sched. F, s. 3.

Solicitor-client privilege

19 A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
- (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation. [2005, c. 28](#), Sched. F, s. 4; [2010, c. 25, s. 24 \(8\)](#).

Danger to safety or health

20 A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. R.S.O. 1990, c. F.31, s. 20; [2002, c. 18](#), Sched. K, s. 8.

Personal privacy

21 (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
- (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
- (e) for a research purpose if,
 - (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

- (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
- (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy. R.S.O. 1990, c. F.31, s. 21 (1).

Criteria re invasion of privacy

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record. R.S.O. 1990, c. F.31, s. 21 (2).

Presumed invasion of privacy

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations. R.S.O. 1990, c. F.31, s. 21 (3).

Limitation

- (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
 - (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;
 - (b) discloses financial or other details of a contract for personal services between an individual and an institution;
 - (c) discloses details of a licence or permit or a similar discretionary financial benefit conferred on an individual by an institution or a head under circumstances where,
 - (i) the individual represents 1 per cent or more of all persons and organizations in Ontario receiving a similar benefit, and
 - (ii) the value of the benefit to the individual represents 1 per cent or more of the total value of similar benefits provided to other persons and organizations in Ontario; or
 - (d) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for

compassionate reasons. R.S.O. 1990, c. F.31, s. 21 (4); 2006, c. 19, Sched. N, s. 1 (2).

Refusal to confirm or deny existence of record

(5) 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. R.S.O. 1990, c. F.31, s. 21 (5).

Species at risk

21.1 A head may refuse to disclose a record where the disclosure could reasonably be expected to lead to,

- (a) killing, harming, harassing, capturing or taking a living member of a species, contrary to [clause 9 \(1\) \(a\)](#) of the *Endangered Species Act, 2007*;
- (b) possessing, transporting, collecting, buying, selling, leasing, trading or offering to buy, sell, lease or trade a living or dead member of a species, any part of a living or dead member of a species, or anything derived from a living or dead member of a species, contrary to [clause 9 \(1\) \(b\)](#) of the *Endangered Species Act, 2007*; or
- (c) damaging or destroying the habitat of a species, contrary to [clause 10 \(1\) \(a\) or \(b\)](#) of the *Endangered Species Act, 2007*. 2007, c. 6, s. 61.

Information soon to be published

22 A head may refuse to disclose a record where,

- (a) the record or the information contained in the record has been published or is currently available to the public; or
- (b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it. R.S.O. 1990, c. F.31, s. 22.

Exemptions not to apply

23 An exemption from disclosure of a record under [sections 13, 15, 15.1, 17, 18, 20, 21](#) and [21.1](#) does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. R.S.O. 1990, c. F.31, s. 23; 1997, c. 41, s. 118 (2); 2017, c. 8, Sched. 13, s. 3.

Request

- 24** (1) A person seeking access to a record shall,
- (a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
 - (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 2; [2017, c. 2](#), Sched. 12, s. 4 (1).

Frivolous request

(1.1) If the head of the institution is of the opinion on reasonable grounds that the request is frivolous or vexatious, subsections (2) to (5) do not apply to the request. 1996, c. 1, Sched. K, s. 2.

Sufficiency of detail

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1). R.S.O. 1990, c. F.31, s. 24 (2).

Request for continuing access to record

(3) The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years. R.S.O. 1990, c. F.31, s. 24 (3).

Institution to provide schedule

- (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
- (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
 - (b) a statement that the applicant may ask the Commissioner to review the schedule. R.S.O. 1990, c. F.31, s. 24 (4).

Act applies as if new requests were being made

(5) This Act applies as if a new request were being made on each of the dates shown in the schedule. R.S.O. 1990, c. F.31, s. 24 (5).

Request to be forwarded

25 (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution. R.S.O. 1990, c. F.31, s. 25 (1).

Transfer of request

(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request. R.S.O. 1990, c. F.31, s. 25 (2).

Greater interest

(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof. R.S.O. 1990, c. F.31, s. 25 (3).

When transferred request deemed made

(4) Where a request is forwarded or transferred under subsection (1) or (2), the request shall be deemed to have been made to the institution to which it is forwarded or transferred on the day the institution to which the request was originally made received it. R.S.O. 1990, c. F.31, s. 25 (4).

Institution

(5) In this section,

“institution” includes an institution as defined in [section 2](#) of the *Municipal Freedom of Information and Protection of Privacy Act*. R.S.O. 1990, c. F.31, s. 25 (5).

Notice by head

26 Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under [section 25](#), the head of the institution to which it is forwarded or transferred, shall, subject to [sections 27](#), [28](#) and [57](#), within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
- (b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced. R.S.O. 1990, c. F.31, s. 26; 1996, c. 1, Sched. K, s. 3.

Extension of time

27 (1) A head may extend the time limit set out in [section 26](#) for a period of time that is reasonable in the circumstances, where,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit. R.S.O. 1990, c. F.31, s. 27 (1).

Notice of extension

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) the length of the extension;
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension. R.S.O. 1990, c. F.31, s. 27 (2).

Frivolous request

27.1 (1) A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under [section 26](#),

- (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
 - (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
 - (c) that the person who made the request may appeal to the Commissioner under [subsection 50 \(1\)](#) for a review of the decision.
- 1996, c. 1, Sched. K, s. 4.

Non-application

(2) [Sections 28](#) and [29](#) do not apply to a head who gives a notice for the purpose of subsection (1). 1996, c. 1, Sched. K, s. 4.

Notice to affected person

28 (1) Before a head grants a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in [subsection 17 \(1\)](#) that affects the interest of a person other than the person requesting information; or
- (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of [clause 21 \(1\) \(f\)](#), the head shall give written notice in accordance with subsection (2) to the person to whom the information relates. R.S.O. 1990, c. F.31, s. 28 (1).

Contents of notice

(2) The notice shall contain,

- (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;
- (b) a description of the contents of the record or part thereof that relate to the person; and
- (c) a statement that the person may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (2); [2016, c. 5](#), Sched. 10, s. 2 (1).

Description

(2.1) If the request covers more than one record, the description mentioned in clause (2) (b) may consist of a summary of the categories of the records requested if it provides sufficient detail to identify them. 1996, c. 1, Sched. K, s. 5.

Time for notice

(3) The notice referred to in subsection (1) shall be given within thirty days after the request for access is received or, where there has been an extension of a time limit under [subsection 27 \(1\)](#), within that extended time limit. R.S.O. 1990, c. F.31, s. 28 (3).

Notice of delay

(4) Where a head gives notice to a person under subsection (1), the head shall also give the person who made the request written notice of delay, setting out,

- (a) that the record or part thereof may affect the interests of another party;
- (b) that the other party is being given an opportunity to make representations concerning disclosure; and
- (c) that the head will, within 10 days after the expiry of the time period for making representations under subsection (5), decide whether or not to disclose the record. R.S.O. 1990, c. F.31, s. 28 (4); [2016, c. 5](#), Sched. 10, s. 2 (2).

Representation re disclosure

(5) Where a notice is given under subsection (1), the person to whom the information relates may, subject to subsection (5.1), within twenty days after the notice is given, make representations to the head as to why the record or the part thereof should not be disclosed. R.S.O. 1990, c. F.31, s. 28 (5); [2016, c. 5](#), Sched. 10, s. 2 (3).

Extension of time

(5.1) If the time limit specified in subsection (5) presents a barrier, as defined in the [Accessibility for Ontarians with Disabilities Act, 2005](#), to the person, the head may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of making representations under that subsection. [2016, c. 5](#), Sched. 10, s. 2 (4).

Representation in writing

(6) Representations under subsection (5) shall be made in writing unless the head permits them to be made orally. R.S.O. 1990, c. F.31, s. 28 (6).

Decision re disclosure

(7) The head shall decide whether or not to disclose the record or part and give written notice of the decision to the person to whom the information relates and the person who made the request within 10 days after the expiry of the time period for making representations under subsection (5). 2016, c. 5, Sched. 10, s. 2 (5).

Notice of head's decision to disclose

(8) A head who decides to disclose a record or part under subsection (7) shall state in the notice that,

(a) the person to whom the information relates may appeal the decision to the Commissioner within 30 days after the notice of decision is given, subject to subsection (8.1); and

(b) the person who made the request will be given access to the record or part unless an appeal of the decision is commenced within the time period specified in clause (a). 2016, c. 5, Sched. 10, s. 2 (5).

Extension of time

(8.1) If the time limit specified in clause (8) (a) presents a barrier, as defined in the *Accessibility for Ontarians with Disabilities Act, 2005*, to the person, the head may extend the time limit for a period of time that is reasonably required in the circumstances to accommodate the person for the purpose of appealing the decision under that clause. 2016, c. 5, Sched. 10, s. 2 (5).

Access to be given unless affected person appeals

(9) Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates appeals the decision to the Commissioner in accordance with clause (8) (a). R.S.O. 1990, c. F.31, s. 28 (9); 2016, c. 5, Sched. 10, s. 2 (6).

Personal information about deceased

(10) In the case of a request by the spouse or a close relative of a deceased individual for disclosure of personal information about the deceased individual, the person making the request shall give the head all information that the person has regarding whether the deceased individual has a personal representative and how to contact the personal representative. 2006, c. 19, Sched. N, s. 1 (3).

Deemed references

(11) If, under subsection (10), the head is informed that the deceased individual has a personal representative and is given sufficient information as to how to contact the personal representative, and if the head has reason to believe that disclosure of personal information about the deceased individual might constitute an unjustified invasion of personal privacy unless, in the circumstances, the disclosure is desirable for compassionate reasons, subsections (1) to (9) apply with the following modifications:

1. The expression "the person to whom the information relates" in subsections (1), (5), (7), (8) and (9) shall be deemed to be the expression "the personal representative".
2. The expression "the person" in clauses (2) (a) and (b) shall be deemed to be the expression "the deceased individual" and the expression "the person" in clause (2) (c) shall be deemed to be the expression "the personal representative". 2006, c. 19, Sched. N, s. 1 (3).

Contents of notice of refusal

29 (1) Notice of refusal to give access to a record or a part thereof under [section 26](#) shall set out,

- (a) where there is no such record,
 - (i) that there is no such record, and
 - (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
- (b) where there is such a record,
 - (i) the specific provision of this Act under which access is refused,
 - (ii) the reason the provision applies to the record,
 - (iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (1).

Same

(2) Where a head refuses to confirm or deny the existence of a record as provided in [subsection 14 \(3\)](#) (law enforcement), [section 14.1](#) (*Civil Remedies Act, 2001*), [section 14.2](#) (*Prohibiting Profiting from Recounting Crimes Act, 2002*) or [subsection 21 \(5\)](#) (unjustified invasion of personal privacy), the head shall state in the notice given under [section 26](#),

- (a) that the head refuses to confirm or deny the existence of the record;
- (b) the provision of this Act on which the refusal is based;
- (c) the name and office of the person responsible for making the decision; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (2); [2001, c. 28, s. 22 \(2\)](#); [2002, c. 2, ss. 15 \(2\), 19 \(5\)](#); [2007, c. 13, s. 43 \(2\)](#).

Idem

(3) Where a head refuses to disclose a record or part thereof under [subsection 28 \(7\)](#), the head shall state in the notice given under subsection 28 (7),

- (a) the specific provision of this Act under which access is refused;
- (b) the reason the provision named in clause (a) applies to the record;
- (c) the name and office of the person responsible for making the decision to refuse access; and
- (d) that the person who made the request may appeal to the Commissioner for a review of the decision. R.S.O. 1990, c. F.31, s. 29 (3).

Description

(3.1) If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1) (b) (ii) or clause (3) (b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them. 1996, c. 1, Sched. K, s. 6.

Deemed refusal

(4) A head who fails to give the notice required under [section 26](#) or [subsection 28 \(7\)](#) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given. R.S.O. 1990, c. F.31, s. 29 (4).

Copy of record

30 (1) Subject to subsection (2), a person who is given access to a record or a part thereof under this Act shall be given a copy thereof unless it would not be reasonably practicable to reproduce the record or part thereof by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part thereof in accordance with the regulations. R.S.O. 1990, c. F.31, s. 30 (1).

Access to original record

(2) Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations. R.S.O. 1990, c. F.31, s. 30 (2).

Copy of part

(3) Where a person examines a record or a part thereof and wishes to have portions of it copied, the person shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature. R.S.O. 1990, c. F.31, s. 30 (3).

INFORMATION TO BE PUBLISHED OR AVAILABLE

Publication of information re institutions

31 The responsible minister shall cause to be published annually a compilation listing all institutions and, in respect of each institution, setting out,

- (a) where a request for a record should be made;
- (b) the name and office of the head of the institution;
- (c) where the material referred to in [sections 32, 33, 34](#) and [45](#) has been made available; and
- (d) whether the institution has a library or reading room which is available for public use, and if so, its address. R.S.O. 1990, c. F.31, s. 31.

Operation of institutions

32 The responsible minister shall cause to be published annually an indexed compilation containing,

- (a) a description of the organization and responsibilities of each institution including details of the programs and functions of each division or branch of each institution;
- (b) a list of the general classes or types of records prepared by or in the custody or control of each institution;
- (c) the title, business telephone number and business address of the head of each institution; and
- (d) any amendment of information referred to in clause (a), (b) or (c) that has been made available in accordance with this section. R.S.O. 1990, c. F.31, s. 32.

Institution documents

33 (1) A head shall make available, in the manner described in [section 35](#),

- (a) manuals, directives or guidelines prepared by the institution, issued to its officers and containing interpretations of the provisions of any enactment or scheme administered by the institution where the interpretations are to be applied by, or are to be guidelines for, any officer who determines,
 - (i) an application by a person for a right, privilege or benefit which is conferred by the enactment or scheme,
 - (ii) whether to suspend, revoke or impose new conditions on a right, privilege or benefit already granted to a person under the enactment or scheme, or
 - (iii) whether to impose an obligation or liability on a person under the enactment or scheme; or
- (b) instructions to, and guidelines for, officers of the institution on the procedures to be followed, the methods to be employed or the objectives to be pursued in their administration or enforcement of the provisions of any enactment or scheme administered by the institution that affects the public. R.S.O. 1990, c. F.31, s. 33 (1).

Deletions

(2) A head may delete from a document made available under subsection (1) any record or part of a record which the head would be entitled to refuse to disclose where the head includes in the document,

- (a) a statement of the fact that a deletion has been made;
- (b) a brief statement of the nature of the record which has been deleted; and
- (c) a reference to the provision of this Act or the *Personal Health Information Protection Act, 2004* on which the head relies. R.S.O. 1990, c. F.31, s. 33 (2); *2004, c. 3*, Sched. A, s. 81 (2).

Annual report of head

34 (1) A head shall provide to the Commissioner an annual report with respect to the previous calendar year in accordance with this section. *2024, c. 24*, Sched. 2, s. 3 (1).

Contents of report

(2) A report made under subsection (1) shall specify,

- (a) the number of requests under this Act or the *Personal Health Information Protection Act, 2004* for access to records made to the institution or to a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution;
- (b) the number of refusals by the head to disclose a record under this Act, the provisions of this Act under which disclosure was refused and the number of occasions on which each provision was invoked;
- (c) the number of refusals under the *Personal Health Information Protection Act, 2004* by a health information custodian, within the meaning of that Act, that is the institution or that is acting as part of the institution, of a request for access to a record, the provisions of that Act under which disclosure was refused and the number of occasions on which each provision was invoked;
- (c.1) the number of thefts, losses or unauthorized uses or disclosures of personal information recorded under *subsection 40.1 (8)*;
- (d) the number of uses or purposes for which personal information is disclosed where the use or purpose is not included in the statements of uses and purposes set forth under *clauses 45 (d) and (e)* of this Act or in

any written public statement provided under [subsection 16 \(1\)](#) of the *Personal Health Information Protection Act, 2004* by the institution or a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution;

(e) the amount of fees collected under [section 57](#) of this Act by the institution and under [subsection 54 \(10\)](#) of the *Personal Health Information Protection Act, 2004* by the institution or a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution; and

(f) any other information indicating an effort by the institution or by a health information custodian within the meaning of the *Personal Health Information Protection Act, 2004* that is acting as part of the institution to put into practice the purposes of this Act or the purposes of the *Personal Health Information Protection Act, 2004*. [2006, c. 19](#), Sched. N, s. 1 (4); [2024, c. 24](#), Sched. 2, s. 3 (2).

Separate information

(3) The information required by each of clauses (2) (a), (d), (e) and (f) shall be provided separately for,

(a) each separate health information custodian that is the institution or that is acting as part of the institution; and

(b) the institution other than in its capacity as a health information custodian and other than in its capacity as an institution containing a health information custodian. [2006, c. 19](#), Sched. N, s. 1 (4).

Same

(4) The information required by clause (2) (c) shall be provided separately for each separate health information custodian that is the institution or that is acting as part of the institution. [2006, c. 19](#), Sched. N, s. 1 (4).

Form of report etc.

(5) The annual report shall be provided no later than the date specified by the Commissioner, if any, and shall be in the form and manner as may be specified by the Commissioner. [2024, c. 24](#), Sched. 2, s. 3 (3).

Documents made available

35 (1) The responsible minister shall cause the materials described in [sections 31, 32](#) and [45](#) to be made generally available for inspection and copying by

the public and shall cause them to be made available to the public on the Internet or in the reading room, library or office designated by each institution for this purpose. 2006, c. 34, Sched. C, s. 3.

Same

(2) Every head shall cause the materials described in sections 33 and 34 to be made available to the public on the Internet or in the reading room, library or office designated by each institution for this purpose. 2006, c. 34, Sched. C, s. 3.

Information from heads

36 (1) Every head shall provide to the responsible minister the information needed by the responsible minister to prepare the materials described in sections 31, 32 and 45. 2006, c. 34, Sched. C, s. 4.

Annual review

(2) Every head shall conduct an annual review to ensure that all the information the head is required to provide under subsection (1) is provided and that all such information is accurate, complete and up to date. 2006, c. 34, Sched. C, s. 4.

Extra-ministerial data integration units

36.1 (1) Where an extra-ministerial data integration unit under Part III.1 is not an institution, or part of an institution, the senior officer of the extra-ministerial data integration unit shall cause to be published annually information respecting,

- (a) where a request for a record should be made;
- (b) the name, title, business telephone number and business address of the senior officer;
- (c) a description of the unit's programs and functions as they relate to Part III.1;
- (d) an indication of the general types of records that are prepared by or are otherwise in the custody or under the control of the unit in relation to Part III.1; and
- (e) an indication of any changes to the information previously published under this section. 2023, c. 4, Sched. 3, s. 1.

(2) The senior officer shall also cause the information to be provided to the responsible minister upon its publication. 2023, c. 4, Sched. 3, s. 1.

PROTECTION OF INDIVIDUAL PRIVACY

COLLECTION AND RETENTION OF PERSONAL INFORMATION

Application of Part

37 (1) This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public. R.S.O. 1990, c. F.31, s. 37.

Same

(2) With the exception of [sections 47 to 49](#), this Part does not apply to personal information that is collected by a member of a multi-sector data integration unit or a ministry data integration unit under Part III.1. [2019, c. 7](#), Sched. 31, s. 3; [2020, c. 5](#), Sched. 2, s. 1 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, [section 37](#) of the Act is amended by adding the following subsection: (See: [2020, c. 5](#), Sched. 2, s. 1 (2))

Right of access, extra-ministerial data integration unit

(3) Where an extra-ministerial data integration unit is not an institution, [sections 47 to 49](#) apply, with any modifications prescribed by the regulations, to personal information that is collected by a member of the extra-ministerial data integration unit under Part III.1 as if the extra-ministerial data integration unit were an institution and, for that purpose, the senior officer of the unit shall be considered the head. [2020, c. 5](#), Sched. 2, s. 1 (2).

Personal information

38 (1) In this section and in [section 39](#) and [subsection 40 \(5\)](#),

“personal information” includes information that is not recorded and that is otherwise defined as “personal information” under this Act. R.S.O. 1990, c. F.31, s. 38 (1); [2024, c. 24](#), Sched. 2, s. 4 (1).

Collection of personal information

(2) No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. R.S.O. 1990, c. F.31, s. 38 (2).

Privacy impact assessment

(3) Unless the regulations provide otherwise, before collecting personal information, the head of an institution shall ensure that a written assessment is prepared that contains the following information respecting any personal information that the institution intends to collect:

1. The purpose for which the personal information is intended to be collected, used and disclosed, as applicable, and an explanation of why the personal information is necessary to achieve the purpose.
2. The legal authority for the intended collection, use and disclosure of the personal information.
3. The types of personal information that is intended to be collected and, for each type of personal information collected, an indication of how the type of personal information is intended to be used or disclosed.
4. The sources of the personal information that is intended be collected.
5. The position titles of the officers, employees, consultants or agents of the institution who will have access to the personal information.
6. Any limitations or restrictions imposed on the collection, use or disclosure of the personal information.
7. The period of time that the personal information would be retained by the institution, in accordance with [subsection 40 \(1\)](#).
8. An explanation of the administrative, technical and physical safeguards and practices that would be used to protect the personal information in accordance with [subsection 40 \(5\)](#) and a summary of any risks to individuals in the event of a theft, loss or unauthorized use or disclosure of the personal information.
9. The steps to be taken by the institution,
 - i. to prevent or reduce the likelihood of a theft, loss or unauthorized use or disclosure of personal information from occurring, and
 - ii. to mitigate the risks to individuals in the event of such an occurrence.
10. Such other information as may be prescribed. [2024, c. 24](#), Sched. 2, s. 4 (2).

Risk mitigation

(4) The head of an institution shall ensure that the steps mentioned in paragraph 9 of subsection (3) are implemented,

- (a) before collecting the personal information mentioned in that subsection; or
- (b) if it is not possible to implement the steps before collecting the personal information, within a reasonable time after collecting the information. [2024, c. 24](#), Sched. 2, s. 4 (2).

Requirement to update

(5) Unless the regulations provide otherwise, before making any significant change to the purpose for which personal information mentioned in subsection (3) is used or disclosed, the head of an institution shall,

- (a) update the assessment prepared under subsection (3) to reflect the proposed change and to set out the proposed intended use or disclosure; and
- (b) implement any additional steps identified under paragraph 9 of subsection (3). [2024, c. 24](#), Sched. 2, s. 4 (2).

Copy to Commissioner

(6) The head of an institution shall, on request, provide the Commissioner with access to, or a copy of, an assessment prepared under subsection (3) or updated under subsection (5). [2024, c. 24](#), Sched. 2, s. 4 (2).

Manner of collection

39 (1) Personal information shall only be collected by an institution directly from the individual to whom the information relates unless,

- (a) the individual authorizes another manner of collection;
- (b) the personal information may be disclosed to the institution concerned under [section 42](#) or under [section 32](#) of the *Municipal Freedom of Information and Protection of Privacy Act*;
- (c) the Commissioner has authorized the manner of collection under [clause 59](#) (c);
- (d) the information is in a report from a reporting agency in accordance with the *Consumer Reporting Act*;
- (e) the information is collected for the purpose of determining suitability for an honour or award to recognize outstanding achievement or distinguished service;
- (f) the information is collected for the purpose of the conduct of a proceeding or a possible proceeding before a court or tribunal;

- (g) the information is collected for the purpose of law enforcement; or
 - (h) another manner of collection is authorized by or under a statute.
- R.S.O. 1990, c. F.31, s. 39 (1).

Notice to individual

(2) Where personal information is collected on behalf of an institution, the head shall, unless notice is waived by the responsible minister, inform the individual to whom the information relates of,

- (a) the legal authority for the collection;
 - (b) the principal purpose or purposes for which the personal information is intended to be used; and
 - (c) the title, business address and business telephone number of a public official who can answer the individual's questions about the collection.
- R.S.O. 1990, c. F.31, s. 39 (2).

Exception

(3) Subsection (2) does not apply where the head may refuse to disclose the personal information under [subsection 14 \(1\)](#) or [\(2\)](#) (law enforcement), [section 14.1](#) (*Civil Remedies Act, 2001*) or [section 14.2](#) (*Prohibiting Profiting from Recounting Crimes Act, 2002*). 2002, c. 2, s. 19 (6); 2007, c. 13, s. 43 (3).

Retention and protection of personal information

40 (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information. R.S.O. 1990, c. F.31, s. 40 (1).

Standard of accuracy

(2) The head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate and up to date. R.S.O. 1990, c. F.31, s. 40 (2).

Exception

(3) Subsection (2) does not apply to personal information collected for law enforcement purposes. R.S.O. 1990, c. F.31, s. 40 (3).

Disposal of personal information

(4) A head shall dispose of personal information under the control of the institution in accordance with the regulations. R.S.O. 1990, c. F.31, s. 40 (4).

Privacy safeguards

(5) The head of an institution shall take steps that are reasonable in the circumstances to ensure that personal information in the custody or under the control of the institution is protected against theft, loss and unauthorized use or disclosure and to ensure that the records containing the personal information are protected against unauthorized copying, modification or disposal. [2024, c. 24](#), Sched. 2, s. 5.

Breach of privacy safeguards

40.1 (1) The head of an institution shall report to the Commissioner any theft, loss or unauthorized use or disclosure of personal information in the custody or under the control of the institution if it is reasonable in the circumstances to believe that there is real risk that a significant harm to an individual would result or if any other prescribed circumstances exist. [2024, c. 24](#), Sched. 2, s. 6.

Report requirements

(2) The report mentioned in subsection (1) must contain the prescribed information and must be made in the prescribed form and manner as soon as feasible after the head determines that the theft, loss or unauthorized use or disclosure has occurred. [2024, c. 24](#), Sched. 2, s. 6.

Notification to individual

(3) Unless otherwise prohibited by law, the head of an institution shall notify an individual of any theft, loss or unauthorized use or disclosure of the individual's personal information that is in the custody or under the control of the institution if it is reasonable in the circumstances to believe that there is a real risk of significant harm to the individual or if any other prescribed circumstances exist. [2024, c. 24](#), Sched. 2, s. 6.

Contents of notification

(4) The notification mentioned in subsection (3) must contain a statement that the individual is entitled to make a complaint to the Commissioner and any other prescribed information and must be made in the prescribed form and manner as soon as feasible after the head determines that the theft, loss

or unauthorized use or disclosure of personal information has occurred. [2024, c. 24](#), Sched. 2, s. 6.

Complaints — time limit

(5) A complaint mentioned in subsection (4) must be made in writing and filed with the Commissioner within one year after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant, whichever is the shorter. [2024, c. 24](#), Sched. 2, s. 6.

Extension of time limit

(6) Despite subsection (5), a complaint may be filed with the Commissioner after the time limit set out in that subsection if,

- (a) the Commissioner is satisfied that the significance of the matter warrants a time extension and that the time extension would not result in any prejudice to any person; or
- (b) the time limit set out in subsection (5) presents a barrier, as defined in the [Accessibility for Ontarians with Disabilities Act, 2005](#), to the complainant and the Commissioner is satisfied that the time extension is reasonably required in the circumstances to accommodate the complainant for the purpose of making the complaint. [2024, c. 24](#), Sched. 2, s. 6.

Real risk of significant harm — factors

(7) The factors that are relevant to determining whether a theft, loss or unauthorized use or disclosure of personal information creates a real risk of significant harm to an individual include,

- (a) the sensitivity of the personal information;
- (b) the probability that the personal information has been, is being or will be misused;
- (c) the availability of steps that the individual could take to,
 - (i) reduce the risk of the harm occurring, or
 - (ii) mitigate the harm should it occur;
- (d) any direction, recommendation or guidance provided by the Commissioner pertaining to what constitutes a real risk of significant harm; and
- (e) any other prescribed factor. [2024, c. 24](#), Sched. 2, s. 6.

Records

(8) The head of an institution shall, in accordance with any prescribed requirements, keep and maintain a record of every theft, loss or unauthorized use or disclosure of personal information reported under subsection (1). [2024, c. 24](#), Sched. 2, s. 6.

Provision to Commissioner

(9) The head of an institution shall, on request, provide the Commissioner with access to, or a copy of, the record. [2024, c. 24](#), Sched. 2, s. 6.

Definition

(10) In this section,

“significant harm” includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property. [2024, c. 24](#), Sched. 2, s. 6.

Regulations

(11) The Lieutenant Governor in Council may make regulations respecting anything in this section that is referred to as being prescribed. [2024, c. 24](#), Sched. 2, s. 6.

USE AND DISCLOSURE OF PERSONAL INFORMATION

Use of personal information

41 (1) An institution shall not use personal information in its custody or under its control except,

- (a) where the person to whom the information relates has identified that information in particular and consented to its use;
- (b) for the purpose for which it was obtained or compiled or for a consistent purpose;
- (c) for a purpose for which the information may be disclosed to the institution under [section 42](#) or under [section 32](#) of the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (d) subject to subsection (2), an educational institution may use personal information in its alumni records and a hospital may use personal information in its records for the purpose of its own fundraising activities, if the personal information is reasonably necessary for the fundraising

activities. R.S.O. 1990, c. F.31, s. 41; 2005, c. 28, Sched. F, s. 5 (1); 2010, c. 25, s. 24 (9).

Notice on using personal information for fundraising

(2) In order for an educational institution to use personal information in its alumni records or for a hospital to use personal information in its records, either for its own fundraising activities or for the fundraising activities of an associated foundation, the educational institution or hospital shall,

(a) give notice to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be used for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, give notice to the individual to whom the personal information relates of his or her right to request that the information cease to be used for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, publish a notice of the individual's right to request that the individual's personal information cease to be used for fundraising purposes. 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (10).

Discontinuing use of personal information

(3) An educational institution or a hospital shall, when requested to do so by an individual, cease to use the individual's personal information under clause (1) (d). 2005, c. 28, Sched. F, s. 5 (2); 2010, c. 25, s. 24 (11).

Where disclosure permitted

42 (1) An institution shall not disclose personal information in its custody or under its control except,

(a) in accordance with Part II;

(b) where the person to whom the information relates has identified that information in particular and consented to its disclosure;

(c) for the purpose for which it was obtained or compiled or for a consistent purpose;

- (d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution's functions;
- (e) where permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada;
- (f) where disclosure is by a law enforcement institution,
 - (i) to a law enforcement agency in a foreign country under an arrangement, a written agreement or treaty or legislative authority, or
 - (ii) to another law enforcement agency in Canada;
- (g) to an institution or a law enforcement agency in Canada if,
 - (i) the disclosure is to aid in an investigation undertaken by the institution or the agency with a view to a law enforcement proceeding, or
 - (ii) there is a reasonable basis to believe that an offence may have been committed and the disclosure is to enable the institution or the agency to determine whether to conduct such an investigation;
- (h) in compelling circumstances affecting the health or safety of an individual if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
- (i) in compassionate circumstances, to facilitate contact with the spouse, a close relative or a friend of an individual who is injured, ill or deceased;
- (j) to a member of the Legislative Assembly who has been authorized by a constituent to whom the information relates to make an inquiry on the constituent's behalf or, where the constituent is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the constituent;
- (k) to a member of the bargaining agent who has been authorized by an employee to whom the information relates to make an inquiry on the employee's behalf or, where the employee is incapacitated, has been authorized by the spouse, a close relative or the legal representative of the employee;
- (l) to the responsible minister;
- (m) to the Information and Privacy Commissioner;
- (n) to the Government of Canada in order to facilitate the auditing of shared cost programs; or

(o) subject to subsection (2), an educational institution may disclose personal information in its alumni records, and a hospital may disclose personal information in its records, for the purpose of its own fundraising activities or the fundraising activities of an associated foundation if,

(i) the educational institution and the person to whom the information is disclosed, or the hospital and the person to whom the information is disclosed, have entered into a written agreement that satisfies the requirements of subsection (3), and

(ii) the personal information is reasonably necessary for the fundraising activities. R.S.O. 1990, c. F.31, s. 42; 2005, c. 28, Sched. F, s. 6 (1); 2006, c. 19, Sched. N, s. 1 (5-7); 2006, c. 34, Sched. C, s. 5; 2010, c. 25, s. 24 (12); 2019, c. 7, Sched. 31, s. 4.

Notice on disclosing personal information for fundraising

(2) In order for an educational institution to disclose personal information in its alumni records or for a hospital to disclose personal information in its records, either for the purpose of its own fundraising activities or the fundraising activities of an associated foundation, the educational institution or hospital shall ensure that,

(a) notice is given to the individual to whom the personal information relates when the individual is first contacted for the purpose of soliciting funds for fundraising of his or her right to request that the information cease to be disclosed for fundraising purposes;

(b) periodically and in the course of soliciting funds for fundraising, notice is given to the individual to whom the personal information relates of his or her right to request that the information cease to be disclosed for fundraising purposes; and

(c) periodically and in a manner that is likely to come to the attention of individuals who may be solicited for fundraising, notice is published in respect of the individual's right to request that the individual's personal information cease to be disclosed for fundraising purposes. 2005, c. 28, Sched. F, s. 6 (2); 2010, c. 25, s. 24 (13).

Fundraising agreement

(3) An agreement between an educational institution and another person for the disclosure of personal information in the educational institution's alumni records for fundraising activities, or an agreement between a hospital and

another person for the disclosure of personal information in the hospital's records for fundraising activities, must,

- (a) require that the notice requirements in subsection (2) are met;
- (b) require that the personal information disclosed under clause (1) (o) be disclosed to the individual to whom the information relates upon his or her request; and
- (c) require that the person to whom the information is disclosed shall cease to use the personal information of any individual who requests that the information not be used. [2005, c. 28](#), Sched. F, s. 6 (2); [2010, c. 25, s. 24 \(14\)](#).

Consistent purpose

43 Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under [clauses 41 \(1\) \(b\)](#) and [42 \(1\) \(c\)](#) only if the individual might reasonably have expected such a use or disclosure. R.S.O. 1990, c. F.31, s. 43; [2006, c. 34](#), Sched. C, s. 6.

PERSONAL INFORMATION BANKS

Personal information banks

44 A head shall cause to be included in a personal information bank all personal information under the control of the institution that is organized or intended to be retrieved by the individual's name or by an identifying number, symbol or other particular assigned to the individual. R.S.O. 1990, c. F.31, s. 44.

Personal information bank index

45 The responsible minister shall publish at least once each year an index of all personal information banks setting forth, in respect of each personal information bank,

- (a) its name and location;
- (b) the legal authority for its establishment;
- (c) the types of personal information maintained in it;
- (d) how the personal information is used on a regular basis;
- (e) to whom the personal information is disclosed on a regular basis;
- (f) the categories of individuals about whom personal information is maintained; and

(g) the policies and practices applicable to the retention and disposal of the personal information. R.S.O. 1990, c. F.31, s. 45.

Inconsistent use or disclosure

46 (1) A head shall attach or link to personal information in a personal information bank,

- (a) a record of any use of that personal information for a purpose other than a purpose described in [clause 45](#) (d); and
- (b) a record of any disclosure of that personal information to a person other than a person described in [clause 45](#) (e). R.S.O. 1990, c. F.31, s. 46 (1).

Record of use part of personal information

(2) A record retained under subsection (1) forms part of the personal information to which it is attached or linked. R.S.O. 1990, c. F.31, s. 46 (2).

Notice and publication

(3) Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under [clauses 45](#) (d) and (e), the head shall,

- (a) forthwith notify the responsible minister of the use or disclosure; and
- (b) ensure that the use is included in the index. R.S.O. 1990, c. F.31, s. 46 (3).

RIGHT OF INDIVIDUAL TO WHOM PERSONAL INFORMATION RELATES TO ACCESS AND CORRECTION

Rights of access and correction

Right of access to personal information

47 (1) Every individual has a right of access to,

- (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
- (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution. R.S.O. 1990, c. F.31, s. 47 (1).

Right of correction

(2) Every individual who is given access under subsection (1) to personal information is entitled to,

- (a) request correction of the personal information where the individual believes there is an error or omission therein;
- (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and
- (c) require that any person or body to whom the personal information has been disclosed within the year before the time a correction is requested or a statement of disagreement is required be notified of the correction or statement of disagreement. R.S.O. 1990, c. F.31, s. 47 (2).

Requests and manner of access

Request

48 (1) An individual seeking access to personal information about the individual shall,

- (a) make a request in writing to the institution that the individual believes has custody or control of the personal information, and specify that the request is being made under this Act;
- (b) identify the personal information bank or otherwise identify the location of the personal information; and
- (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 7; 2017, c. 2, Sched. 12, s. 4 (2).

Access procedures

(2) Subsections 10 (2), 24 (1.1) and (2) and sections 25, 26, 27, 27.1, 28 and 29 apply with necessary modifications to a request made under subsection (1). 1996, c. 1, Sched. K, s. 7.

Exception, s. 25

(2.1) Despite subsection (2), subsection 25 (2) does not apply to a request for personal information that was collected under Part III.1. 2019, c. 7, Sched. 31, s. 5.

Manner of access

(3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

- (a) permit the individual to examine the personal information; or
- (b) provide the individual with a copy thereof. R.S.O. 1990, c. F.31, s. 48 (3).

Comprehensible form

(4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual in a comprehensible form and in a manner which indicates the general terms and conditions under which the personal information is stored and used. R.S.O. 1990, c. F.31, s. 48 (4).

Exemptions

49 A head may refuse to disclose to the individual to whom the information relates personal information,

- (a) where [section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20](#) or [22](#) would apply to the disclosure of that personal information;
- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
- (c) that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
- (c.1) if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of,
 - (i) assessing the teaching materials or research of an employee of an educational institution or a hospital or of a person associated with an educational institution or a hospital,
 - (ii) determining suitability, eligibility or qualifications for admission to an academic program of an educational institution or a hospital, or
 - (iii) determining suitability for an honour or award to recognize outstanding achievement or distinguished service;

- (d) that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;
- (e) that is a correctional record where the disclosure could reasonably be expected to reveal information supplied in confidence; or
- (f) that is a research or statistical record. R.S.O. 1990, c. F.31, s. 49; 2001, c. 28, s. 22 (4); 2002, c. 2, ss. 15 (4), 19 (7); 2002, c. 18, Sched. K, s. 10; 2005, c. 28, Sched. F, s. 7; 2010, c. 25, s. 24 (15); 2017, c. 8, Sched. 13, s. 4.

Commissioner's review of information practices

49.0.1 (1) The Commissioner may conduct a review of the information practices of an institution if the Commissioner has received a complaint under [subsection 40.1 \(4\)](#) or has other reason to believe that the requirements of this Part are not being complied with. [2024, c. 24](#), Sched. 2, s. 7.

Informal dispute resolution

(2) Before conducting a review, the Commissioner may try to resolve the matter through mediation, conciliation or any other informal means of dispute resolution that the Commissioner considers appropriate. [2024, c. 24](#), Sched. 2, s. 7.

No review

(3) The Commissioner may decide not to conduct a review for whatever reason the Commissioner considers proper, including if satisfied that,

- (a) the institution has responded adequately to the complaint;
- (b) the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act;
- (c) there is insufficient evidence to warrant a review;
- (d) the complaint is trivial, frivolous or vexatious or is made in bad faith;
- (e) the subject matter of the complaint is already the object of an ongoing review under this section; or
- (f) the subject matter of the complaint has already been the subject of a review by the Commissioner. [2024, c. 24](#), Sched. 2, s. 7.

Conduct of review

(4) In conducting a review referred to in subsection (1), the Commissioner shall review the institution's information practices to determine whether,

(a) there has been unauthorized collection, use, modification, disclosure, access to or retention of personal information collected under this Part; and

(b) the requirements under this Part, including requirements with respect to notice, retention, security and secure disposal, have been met. [2024, c. 24](#), Sched. 2, s. 7.

Duty to assist

(5) The head and all officers, employees, consultants and agents of an institution shall co-operate with and assist the Commissioner in the conduct of a review, including using any data storage processing or retrieval device or system to produce a record required by the Commissioner in readable form. [2024, c. 24](#), Sched. 2, s. 7.

Powers of Commissioner

(6) The Commissioner may require the production of such information and records that are relevant to the subject matter of the review and that are in the custody or under the control of an institution. [2024, c. 24](#), Sched. 2, s. 7.

Orders

(7) If, after giving an opportunity to be heard to the head of the institution, the Commissioner determines that an information practice contravenes this Part, the Commissioner may order the head to do any of the following:

1. Discontinue the information practice.
2. Change the information practice as specified by the Commissioner.
3. Return, transfer or destroy personal information collected or retained under the information practice.
4. Implement a different information practice as specified by the Commissioner.
5. Make a recommendation in respect of how the information practice could be improved. [2024, c. 24](#), Sched. 2, s. 7.

Limit on certain orders

(8) The Commissioner may order under subsection (5) no more than what is reasonably necessary to achieve compliance with this Part. 2024, c. 24, Sched. 2, s. 7.

Procedure

(9) The *Statutory Powers Procedure Act* does not apply to a review conducted under this section. 2024, c. 24, Sched. 2, s. 7.

PART III.1 DATA INTEGRATION

Definitions

49.1 (1) In this Part,

“data standards” means the data standards approved by the Commissioner under [subsection 49.14 \(1\)](#); (“normes relatives aux données”)

“extra-ministerial data integration unit” means a person or entity, or an administrative division of a person or entity, that is designated as an extra-ministerial data integration unit in the regulations; (“service extraministériel d’intégration des données”)

“inter-ministerial data integration unit” means an administrative division of a ministry that is designated as an inter-ministerial data integration unit in the regulations; (“service interministériel d’intégration des données”)

“member” means,

(a) in relation to an inter-ministerial data integration unit or a ministry data integration unit, an officer, employee or agent of the ministry in which the unit is located who works as part of the unit, and

(b) in relation to an extra-ministerial data integration unit, an officer, employee or agent of the person or entity who works as part of the unit; (“membre”)

“ministry data integration unit” means an administrative division of a ministry that is designated as a ministry data integration unit in the regulations. (“service ministériel d’intégration des données”)

“multi-sector data integration unit” means,

(a) an inter-ministerial data integration unit, or

(b) an extra-ministerial data integration unit. (“service multisectoriel d’intégration des données”)

“senior officer” means, in respect of an extra-ministerial data integration unit, the administrative head of the person or entity or another officer of the person or entity designated in the regulations as the senior officer. (“cadre dirigeant”) [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 2; [2023, c. 4](#), Sched. 3, s. 2.

Meaning of de-identification

(2) A reference in this Part to de-identifying a record or personal information means to remove the following information:

1. Information that identifies an individual.
2. Information that could be used, either alone or with other information, to identify an individual based on what is reasonably foreseeable in the circumstances. [2019, c. 7](#), Sched. 31, s. 6.

Application of Act to extra-ministerial data integration units

49.1.1 (1) Where an extra-ministerial data integration unit is not an institution, or part of an institution, the extra-ministerial data integration unit is deemed to also be an institution under this Act, but only in respect of personal information that is collected by a member of the extra-ministerial data integration unit under this Part, and, for that purpose, its senior officer is deemed to be the head of the institution. [2023, c. 4](#), Sched. 3, s. 3.

Modifications

(2) The application of this Act to an extra-ministerial data integration unit and its senior officer under subsection (1) is subject to the following modifications:

1. [Sections 31, 32 and 33](#) do not apply with respect to the extra-ministerial data integration unit.
2. [Section 62](#) shall be read without reference to [subsection 62 \(3\)](#).
3. Any other modifications prescribed by the regulations. [2023, c. 4](#), Sched. 3, s. 3.

Purpose for the collection of personal information

49.2 The purpose of the collection of personal information under this Part is to compile information, including statistical information, to enable analysis in relation to,

- (a) the management or allocation of resources;
- (b) the planning for the delivery of programs and services provided or funded by the Government of Ontario, including services provided or funded in whole or in part or directly or indirectly; and
- (c) the evaluation of those programs and services. [2019, c. 7](#), Sched. 31, s. 6.

General rules re personal information

49.3 (1) A member of a multi-sector data integration unit or a ministry data integration unit shall not collect personal information under this Part or use or disclose that information if other information will serve the purpose of the collection, use or disclosure. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 3.

Extent of information

(2) A member of a multi-sector data integration unit or a ministry data integration unit shall not collect, use or disclose more personal information under this Part than is reasonably necessary to meet the purpose of the collection, use or disclosure. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 3.

Collection of personal information

49.4 (1) Subject to the restrictions in [section 49.5](#), a member of a multi-sector data integration unit may indirectly collect personal information if the following conditions are met:

1. The personal information is being collected for the purpose set out in [section 49.2](#).
2. In the case of an inter-ministerial data integration unit, the personal information is to be collected from,
 - i. an institution, including another inter-ministerial data integration unit or a ministry data integration unit, or an institution within the meaning of the [Municipal Freedom of Information and Protection of Privacy Act](#),
 - ii. an extra-ministerial data integration unit, or
 - iii. a person or entity prescribed by the regulations.

2.1 In the case of an extra-ministerial data integration unit, the personal information is to be collected from,

- i. an institution, including a ministry data integration unit or an inter-ministerial data integration unit, or an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*;
 - ii. if the extra-ministerial data integration unit, or the person or entity in which it is located, is also a prescribed entity mentioned in subsection 45 (1) of the *Personal Health Information Protection Act, 2004*, an officer, employee or agent who is responsible for personal health information collected under that subsection,
 - iii. another extra-ministerial data integration unit, or
 - iv. a person or entity prescribed by the regulations, but only if the regulations authorize a member to collect the type of personal information.
3. A notice has been published on a website that relates to the personal information and that meets the requirements of [section 49.10](#).
4. The minister of the ministry in which the inter-ministerial data integration unit is located or the senior officer of the extra-ministerial data integration unit, as the case may be, or a person designated by the minister or the senior officer, has determined, after considering the privacy interests of individuals and the manner in which their personal information will be protected, that there is a public interest in collecting the personal information.
5. A member of the multi-sector data integration unit has made a determination as to whether to link the personal information after it is collected to other personal information collected by the unit under this Part and, if so, the personal information with which it will be linked. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 4 (1-4).

Collection of personal information, ministry data integration unit

(2) Subject to the restrictions in [section 49.5](#), a member of a ministry data integration unit may indirectly collect personal information if the following conditions are met:

- 1. The personal information is being collected for the purpose set out in [section 49.2](#).
- 2. The personal information is to be collected from,
 - i. an officer, employee or agent of the ministry in which the unit is located who is not a member of the unit,

- ii. a person or entity that receives funding from the ministry or that administers a program or service on behalf of or in partnership with the ministry, but only if the personal information relates to the funding or to the program or service provided on behalf of or in partnership with the ministry, as the case may be, or
 - iii. a person or entity prescribed by the regulations, but only if the regulations authorize a member to collect the type of personal information to be collected.
3. A notice has been published on a website that relates to the personal information and that meets the requirements of [section 49.10](#).
 4. The minister of the ministry in which the ministry data integration unit is located, or a person designated by the minister, has determined, after considering the privacy interests of individuals and the manner in which their personal information will be protected, that there is a public interest in collecting the personal information.
 5. A member of the ministry data integration unit has made a determination as to whether to link the personal information after it is collected to other personal information collected by the unit under this Part and, if so, the personal information with which it will be linked. [2019, c. 7](#), Sched. 31, s. 6.

Additional requirements

- (3) The member shall comply with any additional requirements set out in the data standards when collecting personal information under this section. [2019, c. 7](#), Sched. 31, s. 6.

Disclosure to unit

- (4) An institution or a person or entity referred to in paragraph 2 or 2.1 of subsection (1) or paragraph 2 of subsection (2), as the case may be, is authorized to disclose the personal information to the member and shall,
 - (a) take reasonable steps to ensure that the personal information provided is accurate, complete and up-to-date before disclosing the information to the member; and
 - (b) notify the member of any concerns respecting the accuracy or completeness of the information or how up-to-date it is. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 4 (5).

Conflict

(5) Personal information may be collected and disclosed as provided for in this section despite a confidentiality provision in any other Act and despite [subsection 67 \(2\)](#), unless the regulations provide that a confidentiality provision in another Act prevails over this section. [2019, c. 7](#), Sched. 31, s. 6.

Same

(5.1) If an extra-ministerial data integration unit, or the person or entity in which the unit is located, is also a prescribed entity mentioned in [subsection 45 \(1\)](#) of the *Personal Health Information Protection Act, 2004*, despite subsection 45 (6) of that Act, an officer, employee or agent of the prescribed entity who is responsible for personal health information under subsection 45 (1) of that Act may disclose personal health information under subsection (1) of this section. [2020, c. 5](#), Sched. 2, s. 4 (6).

Collection of excluded information

(6) Despite [subsections 65 \(1\), \(5.2\), \(6\) and \(8\)](#), the regulations may authorize the collection of personal information under this Part that is excluded from the application of this Act under those subsections. [2019, c. 7](#), Sched. 31, s. 6.

Restrictions on collection

49.5 (1) The authority to collect personal information under [section 49.4](#) is subject to the following restrictions:

1. A member of a multi-sector data integration unit or a ministry data integration unit may not collect personal information until,
 - i. the data standards have been approved by the Commissioner, and
 - ii. in the case of a member of a multi-sector data integration unit, the Commissioner has completed a review of the unit's practices and procedures under [subsection 49.12 \(2\)](#) after the unit's designation.
2. If the purpose of collecting personal information is only to compile statistical information, the member must be a member of the inter-ministerial data integration unit designated by the regulations for this purpose.
3. Subject to subsection (1.1), a member of an inter-ministerial data integration unit or a ministry data integration unit shall not collect personal health information from a health information custodian unless

the unit is located in the Ministry of Health or Ministry of Long-Term Care, or if the unit is designated by the regulations for this purpose.

4. A member of an extra-ministerial data integration unit may only collect personal health information if,

- i. it is collected from an inter-ministerial data integration unit or a ministry data integration unit,
- ii. the extra-ministerial data integration unit is also a prescribed entity mentioned in [subsection 45 \(1\)](#) of the *Personal Health Information Protection Act, 2004* and information has been collected under that subsection,
- iii. it is collected from another extra-ministerial data integration unit that is also a prescribed entity mentioned in [subsection 45 \(1\)](#) of the *Personal Health Information Protection Act, 2004* and that has collected the personal health information under that subsection, or
- iv. the collection is authorized by the regulations.

5. A member of a multi-sector data integration unit or a ministry data integration unit may not collect the following types of information, including personal information:

- i. Information that would reveal information that was obtained in connection with the imposition or collection of a tax or duty imposed under an Act of Canada or of a province or territory, unless the unit is located in the Ministry of Finance.
- ii. Notes of personal information about an individual that are recorded by a health information custodian and that document the contents of conversations during a counselling session.

6. Any other restriction prescribed by the regulations. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 5 (1-3).

Collection of personal health information

(1.1) Paragraphs 3 and 4 of subsection (1) do not have the effect of preventing a member of a multi-sector data integration unit or a ministry data integration unit from collecting personal health information from a ministry, even if that ministry is a health information custodian in respect of some or all of its functions. [2020, c. 5](#), Sched. 2, s. 5 (4).

Definitions

(2) In this section “health information custodian” and “personal health information” have the same meanings as in the *Personal Health Information Protection Act, 2004*. 2019, c. 7, Sched. 31, s. 6.

Linking and de-identification

49.6 (1) Upon collection of personal information under this Part, a member of a multi-sector data integration unit or a ministry data integration unit shall do the following as soon as reasonably possible in the circumstances:

1. Create a record containing the minimal amount of personal information necessary for the purpose of de-identifying the information and linking it to other information collected by the unit.
2. De-identify the personal information.
3. If the information is to be linked, link the personal information that has been de-identified under paragraph 2 to other de-identified information within the unit.
4. Promptly and securely destroy any record created under paragraph 1 that contains personal information, subject to any exemptions set out in the data standards. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 6.

Same

(2) In complying with subsection (1), the member shall comply with the requirements set out in the data standards. 2019, c. 7, Sched. 31, s. 6.

Limits on use of personal information

49.7 (1) A member of an inter-ministerial data integration unit or a ministry data integration unit may only use personal information collected under this Part,

- (a) to link and de-identify the information under [section 49.6](#); and
- (b) to conduct an audit where there are reasonable grounds to believe that there has been inappropriate receipt of a payment, service or good, including any benefit funded in whole or in part, directly or indirectly, by the Government of Ontario. 2019, c. 7, Sched. 31, s. 6.

Extra-ministerial data integration unit

(1.1) A member of an extra-ministerial data integration unit may only use personal information collected under this Part to link and de-identify the information under [section 49.6](#), 2020, c. 5, Sched. 2, s. 7 (1).

Reporting on use

(2) The minister of the ministry in which an inter-ministerial data integration unit or a ministry data integration unit is located and the senior officer of every extra-ministerial data integration unit shall publicly report on the use of personal information under subsection (1) in accordance with the data standards. [2020, c. 5](#), Sched. 2, s. 7 (2).

Limits on use of de-identified information

49.8 No person or entity shall use or attempt to use information that has been de-identified under this Part, either alone or with other information, to identify an individual. [2019, c. 7](#), Sched. 31, s. 6.

Disclosure of personal information

49.9 (1) A member of a multi-sector data integration unit or a ministry data integration unit may only disclose personal information collected under this Part if,

- (a) the disclosure is to another member of the multi-sector data integration unit or the ministry data integration unit, as the case may be, who need access to the information in the performance of their duties in connection with this Part;
- (b) the disclosure is required by law;
- (c) the disclosure is to an institution or a law enforcement agency in Canada and,
 - (i) the disclosure is to aid in an investigation undertaken by the institution or the agency with a view to a law enforcement proceeding, or
 - (ii) there is a reasonable basis to believe that an offence may have been committed and the disclosure is to enable the institution or the agency to determine whether to conduct such an investigation;
- (d) the disclosure is for the purpose of a proceeding or a contemplated proceeding before a court or a tribunal and the information relates to or is a matter in issue in the proceeding and,

(i) in the case of a member of an inter-ministerial data integration unit or a ministry data integration unit, the ministry or the Government of Ontario is, or is expected to be, a party,

(i.1) in the case of a member of an extra-ministerial data integration unit, the unit, or the person or entity in which the unit is located, as the case may be, is or is expected to be, a party, or

(ii) a current or former employee, consultant or agent of the unit is, or is expected to be, a witness;

(e) the disclosure is to the Commissioner; or

(f) the disclosure for a research purpose is permitted by the regulations and the conditions prescribed in the regulations are met. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 8 (1-3); [2023, c. 4](#), Sched. 3, s. 4.

Exception

(2) Clause (1) (c) does not apply to an extra-ministerial data integration unit. [2020, c. 5](#), Sched. 2, s. 8 (4).

Notice of collection

49.10 The minister of the ministry in which an inter-ministerial data integration unit or a ministry data integration unit is located and the senior officer of every extra-ministerial data integration unit shall ensure that a notice is published on a website that contains the following information respecting any personal information that a member of the unit intends to collect under this Part:

1. The legal authority for the collection.
2. The types of personal information that may be collected.
3. The sources of the personal information that may be collected.
4. The purpose for which the personal information is collected and may be used and disclosed, including the general nature of the linkages that may be made with the personal information.
5. The title and contact information of a member of the multi-sector data integration unit or the ministry data integration unit, as the case may be, who can answer questions about the collection, use and disclosure of the personal information under this Part.
6. The contact information for the Commissioner and a description of the Commissioner's functions under [section 49.12](#). [2019, c. 7](#), Sched. 31, s.

Security and retention

49.11 (1) The minister of the ministry in which an inter-ministerial data integration unit or a ministry data integration unit is located and the senior officer of every extra-ministerial data integration unit shall ensure that any personal information collected under this Part is,

(a) retained, transferred and disposed of in a secure manner so as to protect the information against theft or loss or unauthorized use or disclosure;

(b) retained separately from other personal information in the custody or under the control of the institution or extra-ministerial data integration unit;

(c) retained for the period of time set out in the data standards or, if there is no such specified period, for at least one year after the day it was last used by a member of the unit; and

(d) securely disposed of in accordance with the data standards. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 10 (1, 2).

Security requirements

(2) In complying with clause (1) (a), the minister or the senior officer, as the case may be, shall comply with any requirements set out in the data standards respecting the security of the personal information. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 10 (3).

Notice of theft, loss, etc., to individual

(3) Subject to the exceptions and additional requirements, if any, that are prescribed, if personal information collected under this Part that is in the custody or control of an inter-ministerial data integration unit, an extra-ministerial data integration unit or a ministry data integration unit is stolen or lost or if it is used or disclosed in a manner that is not permitted by this Part, the minister of the ministry in which the unit is located or the senior officer of the extra-ministerial data integration unit, as the case may be, shall,

(a) notify the individual to whom the personal information relates at the first reasonable opportunity of the theft or loss or the unauthorized use or disclosure; and

(b) include in the notice a statement that the individual is entitled to make a complaint to the Commissioner. 2019, c. 7, Sched. 31, s. 6; 2020,

Notice to Commissioner

(4) In the case of a theft or loss or of a use or disclosure in a manner that is not permitted by this Part, the minister or the senior officer, as the case may be, shall notify the Commissioner of the theft, loss or unauthorized use or disclosure at the first reasonable opportunity. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 10 (5).

Commissioner's review of practices

49.12 (1) The Commissioner may conduct a review of the practices and procedures of a multi-sector data integration unit or a ministry data integration unit if the Commissioner has reason to believe that the requirements of this Part are not being complied with. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 11 (1).

Mandatory review of inter-ministerial data integration unit

(2) The Commissioner shall conduct a review of the practices and procedures of a multi-sector data integration unit in order to determine if they comply with the requirements under this Part,

- (a) after the unit is designated; and
- (b) as otherwise necessary to ensure that a review of the practices and procedures is conducted at least once every three years. 2019, c. 7, Sched. 31, s. 6; 2020, c. 5, Sched. 2, s. 11 (1).

Same

(2.1) The Commissioner may determine that a review of the practices and procedures of an extra-ministerial data integration unit conducted by the Commissioner under the *Personal Health Information Protection Act, 2004* is satisfactory, in whole or in part, for the purposes of subsection (2) and shall notify the senior officer of the extra-ministerial data integration of this determination. 2020, c. 5, Sched. 2, s. 11 (2).

Conduct of review

(3) In conducting a review referred to in subsection (1), the Commissioner shall review the practices and procedures of the multi-sector data integration

unit or the ministry data integration unit, as the case may be, to determine whether,

- (a) there has been unauthorized collection, retention, use, disclosure, access to or modification of personal information collected under this Part; and
- (b) the requirements under this Part, including requirements with respect to notice, de-identification, retention, security and secure disposal, have been met. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 11 (3).

Duty to assist

(4) Members of the inter-ministerial data integration unit, extra-ministerial data integration unit or the ministry data integration unit and the minister of the ministry in which the unit is located or the senior officer of the extra-ministerial data integration unit shall co-operate with and assist the Commissioner in the conduct of the review. [2020, c. 5](#), Sched. 2, s. 11 (4).

Powers of Commissioner

(5) The Commissioner may require the production of such information and records that are relevant to the subject matter of the review and that are in the custody or under the control of,

- (a) in the case of an inter-ministerial data integration unit or a ministry data integration unit, the ministry in which the unit is located;
- (b) in the case of an extra-ministerial data integration unit, the unit or the person or entity in which the unit is located, as the case may be;
- (c) an institution, an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, a person or an entity that has disclosed personal information to the inter-ministerial data integration unit, extra-ministerial data integration unit or the ministry data integration unit, as the case may be, under this Part; or
- (d) an institution, an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, a person or entity to whom a member of the inter-ministerial data integration unit, extra-ministerial data integration unit or the ministry data integration unit has disclosed personal information under this Part. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 11 (5).

Same

(6) A member of an inter-ministerial data integration unit or a ministry data integration unit, the minister of the ministry in which the unit is located, a member of an extra-ministerial data integration unit and its senior officer, the head of an institution referred to in clause (5) (c) or (d), the administrative head of any person or entity referred to in either of those clauses and any person referred to in either of those clauses who is an individual shall provide the Commissioner with whatever assistance is reasonably necessary for the conduct of the review, including using any data storage processing or retrieval device or system to produce a record required by the Commissioner in readable form. [2020, c. 5](#), Sched. 2, s. 11 (6).

Orders

(7) If, after giving an opportunity to be heard to the minister of the ministry in which the inter-ministerial data integration unit or the ministry data integration unit is located or the senior officer of the extra-ministerial data integration unit, as the case may be, the Commissioner determines that a practice or procedure contravenes this Part, the Commissioner may order the unit to do any of the following:

1. Discontinue the practice or procedure.
2. Change the practice or procedure as specified by the Commissioner.
3. Destroy personal information collected or retained under the practice or procedure.
4. Implement a new practice or procedure as specified by the Commissioner. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 11 (7).

Limit on certain orders

(8) The Commissioner may order under subsection (7) no more than what is reasonably necessary to achieve compliance with this Part. [2019, c. 7](#), Sched. 31, s. 6.

Procedure

(9) The *Statutory Powers Procedure Act* does not apply to a review conducted under this section. [2019, c. 7](#), Sched. 31, s. 6.

Annual report

49.13 (1) The minister of a ministry in which is located an inter-ministerial data integration unit or a ministry data integration unit that collects personal information under this Part during the course of a year shall ensure that an annual report for the year is published on a Government of Ontario website on or before April 1 in the following year. [2019, c. 7](#), Sched. 31, s. 6.

Same

(1.1) The senior officer of an extra-ministerial data integration unit that collects personal information under this Part during the course of a year shall ensure that an annual report for the year is published on a publicly accessible website on or before April 1 in the following year. [2020, c. 5](#), Sched. 2, s. 12 (1).

Contents of report

- (2) The annual report shall,
- (a) describe the types of personal information that were collected and used during the year;
 - (b) describe the purposes for which personal information was collected, used and disclosed during the year;
 - (c) describe the nature of the linkages of personal information that have been made over the year;
 - (d) provide a summary of the manner in which de-identified information was used and disclosed during the year; and
 - (e) set out a description of how the practices and procedures of the multi-sector data integration unit or the ministry data integration unit, as the case may be, meet the requirements of this Part. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 12 (2).

Data standards

49.14 (1) The responsible minister or a person designated by him or her shall,

- (a) prepare draft data standards providing for anything referred to in this Part as being provided for in the data standards, as well as practices and procedures for use, in connection with this Part, when,
 - (i) collecting, using and disclosing personal information,
 - (ii) linking and de-identifying personal information,

- (iii) reporting publicly on the use of personal information,
 - (iv) securely retaining personal information, including providing for a minimum retention period for personal information, and
 - (v) securely disposing of personal information; and
- (b) provide the draft data standards to the Commissioner who may approve them. [2019, c. 7](#), Sched. 31, s. 6.

Publicly available

(2) The responsible minister shall make the data standards available on a Government of Ontario website in English and in French. [2019, c. 7](#), Sched. 31, s. 6.

Non-application of the *Legislation Act, 2006*, Part III

(3) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the data standards. [2019, c. 7](#), Sched. 31, s. 6.

Compliance with data standards

(4) A member of a multi-sector data integration unit or a ministry data integration unit shall comply with the data standards. [2019, c. 7](#), Sched. 31, s. 6; [2020, c. 5](#), Sched. 2, s. 13.

Regulations

49.15 (1) The Lieutenant Governor in Council may make regulations governing anything that this Part refers to as being provided for in the regulations. [2019, c. 7](#), Sched. 31, s. 6.

Inter-ministerial data integration unit

(2) The regulations may only designate a single inter-ministerial data integration unit whose members are also authorized to collect personal information solely for the purpose of compiling statistical information, and the unit must be located in the ministry of the minister who is responsible for the administration of the *Statistics Act*. [2019, c. 7](#), Sched. 31, s. 6.

Consultation with Commissioner

(3) A minister shall consult with the Commissioner before recommending a regulation to the Lieutenant Governor in Council that,

- (a) designates a multi-sector data integration unit; or

(b) permits the disclosure of personal information for a research purpose under [clause 49.9 \(1\)](#) (f) or establishes any conditions for the purposes of that clause. [2020, c. 5](#), Sched. 2, s. 14.

PART IV APPEAL

Right to appeal

50 (1) A person who has made a request for,

- (a) access to a record under [subsection 24 \(1\)](#);
- (b) access to personal information under [subsection 48 \(1\)](#); or
- (c) correction of personal information under [subsection 47 \(2\)](#),

or a person who is given notice of a request under [subsection 28 \(1\)](#) may appeal any decision of a head under this Act to the Commissioner. R.S.O. 1990, c. F.31, s. 50 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, [section 50](#) of the Act is amended by adding the following subsection: (See: [2020, c. 5](#), Sched. 2, s. 15)

Same

(1.0.1) This Part applies, with any necessary modifications, to a request for access to personal information made under [subsection 48 \(1\)](#) to an extra-ministerial data integration unit, as that subsection applies by application of subsection 37 (3). [2020, c. 5](#), Sched. 2, s. 15.

Fee

(1.1) A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose. 1996, c. 1, Sched. K, s. 8.

Time for application

(2) Subject to subsection (2.0.1), an appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal. R.S.O. 1990, c. F.31, s. 50 (2); [2016, c. 5](#), Sched. 10, s. 3 (1).

Extension of time

(2.0.1) If the time limit specified in subsection (2) presents a barrier, as defined in the [Accessibility for Ontarians with Disabilities Act, 2005](#), to the person, the Commissioner may extend the time limit for a period of time that

is reasonably required in the circumstances to accommodate the person for the purpose of making the appeal. [2016, c. 5](#), Sched. 10, s. 3 (2).

Immediate dismissal

(2.1) The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists. 1996, c. 1, Sched. K, s. 8.

Non-application

(2.2) If the Commissioner dismisses an appeal under subsection (2.1), subsection (3) and [sections 51](#) and [52](#) do not apply to the Commissioner. 1996, c. 1, Sched. K, s. 8.

Notice of application for appeal

(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, of the notice of appeal. [2006, c. 34](#), Sched. C, s. 7.

Ombudsman Act not to apply

(4) The *Ombudsman Act* does not apply in respect of a complaint for which an appeal is provided under this Act or the *Municipal Freedom of Information and Protection of Privacy Act*, a complaint respecting a review conducted by the Commissioner under [section 49.0.1](#) or [49.12](#) or an order made by the Commissioner under either of those sections or to the Commissioner or the Commissioner's delegate acting under this Act or the *Municipal Freedom of Information and Protection of Privacy Act*. R.S.O. 1990, c. F.31, s. 50 (4); [2019, c. 7](#), Sched. 31, s. 7; [2024, c. 24](#), Sched. 2, s. 8.

Mediator to try to effect settlement

51 The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal. R.S.O. 1990, c. F.31, s. 51.

Inquiry

52 (1) The Commissioner may conduct an inquiry to review the head's decision if,

- (a) the Commissioner has not authorized a mediator to conduct an investigation under [section 51](#); or
- (b) the Commissioner has authorized a mediator to conduct an investigation under [section 51](#) but no settlement has been effected.
- 1996, c. 1, Sched. K, s. 9.

Procedure

- (2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1). R.S.O. 1990, c. F.31, s. 52 (2).

Inquiry in private

- (3) The inquiry may be conducted in private. R.S.O. 1990, c. F.31, s. 52 (3).

Powers of Commissioner

- (4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation. R.S.O. 1990, c. F.31, s. 52 (4).

Record not retained by Commissioner

- (5) The Commissioner shall not retain any information obtained from a record under subsection (4). R.S.O. 1990, c. F.31, s. 52 (5).

Examination on site

- (6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site. R.S.O. 1990, c. F.31, s. 52 (6).

Notice of entry

- (7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose. R.S.O. 1990, c. F.31, s. 52 (7).

Examination under oath

- (8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and

for that purpose the Commissioner may administer an oath. R.S.O. 1990, c. F.31, s. 52 (8).

Evidence privileged

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court. R.S.O. 1990, c. F.31, s. 52 (9).

Protection

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person. R.S.O. 1990, c. F.31, s. 52 (10).

Protection under Federal Act

(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under [section 5](#) of the *Canada Evidence Act*. R.S.O. 1990, c. F.31, s. 52 (11).

Prosecution

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section. R.S.O. 1990, c. F.31, s. 52 (12).

Representations

(13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under [subsection 50 \(3\)](#) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made. [2006, c. 34](#), Sched. C, s. 8 (1).

Right to representation

(14) Each of the following may be represented by a person authorized under the *Law Society Act* to represent them:

1. The person who requested access to the record.
2. The head of the institution concerned.
3. Any other institution or person informed of the notice of appeal under [subsection 50 \(3\)](#). [2006, c. 34](#), Sched. C, s. 8 (5).

Burden of proof

53 Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head. R.S.O. 1990, c. F.31, s. 53.

Order

54 (1) 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. R.S.O. 1990, c. F.31, s. 54 (1).

Idem

(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part. R.S.O. 1990, c. F.31, s. 54 (2).

Terms and conditions

(3) Subject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate. R.S.O. 1990, c. F.31, s. 54 (3); 1996, c. 1, Sched. K, s. 10.

Notice of order

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under [subsection 50 \(3\)](#) written notice of the order. R.S.O. 1990, c. F.31, s. 54 (4).

Confidentiality

55 (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act, unless the disclosure is permitted for a prescribed purpose. R.S.O. 1990, c. F.31, s. 55 (1); [2024, c. 24](#), Sched. 2, s. 9.

Not compellable witness

(2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (2).

Proceedings privileged

(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act. R.S.O. 1990, c. F.31, s. 55 (3).

Delegation by Commissioner

56 (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation. R.S.O. 1990, c. F.31, s. 56 (1).

Exception re records under [s. 12](#) or [14](#)

(2) The Commissioner shall not delegate to a person other than the Deputy Commissioner or an Assistant Commissioner his or her power to require a record referred to in [section 12](#) or [14](#) to be produced and examined. R.S.O. 1990, c. F.31, s. 56 (2); [2018, c. 17](#), Sched. 19, s. 5.

PART V GENERAL

Fees

57 (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record. 1996, c. 1, Sched. K, s. 11 (1).

(2) Repealed: 1996, c. 1, Sched. K, s. 11 (1).

Estimate of costs

(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over \$25. R.S.O. 1990, c. F.31, s. 57 (3).

Waiver of payment

(4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

(a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);

(b) whether the payment will cause a financial hardship for the person requesting the record;

(c) whether dissemination of the record will benefit public health or safety; and

(d) any other matter prescribed in the regulations. R.S.O. 1990, c. F.31, s. 57 (4); 1996, c. 1, Sched. K, s. 11 (2).

Review

(5) A person who is required to pay a fee under subsection (1) may ask the Commissioner to review the amount of the fee or the head's decision not to waive the fee. R.S.O. 1990, c. F.31, s. 57 (5); 1996, c. 1, Sched. K, s. 11 (3).

Disposition of fees

(6) The fees provided in this section shall be paid and distributed in the manner and at the times prescribed in the regulations. 1996, c. 1, Sched. K, s. 11 (4).

Whistleblowing

57.1 (1) Any person who has reasonable grounds to believe that an institution, a ministry data integration unit under Part III.1 or a multi-sector data integration unit under Part III.1 has contravened or is about to

contravene this Act or the regulations may notify the Commissioner of the particulars of the matter and may request that their identity be kept confidential with respect to the notification. [2024, c. 24](#), Sched. 2, s. 10.

Confidentiality

(2) The Commissioner must keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by the Commissioner. [2024, c. 24](#), Sched. 2, s. 10.

Annual report of Commissioner

58 (1) The Commissioner shall make an annual report to the Speaker of the Assembly in accordance with subsections (2) and (3). [2004, c. 3](#), Sched. A, s. 81 (4).

Contents of report

(2) A report made under subsection (1) shall provide a comprehensive review of the effectiveness of this Act and the [Municipal Freedom of Information and Protection of Privacy Act](#) in providing access to information and protection of personal privacy including,

(0.a) the number of complaints received by the Commissioner in respect to the information practices of institutions and the number of reviews conducted under [section 49.0.1](#);

(a) a summary of the nature and ultimate resolutions of appeals carried out under [subsection 50 \(1\)](#) of this Act and under [subsection 39 \(1\)](#) of the [Municipal Freedom of Information and Protection of Privacy Act](#);

(b) an assessment of the extent to which institutions are complying with this Act and the [Municipal Freedom of Information and Protection of Privacy Act](#); and

(c) the Commissioner's recommendations with respect to the practices of particular institutions and with respect to proposed revisions to this Act, the [Municipal Freedom of Information and Protection of Privacy Act](#) and the regulations under them. R.S.O. 1990, c. F.31, s. 58 (2); [2024, c. 24](#), Sched. 2, s. 11.

Same, personal health information

(3) If the Commissioner has delegated powers or duties under the [Personal Health Information Protection Act, 2004](#) to the Assistant Commissioner for

Personal Health Information, a report made under subsection (1) shall include a report prepared in consultation with the Assistant Commissioner on the exercise of the Commissioner's powers and duties under that Act, including,

- (a) information related to the number and nature of complaints received by the Commissioner under [section 56](#) of that Act and the disposition of them;
 - (b) information related to the number and nature of reviews conducted by the Commissioner under [section 58](#) of that Act and the disposition of them;
 - (c) information related to the number of times the Commissioner has made a determination under subsection 60 (13) of that Act and general information about the Commissioner's grounds for the determination;
 - (d) all other information prescribed by the regulations made under that Act; and
 - (e) all other matters that the Commissioner considers appropriate.
- [2004, c. 3](#), Sched. A, s. 81 (5).

Tabling

(4) The Speaker shall cause the annual report to be laid before the Assembly if it is in session or shall deposit the report with the Clerk of the Assembly if the Assembly is not in session. [2004, c. 3](#), Sched. A, s. 81 (5).

Powers and duties of Commissioner

59 (1) The Commissioner may,

- (a) offer comment on the privacy protection implications of proposed legislative schemes or government programs;
- (b) REPEALED: [2024, c. 24](#), Sched. 2, s. 12 (1).
- (c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;
- (d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
- (e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and
- (f) receive representations from the public concerning the operation of this Act. R.S.O. 1990, c. F.31, s. 59; [2024, c. 24](#), Sched. 2, s. 12 (1).

Consultations with other privacy commissioners

(2) The Commissioner may, in order to ensure that personal information is protected in as consistent a manner as possible, consult with a law enforcement officer or any person who, under an Act of Canada or of another province or territory of Canada, has powers, duties and functions similar to those of the Commissioner with respect to the protection of personal information. [2024, c. 24](#), Sched. 2, s. 12 (2).

Agreements or arrangements

(3) The Commissioner may enter into agreements or arrangements with any person referred to in subsection (2) in order to,

- (a) coordinate the activities of their offices and the office of the Commissioner, including to provide for mechanisms for the handling of any complaint in which they are mutually interested;
- (b) undertake and publish research or develop and publish guidelines or other documents related to the protection of personal information;
- (c) develop model contracts or other documents related to the protection of personal information that is collected, used or disclosed interprovincially or internationally; and
- (d) develop procedures for collecting and disclosing information referred to in subsection (4). [2024, c. 24](#), Sched. 2, s. 12 (2).

Collection or disclosure of information

(4) The Commissioner may, in accordance with any procedure established under clause (3) (d), disclose information, other than information described in [section 12, 14 or 19](#) of the Act, to any person referred to in subsection (2) of this section or may collect information from any such person, if the information,

- (a) could be relevant to an ongoing or potential investigation of a complaint, inquiry or audit under this Act or under an Act of Canada or of another province or territory of Canada that has objectives that are similar to this Act; or
- (b) could assist the Commissioner or that person in the exercise of their powers or the performance of their duties or functions with respect to the protection of personal information. [2024, c. 24](#), Sched. 2, s. 12 (2).

Purpose and confidentiality

- (5) The procedures referred to in clause (3) (d) must,
- (a) restrict the use of the information to the purpose for which it was originally disclosed; and
 - (b) stipulate that the information be treated in a confidential manner and not be further disclosed for other purposes without the express consent of the Commissioner. [2024, c. 24](#), Sched. 2, s. 12 (2).

Regulations

- 60** (1) The Lieutenant Governor in Council may make regulations,
- (0.a) prescribing standards for determining what constitutes reasonable grounds for a head to conclude that a request for access to a record is frivolous or vexatious;
 - (0.a.1) prescribing Aboriginal organizations and communities for the purposes of clause (c) of the definition of “Aboriginal community” in [subsection 15.1 \(2\)](#);
 - (a) respecting the procedures for access to original records under [section 30](#);

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 60 \(1\)](#) of the Act is amended by adding the following clause: (See: [2020, c. 5](#), Sched. 2, s. 16)

- (a.1) prescribing modifications for the purposes of subsection 37 (3);
- (b) respecting the procedures for access to personal information under [subsection 48 \(3\)](#);
- (b.1) requiring the head of an institution to assist persons with disabilities in making requests for access under [subsection 24 \(1\)](#) or [48 \(1\)](#);
- (c) prescribing the circumstances under which records capable of being produced from machine readable records are not included in the definition of “record” for the purposes of this Act;
- (c.1) governing assessments under [section 38](#), including prescribing information to be included in an assessment and providing for circumstances in which an assessment or an update is not required to be prepared;
- (d) setting standards for and requiring administrative, technical and physical safeguards to ensure the security and confidentiality of records

and personal information under the control of institutions;

(d.1) providing for procedures to be followed by an institution if personal information is disclosed in contravention of this Act;

(e) setting standards for the accuracy and completeness of personal information that is under the control of an institution;

(f) prescribing time periods for the purposes of [subsection 40 \(1\)](#);

(f.1) respecting the disposal of personal information under [subsection 40 \(4\)](#), including providing for different procedures for the disposal of personal information based on the sensitivity of the personal information;

(g) prescribing the amount, the manner of payment and the manner of allocation of fees described in [clause 24 \(1\) \(c\)](#) or [48 \(1\) \(c\)](#), [subsection 50 \(1.1\)](#) or [section 57](#) and the times at which they are required to be paid;

(g.1) prescribing additional modifications to this Act for the purposes of [subsection 49.1.1 \(2\)](#);

(g.2) prescribing purposes for which disclosure is permitted under [subsection 55 \(1\)](#);

(h) prescribing matters to be considered in determining whether to waive all or part of the costs required under [section 57](#);

(i) designating any agency, board, commission, corporation or other body as an institution and designating a head for each such institution;

(j) prescribing conditions relating to the security and confidentiality of records used for a research purpose;

(j.1) exempting one or more private hospitals from the application of this Act;

(j.2) providing for transitional matters arising from the enactment of Schedule 19 to the [Restoring Trust, Transparency and Accountability Act, 2018](#);

(k) prescribing forms and providing for their use;

(l) respecting any matter the Lieutenant Governor in Council considers necessary to carry out effectively the purposes of this Act. R.S.O. 1990, c. F.31, s. 60; 1996, c. 1, Sched. K, s. 12 (1, 2); [2010, c. 25, s. 24 \(16\)](#); [2006, c. 34](#), Sched. C, s. 9; [2017, c. 8](#), Sched. 13, s. 5; [2018, c. 17](#), Sched. 19, s. 6 (1); [2023, c. 4](#), Sched. 3, s. 5; [2024, c. 24](#), Sched. 2, s. 13.

Categories of fees

(2) A regulation made under clause (1) (g) may prescribe a different amount, manner of payment, manner of allocation or time of payment of fees for different categories of records or persons requesting access to a record. 1996, c. 1, Sched. K, s. 12 (3).

Conflict

(3) If there is a conflict between a regulation made under clause (1) (j.2) and a provision of this or any other Act or a provision of another regulation made under this or any other Act, the regulation made under clause (1) (j.2) prevails. 2018, c. 17, Sched. 19, s. 6 (2).

Offences

61 (1) No person shall,

(a) wilfully collect, use or disclose personal information in contravention of this Act;

(b) wilfully maintain a personal information bank that contravenes this Act;

(b.1) wilfully contravene [section 49.8](#);

(c) make a request under this Act for access to or correction of personal information under false pretenses;

(c.1) alter, conceal or destroy a record, or cause any other person to do so, with the intention of denying a right under this Act to access the record or the information contained in the record;

(d) wilfully obstruct the Commissioner in the performance of his or her functions under this Act;

(e) wilfully make a false statement to, mislead or attempt to mislead the Commissioner in the performance of his or her functions under this Act; or

(f) wilfully fail to comply with an order of the Commissioner. R.S.O. 1990, c. F.31, s. 61 (1); 2014, c. 13, Sched. 6, s. 2 (1); 2019, c. 7, Sched. 31, s. 8; 2024, c. 24, Sched. 2, s. 14.

Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding \$5,000. R.S.O. 1990, c. F.31, s. 61 (2).

Consent of Attorney General

(3) A prosecution shall not be commenced under clause (1) (c.1), (d), (e) or (f) without the consent of the Attorney General. R.S.O. 1990, c. F.31, s. 61 (3); [2014, c. 13](#), Sched. 6, s. 2 (2).

Extended limitation for prosecution

(4) A prosecution for an offence under clause (1) (c.1) shall not be commenced more than two years after the day evidence of the offence was discovered. [2014, c. 13](#), Sched. 6, s. 2 (3).

Protection of information

(5) In a prosecution for an offence under this section, the court may take precautions to avoid the disclosure by the court or any person of any of the following information, including, where appropriate, conducting hearings or parts of hearings in private or sealing all or part of the court files:

1. Information that may be subject to an exemption from disclosure under [sections 12 to 21.1](#).
2. Information to which this Act may not apply under [section 65](#).
3. Information that may be subject to a confidentiality provision in any other Act. [2014, c. 13](#), Sched. 6, s. 2 (4).

Delegation, civil proceedings

Delegation of head's powers

62 (1) A head may in writing delegate a power or duty granted or vested in the head to an officer or officers of the institution or another institution subject to such limitations, restrictions, conditions and requirements as the head may set out in the delegation. R.S.O. 1990, c. F.31, s. 62 (1); [2006, c. 34](#), Sched. C, s. 10.

Protection from civil proceeding

(2) No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act, or from the failure to give a notice required under this Act if reasonable care is taken to give the required notice. R.S.O. 1990, c. F.31, s. 62 (2).

Vicarious liability of Crown preserved

(3) Subsection (2) does not by reason of [subsection 8 \(3\)](#) of the *Crown Liability and Proceedings Act, 2019* relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject, and the Crown is liable under that Act for any such tort in a like manner as if subsection (2) had not been enacted. R.S.O. 1990, c. F.31, s. 62 (3); [2019, c. 7](#), Sched. 17, s. 80.

Vicarious liability of certain institutions preserved

(4) Subsection (2) does not relieve an institution of liability in respect of a tort committed by a person mentioned in subsection (2) to which it would otherwise be subject and the institution is liable for any such tort in a like manner as if subsection (2) had not been enacted. R.S.O. 1990, c. F.31, s. 62 (4).

Informal access

Oral requests

63 (1) Where a head may give access to information under this Act, nothing in this Act prevents the head from giving access to that information in response to an oral request or in the absence of a request. R.S.O. 1990, c. F.31, s. 63 (1).

Pre-existing access preserved

(2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force. R.S.O. 1990, c. F.31, s. 63 (2).

Information otherwise available

64 (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation. R.S.O. 1990, c. F.31, s. 64 (1).

Powers of courts and tribunals

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document. R.S.O. 1990, c. F.31, s. 64 (2).

Application of Act

65 (1) This Act does not apply to records placed in the archives of an educational institution or the Archives of Ontario by or on behalf of a person or organization other than,

- (a) an institution as defined in this Act or in the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (b) a health information custodian as defined in the *Personal Health Information Protection Act, 2004. 2005, c. 28, Sched. F, s. 8 (1)*.

(2) REPEALED: *2004, c. 3, Sched. A, s. 81 (7)*.

Idem

(3) This Act does not apply to notes prepared by or for a person presiding in a proceeding in a court of Ontario if those notes are prepared for that person's personal use in connection with the proceeding. R.S.O. 1990, c. F.31, s. 65 (3).

Same

(3.1) This Act does not apply to personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a person who is acting in a quasi-judicial capacity. *2019, c. 7, Sched. 60, s. 9*.

Same

(4) This Act does not apply to anything contained in a judge's performance evaluation under *section 51.11* of the *Courts of Justice Act* or to any information collected in connection with the evaluation. *1994, c. 12, s. 49*.

Same

(5) This Act does not apply to a record of the Ontario Judicial Council, whether in the possession of the Judicial Council or of the Attorney General, if any of the following conditions apply:

1. The Judicial Council or its subcommittee has ordered that the record or information in the record not be disclosed or made public.
2. The Judicial Council has otherwise determined that the record is confidential.
3. The record was prepared in connection with a meeting or hearing of the Judicial Council that was not open to the public. *1994, c. 12, s. 49*.

Same

(5.1) This Act does not apply to a record of a committee investigating a complaint against an associate judge under [section 86.2](#) of the *Courts of Justice Act*, whether in the possession of the committee, the Chief Justice of the Superior Court of Justice, the Attorney General or any other person, if any of the following conditions apply:

1. The committee has ordered that the record or information in the record not be disclosed or made public.
2. The record was prepared in connection with the committee's investigation of the complaint and the complaint was not dealt with in a manner that was open to the public. 1996, c. 25, s. 6; [2002, c. 18](#), Sched. K, s. 11; [2021, c. 4](#), Sched. 3, s. 22.

Same

(5.2) This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed. [2006, c. 34](#), Sched. C, s. 11.

Same

(5.3) This Act does not apply to the ecclesiastical records of a church or religious organization that is affiliated with an educational institution or a hospital. [2010, c. 25, s. 24 \(17\)](#).

Same

(5.4) This Act does not apply to records that relate to the operations of a hospital foundation. [2010, c. 25, s. 24 \(17\)](#).

Same

(5.5) This Act does not apply to the administrative records of a member of a health profession listed in Schedule 1 to the *Regulated Health Professions Act, 1991* that relate to the member's personal practice. [2010, c. 25, s. 24 \(17\)](#).

Same

(5.6) This Act does not apply to records relating to charitable donations made to a hospital. [2010, c. 25, s. 24 \(17\)](#).

(5.7) REPEALED: [2017, c. 19](#), Sched. 2, s. 1 (1).

Same

(6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
4. Meetings, consultations, discussions or communications about the appointment or placement of any individual by a church or religious organization within an institution, or within the church or religious organization.
5. Meetings, consultations, discussions or communications about applications for hospital appointments, the appointments or privileges of persons who have hospital privileges, and anything that forms part of the personnel file of those persons. 1995, c. 1, s. 82; 2010, c. 25, s. 24 (18).

Exception

(7) This Act applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 82.

Information relating to adoptions

(8) This Act does not apply with respect to the following:

1. Notices registered under [section 48.3](#) of the *Vital Statistics Act* and notices and information registered under section 48.4 of that Act.
2. Disclosure vetoes registered under [section 48.5](#) of the *Vital Statistics Act*.
3. Information and records in files that are unsealed under section 48.6 of that Act.
4. Revoked: [2017, c. 14](#), Sched. 4, s. 14 (1).

[2005, c. 25, s. 34](#); [2016, c. 23, s. 49 \(2\)](#); [2017, c. 14](#), Sched. 4, s. 14 (1).

Exception

(8.1) This Act does not apply,

- (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution;
- (b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution;
- (c) to a record respecting or associated with research, including clinical trials, conducted or proposed by an employee of a hospital or by a person associated with a hospital; or
- (d) to a record of teaching materials collected, prepared or maintained by an employee of a hospital or by a person associated with a hospital for use at the hospital. [2005, c. 28](#), Sched. F, s. 8 (2); [2010, c. 25, s. 24 \(19\)](#).

Note: [Subsection 65 \(8.1\)](#) was enacted as [subsection 65 \(8\)](#) in source law, *Statutes of Ontario*, [2005, chapter 28](#), Schedule F, subsection 8 (2). The subsection is renumbered in this consolidation to distinguish it from existing subsection 65 (8), enacted by *Statutes of Ontario*, [2005, chapter 25, section 34](#).

Exception

(9) Despite subsection (8.1), the head of the educational institution or hospital shall disclose the subject-matter and amount of funding being

received with respect to the research referred to in that subsection. 2005, c. 28, Sched. F, s. 8 (2); 2010, c. 25, s. 24 (20).

Application of Act

(10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49 (c.1) (i). 2005, c. 28, Sched. F, s. 8 (2).

Non-application of Act

(11) This Act does not apply to identifying information in a record relating to medical assistance in dying. 2017, c. 7, s. 3.

Interpretation

(12) In subsection (11),

“identifying information” means information,

(a) that relates to medical assistance in dying, and

(b) that identifies an individual or facility, or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility; (“renseignements identificatoires”)

“medical assistance in dying” means medical assistance in dying within the meaning of section 241.1 of the *Criminal Code* (Canada). (“aide médicale à mourir”) 2017, c. 7, s. 3.

Non-application of Act, provision of abortion services

(13) This Act does not apply to information relating to the provision of abortion services if,

(a) the information identifies an individual or facility, or it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual or facility; or

(b) disclosure of the information could reasonably be expected to threaten the health or safety of an individual, or the security of a facility or other building. 2017, c. 19, Sched. 2, s. 1 (2).

Same, pharmacies

(14) A reference in subsection (13) to a facility includes reference to a pharmacy, hospital pharmacy or institutional pharmacy, as those terms are defined in [subsection 1 \(1\)](#) of the *Drug and Pharmacies Regulation Act, 2017, c. 19*, Sched. 2, s. 1 (2).

Related statistical information

(15) For greater certainty, this Act applies to statistical or other information relating to the provision of abortion services that does not meet the conditions of clause (13) (a) or (b). [2017, c. 19](#), Sched. 2, s. 1 (2).

Adjudicative records

(16) This Act does not apply to adjudicative records, within the meaning of the *Tribunal Adjudicative Records Act, 2019*, referred to in [subsection 2 \(1\)](#) of that Act. [2019, c. 7](#), Sched. 60, s. 9.

Queen's Park restoration records

(17) This Act does not apply to records prepared by the Assembly with respect to the Queen's Park Restoration Project until 20 years after the *Queen's Park Restoration Secretariat Act, 2023* is repealed. [2023, c. 7](#), Sched. 3, s. 1.

Service provider organizations

65.1 (1) This section applies with respect to a service provider organization as defined in [section 17.1](#) of the *Ministry of Government Services Act, 2006, c. 34*, Sched. F, s. 1 (2).

Definitions

(2) In this section,

“customer service information” means, in relation to a service,

- (a) the name, sex, gender identity, preferred language and date of birth of the individual to whom the service is to be provided,
- (b) the address, email address and telephone number or other contact information of the individual to whom the service is to be provided and, if applicable, the person acting on behalf of that individual, and an indication of any accessibility or communication preferences,
- (c) the transaction or receipt number, the order status, the shipping status, the product identification number and the product expiry date

provided by the service provider organization in relation to the request for the service, as applicable,

- (d) information relating to the payment of any fee,
- (e) information relating to communications between the service provider organization in relation to the request for the service and the individual to whom the service is to be provided, and, if applicable, the person acting on behalf of that individual, and
- (f) such other information as may be prescribed; (“renseignements liés au service à la clientèle”)

“designated service” means a service designated by regulations made under [subsection 17.1 \(3\)](#) of the *Ministry of Government Services Act* as a service that the service provider organization may provide on behalf of the Government or a public body; (“service désigné”)

“Government” means the Government as defined in the *Ministry of Government Services Act*; (“gouvernement”)

“public body” means a public body as defined in [section 17.1](#) of the *Ministry of Government Services Act*. (“organisme public”) [2006, c. 34](#), Sched. F, s. 1 (2); [2024, c. 24](#), Sched. 2, s. 15 (1).

Authorization to collect personal information

(3) A service provider organization is authorized to collect personal information for the purposes of providing a designated service. [2006, c. 34](#), Sched. F, s. 1 (2).

Collection of customer service information

(4) Without limiting the generality of subsection (3), a service provider organization is authorized to collect customer service information, with the consent of the individual to whom the information relates, for the purposes of providing a designated service. [2006, c. 34](#), Sched. F, s. 1 (2).

Additional uses of customer service information

(4.1) A service provider organization that collects customer service information under subsection (4) is authorized to retain and use the information, with the consent of the individual to whom the information relates, for the purposes of providing any designated service to the individual. [2024, c. 24](#), Sched. 2, s. 15 (2).

Conveying information to the Government, etc.

(5) If required by the regulations, a service provider organization that collects personal information on behalf of the Government or a public body in the course of providing a designated service shall convey the personal information to that Government or public body in accordance with the regulations. 2006, c. 34, Sched. F, s. 1 (2).

Limitation after information conveyed

(6) After the service provider organization has conveyed personal information under subsection (5), the service provider organization shall not use or further disclose the personal information except as allowed by the regulations. 2006, c. 34, Sched. F, s. 1 (2).

Collection of personal information under arrangements

(7) A person who provides services on behalf of a service provider organization pursuant to an arrangement under subsection 17.1 (7) of the *Ministry of Government Services Act* may not collect personal information in connection with providing those services unless the service provider organization and the person have entered into an agreement that governs the collection, use and disclosure of such personal information and the agreement meets the prescribed requirements, if any. 2006, c. 34, Sched. F, s. 1 (2).

Audits by Commissioner

(8) The Commissioner may audit a service provider organization to check that there has been no unauthorized access to or modification of personal information in the custody of the organization and the organization shall co-operate with and assist the Commissioner in the conduct of the audit. 2006, c. 34, Sched. F, s. 1 (2).

Regulations

- (9) The Lieutenant Governor in Council may make regulations,
- (a) prescribing information for the purposes of clause (f) of the definition of “customer service information” in subsection (2);
 - (b) governing the collection, use and disclosure of personal information by a service provider organization;
 - (c) requiring the conveyance of personal information under subsection (5) to the extent and within the time period specified by the regulations;

- (d) allowing the use and disclosure of personal information under subsection (6);
- (e) prescribing requirements for agreements under subsection (7);
- (f) prescribing information for the purposes of [clause 65.2 \(2\) \(e\)](#). [2006, c. 34](#), Sched. F, s. 1 (2); [2024, c. 24](#), Sched. 2, s. 15 (3).

Public consultation before making regulations

65.2 (1) Subject to subsection (7), the Lieutenant Governor in Council shall not make any regulation under [subsection 65.1 \(9\)](#) unless,

- (a) the Minister has published a notice of the proposed regulation in *The Ontario Gazette* and given notice of the proposed regulation by all other means that the Minister considers appropriate for the purpose of providing notice to the persons who may be affected by the proposed regulation;
- (b) the notice complies with the requirements of this section;
- (c) the time periods specified in the notice, during which members of the public may exercise a right described in clause (2) (b) or (c), have expired; and
- (d) the Minister has considered whatever comments and submissions that members of the public have made on the proposed regulation in accordance with clause (2) (b) or (c) and has reported to the Lieutenant Governor in Council on what, if any, changes to the proposed regulation the Minister considers appropriate. [2006, c. 34](#), Sched. F, s. 1 (2).

Contents of notice

- (2) The notice mentioned in clause (1) (a) shall contain,
 - (a) a description of the proposed regulation and the text of it;
 - (b) a statement of the time period during which members of the public may submit written comments on the proposed regulation to the Minister and the manner in which and the address to which the comments must be submitted;
 - (c) a description of whatever other rights, in addition to the right described in clause (b), that members of the public have to make submissions on the proposed regulation and the manner in which and the time period during which those rights must be exercised;
 - (d) a statement of where and when members of the public may review written information about the proposed regulation;

- (e) all prescribed information; and
- (f) all other information that the Minister considers appropriate. [2006, c. 34](#), Sched. F, s. 1 (2).

Time period for comments

(3) The time period mentioned in clauses (2) (b) and (c) shall be at least 60 days after the Minister gives the notice mentioned in clause (1) (a) unless the Minister shortens the time period in accordance with subsection (4). [2006, c. 34](#), Sched. F, s. 1 (2).

Shorter time period for comments

- (4) The Minister may shorten the time period if, in the Minister's opinion,
- (a) the urgency of the situation requires it; or
 - (b) the proposed regulation is of a minor or technical nature. [2006, c. 34](#), Sched. F, s. 1 (2).

Discretion to make regulations

(5) Upon receiving the Minister's report mentioned in clause (1) (d), the Lieutenant Governor in Council, without further notice under subsection (1), may make the proposed regulation with the changes that the Lieutenant Governor in Council considers appropriate, whether or not those changes are mentioned in the Minister's report. [2006, c. 34](#), Sched. F, s. 1 (2).

No public consultation

- (6) The Minister may decide that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under [subsection 65.1 \(9\)](#) if, in the Minister's opinion,
- (a) the urgency of the situation requires it; or
 - (b) the proposed regulation is of a minor or technical nature. [2006, c. 34](#), Sched. F, s. 1 (2).

Same

- (7) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under [subsection 65.1 \(9\)](#),
- (a) subsections (1) to (5) do not apply to the power of the Lieutenant Governor in Council to make the regulation; and

(b) the Minister shall give notice of the decision to the public and to the Commissioner as soon as is reasonably possible after making the decision. [2006, c. 34](#), Sched. F, s. 1 (2).

Contents of notice

(8) The notice mentioned in clause (7) (b) shall include a statement of the Minister's reasons for making the decision and all other information that the Minister considers appropriate. [2006, c. 34](#), Sched. F, s. 1 (2).

Publication of notice

(9) The Minister shall publish the notice mentioned in clause (7) (b) in *The Ontario Gazette* and give the notice by all other means that the Minister considers appropriate. [2006, c. 34](#), Sched. F, s. 1 (2).

Temporary regulation

(10) If the Minister decides that subsections (1) to (5) should not apply to the power of the Lieutenant Governor in Council to make a regulation under [subsection 65.1 \(9\)](#) because the Minister is of the opinion that the urgency of the situation requires it, the regulation shall,

(a) be identified as a temporary regulation in the text of the regulation; and

(b) unless it is revoked before its expiry, expire at a time specified in the regulation, which shall not be after the second anniversary of the day on which the regulation comes into force. [2006, c. 34](#), Sched. F, s. 1 (2).

No review

(11) Subject to subsection (12), neither a court, nor the Commissioner shall review any action, decision, failure to take action or failure to make a decision by the Lieutenant Governor in Council or the Minister under this section. [2006, c. 34](#), Sched. F, s. 1 (2).

Exception

(12) Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* on the grounds that the Minister has not taken a step required by this section. [2006, c. 34](#), Sched. F, s. 1 (2).

Time for application

(13) No person shall make an application under subsection (12) with respect to a regulation later than 21 days after the day on which,

- (a) the Minister publishes a notice with respect to the regulation under clause (1) (a) or subsection (9), where applicable; or
- (b) the regulation is filed, if it is a regulation described in subsection (10). [2006, c. 34](#), Sched. F, s. 1 (2).

Non-application re: certain corporations

65.3 (1) REPEALED: [2016, c. 37](#), Sched. 18, s. 8.

Hydro One Inc.

(2) This Act does not apply to Hydro One Inc. and its subsidiaries on and after the date on which the *Building Ontario Up Act (Budget Measures), 2015* received Royal Assent. 2015, c. 20, Sched. 13, s. 1 (2).

Same

(3) The annual publication of information required by [section 31](#) on or after the date described in subsection (2) must not include information about Hydro One Inc. and its subsidiaries. [2015, c. 20](#), Sched. 13, s. 1 (2).

Same, transition

(4) If a person has made a request under [subsection 24 \(3\)](#) for continuing access to a record of Hydro One Inc. or a subsidiary before the date described in subsection (2), and if the specified period for which access is requested expires after April 23, 2015, the specified period is deemed to have expired on April 23, 2015. [2015, c. 20](#), Sched. 13, s. 1 (2).

Same, transition

(5) Despite subsection (2), for a period of six months after the date described in that subsection,

- (a) the Commissioner may continue to exercise all of his or her powers under [section 52](#) (inquiry) and [clause 59](#) (b) (certain orders) in relation to Hydro One Inc. and its subsidiaries with respect to matters that occurred and records that were created before that date; and
- (b) Hydro One Inc. and its subsidiaries continue to have the duties of an institution under this Act in relation to the exercise of the Commissioner's powers mentioned in clause (a). [2015, c. 20](#), Sched. 13, s. 1 (2).

Continuing authority to issue orders, etc.

(6) The powers and duties of the Commissioner to issue orders under [section 54](#) and clause 59 (b) with respect to matters mentioned in subsection (5) continue for an additional six months after the expiry of the six-month period described in that subsection. [2015, c. 20](#), Sched. 13, s. 1 (2).

Orders binding

(7) An order issued within the time described in subsection (6) is binding on Hydro One Inc. or its subsidiaries, as the case may be. [2015, c. 20](#), Sched. 13, s. 1 (2).

Repeal

(8) Subsections (4), (5), (6) and (7) and this subsection are repealed on a day to be named by proclamation of the Lieutenant Governor. [2015, c. 20](#), Sched. 13, s. 1 (2).

Exercise of rights of deceased, etc., persons

66 Any right or power conferred on an individual by this Act may be exercised,

(a) where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

(b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property; and

(c) where the individual is less than sixteen years of age, by a person who has lawful custody of the individual. R.S.O. 1990, c. F.31, s. 66; 1992, c. 32, s. 13; 1996, c. 2, s. 66.

Conflict with other Act

67 (1) This Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise. R.S.O. 1990, c. F.31, s. 67 (1).

Idem

(2) The following confidentiality provisions prevail over this Act:

1. Subsection 53 (1) of the *Assessment Act*.
2. Subsections 87 (8), (9) and (10), 98 (9) and (10), 130 (6) and 163 (6) and section 227 of the *Child, Youth and Family Services Act, 2017*.
3. Section 68 of the *Colleges Collective Bargaining Act, 2008*.
4. Section 12 and 54.1 of the *Commodity Futures Act*.
5. Repealed: 1993, c. 38, s. 65.
6. Subsection 137 (2) of the *Courts of Justice Act*.
- 6.1 Section 20.8 of the *Financial Services Regulatory Authority of Ontario Act, 2016*.
7. Subsection 119 (1) of the *Labour Relations Act, 1995*.
- 7.0.1 Sections 40 and 42 of the *Legal Aid Services Act, 2020*.
- 7.1 Section 40.1 of the *Occupational Health and Safety Act*.
8. Subsection 32 (4) of the *Pay Equity Act*.
- 8.1 REPEALED: 2006, c. 35, Sched. C, s. 47 (3).
9. Sections 16, 17 and 121.5 of the *Securities Act*.
10. Subsection 4 (2) of the *Statistics Act*.
11. Subsection 28 (2) of the *Vital Statistics Act*. R.S.O. 1990, c. F.31, s. 67 (2); 1992, c. 14, s. 1; 1993, c. 38, s. 65; 1994, c. 11, s. 388; 1998, c. 26, s. 103; 2006, c. 35, Sched. C, s. 47 (3); 2008, c. 15, s. 86; 2017, c. 8, Sched. 13, s. 6; 2017, c. 14, Sched. 4, s. 14 (2-4); 2020, c. 11, Sched. 15, s. 54; 2021, c. 40, Sched. 12, s. 2; 2023, c. 21, Sched. 1, s. 11; 2023, c. 21, Sched. 10, s. 13.

68 REPEALED: 2006, c. 34, Sched. C, s. 12.

Application

69 (1) This Act applies to any record in the custody or under the control of an institution regardless of whether it was recorded before or after this Act comes into force. R.S.O. 1990, c. F.31, s. 69.

Hospitals

(2) Despite subsection (1), this Act only applies to records in the custody or under the control of a hospital where the records came into the custody or under the control of the hospital on or after January 1, 2007. 2010, c. 25, s. 24 (21).

Crown bound

70 This Act binds the Crown. R.S.O. 1990, c. F.31, s. 70.

TAB 9

General, RRO 1990, Reg 460

Current version: in force since 2025-05-12

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Freedom of Information and Protection of Privacy Act

R.R.O. 1990, REGULATION 460

GENERAL

Consolidation Period: From May 12, 2025 to the e-Laws currency date.

Last amendment: 49/25.

This is the English version of a bilingual regulation.

1. (1) The agencies, boards, commissions, corporations and other bodies listed in Column 1 of the Schedule are designated as institutions. R.R.O. 1990, Reg. 460, s. 1 (1).

(2) The person occupying the position listed in Column 2 of the Schedule opposite to each institution listed in Column 1 is designated as the head of that institution. R.R.O. 1990, Reg. 460, s. 1 (2).

2. A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution. R.R.O. 1990, Reg. 460, s. 2.

3. (1) A head who provides access to an original record must ensure the security of the record. R.R.O. 1990, Reg. 460, s. 3 (1).

(2) A head may require that a person who is granted access to an original record examine it at premises operated by the institution. R.R.O. 1990, Reg. 460, s. 3 (2).

(3) A head shall verify the identity of a person seeking access to his or her own personal information before giving the person access to it. R.R.O. 1990, Reg. 460, s. 3 (3).

4. (1) Every head shall ensure that reasonable measures to prevent unauthorized access to the records in his or her institution are defined, documented and put in place, taking into account the nature of the records to be protected. R.R.O. 1990, Reg. 460, s. 4 (1).

(2) Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it. R.R.O. 1990, Reg. 460, s. 4 (2).

(3) Every head shall ensure that reasonable measures to protect the records in his or her institution from inadvertent destruction or damage are defined, documented and put in place, taking into account the nature of the records to be protected. R.R.O. 1990, Reg. 460, s. 4 (3).

5. (1) An institution that uses personal information shall retain the information for at least one year after use, except if,

(a) the individual to whom the information relates consents to its earlier disposal; or

(b) the information is credit or debit card payment data. O. Reg. 123/15, s. 1.

(2) Despite subsection (1), an institution that uses personal information that is contained in a telecommunication logger tape in the custody or under the control of the institution shall retain the information for at least 45 days after use, except if the individual to whom the information relates consents to its earlier disposal. O. Reg. 123/15, s. 1.

5.1 A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. O. Reg. 21/96, s. 1.

5.2 The fee that shall be charged for the purposes of [clause 24 \(1\)](#) (c) or [48 \(1\)](#) (c) of the [Act](#) shall be \$5. O. Reg. 21/96, s. 1.

5.3 (1) For the purposes of [subsection 50 \(1.1\)](#) of the [Act](#), the fee payable for appealing a decision of a head to the Commissioner shall be,

(a) \$25, if the person appealing has made a request for access to a record under subsection 24 (1);

(b) \$10, if the person appealing has made a request for access to personal information under subsection 48 (1); and

(c) \$10, if the person appealing has made a request for correction of personal information under subsection 47 (2). O. Reg. 21/96, s. 1.

(2) For the purposes of [subsection 50 \(1.1\)](#) of the [Act](#), no fee is payable for appealing a decision of a head to the Commissioner if the person appealing is given notice of a request under [subsection 28 \(1\)](#) of the [Act](#). O. Reg. 21/96, s. 1.

6. The following are the fees that shall be charged for the purposes of [subsection 57 \(1\)](#) of the [Act](#) for access to a record:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, \$10 for each CD-ROM.

3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received. O. Reg. 21/96, s. 2; O. Reg. 92/07, s. 1.

6.1 The following are the fees that shall be charged for the purposes of subsection 57 (1) of the Act for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For developing a computer program or other method of producing the personal information requested from machine readable record, \$15 for each 15 minutes spent by any person.
4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the personal information requested if those costs are specified in an invoice that the institution has received. O. Reg. 21/96, s. 2; O. Reg. 92/07, s. 2.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request. O. Reg. 21/96, s. 3.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived. R.R.O. 1990, Reg. 460, s. 7 (2).

8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment. R.R.O. 1990, Reg. 460, s. 8.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record. R.R.O. 1990, Reg. 460, s. 9.

10. (1) The following are the terms and conditions relating to security and confidentiality that a person is required to agree to before a head may disclose personal information to that person for a research purpose:

1. The person shall use the information only for a research purpose set out in the agreement or for which the person has written authorization from the institution.
2. The person shall name in the agreement any other persons who will be given access to personal information in a form in which the individual to

whom it relates can be identified.

3. Before disclosing personal information to other persons under paragraph 2, the person shall enter into an agreement with those persons to ensure that they will not disclose it to any other person.

4. The person shall keep the information in a physically secure location to which access is given only to the person and to the persons given access under paragraph 2.

5. The person shall destroy all individual identifiers in the information by the date specified in the agreement.

6. The person shall not contact any individual to whom personal information relates, directly or indirectly, without the prior written authority of the institution.

7. The person shall ensure that no personal information will be used or disclosed in a form in which the individual to whom it relates can be identified without the written authority of the institution.

8. The person shall notify the institution in writing immediately if the person becomes aware that any of the conditions set out in this section have been breached. R.R.O. 1990, Reg. 460, s. 10 (1).

(2) An agreement relating to the security and confidentiality of personal information to be disclosed for a research purpose shall be in the form titled "Security and Confidentiality Agreement of Personal Information for Research Purposes", dated May 1, 2016 and available on the Government of Ontario's Central Forms Repository website. O. Reg. 171/16, s. 1.

11. A request for access to a record under Part II of the Act or for access to or correction of personal information under Part III of the Act shall be in a written form that specifies that it is a request made under the Act. O. Reg. 34/11, s. 2.

SCHEDULE

Item	Column 1 Institution	Column 2 Head
1.	Revoked: O. Reg. 27/19, s. 1 (1).	
2.	Accessibility Standards Advisory Council	Minister for Seniors and Accessibility

3.	Advertising Review Board	Minister of Government and Consumer Services
4.	Revoked: O. Reg. 545/24, s. 1 (1).	
5.	Agricorp	Chair of the Board
6.	Agricultural Research and Innovation Ontario	Minister of Agriculture, Food and Rural Affairs
7.	Agriculture, Food and Rural Affairs Appeal Tribunal	Minister of Agriculture, Food and Rural Affairs
8.	Alcohol and Gaming Commission of Ontario	Chief Executive Officer
9.	Algoma University	Executive Head
10.	Algonquin Forestry Authority	Chair
11.	Animal Care Review Board	Executive Chair, Tribunals Ontario
12.	Assessment Review Board	Executive Chair, Tribunals Ontario
13.	Autism Spectrum Disorder Clinical Expert Committee	Minister of Children and Youth Services
13.1	Big Game Management Advisory Committee	Minister of Natural Resources and Forestry
14.	Board of Negotiation (<i>Environmental Protection Act</i>)	Minister of Agriculture, Food and Rural Affairs
15.	REVOKED: O. Reg. 371/21, s. 1 (1).	
16.	Brock University	Executive Head
17.	Building Code Commission	Minister of Municipal Affairs and Housing

18.	REVOKED: O. Reg. 184/21, s. 1 (6).	
19.	Building Materials Evaluation Commission	Minister of Municipal Affairs and Housing
20.	Business Risk Management Review Committee	Minister of Agriculture, Food and Rural Affairs
21.	REVOKED: O. Reg. 184/21, s. 1 (6).	
22.	Carleton University	Executive Head
23.	The Centennial Centre of Science and Technology	Minister of Heritage, Sport, Tourism and Culture Industries
23.1	Centralized Supply Chain Ontario	Chief Executive Officer
24.	Child and Family Services Review Board	Executive Chair, Tribunals Ontario
25.	Chiropody Review Committee	Minister of Health and Long-Term Care
26.	Citizens' Council	Minister of Health and Long-Term Care
27.	Revoked: O. Reg. 894/21, s. 1 (1).	
28.	Colleges of Applied Arts and Technology	Chair of the Board
29.	Collège universitaire de Hearst	Executive Head
30.	Committee on the Status of Species at Risk in Ontario	Minister of the Environment, Conservation and Parks
31.	Committee to Evaluate Drugs	Minister of Health and Long-Term Care
32.	REVOKED: O. Reg. 27/19, s. 1 (11).	

33.	Consent and Capacity Board	Minister of Health and Long-Term Care
34.	REVOKED: O. Reg. 371/21, s. 1 (1).	
35.	Revoked: O. Reg. 670/21, s. 1.	
36.	Crown Employees Grievance Settlement Board	Minister of Labour, Training and Skills Development
37.	Custody Review Board	Executive Chair, Tribunals Ontario
38.	Death Investigation Oversight Council	Solicitor General
39.	Dentistry Review Committee	Minister of Health and Long-Term Care
40.	Education Quality and Accountability Office	Chair
41.	Education Relations Commission	Minister of Education
42.	REVOKED: O. Reg. 184/21, s. 1 (8).	
43.	REVOKED: O. Reg. 371/21, s. 1 (1).	
44.	Financial Services Regulatory Authority of Ontario	Chief Executive Officer
45.	Financial Services Tribunal	Minister of Finance
46.	Fire Safety Commission	Executive Chair, Tribunals Ontario
47.	Fish and Wildlife Heritage Commission	Minister of Natural Resources and Forestry
48.	French Language Health Services Advisory Council	Minister of Health and Long-Term Care

49.	Grain Financial Protection Board	Minister of Agriculture, Food and Rural Affairs
50.	Greenbelt Council	Minister of Municipal Affairs and Housing
51.	REVOKED: O. Reg. 184/21, s. 1 (8).	
52.	Health Professions Appeal and Review Board	Minister of Health and Long-Term Care
53.	Health Professions Regulatory Advisory Council	Minister of Health and Long-Term Care
54.	Health Services Appeal and Review Board	Minister of Health and Long-Term Care
54.1	REVOKED: O. Reg. 184/21, s. 1 (8).	
55.	Higher Education Quality Council of Ontario	Chair
56.	Human Rights Legal Support Centre	Chair
57.	Human Rights Tribunal of Ontario	Executive Chair, Tribunals Ontario
57.1	iGaming Ontario	President and Chief Executive Officer
58.	Independent Electricity System Operator	Chief Executive Officer
58.1	Intellectual Property Ontario	Chair of the board
59.	Investment Advisory Committee of the Public Guardian and Trustee	Attorney General
59.1	Invest Ontario	Minister of Economic Development, Job Creation and Trade
60.	Joint Committee on the Schedule of Benefits	Minister of Health and Long-Term Care

61.	Justices of the Peace Remuneration Commission	President of the Treasury Board
62.	Labour-Management Advisory Committee	Minister of Labour, Training and Skills Development
63.	Lakehead University	Executive Head
64.	Landlord and Tenant Board	Executive Chair, Tribunals Ontario
65.	Languages of Instruction Commission of Ontario	Minister of Education
66.	Laurentian University of Sudbury	Executive Head
67.	Legal Aid Ontario	President of Legal Aid Ontario
68.	Licence Appeal Tribunal	Executive Chair, Tribunals Ontario
69.	Liquor Control Board of Ontario	President and Chief Executive Officer
70.	Livestock Financial Protection Board	Minister of Agriculture, Food and Rural Affairs
71.	Revoked: O. Reg. 184/21, s. 1 (8).	
72.	Revoked: O. Reg. 240/24, s. 1 (1).	
72.1	Revoked: O. Reg. 371/21, s. 1 (1).	
73.	McMaster University	Executive Head
74.	McMichael Canadian Art Collection	Chief Executive Officer
75.	Medical Eligibility Committee — Health Insurance	Minister of Health and Long-Term Care
76.	Metrolinx	Chief Executive Officer

77.	Metropolitan Toronto Convention Centre Corporation	President and Chief Executive Officer of the Corporation
78.	Minister's Advisory Council on Special Education	Minister of Education
79.	REVOKED: O. Reg. 184/21, s. 1 (8).	
80.	Nawiinginokiima Forest Management Corporation	Minister of Natural Resources and Forestry
81.	Niagara Escarpment Commission	Minister of Natural Resources and Forestry
82.	Niagara Parks Commission	Chair of the Commission
83.	Nipissing University	Executive Head
84.	Normal Farm Practices Protection Board	Minister of Agriculture, Food and Rural Affairs
85.	Northern Ontario Grow Bonds Corporation	Chair of the Board of Directors
86.	Northern Ontario Heritage Fund Corporation	Minister of Energy, Northern Development and Mines
87.	Northern Ontario School of Medicine	Executive Head
88.	Office for Victims of Crime	Attorney General
89.	Office of the Employer Adviser	Minister of Labour, Training and Skills Development
90.	Office of the Fairness Commissioner	Commissioner
91.	REVOKED: O. Reg. 184/21, s. 1 (8).	

92.	Law Enforcement Complaints Agency	Complaints Director
93.	Office of the Worker Adviser	Minister of Labour, Training and Skills Development
94.	Ontario Advisory Committee on HIV/AIDS	Minister of Health and Long-Term Care
95.	Ontario Agency for Health Protection and Promotion	Chief Executive Officer
95.1	Ontario Arts Council	Director and Chief Executive Officer
95.2	Ontario Cannabis Retail Corporation	President and Chief Executive Officer
96.	REVOKED: O. Reg. 108/23, s. 1 (2).	
97.	Ontario Civilian Police Commission	Executive Chair, Tribunals Ontario
98.	Ontario Clean Water Agency	Chair
99.	Ontario College of Art & Design University	Executive Head
100.	Ontario Electricity Financial Corporation	Chief Executive Officer
101.	Ontario Energy Board	Chair
102.	Ontario Farm Products Marketing Commission	Minister of Agriculture, Food and Rural Affairs
103.	Ontario Financing Authority	Minister of Finance
104.	Ontario Food Terminal Board	Chair of the Board
105.	Ontario Geographic Names Board	Minister of Natural Resources and Forestry

105.1	Ontario Health	Chair of the Board
106.	Ontario Health atHome	Chief Executive Officer
107.	Ontario Heritage Trust	Minister of Heritage, Sport, Tourism and Culture Industries
108.	REVOKED: O. Reg. 342/24, s. 1.	
109.	Ontario Honours Advisory Council	Minister of Heritage, Sport, Tourism and Culture Industries
110.	Ontario Human Rights Commission	Chief Commissioner
111.	Ontario Immigrant Investor Corporation	Minister of Labour, Training and Skills Development
112.	Ontario Infrastructure and Lands Corporation	Chief Executive Officer
112.0.1	Ontario Infrastructure Bank	Minister of Finance
112.1	Ontario Internal Audit Committee	President of the Treasury Board
113.	Ontario Labour Relations Board	Minister of Labour, Training and Skills Development
113.1	Ontario Land Tribunal	Chair
114.	Ontario Lottery and Gaming Corporation	President and Chief Executive Officer
115.	Ontario Creates	Minister of Heritage, Sport, Tourism and Culture Industries
116.	Ontario Mental Health Foundation	Chair
117.	REVOKED: O. Reg. 184/21, s. 1 (11).	

118.	Revoked: O. Reg. 184/21, s. 1 (12).	
119.	Revoked: O. Reg. 27/19, s. 1 (30).	
120.	Ontario Northland Transportation Commission	Chair of the Commission
121.	Ontario Parks Board of Directors	Minister of the Environment, Conservation and Parks
122.	Ontario Parole Board	Executive Chair, Tribunals Ontario
123.	Ontario Place Corporation	Minister of Heritage, Sport, Tourism and Culture Industries
124.	Ontario Police Arbitration and Adjudication Commission	Solicitor General
125.	Ontario Power Generation Inc.	Chief Executive Officer
126.	Each subsidiary (as defined in Subsection 2 (1) of the Electricity Act, 1998) of Ontario Power Generation Inc.	Chief Executive Officer of the subsidiary
126.1	Ontario Research Fund Advisory Board	Minister of Economic Development, Job Creation and Trade
127.	Ontario Review Board	Chair of the Board
128.	Ontario Securities Commission	Chair
129.	Revoked: O. Reg. 358/17, s. 1 (2).	
130.	Ontario Special Education Tribunal (English)	Executive Chair, Tribunals Ontario
131.	Ontario Special Education Tribunal (French)	Executive Chair, Tribunals Ontario

132.	Destination Ontario	Minister of Heritage, Sport, Tourism and Culture Industries
133.	Ontario Trillium Foundation	Chief Executive Officer
134.	Revoked: O. Reg. 358/17, s. 1 (2).	
135.	Optometry Review Committee	Minister of Health and Long-Term Care
136.	The Order of Ontario Advisory Council	Chief Justice of Ontario
137.	Ornge, incorporated under the <i>Canada Corporations Act</i> on October 8, 2004 as Ontario Air Ambulance Services Co.	Chair of the board of directors
138.	Ottawa Convention Centre Corporation	President
139.	Owen Sound Transportation Company Limited	President
140.	Revoked: O. Reg. 358/17, s. 1 (2).	
141.	Pay Equity Commission	Minister of Labour, Training and Skills Development
142.	Pay Equity Hearings Tribunal	Minister of Labour, Training and Skills Development
143.	Pesticides Advisory Committee	Minister of the Environment, Conservation and Parks
144.	Pharmacy Council	Minister of Health and Long-Term Care

145.	Physician Payment Review Board	Chair
146.	Physician Services Payment Committee	Minister of Health and Long-Term Care
147.	Post-secondary Education Quality Assessment Board	Minister of Training, Colleges and Universities
148.	Premier's Council on Youth Opportunities	Minister of Children and Youth Services
149.	Prevention Council	Minister of Labour, Training and Skills Development
150.	Provincial Advisory Committee on Francophone Affairs	Minister of Francophone Affairs
151.	Revoked: O. Reg. 358/17, s. 1 (2).	
152.	Provincial Judges Pension Board	President of the Treasury Board
153.	Provincial Schools Authority	Minister of Education
154.	Public Guardian and Trustee	Attorney General
155.	Public Service Commission	Chair
156.	Public Service Grievance Board	Minister of Labour, Training and Skills Development
157.	Queen's University at Kingston	Executive Head
158.	Rabies Advisory Committee	Minister of Natural Resources and Forestry
159.	Royal Ontario Museum	Chair of the Board
160.	Rural Economic Development Advisory Panel	Minister of Agriculture, Food and Rural Affairs

161.	Ryerson University	Executive Head
162.	St. Lawrence Parks Commission	Minister of Heritage, Sport, Tourism and Culture Industries
163.	Science North	Chief Executive Officer
163.1	Skilled Trades Ontario	Chair of the board of directors
164.	Social Benefits Tribunal	Executive Chair, Tribunals Ontario
165.	Soldiers Aid Commission	Minister of Community and Social Services
165.1	Special Investigations Unit	Director
166.	Species at Risk Program Advisory Committee	Minister of the Environment, Conservation and Parks
167.	Toronto Organizing Committee for the 2015 Pan American and Parapan American Games	Chair of the Board
168.	Training Completion Assurance Fund Advisory Board	Minister of Training, Colleges and Universities
169.	Trent University	Executive Head
170.	Revoked: O. Reg. 202/21, s. 1.	
170.1	Université de l'Ontario français	Executive Head
171.	University of Guelph	Executive Head
172.	University of Ontario Institute of Technology	Executive Head
173.	University of Ottawa	Executive Head

174.	University of Toronto	Executive Head
175.	The University of Waterloo	Executive Head
176.	The University of Western Ontario	Executive Head
177.	University of Windsor	Executive Head
177.1	Venture Ontario	Minister of Economic Development, Job Creation and Trade
178.	Walkerton Clean Water Centre	Chief Executive Officer
179.	Wilfrid Laurier University	Executive Head
180.	Workplace Safety and Insurance Appeals Tribunal	Minister of Labour, Training and Skills Development
181.	Workplace Safety and Insurance Board	Chair of the Board
182.	York University	Executive Head

O. Reg. 441/16, s. 1; O. Reg. 358/17, s. 1; O. Reg. 34/18, s. 1; O. Reg. 27/19, s. 1; O. Reg. 175/19, s. 1; O. Reg. 184/21, s. 1; O. Reg. 202/21, s. 1; O. Reg. 371/21, s. 1; O. Reg. 670/21, s. 1; O. Reg. 723/21, s. 1; O. Reg. 894/21, s. 1; O. Reg. 5/22, s. 1; O. Reg. 44/22, s. 1; O. Reg. 108/23, s. 1; O. Reg. 334/23, s. 1; O. Reg. 115/24, s. 1; O. Reg. 234/24, s. 1; O. Reg. 240/24, s. 1; O. Reg. 270/24, s. 1; O. Reg. 342/24, s. 1; O. Reg. 545/24, s. 1; O. Reg. 49/25, s. 1.

FORM 1 REVOKED: O. REG. 171/16, S. 3.

FORM 2 REVOKED: O. REG. 34/11, S. 5.

TAB 10

Disposal of Personal Information, RRO 1990, Reg 459

Current version: in force since 2016-12-06

Link to the latest version ⁽ⁱ⁾: <https://canlii.ca/t/tgh>

Stable link to this version ⁽ⁱ⁾: <https://canlii.ca/t/52v1r>

Citation to this version: Disposal of Personal Information, RRO 1990, Reg 459, <<https://canlii.ca/t/52v1r>> retrieved on 2025-10-28

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Freedom of Information and Protection of Privacy Act

R.R.O. 1990, REGULATION 459

DISPOSAL OF PERSONAL INFORMATION

Consolidation Period: From December 6, 2016 to the [e-Laws currency date](#).

Last amendment: O. Reg. 440/16.

This is the English version of a bilingual regulation.

1. In this Regulation,

“Archives” means the Archives of Ontario. R.R.O. 1990, Reg. 459, s. 1.

2. (1) An institution, other than an educational institution, may dispose of personal information only by transferring it to the Archives or by destroying it. R.R.O. 1990, Reg. 459, s. 2; O. Reg. 91/07, s. 1 (1).

(2) An educational institution may dispose of personal information in the following ways only:

1. By destroying the personal information.

2. By transferring it to the archives of another educational institution, in accordance with an agreement between the educational institutions authorizing the transfer.

3. By transferring it to the Archives, in accordance with an agreement between the educational institution and the Archivist of Ontario authorizing the transfer. O. Reg. 91/07, s. 1 (2).

(3) An educational institution that transfers personal information to its own archives is not considered to have disposed of the information. O. Reg. 91/07, s. 1 (2).

3. Where personal information is in the custody or under the control of an institution, no person shall destroy it without the authorization of the head. R.R.O. 1990, Reg. 459, s. 3.

4. (1) Every head shall ensure that all reasonable steps are taken to protect the security and confidentiality of personal information that is to be destroyed, including protecting its security and confidentiality during its storage, transportation, handling and destruction. R.R.O. 1990, Reg. 459, s. 4 (1).

(2) Every head shall ensure that all reasonable steps are taken to protect the security and confidentiality of personal information that is to be transferred to the Archives, including protecting its security and confidentiality during its storage, transportation and handling. R.R.O. 1990, Reg. 459, s. 4 (2).

(3) In determining whether all reasonable steps are taken under subsection (1) or (2), the head shall consider the nature of the personal information to be destroyed or transferred. R.R.O. 1990, Reg. 459, s. 4 (3).

5. Every head shall take all reasonable steps to ensure that when personal information is to be destroyed, it is destroyed in such a way that it cannot be reconstructed or retrieved. R.R.O. 1990, Reg. 459, s. 5.

6. (1) Every head of an institution shall ensure that the institution maintains a disposal record setting out what personal information has been destroyed or transferred to the Archives and the date of that destruction or transfer. R.R.O. 1990, Reg. 459, s. 6 (1).

(2) The head shall ensure that the disposal record maintained under subsection (1) does not contain personal information. R.R.O. 1990, Reg. 459, s. 6 (2).

TAB 11

Archives and Recordkeeping Act, 2006, SO 2006, c 34, Sch A

This statute replaces RSO 1990, c A.27.

Current version: in force since 2019-07-01

Link to the latest
version ⓘ: <https://canlii.ca/t/344>

Stable link to
this version ⓘ: <https://canlii.ca/t/53n96>

Citation to this
version: Archives and Recordkeeping Act, 2006, SO 2006, c 34, Sch
A, <<https://canlii.ca/t/53n96>> retrieved on 2025-10-28

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Archives and Recordkeeping Act, 2006

S.O. 2006, CHAPTER 34
SCHEDULE A

Consolidation Period: From July 1, 2019 to the [e-Laws currency date](#).

Last amendment: 2019, c. 7, Sched. 17, s. 39.

PART I

PURPOSES, INTERPRETATION AND APPLICATION

Purposes of the Act

1 The purposes of this Act are,

- (a) to ensure that the public records of Ontario are managed, kept and preserved in a useable form for the benefit of present and future generations;
- (b) to foster government accountability and transparency and to support effective government administration by promoting and facilitating good recordkeeping by public bodies; and
- (c) to encourage the public use of Ontario's archival records as a vital resource for studying and interpreting the history of the province. 2006, c. 34, Sched. A, s. 1; 2019, c. 7, Sched. 3, s. 1.

Interpretation

2 (1) In this Act,

"Archivist" means the Archivist of Ontario appointed under section 8; ("archiviste")

"Deputy Minister" means the deputy minister to the Minister; ("sous-ministre")

“legislative body” means,

- (a) the Legislative Assembly or a committee of the Legislative Assembly,
- (b) an officer of the Legislative Assembly or of the Legislature, or
- (c) an officer or servant of the House; (“organisme législatif”)

“Minister” means the member of the Executive Council who is assigned the administration of this Act under the *Executive Council Act*; (“ministre”)

“prescribed” means prescribed by regulation; (“prescrit”)

“private record” means a record that is not a public record; (“document privé”)

“public body” means,

- (a) the Executive Council or a committee of the Executive Council,
- (b) a minister of the Crown,
- (c) a ministry of the Government of Ontario,
- (d) a commission under the *Public Inquiries Act, 2009*, or
- (e) an agency, board, commission, corporation or other entity designated as a public body by regulation; (“organisme public”)

“public record” means a record made or received by a public body in carrying out the public body’s activities, but does not include constituency records of a minister of the Crown or published works; (“document public”)

“record” means a record of information, including data, in any form, including a record made, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic, optical or any other means, but does not include a mechanism or system for making, sending, receiving, storing or otherwise processing information; (“document”)

“regulation” means a regulation made under this Act. (“règlement”) 2006, c. 34, Sched. A, s. 2 (1); 2009, c. 33, Sched. 6, s. 40; 2018, c. 17, Sched. 45, s. 2; 2019, c. 7, Sched. 3, s. 2.

Record of archival value

(2) For the purposes of this Act, a record is a record of archival value if,

- (a) it relates to,
 - (i) the origin, development, organization or activities of a public body, a legislative body, a court or any other person or entity,
 - (ii) the development or implementation of a law or of a policy or decision of a public body, a legislative body or any other person or entity, or
 - (iii) the history of Ontario or of any part of Ontario;
- (b) it has the characteristics of a record of archival value that are prescribed;
- (c) it is designated as a record of archival value by regulation; or
- (d) it belongs to a class of records prescribed as being a class of records of archival value. 2006, c. 34, Sched. A, s. 2 (2).

Laws re privacy and access, privileges

3 (1) Nothing in this Act limits the operation of any law or privilege governing the protection of privacy or access to information in respect of records held by public bodies and legislative bodies. 2006, c. 34, Sched. A, s. 3 (1).

Same

(2) Nothing in this Act limits the operation of any other privilege that may exist in respect of a record transferred to the Archivist or to another person or entity under this Act. 2006, c. 34, Sched. A, s. 3 (2).

Orders of Assembly and courts, statutory provisions

4 Nothing in this Act shall be taken or deemed to authorize the retention, transfer, destruction or other disposition of any public record in contravention of an order of a court or of the Legislative Assembly or in contravention of an express provision in any other Act. 2006, c. 34, Sched. A, s. 4.

Crown bound

5 This Act binds the Crown. 2006, c. 34, Sched. A, s. 5.

PART II
ARCHIVES OF ONTARIO

Archives of Ontario

6 The Archives of Ontario is continued. 2006, c. 34, Sched. A, s. 6.

Objects of the Archives of Ontario

7 The objects of the Archives of Ontario are,

- (a) to preserve records of archival value;
- (b) to provide access to the public to records in the custody or control of the Archives of Ontario;
- (c) to promote good recordkeeping by public bodies to facilitate the preservation of records of archival value and to support effective government administration;
- (d) to assist historical research and encourage archival activities in Ontario. 2006, c. 34, Sched. A, s. 7; 2019, c. 7, Sched. 3, s. 3.

Archivist of Ontario

8 (1) There shall be an Archivist of Ontario who shall be appointed by the Lieutenant Governor in Council. 2006, c. 34, Sched. A, s. 8 (1).

Powers and duties

(2) The Archivist shall administer the Archives of Ontario and shall exercise the powers and perform the duties assigned to the Archivist under this Act. 2006, c. 34, Sched. A, s. 8 (2).

Term of office

(3) The Archivist shall hold office for a term fixed by the Lieutenant Governor in Council and may be reappointed for a further term or terms. 2006, c. 34, Sched. A, s. 8 (3).

Access to records

(4) Despite any other Act or privilege, the Archivist shall have access to any public record for the purpose of exercising or performing the Archivist's powers or duties under this Act and, for greater certainty, nothing in the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* or the *Personal Health Information Protection Act, 2004* prevents the Archivist from having such access. 2006, c. 34, Sched. A, s. 8 (4); 2019, c. 7, Sched. 3, s. 4.

Same

(5) A public body or former public body and any officer, employee, former officer or former employee of a public body or of a former public body shall give the Archivist access to any public record to enable the Archivist to exercise or perform the Archivist's powers or duties under this Act. 2006, c. 34, Sched. A, s. 8 (5); 2019, c. 7, Sched. 3, s. 4.

Not compellable witness

(6) The Archivist or any person employed in the Archives of Ontario is not compellable to give evidence in a civil proceeding concerning anything coming to their knowledge in the exercise or performance of a power or duty under this Act. 2006, c. 34, Sched. A, s. 8 (6).

Delegation

(7) The Archivist may delegate any of the Archivist's powers or duties to a person employed in the Archives of Ontario. 2006, c. 34, Sched. A, s. 8 (7); 2019, c. 7, Sched. 3, s. 4.

Acting Archivist

(8) The Deputy Minister may at any time appoint an acting Archivist with the powers and duties of the Archivist if,

- (a) the Archivist is absent or unable to act; or
- (b) the office of Archivist is vacant. 2006, c. 34, Sched. A, s. 8 (8).

Protection from personal liability

9 (1) No action or other proceeding shall be instituted against the Archivist or any person employed in the Archives of Ontario as a result of any act done in good faith in the performance or intended performance of any duty under this Act or in the exercise or intended exercise of any power under this Act, or of any neglect or default in the performance or exercise in good faith of such duty or power. 2006, c. 34, Sched. A, s. 9 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject. 2006, c. 34, Sched. A, s. 9 (2); 2019, c. 7, Sched. 17, s. 39.

Ministerial directions

10 The Minister may give directions to the Archivist in relation to the exercise of the Archivist's powers and the performance of the Archivist's duties under this Act, other than the establishment of standards and guidelines under section 25. 2006, c. 34, Sched. A, s. 10; 2019, c. 7, Sched. 3, s. 5.

PART III**RETENTION, TRANSFER AND DISPOSITION OF RECORDS****PUBLIC RECORDS****Records schedules**

11 (1) The Archivist may prepare a records schedule that sets out, for a class of public records that a public body creates or receives, the length of time the records will be retained and the disposition of the records at the end of the retention period. 2019, c. 7, Sched. 3, s. 6 (1).

Same

(1.1) Every public body shall prepare a records schedule that sets out, for each class of public records that they create or receive and for which the Archivist has not prepared a records schedule, the length of time the records will be retained and the disposition of the records at the end of their retention period. 2019, c. 7, Sched. 3, s. 6 (1).

Contents

(2) A records schedule shall,

- (a) identify and describe the records or classes of records to which it applies;
- (b) specify how long the records are to be retained by the public body;
- (c) Repealed: 2019, c. 7, Sched. 3, s. 6 (2).
- (d) identify the records or classes of records that are records of archival value;
- (e) specify the transfer of records of archival value at the end of their retention period to the Archives of Ontario or the continued retention of such records in accordance with an agreement entered into under clause 18 (1) (a); and
- (f) contain any other information that may be required by the Archivist. 2006, c. 34, Sched. A, s. 11 (2); 2019, c. 7, Sched. 3, s. 6 (2).

Archivist's approval of records schedule

12 (1) Every public body shall submit their records schedule to the Archivist for approval. 2006, c. 34, Sched. A, s. 12 (1).

Same

(2) The Archivist shall review the records schedule submitted for approval and may approve the schedule or require that it be amended. 2006, c. 34, Sched. A, s. 12 (2).

Amendment

(3) The Archivist may at any time require that a public body amend a previously approved records schedule and the public body shall amend their records schedule accordingly. 2006, c. 34, Sched. A, s. 12 (3).

Same

(4) If a public body amends a records schedule after it has been approved by the Archivist, whether on its own initiative or in response to a requirement of the Archivist, the amended schedule must also be submitted to the Archivist for approval. 2006, c. 34, Sched. A, s. 12 (4).

Exempted from approval

(5) If a public body is exempted by regulation from complying with subsections (1), (2) and (4), then its records schedule is deemed to be approved by the Archivist. 2006, c. 34, Sched. A, s. 12 (5).

Public bodies to comply with approved records schedule

13 (1) Every public body shall retain and transfer or otherwise dispose of their public records in accordance with the public body's approved records schedule. 2006, c. 34, Sched. A, s. 13 (1).

Same

(2) Every public body shall ensure that their public records are preserved and that the information in their public records is accessible until they are transferred or otherwise disposed of in accordance with their approved records schedule. 2006, c. 34, Sched. A, s. 13 (2).

Same

(3) A public record shall not be transferred, destroyed or otherwise disposed of except in accordance with the applicable approved records schedule or with the written consent of the Archivist. 2006, c. 34, Sched. A, s. 13 (3).

Exception

(4) This section does not apply to records that are dealt with under section 14. 2006, c. 34, Sched. A, s. 13 (4).

Disposition of public records where public body, functions change

14 (1) If a public body is to cease to exist, the public body shall transfer or otherwise dispose of their public records in accordance with their approved records schedule as if it were the end of those records' retention periods under the public body's approved records schedule. 2006, c. 34, Sched. A, s. 14 (1).

Same

(2) If any of the functions of a public body are to cease, the public body shall transfer or otherwise dispose of their public records that pertain to the ceased functions in accordance with their approved records schedule as if it were the end of those records' retention periods under the public body's approved records schedule. 2006, c. 34, Sched. A, s. 14 (2).

Same

(3) Despite subsections (1) and (2), if any of the functions of a public body are to be transferred to another public body or any other person or entity, the public body shall enter into an agreement with the Archivist and with the public body or other person or entity with respect to the maintenance, retention, preservation, transfer and other disposition of the records pertaining to the transferred functions. 2006, c. 34, Sched. A, s. 14 (3).

Prohibition against destroying, etc., public records

15 (1) A public record shall not be,

- (a) destroyed or damaged;
- (b) altered so as to delete information from it;
- (c) made illegible;
- (d) removed from the custody or control of a public body or the Archives of Ontario; or
- (e) concealed from a public body or the Archivist. 2006, c. 34, Sched. A, s. 15 (1).

Exception

(2) Subsection (1) does not apply to anything done,

- (a) in accordance with an approved records schedule;
- (b) in accordance with a direction of the Archivist under subclause 20 (4) (b) (i);
- (c) in accordance with an agreement with the Archivist required by subclause 20 (4) (b) (ii); or
- (d) with the written consent of the Archivist. 2006, c. 34, Sched. A, s. 15 (2).

RECORDS OF LEGISLATIVE BODIES AND THE LIEUTENANT GOVERNOR

Election re records schedules**Legislative bodies**

16 (1) A legislative body may elect to have sections 11 and 13 or sections 11, 12 and 13 apply to the legislative body with necessary modifications and, for such purposes, “public records” in those sections includes records made or received by the legislative body in carrying out the legislative body’s activities. 2006, c. 34, Sched. A, s. 16 (1).

Lieutenant Governor

(2) The Lieutenant Governor may elect to have sections 11 and 13 or sections 11, 12 and 13 apply to him or her with necessary modifications and, for such purposes, “public records” in those sections includes records made or received by the Lieutenant Governor in carrying out the Lieutenant Governor’s activities. 2006, c. 34, Sched. A, s. 16 (2).

PRIVATE RECORDS

Private recordkeeping

17 (1) The Archivist may enter into an agreement with any person or entity, other than a public body or legislative body, in respect of the person’s or entity’s records and recordkeeping. 2006, c. 34, Sched. A, s. 17 (1).

Agreement

(2) An agreement under subsection (1) may provide,

- (a) that the Archivist will give the person or entity recordkeeping advice;
- (b) that the Archivist will assist the person or entity in determining which of their private records are records of archival value and in protecting and preserving those records;
- (c) that the Archives of Ontario will acquire some or all of the person’s or entity’s records of archival value by gift, bequest, purchase or otherwise;
- (d) for the protection and preservation of and access to the person’s or entity’s records of archival value. 2006, c. 34, Sched. A, s. 17 (2).

PART IV

RECORDS OF ARCHIVAL VALUE

AGREEMENTS WITH ARCHIVIST

Public records of archival value

18 (1) The Archivist may enter into an agreement,

- (a) with a public body providing that the public body will retain custody of all or some of the public body's records of archival value at the end of their retention period, and will retain and preserve them and make them accessible to the public in accordance with the Archivist's directions; or
- (b) with any other person or entity providing that that person or entity will take custody of all or some of a public body's records of archival value at the end of their retention period, and will retain and preserve them and make them accessible to the public in accordance with the Archivist's directions. 2006, c. 34, Sched. A, s. 18 (1).

Agreement to be reflected in records schedule

(2) A public body shall incorporate the terms of an agreement entered into under clause (1) (a) in their records schedule. 2006, c. 34, Sched. A, s. 18 (2).

Legislative body's records of archival value

19 (1) Subject to an agreement entered into under subsection (2), every legislative body shall transfer the legislative body's records of archival value to the custody and control of the Archives of Ontario within 20 years from the date on which the records cease to be in current use, unless the legislative body has an approved records schedule that provides otherwise. 2006, c. 34, Sched. A, s. 19 (1).

Agreement

(2) The Archivist may enter into an agreement,

- (a) with a legislative body providing that the legislative body will retain custody of all or some of the legislative body's records of archival value at the end of their retention period, and will retain and preserve them and make them accessible to the public in accordance with the Archivist's directions; or
- (b) with any other person or entity providing that that person or entity will take custody of all or some of a legislative body's records of archival value at the end of their retention period, and will retain and preserve them and make them accessible to the public in accordance with the Archivist's directions. 2006, c. 34, Sched. A, s. 19 (2).

ARCHIVIST'S DESIGNATION OF RECORDS OF ARCHIVAL VALUE

Designation of public records of archival value

20 (1) Despite sections 13 and 14 or an agreement entered into under section 18, the Archivist may at any time designate any public record or class of public records that is in the custody or control of a public body if, in the Archivist's opinion, the record or class of records,

- (a) may be of archival value; and
- (b) is at imminent risk of being damaged or destroyed or otherwise disposed of. 2006, c. 34, Sched. A, s. 20 (1).

Notice

(2) The Archivist shall give the public body with custody or control of the record or records notice in writing of the designation. 2006, c. 34, Sched. A, s. 20 (2).

Effect of notice

(3) The public body shall not damage or destroy or otherwise dispose of the designated record or records until the expiry of 45 days after the date of the written notice of the designation, except with the written consent of the Archivist. 2006, c. 34, Sched. A, s. 20 (3).

Archivist's powers

(4) The Archivist may, before the expiry of the 45-day period,

- (a) review the designated record or records to determine if they are records of archival value; and
- (b) if the Archivist determines that they are records of archival value, direct the public body to,
 - (i) transfer the record or records to the custody and control of the Archives of Ontario by a specified date, or
 - (ii) enter into an agreement with the Archivist under clause 18 (1) (a) or amend an existing such agreement. 2006, c. 34, Sched. A, s. 20 (4); 2019, c. 7, Sched. 3, s. 7.

Direction, agreement prevail over approved records schedule

(5) In the event of a conflict between a direction under subclause (4) (b) (i) or an agreement entered into or amended pursuant to a direction under subclause (4) (b) (ii) and an approved records schedule, the direction or agreement prevails, and the public body shall transfer the record or records in accordance with the direction or agreement. 2006, c. 34, Sched. A, s. 20 (5).

Other agreements null and void

(6) Any agreement entered into by the public body after receipt of the notice of designation, other than an agreement entered into or amended pursuant to a direction under subclause (4) (b) (ii), to damage or destroy or otherwise dispose of the designated record or records before the expiry of the 45-day period and without the written consent of the Archivist is null and void. 2006, c. 34, Sched. A, s. 20 (6).

No liability for designation

(7) No action or other proceeding for damages shall be instituted against the Crown, the Minister or the Archivist in respect of a designation made or not made by the Archivist under this section. 2006, c. 34, Sched. A, s. 20 (7).

Offence

(8) Every person is guilty of an offence who,

- (a) damages, destroys or otherwise disposes of a public record that is designated by the Archivist under this section within 45 days after the designation is made, except pursuant to a direction of the Archivist under subclause (4) (b) (i) or an agreement entered into or amended pursuant to a direction of the Archivist under subclause (4) (b) (ii) or with the Archivist's written consent;
- (b) refuses the Archivist access to any records designated under this section; or
- (c) fails to transfer a designated record to the custody and control of the Archives of Ontario in accordance with the Archivist's direction under subclause (4) (b) (i). 2006, c. 34, Sched. A, s. 20 (8).

Designation of private records of archival value

21 (1) The Archivist may designate any private record of archival value or class of private records of archival value if, in the Archivist's opinion, the record or class of records,

- (a) is of provincial significance; and
- (b) is at risk of being damaged or destroyed. 2006, c. 34, Sched. A, s. 21 (1).

Notice to owner

(2) The Archivist shall give the owner of the record or records notice in writing of the designation. 2006, c. 34, Sched. A, s. 21 (2).

Effect of notice

(3) The owner of the designated record or records shall not damage or destroy the designated record or records until the expiry of 180 days after the date of the written notice of the designation, except with the written consent of the Archivist. 2006, c. 34, Sched. A, s. 21 (3).

Second designation

(4) On or before the expiry of the 180-day period described in subsection (3), the Archivist may renew the designation for one further period of 180 days, beginning at the end of the first 180-day period. 2006, c. 34, Sched. A, s. 21 (4).

Crown not liable for designation

(5) No action or other proceeding for damages shall be instituted against the Crown, the Minister or the Archivist in respect of a designation made or not made by the Archivist under this section. 2006, c. 34, Sched. A, s. 21 (5).

Exception

(6) This section does not apply to records made or received by the Lieutenant Governor, a legislative body or a court in carrying out their activities. 2006, c. 34, Sched. A, s. 21 (6).

PUBLIC ACCESS TO RECORDS OF ARCHIVAL VALUE

Right of access to records of archival value**Public records**

22 (1) Every person has the right to examine a public record of archival value that is in the custody or control of the Archives of Ontario, or a copy of the record, during normal business hours, subject to any restrictions imposed by law. 2006, c. 34, Sched. A, s. 22 (1).

Private records

(2) Every person has the right to examine a private record of archival value that is in the custody or control of the Archives of Ontario, or a copy of the record, during normal business hours, subject to any restrictions imposed by law or by agreement between the Archivist and the donor of the private record. 2006, c. 34, Sched. A, s. 22 (2).

Archivist's discretion re original or copy

(3) The Archivist shall, in the Archivist's absolute discretion, decide in each case whether a person may examine an original record or a copy of the record. 2006, c. 34, Sched. A, s. 22 (3); 2019, c. 7, Sched. 3, s. 8.

Refusal of access

(4) Despite subsections (1) and (2), the Archivist,

- (a) shall refuse to produce for examination any record of archival value, or a copy of any record of archival value, if the refusal is required by the *Freedom of Information and Protection of Privacy Act* or any other Act;
- (b) may refuse to produce for examination any record of archival value, or a copy of any record of archival value, if,
 - (i) the refusal is permitted by the *Freedom of Information and Protection of Privacy Act* or any other Act, or
 - (ii) the record is excluded from the application of the *Freedom of Information and Protection of Privacy Act* by section 65 of that Act. 2006, c. 34, Sched. A, s. 22 (4).

Preservation of records

(5) The Archivist shall ensure that the records of archival value that are in the custody or control of the Archives of Ontario are preserved and that the information in them is accessible such that it can be understood. 2006, c. 34, Sched. A, s. 22 (5).

Legislative records

(6) This section applies to records made or received by a legislative body in carrying out its activities and that are in the custody or control of the Archives of Ontario as if they were public records. 2006, c. 34, Sched. A, s. 22 (6).

Certified copy of record

23 A copy of a record from the Archives of Ontario certified by the Archivist or the Archivist's delegate to be a true copy of the original record,

- (a) is proof, in the absence of evidence to the contrary, of the authenticity and correctness of the copy, without proof of the appointment or signature of the Archivist or the Archivist's delegate; and
- (b) is admissible in evidence to the same extent as the original record and has the same evidentiary value. 2006, c. 34, Sched. A, s. 23; 2019, c. 7, Sched. 3, s. 9.

ARCHIVIST'S DISPOSITION OF RECORDS

Disposition of records

24 The Archivist may transfer, destroy or otherwise dispose of any record that is in the custody or control of the Archives of Ontario if the Archivist is of the opinion that it is no longer necessary to retain it in the Archives of Ontario. 2006, c. 34, Sched. A, s. 24; 2019, c. 7, Sched. 3, s. 10.

STANDARDS, GUIDELINES AND REGULATIONS

Standards, guidelines re recordkeeping

25 (1) The Archivist shall, at the direction of the Management Board of Cabinet, establish standards and guidelines respecting recordkeeping practices, including practices to facilitate the preservation of records of archival value. 2019, c. 7, Sched. 3, s. 11 (1).

Availability of standards, guidelines

(2) The Archivist shall make the standards and guidelines available to public bodies, and may make them available to other persons and entities, by whatever means the Archivist considers appropriate. 2006, c. 34, Sched. A, s. 25 (2); 2019, c. 7, Sched. 3, s. 11 (2).

Not regulations

(3) The standards and guidelines are not regulations within the meaning of Part III (Regulations) of the *Legislation Act, 2006*. 2006, c. 34, Sched. A, ss. 25 (3), 29 (3).

Management Board of Cabinet policies and procedures prevail

(4) In the case of a conflict between a standard or guideline established by the Archivist and any administrative policy or procedure established or prescribed by the Management Board of Cabinet under clause 3 (1) (e) of the *Management Board of Cabinet Act*, the latter prevails. 2006, c. 34, Sched. A, s. 25 (4).

Regulations

26 The Lieutenant Governor in Council may make regulations,

- (a) designating an agency, board, commission, corporation or other entity as a public body;
- (b) prescribing characteristics of a record of archival value;
- (c) designating any record to be a record of archival value;
- (d) prescribing a class of records to be records of archival value;
- (e) defining “provincial significance” for the purpose of section 21;
- (f) exempting any public body, or any class of public body, from any provision of this Act and prescribing conditions and circumstances for such exemption;
- (g) assigning additional powers and duties to the Archivist. 2006, c. 34, Sched. A, s. 26.

27., 28 Omitted (amends or repeals other Acts). 2006, c. 34, Sched. A, ss. 27, 28.

29 Omitted (provides for amendments to this Act) 2006, c. 34, Sched. A, s. 29.

30 Omitted (amends or repeals other Acts). 2006, c. 34, Sched. A, s. 30.

31 Omitted (provides for coming into force of provisions of this Act) 2006, c. 34, Sched. A, s. 31.

32 Omitted (enacts short title of this Act). 2006, c. 34, Sched. A, s. 32.

TAB 11

Designated Public Bodies, O Reg 336/07

Current version: in force since 2025-01-01

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Archives and Recordkeeping Act, 2006

ONTARIO REGULATION 336/07

DESIGNATED PUBLIC BODIES

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: 544/24.

This is the English version of a bilingual regulation.

Designation

1. Each of the following agencies, boards, commissions, corporations and other entities is designated as a public body for the purposes of the Act:

1. Accessibility Standards Advisory Council.
2. Advertising Review Board.
3. Advisory Council on Drinking Water Quality and Testing Standards.
4. REVOKED: O. Reg. 544/24, s. 1 (1).
5. Advisory Council to the Order of Ontario.

6. AgriCorp.
7. Agricultural Research and Innovation Ontario.
8. Agriculture, Food and Rural Affairs Appeal Tribunal.
9. Alcohol and Gaming Commission of Ontario.
10. Animal Care Review Board.
11. Assessment Review Board.
12. Autism Spectrum Disorders Clinical Expert Committee (ASD Clinical Expert Committee).
- 12.1 Big Game Management Advisory Committee.
13. REVOKED: O. Reg. 354/21, s. 1 (1).
14. REVOKED: O. Reg. 186/21, s. 1 (2).
15. Building Code Commission.
16. Building Code Conservation Advisory Council.
17. Building Materials Evaluation Commission.
18. Business Risk Management Review Committee.
19. Associate Judges Remuneration Commission.
20. The Centennial Centre of Science and Technology.
- 20.1 Centralized Supply Chain Ontario.
21. Child and Family Services Review Board.
22. REVOKED: O. Reg. 186/21, s. 1 (4).
23. Chiropractic Review Committee.
24. Citizens' Council established under [section 1.5](#) of the *Ontario Drug Benefit Act*.
25. REVOKED: O. Reg. 895/21, par. 1 (1).
26. REVOKED: O. Reg. 186/21, s. 1 (4).
27. Committee on the Status of Species at Risk in Ontario.
28. Committee to Evaluate Drugs.
29. REVOKED: O. Reg. 186/21, s. 1 (4).
30. Consent and Capacity Board.
31. REVOKED: O. Reg. 354/21, s. 1 (1).
32. Constable Joe MacDonald Public Safety Officers' Survivors Scholarship Fund Committee.

33. REVOKED: O. Reg. 669/21, s. 1.
34. Crown Employees Grievance Settlement Board.
35. REVOKED: O. Reg. 186/21, s. 1 (4).
36. Curriculum Council.
37. Custody Review Board.
38. Death Investigation Oversight Council.
39. REVOKED: O. Reg. 186/21, s. 1 (4).
40. Revoked: O. Reg. 29/19, s. 1 (1).
41. Deputy Judges Remuneration Commission.
42. Destination Ontario.
43. REVOKED: O. Reg. 186/21, s. 1 (4).
44. Education Quality and Accountability Office.
45. Education Relations Commission.
46. REVOKED: O. Reg. 55/20, s. 1.
47. REVOKED: O. Reg. 354/21, s. 1 (1).
48. REVOKED: O. Reg. 186/21, s. 1 (4).
49. Financial Services Regulatory Authority of Ontario.
50. Financial Services Tribunal.
51. Fire Marshal's Public Fire Safety Council.
52. Fire Safety Commission.
53. Fish and Wildlife Heritage Commission (Fish and Wildlife Advisory Board).
54. French Language Health Services Advisory Council.
55. Grain Financial Protection Board.
56. Greenbelt Council.
57. REVOKED: O. Reg. 186/21, s. 1 (4).
58. Health Professions Appeal and Review Board.
59. Health Professions Regulatory Advisory Council.
60. Health Services Appeal and Review Board.
61. REVOKED: O. Reg. 55/20, s. 1.
62. Higher Education Quality Council of Ontario.

- 63. Human Rights Legal Support Centre.
- 64. Human Rights Tribunal of Ontario.
- 65. iGaming Ontario.
- 65.1 Intellectual Property Ontario.
- 66. Investment Advisory Committee of the Public Guardian and Trustee.
- 66.1 Invest Ontario.
- 67. Joint Committee on the Schedule of Benefits.
- 68. Justices of the Peace Remuneration Commission.
- 69. REVOKED: O. Reg. 186/21, s. 1 (4).
- 70. Lake Simcoe Coordinating Committee.
- 71. Lake Simcoe Science Committee.
- 72. Landlord and Tenant Board.
- 73. Languages of Instruction Commission of Ontario.
- 74. Licence Appeal Tribunal.
- 75. Livestock Financial Protection Board.
- 76. Livestock Medicines Advisory Committee.
- 77. REVOKED: O. Reg. 237/24, s. 1 (1).
- 77.1 REVOKED: O. Reg. 354/21, s. 1 (1).
- 78. Medical Eligibility Committee formed under [subsection 7 \(1\)](#) of the *Health Insurance Act*.
- 79. REVOKED: O. Reg. 186/21, s. 1 (6).
- 80. Metrolinx.
- 81. Minister's Advisory Council on Special Education.
- 82. Niagara Escarpment Commission.
- 83. Normal Farm Practices Protection Board.
- 84. REVOKED: O. Reg. 186/21, s. 1 (8).
- 85. Northern Ontario Heritage Fund Corporation.
- 86. REVOKED: O. Reg. 186/21, s. 1 (8).
- 87. Office for Victims of Crime.
- 88. Office of the Conflict of Interest Commissioner.
- 89. Office of the Employer Adviser.

- 90. Office of the Fairness Commissioner.
- 91. Law Enforcement Complaints Agency.
- 92. Office of the Worker Adviser.
- 93. Ontario Advisory Committee on HIV/AIDS.
- 94. Ontario Agency for Health Protection and Promotion.
- 95. REVOKED: O. Reg. 186/21, s. 1 (8).
- 96. REVOKED: O. Reg. 107/23, s. 1 (2).
- 97. Ontario Civilian Police Commission.
- 98. Ontario Clean Water Agency.
- 98.1 Ontario Creates.
- 99. Ontario Educational Communications Authority.
- 100. Ontario Energy Board.
- 101. Ontario Farm Products Marketing Commission.
- 102. REVOKED: O. Reg. 211/14, s. 1.
- 103. Ontario Financing Authority.
- 104. Ontario Food Terminal Board.
- 105. Ontario French-language Educational Communications Authority.
- 106. Ontario Geographic Names Board.
- 106.1 Ontario Health.
- 107. Ontario Health atHome.
- 108. Ontario Heritage Trust.
- 109. REVOKED: O. Reg. 343/24, s. 1.
- 110. Ontario Honours Advisory Council.
- 110.1 Ontario Human Rights Commission.
- 111. Ontario Immigrant Investor Corporation.
- 111.1 Ontario Infrastructure Bank.
- 112. Ontario Infrastructure and Lands Corporation.
- 112.1 Ontario Internal Audit Committee.
- 113. REVOKED: O. Reg. 186/21, s. 1 (11).
- 114. Ontario Labour Relations Board.
- 115. Ontario Land Tribunal.

116. REVOKED: O. Reg. 233/24, s. 1 (2).
- 117., 118. REVOKED: O. Reg. 186/21, s. 1 (11).
119. REVOKED: O. Reg. 186/21, s. 1 (12).
120. REVOKED: O. Reg. 186/21, s. 1 (13).
121. Ontario Northland Transportation Commission.
122. REVOKED: O. Reg. 186/21, s. 1 (13).
123. Ontario Parks Board of Directors.
124. Ontario Parole Board.
125. Ontario Place Corporation.
126. Ontario Police Arbitration and Adjudication Commission.
127. Ontario Public Service Pension Board.
128. REVOKED: O. Reg. 186/21, s. 1 (13).
129. Ontario Research Fund Advisory Board.
130. Ontario Review Board.
131. Ontario Securities Commission.
132. Ontario Special Education Tribunal (English).
133. Ontario Special Education Tribunal (French).
134. REVOKED: O. Reg. 186/21, s. 1 (13).
135. REVOKED: O. Reg. 233/24, s. 1 (2).
136. Ontario Trillium Foundation.
137. REVOKED: O. Reg. 186/21, s. 1 (13).
138. Pay Equity Hearings Tribunal.
139. Pay Equity Office.
140. Pesticides Advisory Committee.
141. Pharmacy Council established under [section 1.4](#) of the *Ontario Drug Benefit Act*.
142. Physician Payment Review Board.
143. Physician Services Payment Committee.
144. Post-secondary Education Quality Assessment Board.
- 145.-147. REVOKED: O. Reg. 186/21, s. 1 (13).
148. REVOKED: O. Reg. 895/21, par. 1 (1).

149. Provincial Advisory Committee on Francophone Affairs.

150. Provincial Judges Pension Board.

151. Provincial Judges Remuneration Commission.

152. Provincial Schools Authority.

153. Public Service Commission.

154. Public Service Grievance Board.

155. Rabies Advisory Committee.

156. Rural Economic Development Advisory Panel.

157., 158. REVOKED: O. Reg. 186/21, s. 1 (13).

159. Skilled Trades Ontario.

160. Social Benefits Tribunal.

161. Soldiers' Aid Commission.

161.1 Special Investigations Unit.

162. Species at Risk Program Advisory Committee.

163. St. Lawrence Parks Commission.

164. Training Completion Assurance Fund Advisory Board.

165. Venture Ontario.

166. Walkerton Clean Water Centre.

167. REVOKED: O. Reg. 186/21, s. 1 (15).

168. Workplace Safety and Insurance Appeals Tribunal. O. Reg. 336/07, s. 1; O. Reg. 111/13, s. 1; O. Reg. 211/14, s. 1; O. Reg. 29/19, s. 1; O. Reg. 176/19, s. 1; O. Reg. 55/20, s. 1; O. Reg. 186/21, s. 1; O. Reg. 199/21, s. 1; O. Reg. 354/21, s. 1; O. Reg. 591/21, s. 1; O. Reg. 669/21, s. 1; O. Reg. 724/21, s. 1; O. Reg. 895/21, s. 1; O. Reg. 6/22, s. 1; O. Reg. 107/23, s. 1; O. Reg. 335/23, s. 1; O. Reg. 114/24, s. 1; O. Reg. 233/24, s. 1; O. Reg. 237/24, s. 1; O. Reg. 269/24, s. 1; O. Reg. 343/24, s. 1; O. Reg. 544/24, s. 1 (1-3).

2. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 336/07, s. 2.

TAB 13

Legislation Act, 2006, SO 2006, c 21, Sch F

This statute replaces RSO 1990, c I.11, RSO 1990, c R.21, RSO 1990, c S.21, SO 1998, c 18, Sch C.

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Legislation Act, 2006

S.O. 2006, CHAPTER 21
SCHEDULE F

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: [2024, c. 2](#), Sched. 19, s. 9.

PART I GENERAL

Definitions

1 (1) In this Act,

“consolidated law” means a source law into which are incorporated,

(a) amendments, if any, that are enacted by the Legislature or filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part, and

(b) changes, if any, that are made under Part V (Change Powers); (“texte législatif codifié”)

“e-Laws website” means the website of the Government of Ontario for statutes, regulations and related materials that is available on the Internet at www.e-laws.gov.on.ca or at another website address specified by a regulation made under subsection (3); (“site Web Lois-en-ligne”)

“legislation” means Acts and regulations; (“législation”)

“source law” means,

(a) in the case of an Act, the Act as enacted by the Legislature, and

(b) in the case of a regulation, the regulation as filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part. (“texte législatif source”) [2006, c. 21](#), Sched. F, s. 1 (1); [2009, c. 33](#), Sched. 2, s. 43 (1-3).

Reference to amendment includes reference to repeal, revocation

(2) A reference in this Act to amendment in relation to legislation is also a reference to repeal or revocation, unless a contrary intention appears. [2006, c. 21](#), Sched. F, s. 1 (2).

Regulations re e-Laws website

(3) The Attorney General may, by regulation, specify another website address for the purpose of the definition of “e-Laws website” in subsection (1). [2006, c. 21](#), Sched. F, s. 1 (3).

Role of Attorney General

2 The Attorney General shall,

(a) maintain the electronic database of source law and consolidated law for the e-Laws website so as to facilitate convenient and reliable public access to Ontario legislation;

(b) safeguard the accuracy and integrity of the electronic database of source law and consolidated law that appears on the e-Laws website; and

(c) safeguard the accuracy and integrity of publications of source law and consolidated law published by the King's Printer for Ontario or by an entity prescribed under [clause 41 \(1\) \(a\)](#). [2006, c. 21](#), Sched. F, s. 2; [2020, c. 34](#), Sched. 13, s. 5 (1); [2024, c. 2](#), Sched. 19, s. 9 (6).

Designation by Chief Legislative Counsel

3 The Chief Legislative Counsel may designate one or more lawyers employed in the Office of Legislative Counsel to exercise the powers and perform the duties of the Chief Legislative Counsel in his or her place. [2006, c. 21](#), Sched. F, s. 3.

Duty, obsolete Acts

4 The Chief Legislative Counsel shall, from time to time, provide to the Attorney General a list of Acts, or any parts, portions or sections of Acts, that have been rendered obsolete by events or the passage of time. [2006, c. 21](#), Sched. F, s. 4.

PART II STATUTES

Citation of Acts

5 (1) An Act may be cited,

(a) by its long or short title;

(b) in English as "Statutes of Ontario" or "S.O." and in French as "Lois de l'Ontario" or "L.O.", followed by its year of enactment and its chapter number. [2006, c. 21](#), Sched. F, s. 5 (1); [2009, c. 33](#), Sched. 2, s. 43 (4).

Same

(2) An Act set out in the Revised Statutes of Ontario may be cited in English as "Revised Statutes of Ontario, (year)" or "R.S.O. (year)" and in French as "Lois refondues de l'Ontario de (year)" or "L.R.O. (year)", followed by its chapter number. [2006, c. 21](#), Sched. F, s. 5 (2); [2009, c. 33](#), Sched. 2, s. 43 (5).

Same

(3) An Act may also be cited in accordance with a method prescribed under [clause 16](#) (a) or in accordance with accepted legislation citation practices. [2006, c. 21](#), Sched. F, s. 5 (3); [2009, c. 33](#), Sched. 2, s. 43 (6).

Enacting clause

6 An Act shall contain, at the beginning, the following words to indicate the authority by virtue of which it is passed: “His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows”. [2006, c. 21](#), Sched. F, s. 6; [2024, c. 2](#), Sched. 19, s. 9 (1).

Power to amend or repeal

7 (1) Every Act reserves to the Legislature power to repeal or amend it and to revoke or modify any power or advantage that it confers. [2006, c. 21](#), Sched. F, s. 7 (1).

Same

(2) Any Act may be amended or repealed by an Act passed in the same session of the Legislature. [2006, c. 21](#), Sched. F, s. 7 (2).

Commencement of Acts

8 (1) Unless otherwise provided, an Act comes into force on the day it receives Royal Assent. [2006, c. 21](#), Sched. F, s. 8 (1).

Same

(2) Commencement and short title provisions in an Act and the long title of the Act are deemed to come into force on the day the Act receives Royal Assent, regardless of when the Act is specified to come into force. [2006, c. 21](#), Sched. F, s. 8 (2).

Provisions coming into force on a day to be named by order

(3) If an Act provides that any provisions of an Act are to come into force on a day to be named by order of the Lieutenant Governor in Council, the following rules apply to such an order:

1. Orders may be issued at different times for different parts, portions or sections of those provisions.
2. The order may be amended or revoked by a further order of the Lieutenant Governor in Council.
3. The order may be amended or revoked before the date named by the order, but not on or after that date.

4. If the order names different dates for different provisions, the order may be amended or revoked with respect to a particular provision before the date named for that provision, but not on or after that date. [2024, c. 2](#), Sched. 15, s. 1.

Effect of amendment to order

(4) For greater certainty, the dates referred to in paragraphs 3 and 4 of subsection (3) are the dates as amended by any amendments to that order. [2024, c. 2](#), Sched. 15, s. 1.

Transition — provisions to come into force on proclamation

8.1 (1) A provision of an Act that is to come into force on a day to be named by proclamation of the Lieutenant Governor is deemed to be a provision that is to come into force on a day to be named by order of the Lieutenant Governor in Council. [2024, c. 2](#), Sched. 15, s. 2.

Same

(2) A proclamation that names a day on which any provisions of an Act are to come into force may be amended by order of the Lieutenant Governor in Council in accordance with the rules set out in [section 8](#), with necessary modifications. [2024, c. 2](#), Sched. 15, s. 2.

Continued validity of issued proclamations

(3) Any proclamation that names a day on which provisions of an Act are to come into force and that was issued on or before the day that is 30 days after the day this section came into force continues to be valid. [2024, c. 2](#), Sched. 15, s. 2.

Time of commencement and repeal

Commencement

9 (1) Unless otherwise provided, an Act comes into force at the first instant of the day on which it comes into force. [2006, c. 21](#), Sched. F, s. 9 (1).

Limitation

(2) Unless otherwise provided, an Act that comes into force on Royal Assent is not effective against a person before the earlier of the following times:

1. When the person has actual notice of it.

2. The last instant of the day on which it comes into force. [2006, c. 21](#), Sched. F, s. 9 (2).

Repeal

(3) Unless otherwise provided, the repeal of an Act takes effect at the first instant of the day of repeal. [2006, c. 21](#), Sched. F, s. 9 (3).

Exercise of delegated power before commencement

10 (1) A power conferred by an Act to make regulations or appointments or do any other thing may be exercised at any time after Royal Assent even if the Act is not yet in force. [2006, c. 21](#), Sched. F, s. 10 (1).

Same

(2) Until the Act comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the Act effective when it comes into force. [2006, c. 21](#), Sched. F, s. 10 (2).

Repeal of Acts, provisions not yet ordered in force

Annual report

10.1 (1) On one of the first five days on which the Legislative Assembly sits in each calendar year, the Attorney General shall table in the Assembly a report listing every Act or provision of an Act that,

(a) is to come into force on a day to be named by order of the Lieutenant Governor in Council;

(b) was enacted nine years or more before December 31 of the preceding calendar year; and

(c) was not in force on December 31 of the preceding calendar year. [2009, c. 33](#), Sched. 2, s. 43 (7); [2024, c. 2](#), Sched. 15, s. 3 (1).

Repeal

(2) Every Act or provision listed in the annual report is repealed on December 31 of the calendar year in which the report is tabled unless,

(a) it comes into force or is repealed on or before December 31 of that calendar year; or

(b) during that calendar year, the Assembly adopts a resolution that the Act or provision listed in the report not be repealed. [2009, c. 33](#), Sched. 2, s. 43 (7); [2024, c. 2](#), Sched. 15, s. 3 (2).

Publication

(3) The Attorney General shall, in each calendar year, publish on the e-Laws website a list of every Act or provision repealed under this section on December 31 of the preceding calendar year, and may publish the list in any other manner that he or she considers appropriate. [2009, c. 33](#), Sched. 2, s. 43 (7).

First report

(4) The first report under subsection (1) shall be tabled in 2011. [2009, c. 33](#), Sched. 2, s. 43 (7).

Endorsements on Acts

11 (1) The Clerk of the Assembly shall indicate on every Act, after the title, the date on which it receives Royal Assent. [2006, c. 21](#), Sched. F, s. 11 (1).

Same

(2) The date of assent forms part of the Act. [2006, c. 21](#), Sched. F, s. 11 (2).

Reserved bills

12 (1) In this Part, a reference to the day or date on which an Act receives Royal Assent is, in the case of a bill reserved by the Lieutenant Governor, a reference to the day on which the Lieutenant Governor signifies, by speech or message to the Assembly or by proclamation, that the bill was laid before the Governor General in Council and that the Governor General was pleased to assent to it. [2006, c. 21](#), Sched. F, s. 12 (1).

Endorsement, date of reservation

(2) The Clerk of the Assembly shall indicate, on every bill that is reserved, the date of reservation. [2006, c. 21](#), Sched. F, s. 12 (2).

Judicial notice

13 (1) Judicial notice shall be taken of the enactment and contents of an Act. [2006, c. 21](#), Sched. F, s. 13.

Same

- (2) Judicial notice shall be taken of the issuing and contents of,
- (a) every order of the Lieutenant Governor in Council that names a day on which provisions of an Act are to come into force; and
 - (b) every order of the Lieutenant Governor in Council that amends or revokes an order described in clause (a). [2024, c. 2](#), Sched. 15, s. 4.

Copies for publication

14 The Clerk of the Assembly shall provide a certified copy of each Act of the Legislature, as soon as it has been assented to, for the purpose of publication on the e-Laws website and print publication. [2006, c. 21](#), Sched. F, s. 14.

Publication

15 (1) Every Act of the Legislature shall be published on the e-Laws website and in print. [2006, c. 21](#), Sched. F, s. 15 (1).

Corrections on e-Laws website

(2) If the Chief Legislative Counsel discovers that an Act published on the e-Laws website differs from the Act as assented to, he or she shall ensure that a corrected Act is promptly published on the e-Laws website. [2006, c. 21](#), Sched. F, s. 15 (2); [2009, c. 33](#), Sched. 2, s. 43 (8).

Corrections in print

(3) If the Chief Legislative Counsel discovers that an Act published in print under subsection (1) differs from the Act as assented to, he or she may cause the corrected Act to be published in print, if he or she considers it appropriate. [2006, c. 21](#), Sched. F, s. 15 (3); [2009, c. 33](#), Sched. 2, s. 43 (9).

Publication of certain orders

(3.1) Every order of the Lieutenant Governor in Council that names a day on which provisions of an Act are to come into force, and every order of the Lieutenant Governor in Council that amends or revokes such an order, shall be published on the e-Laws website promptly after it is made. [2024, c. 2](#), Sched. 15, s. 5 (1).

Corrections

(3.2) If the Chief Legislative Counsel discovers that an order that is published on the e-Laws website in accordance with subsection (3.1) differs from the order that was made, the Chief Legislative Counsel shall ensure that a corrected order is promptly published on the e-Laws website. [2024, c. 2](#), Sched. 15, s. 5 (1).

Notice

(4) Where subsection (2), (3) or (3.2) applies, the Chief Legislative Counsel may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website or in print. [2009, c. 33](#), Sched. 2, s. 43 (10); [2024, c. 2](#), Sched. 15, s. 5 (2).

Regulations

16 The Attorney General may make regulations,

- (a) prescribing methods of citing Acts to supplement or provide alternatives to the methods set out in [section 5](#);
- (b) prescribing the manner of publishing Acts on the e-Laws website and in print for the purposes of [subsection 15 \(1\)](#). [2006, c. 21](#), Sched. F, s. 16; [2009, c. 33](#), Sched. 2, s. 43 (11).

PART III REGULATIONS

Definitions

17 In this Part,

“Registrar” means the Registrar of Regulations appointed under [section 31](#); (“registrateur”)

“regulation” means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

- (a) a by-law of a municipality or local board as defined in the [Municipal Affairs Act](#), or
- (b) an order of the Ontario Land Tribunal. (“règlement”) [2006, c. 21](#), Sched. F, s. 17; [2021, c. 4](#), Sched. 6, s. 57.

Filing of regulations

18 (1) Every regulation shall be filed with the Registrar, except as provided in [sections 19 to 21](#). [2006, c. 21](#), Sched. F, s. 18 (1).

Regulations made or approved by Lieutenant Governor in Council

(2) If a regulation is made or approved by the Lieutenant Governor in Council, a copy of the regulation certified to be a true copy by the Clerk or Deputy Clerk of the Executive Council shall be filed. [2006, c. 21](#), Sched. F, s. 18 (2).

Other regulations

(3) If a regulation is not made or approved by the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation, shall be filed. [2006, c. 21](#), Sched. F, s. 18 (3).

Same

(4) If a regulation described in subsection (3) requires the approval of a person or entity other than the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation and by the person or entity whose approval is required, shall be filed. [2006, c. 21](#), Sched. F, s. 18 (4).

Corporation or other entity

(5) If a corporation or other entity makes or approves a regulation, the signature of an officer or agent who has authority to sign on behalf of the corporation or entity is deemed to be the signature of the corporation or entity for the purposes of subsections (3) and (4). [2006, c. 21](#), Sched. F, s. 18 (5).

Proof of office not required

(6) A regulation signed by an officer or agent under subsection (5) may be filed without proof of the authority, office or signature of the person signing on behalf of the corporation or entity, but the signed regulation shall show his or her office or title. [2006, c. 21](#), Sched. F, s. 18 (6).

Other requirement

(7) A regulation presented for filing shall show the date on which it was made and, if approval is required, the date on which it was approved. [2006, c. 21](#), Sched. F, s. 18 (7).

Public inspection

(8) A filed regulation shall be made available for public inspection. [2006, c. 21](#), Sched. F, s. 18 (8).

Filing date

19 (1) A regulation shall not be filed on a date that is later than four months after the date on which it was made or, if approval of the regulation is required, the date it is approved. [2006, c. 21](#), Sched. F, s. 19 (1).

Consent to extend filing date

(2) Despite subsection (1), a regulation may be filed on a date that is later than that described in subsection (1) if consent to do so has been obtained from the person or entity authorized to make the regulation and, if the regulation requires approval, from the person or entity authorized to approve the regulation. [2006, c. 21](#), Sched. F, s. 19 (2).

Date to be specified

(3) The consent shall specify a date after the four-month period described in subsection (1) by which the regulation shall be filed. [2006, c. 21](#), Sched. F, s. 19 (3).

Timing of consent

(4) A consent to extend the filing date and any subsequent consents may be given at any time,

(a) whether before or after the four-month period described in subsection (1) has expired; and

(b) whether or not a date set out in an earlier consent has expired. [2006, c. 21](#), Sched. F, s. 19 (4).

Filing restriction

(5) The regulation shall not be filed after the date specified in the consent. [2006, c. 21](#), Sched. F, s. 19 (5).

Consent to be filed

(6) The consent extending the filing date shall be filed with the Registrar at the same time as the regulation is filed, and the rules for signing and certifying the regulation set out in [section 18](#) apply to the consent, with necessary modifications. [2006, c. 21](#), Sched. F, s. 19 (6).

Same

(7) A consent filed under this section need not be published. [2006, c. 21](#), Sched. F, s. 19 (7).

(8) REPEALED: [2024, c. 2](#), Sched. 15, s. 6.

Registrar's discretion not to file

20 The Registrar may refuse to file a regulation if the rules for filing set out in [section 18](#) or prescribed under [clause 32](#) (a) have not been complied with. [2006, c. 21](#), Sched. F, s. 20.

Registrar's duty not to file

21 (1) The Registrar shall refuse to file a regulation if the regulation is not bilingual but purports to amend a bilingual regulation. [2006, c. 21](#), Sched. F, s. 21 (1).

Same

(2) The Registrar shall refuse to file a regulation if [section 19](#) has not been complied with. [2006, c. 21](#), Sched. F, s. 21 (2).

Deemed validity of filing

(3) If a regulation that fails to meet the requirements of this section is inadvertently accepted for filing, the regulation is deemed to be validly filed despite that failure. [2006, c. 21](#), Sched. F, s. 21 (3).

Same

(4) Subsection (3) shall be interpreted only as validating a procedural irregularity. [2006, c. 21](#), Sched. F, s. 21 (4).

When regulation effective

22 (1) A regulation that is not filed has no effect. [2006, c. 21](#), Sched. F, s. 22 (1).

Same

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed. [2006, c. 21](#), Sched. F, s. 22 (2).

No retroactivity authorized

(3) Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing. [2006, c. 21](#), Sched. F, s. 22 (3).

Time of commencement and revocation

Commencement

23 (1) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force at the first instant of the day on which it comes into force. [2006, c. 21](#), Sched. F, s. 23 (1).

Same

(1.1) A commencement provision in a regulation is deemed to come into force on the day the regulation is filed, regardless of when the regulation is specified to come into force. [2024, c. 2](#), Sched. 15, s. 7.

Limitation

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation is not effective against a person before the earliest of the following times:

1. When the person has actual notice of it.
2. The last instant of the day on which it is published on the e-Laws website.
3. The last instant of the day on which it is published in *The Ontario Gazette*. [2006, c. 21](#), Sched. F, s. 23 (2); [2020, c. 34](#), Sched. 13, s. 5 (2).

Revocation

(3) Unless a regulation or an Act provides otherwise, the revocation of a regulation takes effect at the first instant of the day of revocation. [2006, c. 21](#), Sched. F, s. 23 (3).

Exercise of delegated power before commencement

23.1 (1) A power conferred by a regulation may be exercised at any time after the regulation is filed even if the regulation is not yet in force. [2024, c. 2](#), Sched. 15, s. 8.

Same

(2) Until the regulation comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the regulation effective when it comes into force. [2024, c. 2](#), Sched. 15, s. 8.

Proof of making, approval, filing and publication

When made

24 (1) Unless the contrary is proved, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which a regulation was made is proof that the regulation was made on that date. [2006, c. 21](#), Sched. F, s. 24 (1); [2020, c. 34](#), Sched. 13, s. 5 (2).

When approved

(2) Unless the contrary is proved, if approval is required for the making of a regulation, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which approval was given is proof that the regulation was approved on that date. [2006, c. 21](#), Sched. F, s. 24 (2); [2020, c. 34](#), Sched. 13, s. 5 (2).

When filed

(3) Unless the contrary is proved, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which a regulation was filed is proof that the regulation was filed on that date. [2006, c. 21](#), Sched. F, s. 24 (3); [2020, c. 34](#), Sched. 13, s. 5 (2).

When published on e-Laws

(4) Unless the contrary is proved, the date of publication indicated for a regulation on the e-Laws website is proof that the regulation was published on the e-Laws website on that date. [2006, c. 21](#), Sched. F, s. 24 (4).

When published in *The Ontario Gazette*

(5) Unless the contrary is proved, the date of publication indicated for a regulation in *The Ontario Gazette* is proof that the regulation was published in *The Ontario Gazette* on that date. [2006, c. 21](#), Sched. F, s. 24 (5); [2020, c. 34](#), Sched. 13, s. 5 (2).

When published

- 25** (1) Every regulation shall be published,
- (a) on the e-Laws website promptly after its filing; and
 - (b) in *The Ontario Gazette* within one month after its filing or in accordance with such other timelines as may be specified in a regulation made under [clause 32](#) (c). [2006, c. 21](#), Sched. F, s. 25 (1); [2020, c. 34](#), Sched. 13, s. 5 (2).

Date of filing, publication, etc.

- (2) A published regulation shall show the date of its filing, the date of its publication on the e-Laws website and the date of its publication in *The Ontario Gazette*, in the manner directed by the Registrar. [2006, c. 21](#), Sched. F, s. 25 (2); [2020, c. 34](#), Sched. 13, s. 5 (2).

Publication in order of filing

- (3) Regulations shall be published in the order in which they are filed unless, in the opinion of the Registrar, for practical or technical reasons related to the publication process, it is impossible, impractical or unreasonably difficult or costly to do so. [2006, c. 21](#), Sched. F, s. 25 (3).

Numbering

- (4) Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced each year. [2006, c. 21](#), Sched. F, s. 25 (4).

Same, e-Laws publication

- (5) For the purposes of subsection (3), regulations that are published on the e-Laws website simultaneously or as a batch are deemed to be published in the order in which they are filed. [2006, c. 21](#), Sched. F, s. 25 (5).

Pre-publication corrections

- 26** (1) At any time before a filed regulation is first published under [subsection 25 \(1\)](#), the Registrar may,
- (a) correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature;
 - (b) alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation; and

(c) correct errors in the numbering of provisions and make any changes in cross-references that are required as a result. [2006, c. 21](#), Sched. F, s. 26 (1).

Same

(2) Corrections and alterations made under this section are deemed to be part of the regulation as filed with the Registrar under this Part. [2006, c. 21](#), Sched. F, s. 26 (2).

Post-publication corrections

Correction on e-Laws website

27 (1) If the Registrar discovers that a regulation published on the e-Laws website differs from the filed regulation, he or she shall ensure that a corrected regulation is promptly published on the e-Laws website. [2006, c. 21](#), Sched. F, s. 27 (1); [2009, c. 33](#), Sched. 2, s. 43 (12).

Notice of correction on e-Laws website

(2) Where subsection (1) applies, the Registrar may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website. [2009, c. 33](#), Sched. 2, s. 43 (13).

Notice of correction in Gazette

(3) If the Registrar discovers that a regulation published in *The Ontario Gazette* differs from the filed regulation, the Registrar may, if he or she considers it appropriate, publish a notice of correction in *The Ontario Gazette*. [2006, c. 21](#), Sched. F, s. 27 (3); [2009, c. 33](#), Sched. 2, s. 43 (14); [2020, c. 34](#), Sched. 13, s. 5 (2).

Same

(4) A notice of correction published under subsection (3) may include a corrected regulation, if the Registrar considers it appropriate. [2009, c. 33](#), Sched. 2, s. 43 (15).

(5) REPEALED: [2009, c. 33](#), Sched. 2, s. 43 (15).

No validation

28 The filing, publication or correction of a regulation under this Act does not validate the regulation if it is otherwise invalid. [2006, c. 21](#), Sched. F, s. 28.

Judicial notice

29 Judicial notice shall be taken of the making, approval where required, filing, contents and publication of a regulation that is published on the e-Laws website or in *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 29; 2020, c. 34, Sched. 13, s. 5 (2).

Citation of regulations

30 (1) A regulation may be cited in English as “Ontario Regulation” or “O. Reg.” and in French as “Règlement de l’Ontario” or “Règl. de l’Ont.” followed by its filing number, a forward slash and the year of its filing. 2006, c. 21, Sched. F, s. 30 (1); 2009, c. 33, Sched. 2, s. 43 (16).

Same

(2) The year of filing of a regulation may be indicated in full or by the last two figures in the year. 2006, c. 21, Sched. F, s. 30 (2).

Same

(3) A regulation set out in the Revised Regulations of Ontario may be cited,

- (a) in English as “Revised Regulations of Ontario, (year) , Regulation (number)” or as “R.R.O. (year), Reg. (number)”; and
- (b) in French as “Règlements refondus de l’Ontario de (year), Règlement (number)” or as “R.R.O. (year), Règl. (number)”. 2006, c. 21, Sched. F, s. 30 (3); 2009, c. 33, Sched. 2, s. 43 (17).

Same

(4) A regulation may also be cited in accordance with a method prescribed under clause 32 (b) or in accordance with accepted legislation citation practices. 2006, c. 21, Sched. F, s. 30 (4); 2009, c. 33, Sched. 2, s. 43 (18).

Registrar

31 (1) A lawyer employed in the Office of Legislative Counsel shall be appointed by the Lieutenant Governor in Council as Registrar of Regulations. 2006, c. 21, Sched. F, s. 31 (1).

Duty, preparation of regulations

(2) The Registrar shall advise on and assist in the preparation of regulations. 2006, c. 21, Sched. F, s. 31 (2).

Other duties

(3) The Registrar shall,

- (a) be responsible for the numbering, indexing and publication of all regulations filed under this Part;
- (b) set standards respecting the format in which regulations shall be submitted for filing;
- (c) exercise the powers given and perform the duties assigned under this Part. [2006, c. 21](#), Sched. F, s. 31 (3).

Assistant Registrars

(4) The Registrar may designate one or more lawyers employed in the Office of Legislative Counsel as Assistant Registrar to exercise the powers and perform the duties of the Registrar in his or her place. [2006, c. 21](#), Sched. F, s. 31 (4).

Regulations

32 The Attorney General may make regulations,

- (a) prescribing methods and rules for filing regulations that supplement or provide alternatives to the rules described in [section 18](#), to permit the establishment of an electronic regulations filing system or otherwise address technological change;
- (b) prescribing methods of citing regulations to supplement or provide alternatives to the methods set out in [section 30](#);
- (c) prescribing timelines for the purposes of [clause 25 \(1\) \(b\)](#);
- (d) respecting the powers and duties of the Registrar. [2006, c. 21](#), Sched. F, s. 32; [2009, c. 33](#), Sched. 2, s. 43 (19).

Standing committee

33 (1) At the commencement of each session of the Legislature, a standing committee of the Assembly shall be appointed under this section with authority to sit during the session. [2006, c. 21](#), Sched. F, s. 33 (1).

Regulations referred

(2) Every regulation stands permanently referred to the standing committee for the purposes of subsection (3). [2006, c. 21](#), Sched. F, s. 33 (2).

Terms of reference

(3) The standing committee shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts, and shall deal with such other matters as are referred to it by the Assembly. [2006, c. 21](#), Sched. F, s. 33 (3).

Authority to call persons

(4) The standing committee may examine any member of the Executive Council or any public servant designated by the member respecting any regulation made under an Act that is under his or her administration. [2006, c. 21](#), Sched. F, s. 33 (4).

Report

(5) The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations. [2006, c. 21](#), Sched. F, s. 33 (5).

PART IV PROOF OF LEGISLATION

Official law

34 (1) A bill that receives Royal Assent and is endorsed by the Clerk of the Assembly as having received Royal Assent is official law. [2006, c. 21](#), Sched. F, s. 34 (1).

Same

(2) A regulation that is filed with the Registrar of Regulations under Part III (Regulations) or a predecessor of that Part is official law. [2006, c. 21](#), Sched. F, s. 34 (2).

Official copy

35 (1) A copy of a source law or a consolidated law is an official copy of that law if,

- (a) it is printed by the King's Printer for Ontario or by an entity that is prescribed under [clause 41 \(1\)](#) (a);
- (b) it is accessed from the e-Laws website in a form or format prescribed under [clause 41 \(1\)](#) (b); or

(c) it is prescribed under [clause 41 \(1\)](#) (c) as an official copy. [2006, c. 21](#), Sched. F, s. 35 (1); [2024, c. 2](#), Sched. 19, s. 9 (6).

Disclaimer

(2) Subsection (1) does not apply to a copy that is accompanied by a disclaimer to the effect that it is not intended as official. [2006, c. 21](#), Sched. F, s. 35 (2); [2009, c. 33](#), Sched. 2, s. 43 (20).

Same

(3) In the case of a copy referred to in [clause \(1\) \(b\)](#), the copy is accompanied by a disclaimer if the disclaimer is on the e-Laws website when the copy is accessed. [2006, c. 21](#), Sched. F, s. 35 (3); [2009, c. 33](#), Sched. 2, s. 43 (21).

Presumption, printed by King's Printer

36 Unless the contrary is proved, a copy of a source law or consolidated law purporting to be printed by the King's Printer for Ontario or other prescribed entity was so printed. [2006, c. 21](#), Sched. F, s. 36; [2024, c. 2](#), Sched. 19, s. 9 (6).

Presumption, accessed from e-Laws

37 Unless the contrary is proved, a copy of a source law or consolidated law submitted with an oral or written statement to the effect that it was accessed from the e-Laws website in a form or format prescribed under [clause 41 \(1\) \(b\)](#) was so accessed. [2006, c. 21](#), Sched. F, s. 37.

Official copies of source law as evidence

38 Unless the contrary is proved, an official copy of a source law is an accurate statement of that law. [2006, c. 21](#), Sched. F, s. 38.

Official copies of consolidated law as evidence

39 Unless the contrary is proved, an official copy of a consolidated law is an accurate statement of that law,

(a) in the case of an official copy described in [clause 35 \(1\) \(a\)](#), on the consolidation date shown on the copy;

(b) in the case of an official copy accessed from the e-Laws website in a form or format prescribed under [clause 41 \(1\) \(b\)](#), during the period indicated on the e-Laws website in respect of the copy when the copy is accessed;

(c) in the case of an official copy prescribed under [clause 41 \(1\) \(c\)](#), on the date or during the period prescribed under [clause 41 \(1\) \(d\)](#). [2006, c. 21](#), Sched. F, s. 39.

e-Laws, provisions not in force

40 (1) A source law or consolidated law published on the e-Laws website shall include provisions that have been enacted by the Legislature or filed under Part III (Regulations) or a predecessor of that Part, as the case may be, but that are not yet in force. [2006, c. 21](#), Sched. F, s. 40 (1).

Same

(2) Where a provision that is not yet in force is included in a law published on the e-Laws website, the fact that it is not yet in force shall be indicated on the website, in the manner and to the extent directed by the Chief Legislative Counsel. [2006, c. 21](#), Sched. F, s. 40 (2).

Regulations

41 (1) The Attorney General may make regulations,

- (a) prescribing an entity for the purposes of [clause 35 \(1\) \(a\)](#);
- (b) prescribing forms or formats, including print-outs, on-screen displays or other output of electronic data, for the purposes of [clause 35 \(1\) \(b\)](#);
- (c) prescribing official copies for the purposes of [clause 35 \(1\) \(c\)](#);
- (d) prescribing the date on or period during which a copy prescribed under [clause \(c\)](#) is an accurate statement of a consolidated law. [2006, c. 21](#), Sched. F, s. 41 (1).

Same

(2) A regulation made under [clause \(1\) \(b\)](#), [\(c\)](#) or [\(d\)](#) may be made with respect to,

- (a) the manner in which a copy is created, recorded, transmitted, stored, authenticated, received, displayed or perceived;
- (b) the person, body or thing that created, recorded, transmitted, stored, authenticated, received, displayed or perceived the copy; and
- (c) any statement, mark or certification associated with the creation, recording, transmission, storage, authentication, reception, display or perception of the copy. [2006, c. 21](#), Sched. F, s. 41 (2).

Editorial and other changes

42 (1) This Part does not authorize any change that alters the legal effect of any Act or regulation. [2006, c. 21](#), Sched. F, s. 42 (1).

Same

(2) The Chief Legislative Counsel may make the following changes to consolidated laws:

1. Correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature.
2. Alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation.
 - 2.1 Make such minor changes as may be required to ensure a consistent form of expression.
 - 2.2 Make such minor changes as may be required to make the form of expression of an Act or regulation in French or in English more compatible with its form of expression in the other language.
3. Replace a form of reference to an Act or regulation, or a provision or other portion of an Act or regulation, with a different form of reference, in accordance with Ontario drafting practices.
4. Replace a description of a date or time with the actual date or time.
5. After a bill has been enacted, replace a reference to the bill or a provision or other portion of the bill with a reference to the Act or provision or other portion of the Act.
6. If a provision provides that it is contingent on the occurrence of a future event and the event occurs, remove text referring to the contingency and make any other changes that are required as a result.
7. Make such changes to the title of an Act or regulation, including but not limited to omitting the year from the title of an Act, as are required to accord with changes in methods of citing Acts or regulations or changes in the electronic or print presentation of Acts or regulations, and make any other changes that are required as a result.
8. If an Act or regulation provides that references to a body, office, person, place or thing are deemed or considered to be references to

another body, office, person, place or thing, replace a reference to the original body, office, person, place or thing with a reference to the other.

9. When the name, title, location or address of a body, office, person, place or thing has been altered, change references to the name, title, location or address to reflect the alteration, if the body, office, person, place or thing continues under the new name or title or at the new location or address.

9.1 Make such changes as may be required to reflect a change of reigning sovereign or to otherwise change the terminology used to refer to the Crown in accordance with Ontario drafting practices.

10. Correct errors in the numbering of provisions or other portions of an Act or regulation and make any changes in cross-references that are required as a result.

11. If a provision of a transitional nature is contained in an amending Act or regulation, incorporate it as a provision of the relevant consolidated law and make any other changes that are required as a result.

12. Make a correction, if it is patent both that an error has been made and what the correction should be. [2006, c. 21](#), Sched. F, s. 42 (2); [2009, c. 33](#), Sched. 2, s. 43 (22, 23); [2024, c. 2](#), Sched. 19, s. 9 (2).

Exception, par. 9 of subs. (2)

(3) Paragraph 9 of subsection (2) does not apply to alterations to the name or title of,

- (a) a Minister or Ministry of the Government of Ontario;
- (b) a municipality, as defined in the [Municipal Act, 2001](#);
- (c) a non-legislative document incorporated by reference into an Act or regulation; or
- (d) an Act or regulation. [2006, c. 21](#), Sched. F, s. 42 (3).

Error in consolidation

(4) If the Chief Legislative Counsel discovers that an error was made in the process of publishing or consolidating a consolidated law,

- (a) in the case of a consolidated law published on the e-Laws website, he or she shall ensure that a corrected consolidated law is published on the e-Laws website; and
- (b) in the case of a consolidated law printed by the King's Printer for Ontario or by an entity that is prescribed under [clause 41 \(1\) \(a\)](#), he or

she may cause a corrected consolidated law to be published in print, if he or she considers it appropriate in the circumstances. 2006, c. 21, Sched. F, s. 42 (4); 2009, c. 33, Sched. 2, s. 43 (24); 2024, c. 2, Sched. 19, s. 9 (6).

Notice

43 (1) The Chief Legislative Counsel may provide notice of the changes made under paragraphs 1 to 3 of subsection 42 (2) and of corrections made under subsection 42 (4), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (1).

Same

(2) The Chief Legislative Counsel shall provide notice of the changes made under paragraphs 4 to 12 of subsection 42 (2), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (2).

Same

(3) In determining whether to provide notice of a change made under paragraphs 1 to 3 of subsection 42 (2) or of a correction made under subsection 42 (4), the Chief Legislative Counsel shall consider,

- (a) the nature of the change or correction; and
- (b) the extent to which notice, and the information provided in it, would provide assistance in understanding the relevant legislative history. 2006, c. 21, Sched. F, s. 43 (3); 2009, c. 33, Sched. 2, s. 43 (25, 26).

Same

(4) In providing notice of a change under subsection (1) or (2), the Chief Legislative Counsel shall state the change or the nature of the change. 2009, c. 33, Sched. 2, s. 43 (27).

Date of change

44 No legal significance shall be inferred from the timing of the exercise of a power under this Part. 2006, c. 21, Sched. F, s. 44.

Interpretation

45 Regardless of when a change is made to a consolidated law under this Part, the change may be read, if it is appropriate to do so,

- (a) into the source law as of the date it was enacted or filed; or

(b) into earlier consolidations of the Act or regulation. [2006, c. 21](#), Sched. F, s. 45.

PART VI INTERPRETATION

APPLICATION

Application to Acts and regulations

46 Every provision of this Part applies to every Act and regulation. [2006, c. 21](#), Sched. F, s. 46.

Contrary intention or context requiring otherwise

47 Section 46 applies unless,

- (a) a contrary intention appears; or
- (b) its application would give to a term or provision a meaning that is inconsistent with the context. [2006, c. 21](#), Sched. F, s. 47.

Existing and future legislation

48 Section 46 applies regardless of when the Act or regulation was enacted or made. [2024, c. 2](#), Sched. 15, s. 9.

Other documents

49 The following provisions also apply, in the same way as to a regulation, to every document that is made under an Act but is not a regulation:

1. [Subsection 52 \(6\)](#) (regulation continues).
2. [Section 54](#) (regulations – power to make, amend, etc.).
3. [Section 58](#) (reference to Act or regulation includes reference to individual provisions).
4. [Section 59](#) (rolling incorporation of Ontario legislation), but only with respect to the document that contains the reference.
5. [Section 86](#) (terms used in regulations).
6. [Section 89](#) (computation of time). [2006, c. 21](#), Sched. F, s. 49.

Interpretation and definition provisions

50 The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in [section 47](#). [2006, c. 21](#), Sched. F,

LEGISLATIVE CHANGES

Effect of repeal and revocation

- 51** (1) The repeal of an Act or the revocation of a regulation does not,
- (a) affect the previous operation of the repealed or revoked Act or regulation;
 - (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;
 - (c) affect a contravention of or offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the contravention or offence; or
 - (d) affect an investigation, proceeding or remedy in respect of,
 - (i) a right, privilege, obligation or liability described in clause (b), or
 - (ii) a penalty, forfeiture or punishment described in clause (c). [2006, c. 21](#), Sched. F, s. 51 (1); [2024, c. 2](#), Sched. 15, s. 10.

Same

- (2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked. [2006, c. 21](#), Sched. F, s. 51 (2).

Same

- (3) A penalty, forfeiture or punishment described in clause (1) (c) may be imposed as if the Act or regulation had not been repealed or revoked. [2006, c. 21](#), Sched. F, s. 51 (3).

Effect of amendment and replacement**Application**

- 52** (1) This section applies,
- (a) if an Act is repealed and replaced;
 - (b) if a regulation is revoked and replaced;
 - (c) if an Act or regulation is amended. [2006, c. 21](#), Sched. F, s. 52 (1).

Authorized persons continue to act

(2) A person authorized to act under the former Act or regulation has authority to act under the corresponding provisions, if any, of the new or amended one until another person becomes authorized to do so. 2006, c. 21, Sched. F, s. 52 (2).

Proceedings continued

(3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible. 2006, c. 21, Sched. F, s. 52 (3).

New procedure

(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment. 2006, c. 21, Sched. F, s. 52 (4).

Reduction of penalty

(5) If the new or amended Act or regulation provides for a lesser penalty, forfeiture or punishment, the lesser one applies when a sanction is imposed, after the replacement or amendment, in respect of matters that happened before that time. 2006, c. 21, Sched. F, s. 52 (5).

Regulation continues

(6) If an Act under which a regulation has been made is replaced or amended, the regulation remains in force to the extent that it is authorized by the new or amended Act. 2006, c. 21, Sched. F, s. 52 (6).

Effect of repeal and revocation on amendments

53 The repeal or revocation of an Act or regulation includes the repeal or revocation of any amendment to the Act or regulation. 2006, c. 21, Sched. F, s. 53.

Regulations – power to make, amend, etc.

54 (1) Power to make regulations includes power to amend, revoke or replace them from time to time. 2006, c. 21, Sched. F, s. 54 (1).

Survival of power to revoke

(2) Power to revoke a regulation remains even if the provision conferring power to make it has been repealed. [2006, c. 21](#), Sched. F, s. 54 (2).

New regulation-maker

(3) If a provision conferring power on a person or entity to make a regulation is amended, or repealed and replaced, so as to confer the power or substantially the same power on a different person or entity, the second person or entity has power to revoke, amend or replace the regulation made by the first one. [2006, c. 21](#), Sched. F, s. 54 (3).

Same

(4) Subsection (3) applies with necessary modifications if a power of a minister of the Crown to make regulations is conferred on a different minister of the Crown under the *Executive Council Act*. [2024, c. 2](#), Sched. 15, s. 11.

Obsolete regulations

55 (1) If a provision of an Act under which a regulation is made is repealed and not replaced, the regulation ceases to have effect, subject to [section 51](#) and [subsection 59 \(3\)](#). [2006, c. 21](#), Sched. F, s. 55 (1).

Same

(2) The Lieutenant Governor in Council may, by regulation, revoke a regulation,

(a) that has ceased to have effect under subsection (1); or

(b) that has been rendered obsolete by events or the passage of time.

[2006, c. 21](#), Sched. F, s. 55 (2).

No implication

56 (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force. [2006, c. 21](#), Sched. F, s. 56 (1).

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different. [2006, c. 21](#), Sched. F, s. 56 (2).

Same

(3) The re-enactment, remaking, amendment or changing under Part V (Change Powers) of an Act or regulation does not imply an adoption of any judicial or other interpretation of the language used in the Act or regulation, or of similar language. [2006, c. 21](#), Sched. F, s. 56 (3).

No revival

57 The repeal or revocation of an Act or regulation does not imply the revival of an Act or regulation that is not in force or another thing that is not in existence at the time the repeal or revocation takes effect. [2006, c. 21](#), Sched. F, s. 57.

REFERENCES

Reference to Act or regulation includes reference to individual provisions

58 A reference to an Act or regulation is also a reference to each provision of the Act or regulation. [2006, c. 21](#), Sched. F, s. 58.

References to Ontario legislation

59 (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,

- (a) as amended;
 - (b) as changed under Part V (Change Powers); or,
 - (c) if the provision has been replaced, to the replacement provision.
- [2024, c. 2](#), Sched. 15, s. 12.

Same

(2) Subsection (1) applies whether the provision is amended, changed or replaced before or after the commencement of the provision containing the reference. [2024, c. 2](#), Sched. 15, s. 12.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced,

- (a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that

contains the reference; and

(b) the reference is to the provision as it read immediately before the repeal or revocation. [2006, c. 21](#), Sched. F, s. 59 (3).

References to other Canadian legislation

60 (1) A reference in an Act or regulation to a provision of an Act or regulation of Canada or of another province or territory of Canada is a reference to the provision,

(a) as amended;

(b) as changed in the exercise of a statutory power to make non-substantive changes; or,

(c) if the provision has been replaced, to the replacement provision. [2024, c. 2](#), Sched. 15, s. 13.

Same

(2) Subsection (1) applies whether the provision is amended, changed or replaced before or after the commencement of the provision containing the reference. [2024, c. 2](#), Sched. 15, s. 13.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced, the reference is to the provision as it read immediately before the repeal or revocation. [2006, c. 21](#), Sched. F, s. 60 (3).

Static incorporation of foreign legislation

61 A reference in an Act or regulation to a provision of an Act or regulation of a jurisdiction outside Canada is a reference to the provision as it read when the Ontario provision containing the reference was most recently enacted, made or amended. [2006, c. 21](#), Sched. F, s. 61.

Incorporation of documents by reference

62 (1) The power to make a regulation may be exercised by incorporating an existing document by reference, in whole or in part. [2006, c. 21](#), Sched. F, s. 62 (1).

Changes

(2) The document may be incorporated subject to such changes as the maker of the regulation considers necessary. [2006, c. 21](#), Sched. F, s. 62 (2).

Static incorporation

(3) The reference to the document is a reference to it as it read when the provision containing the reference was most recently enacted, made or amended. [2006, c. 21](#), Sched. F, s. 62 (3).

Access to incorporated document and earlier versions

(4) When a document is incorporated by reference as described in subsection (1), the Minister responsible for the administration of the Act under which the regulation is made shall take steps to ensure that,

(a) the incorporated document is readily available to the public, on and after the day the regulation or amending regulation containing the reference is filed under Part III (Regulations); and

(b) the incorporated document and any earlier versions of it that were previously incorporated into the regulation or into a predecessor of the regulation remain readily available to the public. [2006, c. 21](#), Sched. F, s. 62 (4); [2009, c. 33](#), Sched. 2, s. 43 (28).

Transition

(5) Subsection (4) applies with respect to documents incorporated by reference as described in subsection (1) on and after October 19, 2006. [2006, c. 21](#), Sched. F, s. 62 (5); [2024, c. 2](#), Sched. 15, s. 14.

GENERAL RULES OF CONSTRUCTION

Law always speaking

63 The law is always speaking, and the present tense shall be applied to circumstances as they arise. [2006, c. 21](#), Sched. F, s. 63.

Rule of liberal interpretation

64 (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. [2006, c. 21](#), Sched. F, s. 64 (1).

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. [2006, c. 21](#), Sched. F, s. 64 (2).

Bilingual texts

65 The English and French versions of Acts and regulations that are enacted or made in both languages are equally authoritative. [2006, c. 21](#), Sched. F, s. 65.

Bilingual names

66 If the Act or regulation that creates or continues an entity refers to it by both an English and a French name, or if the English and French versions of the Act or regulation refer to the entity by different names, it may be referred to for any purpose by either name or by both names. [2006, c. 21](#), Sched. F, s. 66.

Number

67 Words in the singular include the plural and words in the plural include the singular. [2006, c. 21](#), Sched. F, s. 67.

Gender

68 Gender-specific terms refer to any gender and include corporations. [2016, c. 23, s. 56](#).

PREAMBLES AND REFERENCE AIDS

Preambles

69 (1) A preamble to a new Act is part of that Act and may be used to help explain its purpose. [2006, c. 21](#), Sched. F, s. 69 (1).

Same

(2) A preamble to an Act that amends one or more other Acts is part of the amending Act and may be used to help explain the purpose of the amendments. [2006, c. 21](#), Sched. F, s. 69 (2).

Reference aids

70 Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation

for convenience of reference only and do not form part of it. [2006, c. 21](#), Sched. F, s. 70.

CROWN

Crown not bound, exception

71 No Act or regulation binds the Crown or affects the Crown's rights or prerogatives unless it expressly states an intention to do so. [2006, c. 21](#), Sched. F, s. 71; [2024, c. 2](#), Sched. 19, s. 9 (3).

Succession

72 (1) A change of reigning sovereign does not affect anything done or begun under the previous reigning sovereign, and all matters continue as if no succession had occurred. [2019, c. 14](#), Sched. 4, s. 1.

Same, offices and oaths

- (2) For greater certainty, a change of reigning sovereign,
- (a) does not affect any appointment or the holding of any office under the Crown; and
 - (b) does not require the retaking of any related oath or affirmation. [2019, c. 14](#), Sched. 4, s. 1.

PROCLAMATIONS

How proclamations issued

73 When an Act authorizes the Lieutenant Governor to do anything by proclamation, the proclamation,

- (a) shall be issued under an order of the Lieutenant Governor in Council recommending that the proclamation be issued; and
- (b) need not refer to the order in council. [2006, c. 21](#), Sched. F, s. 73.

Judicial notice

74 Judicial notice shall be taken of the issuing and contents of every proclamation. [2006, c. 21](#), Sched. F, s. 74.

75 REPEALED: [2024, c. 2](#), Sched. 15, s. 15.

Appointments

76 (1) A provision authorizing the Lieutenant Governor in Council, the Lieutenant Governor or a minister of the Crown to appoint a person to an office authorizes an appointment for a fixed term or an appointment during pleasure, and if the appointment is during pleasure, it may be revoked at any time, without cause and without giving notice. [2006, c. 21](#), Sched. F, s. 76 (1).

Remuneration and expenses

(2) A provision described in subsection (1) authorizes the Lieutenant Governor in Council to determine the remuneration and expenses of the person who is appointed. [2006, c. 21](#), Sched. F, s. 76 (2).

Implied powers

77 Power to appoint a person to a public office includes power to,

- (a) reappoint or remove the person;
- (b) appoint a deputy with the same powers as the holder of the office, subject to specified conditions, or with limited powers as specified; and
- (c) temporarily appoint another person to the office if it is vacant or if the holder of the office is absent or unable to act. [2006, c. 21](#), Sched. F, s. 77.

Incidental powers

78 If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included. [2006, c. 21](#), Sched. F, s. 78.

Performance when occasion requires

79 Powers that are conferred on a person may be exercised, and duties that are imposed on a person shall be performed, whenever the occasion requires. [2006, c. 21](#), Sched. F, s. 79.

Powers and duties remain despite delegation

80 A person on whom an Act confers a power or imposes a duty may exercise it even if it has been delegated to another person. [2006, c. 21](#), Sched. F, s. 80.

Delegation of regulation-making power

80.1 (1) A person on whom an Act confers power to make a regulation may delegate the power only if an Act specifically authorizes the delegation of that regulation-making power. 2009, c. 33, Sched. 2, s. 43 (29).

Exception

(2) Subsection (1) does not apply in respect of orders made under [section 17](#) of the *Ontario Planning and Development Act, 1994*, [section 47](#) of the *Planning Act*, or a predecessor of either of those sections. 2009, c. 33, Sched. 2, s. 43 (29).

Survival of delegation

81 The delegation of a power or duty remains valid until it is revoked or amended, even if the author of the delegation is no longer in office. 2006, c. 21, Sched. F, s. 81.

REGULATIONS AND FORMS

General or particular

82 (1) A regulation may be general or particular in its application. 2006, c. 21, Sched. F, s. 82 (1).

Classes

(2) The power to make a regulation includes the power to prescribe a class. 2006, c. 21, Sched. F, s. 82 (2).

Same

- (3) For the purposes of subsection (2), a class may be defined,
- (a) in terms of any attribute or combination of attributes; or
 - (b) as consisting of, including or excluding a specified member. 2006, c. 21, Sched. F, s. 82 (3).

Fee regulations

83 This Act authorizes the Lieutenant Governor in Council to make regulations under an Act, prescribing fees to be charged by persons whom the Act or a regulation made under the Act requires or authorizes to do anything, if the Act itself does not provide for such regulations. 2006, c. 21, Sched. F, s. 83.

Deviations from required form

84 Deviations from a form whose use is required under an Act do not invalidate the form if,

- (a) they do not affect the substance and are unlikely to mislead; and
- (b) the form is organized in the same or substantially the same way as the form whose use is required. [2006, c. 21](#), Sched. F, s. 84.

DEFINITIONS

Different forms of defined terms

85 If a term is defined, other forms of the same term have corresponding meanings. [2006, c. 21](#), Sched. F, s. 85.

Terms used in regulations

86 Terms used in regulations have the same meaning as in the Act under whose authority they are made. [2006, c. 21](#), Sched. F, s. 86.

Definitions

87 In every Act and regulation,

“Act” means an Act of the Legislature, and “statute” has the same meaning; (“loi”)

“Assembly” and “Legislative Assembly” mean the Legislative Assembly of Ontario; (“Assemblée”, “Assemblée législative”)

“Court of Appeal” means the Court of Appeal for Ontario; (“Cour d’appel”)

“Divisional Court” means the Divisional Court of the Superior Court of Justice; (“Cour divisionnaire”)

“Her Majesty”, “His Majesty”, “the Queen”, “the King” or “the Crown” means the Sovereign of the United Kingdom, Canada and His other Realms and Territories, and Head of the Commonwealth; (“Sa Majesté”, “la Reine”, “le Roi”, “la Couronne”)

“holiday” means a holiday as described in [section 88](#); (“jour férié”)

“individual” means a natural person; (“particulier”)

“legally qualified medical practitioner” and similar expressions indicating legal recognition of a person as a member of the medical profession mean a member of the College of Physicians and Surgeons of Ontario; (“médecin dûment qualifié”)

“Legislature” means the Lieutenant Governor acting by and with the advice and consent of the Assembly; (“Législature”)

“Lieutenant Governor” means the Lieutenant Governor of Ontario, or the person administering the Government of Ontario for the time being in His Majesty’s name, by whatever title he or she is designated; (“lieutenant-gouverneur”)

“Lieutenant Governor in Council” means the Lieutenant Governor acting by and with the advice of the Executive Council of Ontario; (“lieutenant-gouverneur en conseil”)

“mentally ill”, when used in reference to a person, means suffering from such a disorder of the mind that he or she requires care, supervision and control for his or her own protection or welfare, or for the protection of others; (“mentalement malade”)

“newspaper”, in a provision requiring publication, means a document that,

- (a) is printed in sheet form, published at regular intervals of a week or less and circulated to the general public, and
- (b) consists primarily of news of current events of general interest; (“journal”)

“now”, “next”, “heretofore” and “hereafter” relate to the date of coming into force of the provision in which they are used; (“maintenant”, “prochainement”, “jusqu’ici”, “dorénavant”)

“peace officer” includes,

- (a) a person employed to serve or execute civil process, including a sheriff, deputy sheriff and sheriff’s officer, and a bailiff of the Small Claims Court,
- (b) a justice of the peace,
- (c) an officer or permanent employee of a correctional institution, or of a place of detention or custody, and
- (d) a person employed to maintain the public peace, including a police officer and constable; (“agent de la paix”)

“person” includes a corporation; (“personne”)

“proclamation” means a proclamation issued by the Lieutenant Governor under the Great Seal; (“proclamation”)

“regulation” means a regulation that is filed under Part III (Regulations); (“règlement”)

“rules of court” means rules made under Part IV of the *Courts of Justice Act*, or otherwise by an authority having power to make rules regulating court practices and procedures. (“règles de pratique”) 2006, c. 21, Sched. F, s. 87; 2009, c. 33, Sched. 2, s. 43 (30, 31); 2017, c. 2, Sched. 2, s. 25; 2024, c. 2, Sched. 19, s. 9 (4, 5).

TIME

Holidays

88 (1) This section applies for the purposes of the definition of “holiday” in [section 87](#). 2006, c. 21, Sched. F, s. 88 (1).

Same

(2) The following days are holidays:

1. Sunday.
2. New Year’s Day.
- 2.1 Family Day.
3. Good Friday.
4. Easter Monday.
5. Victoria Day.
6. Canada Day.
7. Labour Day.
8. Thanksgiving Day.
9. Remembrance Day.
10. Christmas Day.
11. Boxing Day.
12. Any day fixed as a holiday by proclamation of the Governor General or Lieutenant Governor. 2006, c. 21, Sched. F, s. 88 (2); 2009, c. 33, Sched. 2, s. 43 (32).

Same

(3) When New Year’s Day falls on a Sunday, the following Monday is also a holiday. 2006, c. 21, Sched. F, s. 88 (3).

Same

(4) In accordance with the *Holidays Act* (Canada), when July 1 is a Sunday, Canada Day falls on July 2. 2006, c. 21, Sched. F, s. 88 (4).

Same

(5) When Christmas Day falls on a Saturday, the following Monday is also a holiday, and when it falls on a Sunday, the following Tuesday is also a holiday. 2006, c. 21, Sched. F, s. 88 (5).

Computation of time

Holidays

89 (1) Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday. 2006, c. 21, Sched. F, s. 89 (1).

Days on which offices closed

(2) Time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. 2006, c. 21, Sched. F, s. 89 (2).

Number of days between events

(3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to “at least” or “not less than” a number of days. 2006, c. 21, Sched. F, s. 89 (3).

Specified day included

(4) A period of time described as beginning or ending on, at or with a specified day includes that day. 2006, c. 21, Sched. F, s. 89 (4).

Specified day excluded

(5) A period of time described as beginning before or after a specified day excludes that day. 2006, c. 21, Sched. F, s. 89 (5).

Months

(6) If a period of time is described as a number of months before or after a specified day, the following rules apply:

1. The number of months is counted from the specified day, excluding the month in which the specified day falls.
2. The period includes the day in the last month counted that has the same calendar number as the specified day or, if that month has no day with that number, its last day.
3. REPEALED: 2009, c. 33, Sched. 2, s. 43 (33).

2006, c. 21, Sched. F, s. 89 (6); 2009, c. 33, Sched. 2, s. 43 (33); 2024, c. 2, Sched. 15, s. 16.

Leap years

(7) The anniversary of an event that took place on February 29 falls on February 28, except in a leap year. 2006, c. 21, Sched. F, s. 89 (7).

Age

90 A person attains an age specified as a number of years at the first instant of the corresponding anniversary of his or her birth. 2006, c. 21, Sched. F, s. 90.

MISCELLANEOUS

Private Acts

91 (1) A private Act does not affect the rights of a person or entity except as mentioned in the Act. 2006, c. 21, Sched. F, s. 91 (1).

Same

(2) Subsection (1) does not apply to a private Act respecting the powers or duties of a municipality. 2006, c. 21, Sched. F, s. 91 (2).

Corporations, implied provisions

92 (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that

incorporates them. [2006, c. 21](#), Sched. F, s. 92 (1).

Restricted application

(2) Subsection (1) applies to a corporation only if the provision creating it is in force immediately before October 19, 2006. [2006, c. 21](#), Sched. F, s. 92 (2); [2024, c. 2](#), Sched. 15, s. 17.

Majority

93 If something is required or authorized to be done by more than two persons, a majority of them may do it. [2006, c. 21](#), Sched. F, s. 93.

Reference to series

94 If reference is made to a series, the first and last items are included. [2006, c. 21](#), Sched. F, s. 94.

Oaths, affirmations and declarations

95 A requirement that a person take an oath or be sworn is satisfied by an affirmation or a declaration. [2006, c. 21](#), Sched. F, s. 95.

Requirements for security and sureties

Security

96 (1) A requirement to give security is a requirement to give security that is sufficient for the purpose. [2006, c. 21](#), Sched. F, s. 96 (1).

Sureties

(2) Subsection (1) also applies, with necessary modifications, to a surety, and if the provision refers to sureties without specifying the number of persons, one is sufficient. [2006, c. 21](#), Sched. F, s. 96 (2).

Immunity provisions

97 (1) Where words referring to actions or other proceedings for damages are used in a provision excluding or limiting the liability of the Crown or any other person, third or subsequent party proceedings and proceedings for contribution and indemnity or restitution are included. [2006, c. 21](#), Sched. F, s. 97 (1).

Transition

(2) Subsection (1) applies in respect of proceedings commenced on or after October 4, 2000. [2006, c. 21](#), Sched. F, s. 97 (2).

PART VII

UNCONSOLIDATED ACTS AND REGULATIONS

Unconsolidated Acts

98 (1)-(3) OMITTED (AMENDS OR REPEALS OTHER ACTS). [2006, c. 21](#), Sched. F, s. 98 (1-3).

Consolidation

(4) The Chief Legislative Counsel may at any time cause an Act that is unconsolidated and unrepealed to be consolidated and published on the e-Laws website as consolidated law. [2009, c. 33](#), Sched. 2, s. 43 (34).

French version

(5) If the Chief Legislative Counsel causes an Act to be consolidated under subsection (4), he or she shall, in the case of a public Act, or may, in the case of a private Act,

- (a) prepare a French version of the Act; and
- (b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. [2009, c. 33](#), Sched. 2, s. 43 (34).

Revision

(6) For the purposes of consolidating an Act under subsection (4), Part V (Change Powers) applies in respect of the consolidated Act with the following modifications:

1. [Subsection 42 \(2\)](#) shall be read as including power to,
 - i. omit provisions that are obsolete, and
 - ii. alter the numbering and arrangement of provisions.
2. [Subsection 42 \(3\)](#) does not apply.
3. [Subsection 43 \(1\)](#) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. [2009, c. 33](#), Sched. 2, s. 43 (34).

Unconsolidated regulations

99 (1), (2) OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2006, c. 21, Sched. F, s. 99 (1, 2).

Consolidation

(3) The Chief Legislative Counsel may at any time cause a regulation that is unconsolidated and unrevoked to be consolidated and published on the e-Laws website as consolidated law. 2009, c. 33, Sched. 2, s. 43 (35).

French version

(4) If the Chief Legislative Counsel causes a regulation to be consolidated under subsection (3), he or she may,

- (a) prepare a French version of the regulation; and
- (b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. 2009, c. 33, Sched. 2, s. 43 (35).

Revision

(5) For the purposes of consolidating a regulation under subsection (3), Part V (Change Powers) applies in respect of the consolidated regulation with the following modifications:

1. Subsection 42 (2) shall be read as including power to,
 - i. omit provisions that are obsolete, and
 - ii. alter the numbering and arrangement of provisions.
2. Subsection 42 (3) does not apply.
3. Subsection 43 (1) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. 2009, c. 33, Sched. 2, s. 43 (35).

RESOLUTION OF UNCERTAINTY OR TRANSITION

Resolution of uncertainty or transition

100 (1) The Lieutenant Governor in Council may make regulations in respect of an Act repealed by section 98 or a regulation revoked by section 99,

- (a) to resolve any uncertainty in respect of,
 - (i) any right, privilege, obligation or liability related to the Act or regulation, or

(ii) the effect of the repeal of the Act or the revocation of the regulation;

(b) to resolve any transitional matters that may arise in relation to the repeal or revocation. [2006, c. 21](#), Sched. F, s. 100 (1).

Same

(2) For greater certainty, a regulation under subsection (1) may address any uncertainty or transitional matter that arises before the day the regulation is filed. [2006, c. 21](#), Sched. F, s. 100 (2).

PART VIII (OMITTED)

101-142 OMITTED (AMENDS OR REPEALS OTHER ACTS). [2006, c. 21](#), Sched. F, ss. 101-142.

PART IX (OMITTED)

143 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). [2006, c. 21](#), Sched. F, s. 143.

144 OMITTED (ENACTS SHORT TITLE OF THIS ACT). [2006, c. 21](#), Sched. F, s. 144.

TAB 14

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, SO 2009, c 33, Sch 5

Current version: in force since 2019-05-01

Link to the latest version ⓘ: <https://canlii.ca/t/8mns>

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Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

S.O. 2009, CHAPTER 33
SCHEDULE 5

Consolidation Period: From May 1, 2019 to the [e-Laws currency date](#).

Last amendment: 2018, c. 17, Sched. 35, s. 16.

PURPOSE AND INTERPRETATION

Purpose

1 The purpose of this Act is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making. 2009, c. 33, Sched. 5, s. 1.

Definitions

2 In this Act,

“adjudicative tribunal” means an agency, board, commission, corporation or other entity that is prescribed; (“tribunal décisionnel”)

“governance accountability documents” means the memorandum of understanding, business plan and annual report required by sections 11, 12 and 13, respectively; (“documents de responsabilisation en matière de gouvernance”)

“prescribed” means prescribed by regulations made under this Act; (“prescrit”)

“public accountability documents” means the mandate and mission statement, consultation policy, service standard policy, ethics plan and member accountability framework required by sections 3, 4, 5, 6 and 7, respectively; (“documents de responsabilisation à l’égard du public”)

“responsible minister”, in relation to an adjudicative tribunal, means the minister of the Crown who is responsible to the Assembly for the tribunal. (“ministre responsable”) 2009, c. 33, Sched. 5, s. 2.

PUBLIC ACCOUNTABILITY DOCUMENTS

Mandate and mission statement

3 (1) Every adjudicative tribunal shall develop a mandate and mission statement. 2009, c. 33, Sched. 5, s. 3 (1).

Contents

(2) The mandate and mission statement must contain,

- (a) a statement of the tribunal's legislative mandate, with reference to the Act that establishes its mandate and to any Act or Acts that add to its mandate;
- (b) the tribunal's mission statement; and
- (c) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 3 (2).

Approval

(3) The mandate and mission statement must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 3 (3).

Consultation policy

4 (1) Every adjudicative tribunal shall develop a consultation policy. 2009, c. 33, Sched. 5, s. 4 (1).

Contents

(2) The consultation policy must describe whether and how the tribunal will consult with the public when it is considering changes to its rules or policies, including consultation with any persons, entities or groups of persons or entities whose interests, in the opinion of the tribunal's chair, would be affected by those changes. 2009, c. 33, Sched. 5, s. 4 (2).

Same

(3) The consultation policy must contain any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 4 (3).

Approval

(4) The consultation policy must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 4 (4).

Service standard policy

5 (1) Every adjudicative tribunal shall develop a service standard policy. 2009, c. 33, Sched. 5, s. 5 (1).

Contents

(2) The service standard policy must contain,

- (a) a statement of the standards of service that the tribunal intends to provide;
- (b) a process for making, reviewing and responding to complaints about the service provided by the tribunal; and
- (c) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 5 (2).

Approval

(3) The service standard policy must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 5 (3).

Relationship to other remedies

(4) Nothing in the service standard policy shall be interpreted as affecting,

- (a) a process or remedy available under the *Ombudsman Act*;

- (b) a right of appeal from decisions of the tribunal available under any Act; or
- (c) a right to bring an application for judicial review. 2009, c. 33, Sched. 5, s. 5 (4).

Ethics plan

6 (1) Every adjudicative tribunal shall develop an ethics plan. 2009, c. 33, Sched. 5, s. 6 (1).

Contents

(2) The contents of the ethics plan shall be prescribed and must also include any matter specified in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 6 (2).

Approval

(3) The ethics plan must be approved by the Integrity Commissioner appointed under the *Public Service of Ontario Act, 2006*. 2009, c. 33, Sched. 5, s. 6 (3); 2018, c. 17, Sched. 35, s. 16.

Conflict with *Public Service of Ontario Act, 2006*

(4) In the event of any conflict between an adjudicative tribunal's ethics plan and the conflict of interest rules made under the *Public Service of Ontario Act, 2006* that apply to the tribunal, the conflict of interest rules prevail. 2009, c. 33, Sched. 5, s. 6 (4).

Member accountability framework

7 (1) Every adjudicative tribunal shall develop a member accountability framework. 2009, c. 33, Sched. 5, s. 7 (1).

Contents

(2) The member accountability framework must contain,

- (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
- (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
- (c) a code of conduct for the members of the tribunal; and
- (d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 7 (2).

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 7 (3).

PUBLICATION, AMENDMENT AND REVIEW OF PUBLIC ACCOUNTABILITY DOCUMENTS

Publication of public accountability documents

8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public. 2009, c. 33, Sched. 5, s. 8.

Amendments to public accountability documents

9 An adjudicative tribunal may amend its public accountability documents, and the person required to approve the original document is also required to approve any amendment to the document. 2009, c. 33, Sched. 5, s. 9.

Review of public accountability documents

10 Every adjudicative tribunal shall review its public accountability documents to determine whether they require amendment every three years after their initial publication. 2009, c. 33, Sched. 5, s. 10.

GOVERNANCE ACCOUNTABILITY DOCUMENTS

Memorandum of understanding

11 (1) Every adjudicative tribunal shall enter into a memorandum of understanding with its responsible minister. 2009, c. 33, Sched. 5, s. 11 (1).

Contents

(2) The memorandum of understanding must address,

- (a) the financial, staffing and administrative arrangements for the tribunal;
- (b) the accountability relationships of the tribunal, including its duty to account to its responsible minister;
- (c) the recruitment, orientation and training of the tribunal's members;
- (d) the committee structure of the tribunal, if any;
- (e) the tribunal's planning and reporting requirements; and
- (f) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 11 (2).

Expiry

(3) The memorandum of understanding expires five years after the day it is entered into, and may be renewed before that day for another five years. 2009, c. 33, Sched. 5, s. 11 (3).

Review

(4) The tribunal and its responsible minister shall review the memorandum of understanding after there is a change in the responsible minister or the chair of the tribunal, and, in any event, at least once before it expires. 2009, c. 33, Sched. 5, s. 11 (4).

Continuation of expired memorandum

(5) A memorandum of understanding that has expired continues in effect, despite its expiry, until it is renewed or replaced. 2009, c. 33, Sched. 5, s. 11 (5).

Publication

(6) The tribunal's responsible minister shall make the memorandum of understanding available to the public. 2009, c. 33, Sched. 5, s. 11 (6).

Transition

(7) An adjudicative tribunal and its responsible minister may agree that a memorandum of understanding entered into by them before the day that subsection (1) becomes applicable to the tribunal and that is still in effect on that day is a memorandum of understanding entered into by them on the day subsection (1) becomes applicable to the tribunal for the purposes of this section. 2009, c. 33, Sched. 5, s. 11 (7).

Business plan

12 (1) Every adjudicative tribunal shall develop a business plan for a prescribed period of time. 2009, c. 33, Sched. 5, s. 12 (1).

Contents

(2) The contents of the business plan shall be prescribed and must also include any matter specified in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 12 (2).

Approval

(3) The business plan must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 12 (3).

Publication

(4) The tribunal shall make the business plan available to the public. 2009, c. 33, Sched. 5, s. 12 (4).

Annual report

13 (1) Every adjudicative tribunal shall prepare an annual report, provide it to the responsible minister no later than 90 days after the end of the tribunal's fiscal year and make it available to the public. 2017, c. 34, Sched. 46, s. 1 (1).

Same

(2) The tribunal shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

- (a) the form and content of the annual report; and
- (b) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 1 (1).

Same

(3) The tribunal shall include such additional content in the annual report as the responsible minister may require. 2017, c. 34, Sched. 46, s. 1 (1).

Tabling of annual report

13.1 The responsible minister shall table each adjudicative tribunal's annual report in the Assembly no later than 30 days after determining that the annual report meets the requirements of section 13 and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when and how to make that determination. 2017, c. 34, Sched. 46, s. 1 (1).

This Act prevails re annual reports

13.2 In the event of any conflict between section 13 or 13.1 and a provision of another Act or a regulation respecting an adjudicative tribunal's annual report, section 13 or 13.1 prevails. 2017, c. 34, Sched. 46, s. 1 (1).

APPOINTMENT TO ADJUDICATIVE TRIBUNALS

Adjudicative tribunal members to be selected by competitive, merit-based process

14 (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:

- 1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
- 2. Aptitude for impartial adjudication.
- 3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules. 2009, c. 33, Sched. 5, s. 14 (1).

Tribunal-specific qualifications

(2) If a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications, a person shall not be appointed to the tribunal unless he or she possesses those qualifications. 2009, c. 33, Sched. 5, s. 14 (2).

Publication

(3) The responsible minister of an adjudicative tribunal shall make public the recruitment process to select one or more persons to be appointed to the tribunal and in doing so shall specify,

- (a) the steps intended to be taken in the recruitment process; and
- (b) the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed. 2009, c. 33, Sched. 5, s. 14 (3).

Chair to recommend appointments, reappointments

(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed. 2009, c. 33, Sched. 5, s. 14 (4).

Conflict with other Acts, regulations

(5) In the event of any conflict between this section and a provision of another Act or of a regulation made under another Act respecting the appointment of members of an adjudicative tribunal, the provision of the other Act or regulation prevails. 2009, c. 33, Sched. 5, s. 14 (5).

Designation of clusters

15 The Lieutenant Governor in Council may by regulation designate two or more adjudicative tribunals as a cluster if, in the opinion of the Lieutenant Governor in Council, the matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone. 2009, c. 33, Sched. 5, s. 15.

Governance structure of clusters

Executive chair

16 (1) The Lieutenant Governor in Council may appoint an executive chair to be responsible for all of the adjudicative tribunals included in a cluster. 2009, c. 33, Sched. 5, s. 16 (1).

Associate chairs

(2) The Lieutenant Governor in Council may appoint an associate chair for each adjudicative tribunal that is included in a cluster. 2009, c. 33, Sched. 5, s. 16 (2).

Alternate executive chairs

(3) The Lieutenant Governor in Council may appoint one or more of the associate chairs as alternate executive chairs of the cluster, and an alternate executive chair shall act in the place of the executive chair if the executive chair is unable to act or if the position of executive chair is vacant. 2009, c. 33, Sched. 5, s. 16 (3).

Vice-chairs

(4) The Lieutenant Governor in Council may appoint one or more vice-chairs for each adjudicative tribunal that is included in a cluster, and a vice-chair shall act in the place of the tribunal's associate chair if the associate chair is unable to act or if the position of associate chair is vacant. 2009, c. 33, Sched. 5, s. 16 (4).

Chairs must be members of tribunals

(5) The executive chair and each alternate executive chair must also be members of each of the adjudicative tribunals in the cluster and the associate chair and each vice-chair must also be members of the tribunal to which they are appointed as associate chair and vice-chair. 2009, c. 33, Sched. 5, s. 16 (5).

Powers, duties, etc., of executive chair

17 (1) The executive chair shall have the powers, duties and functions assigned to the chair of each adjudicative tribunal that is included in the cluster by this or any other Act or by any regulation, order-in-council or ministerial or Management Board of Cabinet directive. 2009, c. 33, Sched. 5, s. 17 (1).

Delegation

(2) The executive chair may delegate to an associate chair or vice-chair of an adjudicative tribunal that is included in the cluster any power, duty or function, except a power, duty or function he or she may have as an ethics executive under the *Public Service of Ontario Act, 2006*. 2009, c. 33, Sched. 5, s. 17 (2).

Protection from liability

(3) The executive chair, alternate executive chair and associate chair of an adjudicative tribunal that is included in a cluster shall be entitled to the same protection from liability as the chair of the tribunal. 2009, c. 33, Sched. 5, s. 17 (3).

Same

(4) The vice-chairs and members of an adjudicative tribunal that is included in a cluster shall be entitled to the same protection from liability as the members of the tribunal. 2009, c. 33, Sched. 5, s. 17 (4).

Crown liability

(5) Any provision in another Act that addresses the Crown's liability for the actions or omissions of an adjudicative tribunal that is included in a cluster or of a chair, vice-chair or member of an adjudicative tribunal that is included in a cluster applies with necessary modifications to the adjudicative tribunal. 2009, c. 33, Sched. 5, s. 17 (5).

References to chair in other Acts, etc.

(6) Except as provided in a regulation made under this Act, any reference in this or any other Act or a regulation to the chair of an adjudicative tribunal that is included in a cluster shall be read as a reference to the tribunal's executive chair. 2009, c. 33, Sched. 5, s. 17 (6).

Joint accountability documents

18 (1) All the adjudicative tribunals included in a cluster shall jointly develop, prepare or enter into, as the case may be, the public accountability documents and governance accountability documents required by this Act. 2009, c. 33, Sched. 5, s. 18 (1).

Same

(2) Section 3, 4, 5, 6 or 7, as the case may be, and sections 8, 9 and 10 apply with necessary modifications to any public accountability document jointly developed by all the adjudicative tribunals in a cluster. 2009, c. 33, Sched. 5, s. 18 (2).

Same

(3) Section 11, 12 or 13 to 13.2, as the case may be, applies with necessary modifications to any governance accountability document jointly developed, prepared or entered into, as the case may be, by all the adjudicative tribunals in a cluster. 2009, c. 33, Sched. 5, s. 18 (3); 2017, c. 34, Sched. 46, s. 1 (2).

This Act prevails re governance of clusters

19 In the event of any conflict between section 16 or 17 and a provision of another Act or a regulation respecting the governance of an adjudicative tribunal that is included in a cluster, section 16 or 17 prevails. 2009, c. 33, Sched. 5, s. 19.

GENERAL MATTERS**Chair is responsible for tribunals**

20 (1) The chair of an adjudicative tribunal is responsible for ensuring that the tribunal performs the duties and functions required of it under this or any other Act and that it is in compliance with any other Act or any regulation applicable to it. 2009, c. 33, Sched. 5, s. 20 (1).

Effect of failure to comply

(2) Any failure of an adjudicative tribunal or its chair to comply with this Act does not affect the validity of any action taken or decision made by the tribunal or the chair. 2009, c. 33, Sched. 5, s. 20 (2).

Review of tribunals

21 (1) An adjudicative tribunal's responsible minister shall direct a public servant employed under Part III of the *Public Service of Ontario Act, 2006* or any other person to conduct a review of the adjudicative tribunal at least once every six years. 2009, c. 33, Sched. 5, s. 21 (1).

Matters for review

(2) The review required by subsection (1) must address,

- (a) the tribunal's mandate and whether it continues to be relevant;
- (b) the functions performed by the tribunal, and whether they are best performed by the tribunal or whether they would be better performed by another entity;
- (c) the tribunal's governance structure and management systems, and whether they continue to be appropriate to its mandate and functions;
- (d) the tribunal's financial and human resources and its financial and information systems;
- (e) the tribunal's business planning, performance measurement and reporting practices;

- (f) whether the tribunal has effective processes in place to ensure its compliance with any applicable Act, regulation or directive of the Management Board of Cabinet;
- (g) whether the tribunal is effective in achieving its mandate and serving the public;
- (h) whether changes should be made to the tribunal or whether the tribunal should be discontinued; and
- (i) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 21 (2).

Additional reviews

(3) An adjudicative tribunal's responsible minister may at any time direct a public servant employed under Part III of the *Public Service of Ontario Act, 2006* or any other person to conduct a review of the adjudicative tribunal in respect of any of the matters listed in subsection (2). 2009, c. 33, Sched. 5, s. 21 (3).

Protection of personal information

(4) Nothing in this section authorizes a person conducting a review under subsection (1) or subsection (3) to collect, or an adjudicative tribunal to disclose to such person, any information that is personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* or personal health information within the meaning of the *Personal Health Information Protection Act, 2004*. 2009, c. 33, Sched. 5, s. 21 (4).

Application of *Public Service of Ontario Act, 2006*, *Management Board of Cabinet Act*

22 Nothing in this Act affects any obligation or requirement imposed by or under the *Public Service of Ontario Act, 2006* or the *Management Board of Cabinet Act* on a person who is appointed as a chair, vice-chair or member of an adjudicative tribunal. 2009, c. 33, Sched. 5, s. 22.

REGULATIONS

Regulations

23 The Lieutenant Governor in Council may make regulations,

- (a) prescribing agencies, boards, commissions, corporations or other entities for the purpose of the definition of "adjudicative tribunal" in section 2;
- (b) prescribing the contents of the ethics plan required by section 6;
- (c) prescribing a period of time for the purpose of subsection 12 (1) and the contents of the business plan required by section 12;
- (d) governing the publication of the recruitment process required by subsection 14 (3);
- (e) respecting the waiver of any requirement set out in section 14, including waiving any such requirement;
- (f) prescribing references in this or any other Act or in a regulation to the chair of an adjudicative tribunal that are to be read other than as described in subsection 17 (6) and prescribing how such references shall be read in relation to the adjudicative tribunal that is included in a cluster;
- (g) prescribing other matters to be addressed in a review of an adjudicative tribunal required by section 21;
- (h) prescribing other matters to be addressed or included in any public accountability document or governance accountability document;
- (i) prescribing the date by or time within which an adjudicative tribunal must comply with any provision or requirement of this Act or of a regulation made under this Act respecting a public accountability document or governance accountability document;
- (j) prescribing the form and format of any public accountability document or governance accountability document;
- (k) governing the publication of the public accountability documents or governance accountability documents or of the review required by section 21. 2009, c. 33, Sched. 5, s. 23.

24 Omitted (provides for coming into force of provisions of this Act). 2009, c. 33, Sched. 5, s. 24.

25 Omitted (enacts short title of this Act). 2009, c. 33, Sched. 5, s. 25.

TAB 15

Adjudicative Tribunals and Clusters, O Reg 126/10

Current version: in force since 2022-01-01

Link to the latest version ⓘ: <https://canlii.ca/t/8mtz>

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Former title: General

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 126/10

ADJUDICATIVE TRIBUNALS AND CLUSTERS

Consolidation Period: From January 1, 2022 to the [e-Laws currency date](#).

Last amendment: 668/21.

This is the English version of a bilingual regulation.

Adjudicative tribunals

1. Each of the agencies, boards, commissions, corporations and other entities listed in Schedule 1 to this Regulation is prescribed for the purposes of the definition of “adjudicative tribunal” in section 2 of the Act. O. Reg. 126/10, s. 1.

1.1 Revoked: O. Reg. 352/21, s. 1.

Cluster, Tribunals Ontario

2. The following adjudicative tribunals are designated as a cluster of tribunals entitled “Tribunals Ontario” in English and “Tribunaux décisionnels Ontario” in French:

1. Animal Care Review Board.
2. Assessment Review Board.
3. Revoked: O. Reg. 282/20, s. 2.
4. Child and Family Services Review Board.
5. Revoked: O. Reg. 282/20, s. 2.
6. Revoked: O. Reg. 668/21, s. 1.

7. Custody Review Board.
8. Revoked: O. Reg. 282/20, s. 2.
9. Fire Safety Commission.
10. Human Rights Tribunal of Ontario.
11. Landlord and Tenant Board.
12. Licence Appeal Tribunal.
- 13., 14. Revoked: O. Reg. 282/20, s. 2.
15. Ontario Civilian Police Commission.
16. Ontario Parole Board.
17. Ontario Special Education Tribunal (English).
18. Ontario Special Education Tribunal (French).
19. Social Benefits Tribunal. O. Reg. 494/18, s. 1; O. Reg. 282/20, s. 2; O. Reg. 668/21, s. 1.
- 3., 4. Revoked: O. Reg. 494/18, s. 1.

SCHEDULE 1 ADJUDICATIVE TRIBUNALS

1. Agriculture, Food and Rural Affairs Appeal Tribunal.
2. Animal Care Review Board.
3. Assessment Review Board.
4. Revoked: O. Reg. 352/21, s. 2 (1).
5. Revoked: O. Reg. 257/21, s. 1 (2).
6. Building Code Commission.
7. Child and Family Services Review Board.
8. Revoked: O. Reg. 494/18, s. 2.
9. Consent and Capacity Board.
10. Revoked: O. Reg. 352/21, s. 2 (1).
11. Revoked: O. Reg. 668/21, s. 2.
12. Crown Employees Grievance Settlement Board.
13. Custody Review Board.
14. Revoked: O. Reg. 494/18, s. 2.
15. Revoked: O. Reg. 352/21, s. 2 (1).
- 15.1 Financial Services Tribunal.
16. Fire Safety Commission.
17. Health Professions Appeal and Review Board.
18. Health Services Appeal and Review Board.
19. Human Rights Tribunal of Ontario.
20. Landlord and Tenant Board.
21. Licence Appeal Tribunal.
- 21.1 Revoked: O. Reg. 352/21, s. 2 (1).
22. Revoked: O. Reg. 257/21, s. 1 (2).
- 22.1 Revoked: O. Reg. 352/21, s. 2 (1).

23. Normal Farm Practices Protection Board.
24. Ontario Civilian Police Commission.
25. Ontario Labour Relations Board.
26. Ontario Land Tribunal.
27. Ontario Parole Board.
28. Ontario Review Board.
29. Ontario Special Education Tribunal (English).
30. Ontario Special Education Tribunal (French).
31. Revoked: O. Reg. 494/18, s. 2.
32. Pay Equity Hearings Tribunal.
33. Revoked: O. Reg. 257/21, s. 1 (2).
34. Public Service Grievance Board.
35. Revoked: O. Reg. 10/11, s. 3.
36. Social Benefits Tribunal.
37. Workplace Safety and Insurance Appeals Tribunal.
O. Reg. 126/10, Sched; O. Reg. 10/11, s. 3; O. Reg. 470/17, s. 2; O. Reg. 81/18, s. 2; O. Reg. 494/18, s. 2; O. Reg. 257/21, s. 1; O. Reg. 352/21, s. 2; O. Reg. 668/21, s. 2.

TAB 16

Appointment to Adjudicative Tribunals, O Reg 88/11

Current version: in force since 2019-08-21

Link to the latest version ⁽ⁱ⁾: <https://canlii.ca/t/8p74>

Stable link to this version ⁽ⁱ⁾: <https://canlii.ca/t/53pq8>

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Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 88/11

APPOINTMENT TO ADJUDICATIVE TRIBUNALS

Consolidation Period: From August 21, 2019 to the [e-Laws currency date](#).

Last amendment: 273/19.

This is the English version of a bilingual regulation.

Public information about recruitment process

1. (1) This section applies with respect to the requirement under subsection 14 (3) of the Act to make information public about the recruitment process for selecting persons to be appointed to an adjudicative tribunal. O. Reg. 88/11, s. 1 (1).

(2) The information specified by subsection 14 (3) of the Act must be made available to the public on a government website for at least 10 days before the closing date of the competition for the appointment, excluding Saturdays, Sundays and holidays. O. Reg. 88/11, s. 1 (2).

(3) If the requirement under subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal is waived under section 2 of this Regulation, the requirement under subsection 14 (3) of the Act to make information public about the recruitment process for that appointment is also waived. O. Reg. 88/11, s. 1 (3).

Waiver of competitive, merit-based selection process

2. (1) The requirement in subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal is waived in the following circumstances:

1. If a member of the tribunal is being reappointed.

2. If a former member of the tribunal is being reappointed, but only if his or her prior appointment expired within 90 days of the date of the reappointment.
3. If a member of one adjudicative tribunal is being appointed to another tribunal.
4. If the person being appointed to the tribunal was a candidate for appointment to an adjudicative tribunal within 12 months before the date of the intended appointment and,
 - i. the selection process for the appointment to the tribunal was a competitive, merit-based process, and
 - ii. although the person was not appointed to the tribunal, it was determined that the person was qualified for such an appointment.
5. If the person being appointed must, under an Act, be nominated or selected by a person or entity other than the Lieutenant Governor in Council or a minister.
6. If the person being appointed must, under an Act, be nominated or selected jointly by a person or entity representing one or more employers (including the Crown as an employer) and by a trade union or other collective bargaining agent representing employees.
7. If the appointment is needed to ensure that the tribunal has the quorum or minimum number of members specified under an Act. O. Reg. 88/11, s. 2 (1).

(2) The requirement in subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal may be waived in the following circumstances, if the person or entity authorized to appoint the member considers it appropriate to do so:

1. If the tribunal is the successor of another adjudicative tribunal that has been restructured or discontinued and if the person being appointed to the successor tribunal was a member of the predecessor tribunal when it was restructured or discontinued.
2. If the appointment is being made to fill an unanticipated vacancy on the tribunal.
3. If the appointment is being made on an urgent basis for a maximum period of six months. O. Reg. 88/11, s. 2 (2); O. Reg. 273/19, s. 1 (1).

(2.1) If the requirement to use a competitive, merit-based process is waived under paragraph 3 of subsection (2) with respect to the appointment of a member of an adjudicative tribunal, the waivers under paragraphs 1, 2, 3, 4 and 7 of subsection (1) do not apply, and a waiver under subsection (2) may not be used, with respect to the reappointment or further appointment of the member. O. Reg. 273/19, s. 1 (2).

(2.2) If the requirement to use a competitive, merit-based process is waived under paragraph 3 of subsection (2) with respect to the appointment of a member of an adjudicative tribunal, a further waiver under that paragraph may not be used with respect to a successive appointment of another member to that tribunal. O. Reg. 273/19, s. 1 (2).

(3) If the requirement to use a competitive, merit-based process is waived under subsection (2) with respect to the appointment of a member of an adjudicative tribunal, notice of the use of the waiver must be included in the next annual report of the adjudicative tribunal. O. Reg. 88/11, s. 2 (3).

Waiver of chair's recommendation, etc.

3. The prohibition in subsection 14 (4) of the Act against the appointment or reappointment of a member of an adjudicative tribunal without the recommendation of the chair of the tribunal is waived with respect to the appointment or reappointment of a person as chair of the adjudicative tribunal. O. Reg. 88/11, s. 3.

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 88/11, s. 4.

TAB 17

Business Plan — Contents, O Reg 89/11

Current version: in force since 2017-07-05

Link to the latest version ⁽ⁱ⁾: <https://canlii.ca/t/8p75>

Stable link to this version ⁽ⁱ⁾: <https://canlii.ca/t/52zgl>

Citation to this version: Business Plan — Contents, O Reg 89/11, <<https://canlii.ca/t/52zgl>> retrieved on 2025-10-28

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 89/11

BUSINESS PLAN — CONTENTS

Consolidation Period: From July 5, 2017 to the [e-Laws currency date](#).

Last amendment: O. Reg. 271/17.

This is the English version of a bilingual regulation.

Contents of business plan

1. (1) The prescribed period of time for a business plan, as required by subsection 12 (1) of the Act, is three years. O. Reg. 89/11, s. 1 (1).

(2) A business plan must contain the following:

1. A detailed description of the mandate of the adjudicative tribunal.
 2. The proposed budget of the adjudicative tribunal for the three-year period.
 3. The number of employees, expressed as full-time equivalents (FTEs), who are assigned as staff to the adjudicative tribunal at the beginning of the three-year period.
 4. The performance measures to be used by the adjudicative tribunal to evaluate its effectiveness and efficiency.
 5. The annual performance targets of the adjudicative tribunal for the three-year period. O. Reg. 89/11, s. 1 (2).
2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 89/11, s. 2.

TAB 18

Deadlines re Accountability Documents, O Reg 90/11

Current version: in force since 2017-07-05

Link to the latest version ⓘ: <https://canlii.ca/t/8p76>

Stable link to this version ⓘ: <https://canlii.ca/t/52zgr>

Citation to this version: Deadlines re Accountability Documents, O Reg 90/11, <<https://canlii.ca/t/52zgr>> retrieved on 2025-10-28

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 90/11

DEADLINES RE ACCOUNTABILITY DOCUMENTS

Consolidation Period: From July 5, 2017 to the [e-Laws currency date](#).

Last amendment: O. Reg. 272/17.

This is the English version of a bilingual regulation.

Definitions

1. In this Regulation,

“start-up date” means, in relation to an adjudicative tribunal that is not part of a cluster, the later of,

- (a) the date on which the legislative provision establishing the tribunal comes into force, and
- (b) the effective date of the appointment of the initial chair of the tribunal; (“date d’entrée en vigueur”)

“start-up date” means, in relation to a cluster, the later of,

- (a) the date on which the provision of the regulation designating the cluster comes into force, and
- (b) the effective date of the appointment of the initial executive chair of the cluster. (“date d’entrée en vigueur”)

O. Reg. 90/11, s. 1.

Deadline re public accountability documents

2. (1) An adjudicative tribunal that is not part of a cluster shall develop its public accountability documents no later than 12 months after the start-up date for the tribunal. O. Reg. 90/11, s. 2 (1).

(2) A cluster shall jointly develop its public accountability documents no later than 12 months after the start-up date for the cluster. O. Reg. 90/11, s. 2 (2).

(3) Despite subsections (1) and (2), if an adjudicative tribunal is prescribed or a cluster is designated before the date on which this Regulation comes into force, the deadline for developing the public accountability documents is 12 months after the date on which this Regulation comes into force. O. Reg. 90/11, s. 2 (3).

Deadline re certain governance accountability documents

3. (1) An adjudicative tribunal that is not part of a cluster shall enter into a memorandum of understanding and develop a business plan no later than 12 months after the start-up date for the tribunal. O. Reg. 90/11, s. 3 (1).

(2) A cluster shall enter into a memorandum of understanding and develop a business plan no later than 12 months after the start-up date for the cluster. O. Reg. 90/11, s. 3 (2).

(3) Despite subsections (1) and (2), if an adjudicative tribunal is prescribed or a cluster is designated before the date on which this Regulation comes into force, the deadline for entering into a memorandum of understanding and developing a business plan is 12 months after the date on which this Regulation comes into force. O. Reg. 90/11, s. 3 (3).

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 90/11, s. 4.

TAB 19

Ethics Plan - Contents, O Reg 91/11

Current version: in force since 2011-04-01

Link to the latest version ⓘ: <https://canlii.ca/t/8p77>

Stable link to this version ⓘ: <https://canlii.ca/t/l1sc>

Citation to this version: Ethics Plan - Contents, O Reg 91/11, <<https://canlii.ca/t/l1sc>> retrieved on 2025-10-28

Currency: Last updated from the [e-Laws](#) site on 2025-10-21

Adjudicative Tribunals Accountability, Governance And Appointments Act, 2009
Loi de 2009 sur la responsabilisation et la gouvernance des tribunaux décisionnels et les nominations à ces tribunaux

ONTARIO REGULATION 91/11

ETHICS PLAN — CONTENTS

Consolidation Period: From April 1, 2011 to the [e-Laws currency date](#).

No amendments.

This Regulation is made in English only.

Contents of ethics plans

1. The ethics plan required by [subsection 6 \(1\)](#) of the [Act](#) must contain the following:
 1. A description of the practices and procedures for ensuring that members are familiar with the requirements of Part IV (Ethical Conduct) and Part V (Political Activity) of the [Public Service of Ontario Act, 2006](#). The practices and procedures must include an annual notice for members containing information about the requirements of Parts IV and V of that Act.
 2. A description of the practices and procedures for ensuring that members are familiar with the code of conduct that forms part of the member accountability

framework for the adjudicative tribunal. The practices and procedures must include an annual notice for members containing information about the code of conduct. O. Reg. 91/11, s. 1.

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 91/11, s. 2.

TAB 20

Tribunal Adjudicative Records Act, 2019, SO 2019, c 7, Sch 60

Current version: in force since 2019-07-01

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Tribunal Adjudicative Records Act, 2019

S.O. 2019, CHAPTER 7
SCHEDULE 60

Consolidation Period: From July 1, 2019 to the e-Laws currency date.

Last amendment: 2019, c. 7, Sched. 17, s. 171 (4).

Interpretation

1 (1) In this Act,

“adjudicative record” means a record referred to in subsection (2); (“document décisionnel”)

“confidentiality order” means an order made by a tribunal under subsection 2 (2); (“ordonnance de confidentialité”)

“tribunal” means an adjudicative tribunal prescribed by the regulations made under this Act. (“tribunal”)

Adjudicative records

(2) Subject to subsection (3), the following are adjudicative records for the purposes of this Act:

1. An application or other document by which a proceeding before a tribunal is commenced.
2. A notice of a hearing before a tribunal.
3. A written submission filed with a tribunal in respect of a proceeding before the tribunal.
4. A document that has been admitted as evidence at a hearing of a tribunal or otherwise relied upon by a tribunal in making a decision or an order.
5. A transcript of oral evidence given at a hearing of a tribunal.
6. A decision or an order made by a tribunal and any reasons for the decision or order.
7. A docket or schedule of hearings of a tribunal.
8. A register of proceedings before a tribunal.

9. Any other record that relates to a proceeding before a tribunal and that is prescribed by the regulations made under this Act.

Excluded records

(3) The following are not adjudicative records for the purposes of this Act:

1. Personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a member of a tribunal in connection with a proceeding before the tribunal in which the member is presiding.
2. Personal notes created by or for a person appointed by a tribunal to help resolve a matter in a proceeding before the tribunal by means of an alternative dispute resolution mechanism.
3. Records related to any attempt to resolve a matter in a proceeding before a tribunal by means of an alternative dispute resolution mechanism, unless the record forms part of a decision or an order of the tribunal.

Disposal of records

(4) Nothing in this Act shall be interpreted as restricting a tribunal from disposing of any of its adjudicative records in accordance with its usual practices.

Adjudicative records public

2 (1) A tribunal shall make those adjudicative records in its possession that relate to proceedings commenced on or after the day this section comes into force available to the public in accordance with this Act, including any rules made under section 3.

Confidentiality orders

(2) A tribunal may, of its own motion or on the application of a person referred to in subsection (3), order that an adjudicative record or portion of an adjudicative record be treated as confidential and that it not be disclosed to the public if the tribunal determines that,

- (a) matters involving public security may be disclosed; or
- (b) intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

Who may apply

(3) The following persons may apply to the tribunal for a confidentiality order in respect of an adjudicative record:

1. A party to a proceeding to which the adjudicative record relates.
2. A person who would be affected by the disclosure of the information contained in the adjudicative record or a portion of the adjudicative record.

Scope of order

(4) A confidentiality order may apply to adjudicative records regardless of when the proceeding to which they relate was commenced.

Rules

3 (1) A tribunal may make rules governing procedures for providing access to adjudicative records and for obtaining a confidentiality order.

Legislation Act, 2006, Part III

(2) Part III (Regulations) of the *Legislation Act, 2006* does not apply to any rules made under this section.

Public access to rules

(3) A tribunal shall make any rules made under this section available to the public in English and in French.

Power to set, charge fees

4 A tribunal may, subject to the approval of the minister responsible for the administration of the part of the Act that establishes the tribunal, set and charge fees for providing access to adjudicative records.

Enforcement of confidentiality orders

5 (1) A certified copy of a confidentiality order may be filed in the Superior Court of Justice by,

- (a) the tribunal that made the order;
- (b) a party to a proceeding to which the order relates; or
- (c) a person who would be affected by the disclosure of the information contained in an adjudicative record or portion of an adjudicative record that is to be treated as confidential in accordance with the order.

Same

(2) On filing in the Superior Court of Justice, the confidentiality order shall be enforceable as if it were an order of that court.

Notice of filing

(3) A party or a person referred to in clause (1) (c) who files a confidentiality order shall notify the tribunal that made it within 10 days after the filing.

Protection from personal liability

6 (1) No action or other proceeding may be commenced against a member or an employee of a tribunal for an act or omission done or omitted by the member or the employee in good faith in the execution or intended execution of any duty or power under this Act. 2019, c. 7, Sched. 60, s. 6 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2019, c. 7, Sched. 60, s. 6 (2); 2019, c. 7, Sched. 17, s. 171 (4).

Conflict

7 In the event of a conflict between a provision of this Act and a provision of any other Act or a regulation made under another Act, the provision of this Act prevails unless the regulations made under this Act provide otherwise.

Regulations

8 The Lieutenant Governor in Council may make regulations,

- (a) prescribing adjudicative tribunals for the purposes of the definition of “tribunal” in subsection 1 (1);
- (b) prescribing additional records for the purposes of subsection 1 (2);
- (c) providing that a provision of another Act or of a regulation made under another Act prevails over a provision of this Act in the event of a conflict.

9 Omitted (amends, repeals or revokes other legislation).

10 Omitted (provides for coming into force of provisions of this Act).

11 Omitted (enacts short title of this Act).

TAB 21

General, O Reg 211/19

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Tribunal Adjudicative Records Act, 2019

ONTARIO REGULATION 211/19

GENERAL

Consolidation Period: From September 1, 2025 to the e-Laws currency date.

Last amendment: 204/25.

This is the English version of a bilingual regulation.

Tribunals

1. The adjudicative tribunals listed in Schedule 1 to this Regulation are prescribed for the purposes of the definition of “tribunal” in [subsection 1 \(1\)](#) of the [Act](#).

Conflict

2. The following provisions prevail over a provision of the Act in the event of a conflict:

1. [Subsections 87 \(7\) to \(10\)](#) and [section 227](#) of the [Child, Youth and Family Services Act, 2017](#).

2. [Subsections 29 \(17\) and \(18\)](#) and [38 \(4\) and \(5\)](#) and [sections 68 and 69](#) of the [Colleges Collective Bargaining Act, 2008](#).

3. [Subsection 123 \(2\)](#) of the [Employment Standards Act, 2000](#).

4. Subsection 116 (1) of the *Environmental Bill of Rights, 1993*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.
5. Subsection 174 (14) of the *Environmental Protection Act*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.
6. The provisions of any regulation made under section 16 of the *Financial Services Tribunal Act, 2017*.
7. Subsections 7 (13) and 63 (4) and section 119 of the *Labour Relations Act, 1995*.
8. Subsection 20 (2) and clauses 63 (1) (c) and (f) of the *Occupational Health and Safety Act*.
9. Subsection 21 (3) of the *Ontario Provincial Police Collective Bargaining Act, 2006*, in respect of the application of section 119 of the *Labour Relations Act, 1995*.
10. Subsection 32 (4) of the *Pay Equity Act*.

Note: On the day subsection 18 (2) of the *Pay Transparency Act, 2018* comes into force, section 2 of the Regulation is amended by adding the following paragraph: (See: O. Reg. 211/19, s. 3)

- 10.1 Subsection 18 (2) of the *Pay Transparency Act, 2018*.
11. Subsection 99 (1) of the *Provincial Offences Act*.
12. Subsection 4 (1) of the *School Boards Collective Bargaining Act, 2014*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.
3. Omitted (provides for amendments to this Regulation).
4. Omitted (provides for coming into force of provisions of this Regulation).

schedule 1

Prescribed tribunals

1. Agriculture, Food and Rural Affairs Appeal Tribunal.
2. Animal Care Review Board.
3. Assessment Review Board.
4. Building Code Commission.
5. Child and Family Services Review Board.
6. Revoked: O. Reg. 370/21, s. 1 (1).
7. Revoked: O. Reg. 667/21, s. 1.
8. Custody Review Board.

9. Revoked: O. Reg. 370/21, s. 1 (1).
 10. Financial Services Tribunal.
 11. Fire Safety Commission.
 12. Health Professions Appeal and Review Board.
 13. Health Services Appeal and Review Board.
 14. Human Rights Tribunal of Ontario.
 15. Landlord and Tenant Board.
 16. Licence Appeal Tribunal.
 - 17.-19. Revoked: O. Reg. 370/21, s. 1 (1).
 20. Normal Farm Practices Protection Board.
 21. Revoked: O. Reg. 204/25, s. 1.
 22. Ontario Labour Relations Board.
 - 22.1 Ontario Land Tribunal.
 23. Ontario Review Board.
 24. Ontario Securities Commission.
 25. Ontario Special Education Tribunal (English).
 26. Ontario Special Education Tribunal (French).
 27. Pay Equity Hearings Tribunal.
 28. Revoked: O. Reg. 370/21, s. 1 (1).
- O. Reg. 370/21, s. 1; O. Reg. 667/21, s. 1; O. Reg. 204/25, s. 1.

TAB 22

Licence Appeal Tribunal Act, 1999, SO 1999, c 12, Sch G

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Licence Appeal Tribunal Act, 1999

S.O. 1999, CHAPTER 12
SCHEDULE G

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: [2023, c. 23](#), Sched. 1, s. 114.

Definition

1 In this Act,

“Tribunal” means the Licence Appeal Tribunal. 1999, c. 12, Sched. G, s. 1.

Tribunal established

2 (1) There is hereby established a tribunal to be known in English as the Licence Appeal Tribunal and in French as Tribunal d’appel en matière de permis. 1999, c. 12, Sched. G, s. 2 (1).

Members

(2) The Tribunal shall consist of not fewer than three members. 1999, c. 12, Sched. G, s. 2 (2).

Appointment

(3) The Lieutenant Governor in Council shall appoint the members and designate the term of their appointment. 1999, c. 12, Sched. G, s. 2 (3).

Remuneration and expenses

(4) Each member of the Tribunal, other than a full-time member, shall receive the remuneration that the Lieutenant Governor in Council determines and reimbursement for the member's reasonable and necessary expenses incurred in attending meetings and in transacting the business of the Tribunal. 1999, c. 12, Sched. G, s. 2 (4).

Duties and powers

3 (1) The Tribunal shall hold the hearings and perform the other duties that are assigned to it by or under any Act or regulation. 1999, c. 12, Sched. G, s. 3 (1).

Powers

(2) Except as limited by this Act, the Tribunal has all the powers that are necessary or expedient for carrying out its duties. 1999, c. 12, Sched. G, s. 3 (2).

Quorum

4 (1) One member of the Tribunal constitutes a quorum and may exercise all the powers of the Tribunal. 1999, c. 12, Sched. G, s. 4 (1).

Chair and vice-chair

(2) The Lieutenant Governor in Council shall designate one of the members as chair and may designate one or more other members as vice-chairs of the Tribunal. 1999, c. 12, Sched. G, s. 4 (2).

Duties of chair

(3) The chair shall have general supervision and direction over the conduct of the affairs of the Tribunal and, subject to subsection (4), shall arrange the sittings of the Tribunal and assign members to panels to conduct hearings as circumstances require. 1999, c. 12, Sched. G, s. 4 (3); 2011, c. 1, Sched. 5, s. 5 (1).

Composition of panel

(4) The panel that conducts a hearing shall include a member of the Tribunal who is a legally qualified medical practitioner if the hearing involves,

(a) an appeal of a suspension of a driver's licence under [section 50](#) of the *Highway Traffic Act*; and

(b) the appeal involves the medical condition or fitness to drive of the holder of the licence. 1999, c. 12, Sched. G, s. 4 (4).

Chair of panel

(5) The chair shall appoint a chair for each panel from the members sitting on the panel. 1999, c. 12, Sched. G, s. 4 (5).

Resolving deadlock

(6) If a panel of the Tribunal consists of two members and they do not agree on a decision, the decision of the chair of the panel shall be the decision of the panel. 1999, c. 12, Sched. G, s. 4 (6).

(7) REPEALED: 2011, c. 1, Sched. 5, s. 5 (2).

No personal liability

5 No action or other proceeding for damages shall be instituted against any member of the Tribunal or anyone appointed to the service of the Tribunal for any act done in good faith in the execution or intended execution of the person's duty or for any alleged neglect or default in the execution in good faith of the person's duty. 1999, c. 12, Sched. G, s. 5.

Hearings re liquor, cannabis or gaming

5.1 (1) This section applies to hearings held by the Tribunal under [section 14](#) of the *Alcohol and Gaming Commission of Ontario Act, 2019* or under the *Cannabis Licence Act, 2018*, the *Gaming Control Act, 1992*, the *Horse Racing Licence Act, 2015*, the *Liquor Licence and Control Act, 2019* or the *Vintners Quality Alliance Act, 1999*. 2018, c. 12, Sched. 2, s. 54 (1); 2019, c. 15, Sched. 1, s. 23 (1); 2019, c. 15, Sched. 22, s. 97 (1).

Parties

(2) The Registrar under the *Alcohol and Gaming Commission of Ontario Act, 2019*, the person who required the hearing and the other persons that the Tribunal specifies are parties to the hearing. 2015, c. 38, Sched. 9, s. 46 (2); 2018, c. 12, Sched. 2, s. 54 (2); 2019, c. 15, Sched. 1, s. 23 (2).

Notice

(3) The Tribunal shall give notice of the hearing to the parties in the manner it considers appropriate. 2011, c. 1, Sched. 1, s. 5 (1).

Jurisdiction

(4) The Tribunal has jurisdiction to determine all questions of fact or law that arise in matters before it. 2011, c. 1, Sched. 1, s. 5 (1).

Stay

(5) An order of the Tribunal takes effect immediately unless the order provides otherwise but if [section 11](#) allows for an appeal to the Divisional Court and such an appeal is made, that court may grant a stay of the order until the appeal has been disposed of. [2011, c. 1](#), Sched. 1, s. 5 (1).

Rules of Tribunal

6 (1) The Tribunal may make rules establishing procedures for hearings held by the Tribunal and the rights of parties to the hearings including,

(a) rules requiring that, despite any other Act, parties shall submit disagreements to mechanisms of alternate dispute resolution that are set out in the rules before they are entitled to a hearing before the Tribunal on the subject matter of the disagreement; and

(b) rules applicable if a member of the Tribunal conducting a hearing is unable to continue to conduct the hearing for any reason. 1999, c. 12, Sched. G, s. 6 (1); [2011, c. 1](#), Sched. 1, s. 5 (2).

Continuation of hearing

(2) A rule made under clause (1) (b) may provide for the continuation or termination of the hearing, with or without the consent of the parties, or the commencement of a fresh hearing by a panel differently composed if the initial hearing is terminated. 1999, c. 12, Sched. G, s. 6 (2).

Recording of evidence

(3) The Tribunal may make rules providing that the oral evidence given before the Tribunal at a hearing may be recorded if a party to the hearing so requests and pays the fee established by the Tribunal for that purpose. 1999, c. 12, Sched. G, s. 6 (3).

Special application

(4) A rule made under this section may be general or specific in its application and may apply differently to different hearings. 1999, c. 12, Sched. G, s. 6 (4).

Not regulations

(5) A rule made under this section shall not be deemed to be a regulation within the meaning of Part III (Regulations) of the [Legislation Act, 2006](#). 1999, c. 12, Sched. G, s. 6 (5); [2006, c. 21](#), Sched. F, s. 136 (1).

Conflict

(6) A rule made under this section does not prevail over any provision of this or any other Act, or a regulation made under this or any other Act, that sets out requirements for procedures for hearings held by the Tribunal or rights of parties to the hearings. 1999, c. 12, Sched. G, s. 6 (6).

Extension of time

7 Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under [section 11](#) or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time. 1999, c. 12, Sched. G, s. 7.

Frivolous or vexatious application

8 If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing

or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances. 1999, c. 12, Sched. G, s. 8.

Fees and charges

9 Subject to the approval of the Minister responsible for the administration of this Act, the Tribunal may establish fees or other charges to be paid by parties to hearings before the Tribunal. 1999, c. 12, Sched. G, s. 9.

Service of decisions and orders

10 The Tribunal shall send a copy of its final decision or order, including any reasons, to each party to a hearing, or to the person who represented the party. 2011, c. 1, Sched. 5, s. 5 (3).

Appeal

11 (1) Subject to subsections (2) to (6), a party to a proceeding before the Tribunal relating to a matter under any of the following Acts may appeal from its decision or order to the Divisional Court in accordance with the rules of court:

Bailiffs Act

Board of Funeral Services Act

Building Code Act, 1992

Cannabis Licence Act, 2018

Collection and Debt Settlement Services Act

Combative Sports Act, 2019

Condominium Management Services Act, 2015

Consumer Protection Act, 2002

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 11 \(1\)](#) of the Act is amended by striking out “[Consumer Protection Act, 2002](#)” and substituting “[Consumer Protection Act, 2023](#)”. (See: [2023, c. 23](#) Sched. 1, s. 114)

Consumer Reporting Act

Discriminatory Business Practices Act

Funeral, Burial and Cremation Services Act, 2002

Gaming Control Act, 1992

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 11 \(1\)](#) of the Act is amended by adding the following: (See: [2017, c. 5](#), Sched. 1, s. 79)

Home Inspection Act, 2017

Horse Racing Licence Act, 2015

Insurance Act

Liquor Licence and Control Act, 2019

Motor Vehicle Dealers Act, 2002

New Home Construction Licensing Act, 2017

Ontario Career Colleges Act, 2005

Ontario New Home Warranties Plan Act

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 11 \(1\)](#) of the Act is amended by striking out “[Ontario New Home Warranties Plan Act](#)”. (See: [2017, c. 33](#), Sched. 2, s. 78 (2))

Payday Loans Act, 2008

Private Security and Investigative Services Act, 2005

Note: On a day to be named by proclamation of the Lieutenant Governor, [subsection 11 \(1\)](#) of the Act is amended by adding the following: (See: [2017, c. 33](#), Sched. 2, s. 78 (1))

Protection for Owners and Purchasers of New Homes Act, 2017

Trust in Real Estate Services Act, 2002

Ticket Sales Act, 2017

Towing and Storage Safety and Enforcement Act, 2021

Travel Industry Act, 2002

Upholstered and Stuffed Articles Act

Vintners Quality Alliance Act, 1999

1999, c. 12, Sched. G, s. 11; [2002, c. 33, s. 143](#); [2004, c. 19, s. 14](#); [2005, c. 17, s. 49](#); [2005, c. 28, Sched. L, s. 59](#); [2005, c. 34, s. 55](#); [2006, c. 29, s. 63](#); [2008, c. 9, s. 80](#); [2011, c. 1, Sched. 1, s. 5 \(3, 4\)](#); [2013, c. 13, Sched. 1, s. 15](#); [2014, c. 9, Sched. 5, s. 5 \(1, 2\)](#); [2015, c. 38, Sched. 9, s. 46 \(3\)](#); [2015, c. 38, Sched. 13, s. 2 \(1\)](#); [2015, c. 28, Sched. 2, s. 81](#); [2017, c. 33, Sched. 1, s. 89](#); [2017, c. 33, Sched. 3, s. 38](#); [2018, c. 12, Sched. 2, s. 54 \(3\)](#); [2019, c. 7, Sched. 9, s. 52](#); [2019, c. 14, Sched. 10, s. 9](#); [2019, c. 15, Sched. 22, s. 97 \(2\)](#); [2020, c. 1, s. 34](#); [2020, c. 36, Sched. 12, s. 21](#); [2022, c. 2, Sched. 8, s. 1](#); [2023, c. 9, Sched. 29, s. 12.](#)

Certain appeals

(2) Subsections (3) to (5) apply to appeals of decisions made in respect of proceedings under the [Cannabis Licence Act, 2018](#), the [Gaming Control Act, 1992](#), the [Horse Racing Licence Act, 2015](#), the [Liquor Licence and Control Act, 2019](#) or the [Vintners Quality Alliance Act, 1999](#). [2018, c. 12, Sched. 2, s. 54 \(4\)](#); [2019, c. 15, Sched. 22, s. 97 \(3\)](#).

Question of law only

(3) An appeal may be made on a question of law only. [2011, c. 1](#), Sched. 1, s. 5 (5).

Registrar a party

(4) The Registrar under the [Alcohol and Gaming Commission of Ontario Act, 2019](#) is a party to the appeal. [2018, c. 12](#), Sched. 2, s. 54 (4); [2019, c. 15](#), Sched. 1, s. 23 (3).

Right to be heard

(5) The Minister responsible for administration of the Act under which the decision that is the subject of the appeal was made is entitled to be heard, by counsel or otherwise, on the appeal. [2018, c. 12](#), Sched. 2, s. 54 (4).

Insurance Act appeals — question of law only

(6) An appeal from a decision of the Tribunal relating to a matter under the [Insurance Act](#) may be made on a question of law only. [2014, c. 9](#), Sched. 5, s. 5 (3).

Regulations

12 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing rules of practice and procedure for proceedings before the Tribunal with respect to appeals to the Tribunal under the [Highway Traffic Act](#);

(b) governing transitional matters relating to hearings of matters under the [Racing Commission Act, 2000](#), as a result of the coming into force of the [Horse Racing Licence Act, 2015](#);

(c), (d) REPEALED: [2015, c. 38](#), Sched. 9, s. 46 (6);

(e) governing transitional matters relating to disputes in respect of statutory accident benefits as defined in [subsection 224 \(1\)](#) of the *Insurance Act* as a result of the coming into force of section 14 of Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*;

(f) REPEALED: [2019, c. 15](#), Sched. 22, s. 97 (4).

[2011, c. 1](#), Sched. 1, s. 5 (6); [2014, c. 9](#), Sched. 5, s. 6; [2015, c. 38](#), Sched. 9, s. 46 (6); 2015, c. 38, Sched. 13, s. 3; [2019, c. 15](#), Sched. 22, s. 97 (4).

Scope of regulations

(2) The prescribed rules may be of general or particular application. 1999, c. 12, Sched. G, s. 12 (2).

Conflict

(3) If the prescribed rules conflict with the *Statutory Powers Procedure Act* or any other Act or rules made under that Act or any other Act, the prescribed rules prevail. 1999, c. 12, Sched. G, s. 12 (3).

13-36 OMITTED (AMENDS OR REPEALS OTHER ACTS). 1999, c. 12, Sched. G, ss. 13-36.

37 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1999, c. 12, Sched. G, s. 37.

38 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1999, c. 12, Sched. G, s. 38.

TAB 23

Statutory Powers Procedure Act, RSO 1990, c S.22

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Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From July 1, 2025 to the e-Laws currency date.

Last amendment: [2024, c. 28](#), Sched. 25, s. 1, 2.

Interpretation

1 (1) In this Act,

“electronic hearing” means a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another; (“audience électronique”)

“hearing” means a hearing in any proceeding; (“audience”)

“licence” includes any permit, certificate, approval, registration or similar form of permission required by law; (“autorisation”)

“municipality” has the same meaning as in the *Municipal Affairs Act*; (“municipalité”)

“oral hearing” means a hearing at which the parties or their representatives attend before the tribunal in person; (“audience orale”)

“proceeding” means a proceeding to which this Act applies; (“instance”)

“representative” means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding; (“représentant”)

“statutory power of decision” means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; (“compétence légale de décision”)

“tribunal” means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute; (“tribunal”)

“written hearing” means a hearing held by means of the exchange of documents, whether in written form or by electronic means. (“audience écrite”) R.S.O. 1990, c. S.22, s. 1 (1); 1994, c. 27, s. 56 (1-3); 2002, c. 17, Sched. F, Table; 2006, c. 21, Sched. C, s. 134 (1, 2).

Meaning of “person” extended

(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to a proceeding in the exercise of a statutory power of decision under the statute conferring the power shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties. R.S.O. 1990, c. S.22, s. 1 (2).

Liberal construction of Act and rules

2 This Act, and any rule made by a tribunal under *subsection 17.1 (4)* or *section 25.1*, shall be liberally construed to secure the just, most expeditious

and cost-effective determination of every proceeding on its merits. 1999, c. 12, Sched. B, s. 16 (1); 2006, c. 19, Sched. B, s. 21 (1).

Application of Act

3 (1) Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. R.S.O. 1990, c. S.22, s. 3 (1); 1994, c. 27, s. 56 (5).

Where Act does not apply

(2) This Act does not apply to a proceeding,

- (a) before the Assembly or any committee of the Assembly;
- (b) in or before,
 - (i) the Court of Appeal,
 - (ii) the Superior Court of Justice,
 - (iii) the Ontario Court of Justice,
 - (iv) the Family Court of the Superior Court of Justice,
 - (v) the Small Claims Court, or
 - (vi) a justice of the peace;
- (c) to which the [Rules of Civil Procedure](#) apply;
- (d) before an arbitrator to which the [Arbitration Act, 1991](#) or the [Labour Relations Act, 1995](#) applies;
- (e) at a coroner's inquest;
- (f) of a commission appointed under the [Public Inquiries Act, 2009](#);
- (g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he or she may have power to make; or
- (h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned. R.S.O. 1990, c. S.22, s. 3 (2); 1994, c. 27, s. 56 (6); 2006, c. 19, Sched. C, s. 1 (1, 2, 4); 2009, c. 33, Sched. 6, s. 87; 2021, c. 25, Sched. 27, s. 1.

Waiver

Waiver of procedural requirement

4 (1) Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal. 1997, c. 23, s. 13 (1).

Same, rules

(2) Any provision of a tribunal's rules made under [section 25.1](#) may be waived in accordance with the rules. 1994, c. 27, s. 56 (7).

Disposition without hearing

4.1 If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise. 1997, c. 23, s. 13 (2).

Panels, certain matters

4.2 (1) A procedural or interlocutory matter in a proceeding may be heard and determined by a panel consisting of one or more members of the tribunal, as assigned by the chair of the tribunal. 1994, c. 27, s. 56 (8).

Assignments

(2) In assigning members of the tribunal to a panel, the chair shall take into consideration any requirement imposed by another Act or a regulation that applies to the proceeding that the tribunal be representative of specific interests. 1997, c. 23, s. 13 (3).

Decision of panel

(3) The decision of a majority of the members of a panel, or their unanimous decision in the case of a two-member panel, is the tribunal's decision. 1994, c. 27, s. 56 (8).

Panel of one, reduced panel

Panel of one

4.2.1 (1) The chair of a tribunal may decide that a proceeding be heard by a panel of one person and assign the person to hear the proceeding unless there is a statutory requirement in another Act that the proceeding be heard by a panel of more than one person.

Reduction in number of panel members

(2) Where there is a statutory requirement in another Act that a proceeding be heard by a panel of a specified number of persons, the chair of the tribunal may assign to the panel one person or any lesser number of persons than the number specified in the other Act if all parties to the proceeding consent. 1999, c. 12, Sched. B, s. 16 (2).

Expiry of term

4.3 If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose. 1997, c. 23, s. 13 (4).

Incapacity, failure to complete hearing or make decision

Incapacity, panel of one

4.4 (1) In the case of a panel of one person, if the person dies or is or appears to be, for any other reason, unable to complete a hearing or to make a decision, the chair of the tribunal may, on a party's motion to the tribunal or on the chair's own initiative, assign another panel to complete the hearing or make a decision in the person's place. [2024, c. 28](#), Sched. 25, s. 1.

Incapacity, panel of more than one

(2) In the case of a panel of more than one person, if a member of the panel dies or is unable for any other reason to complete a hearing or to participate in a decision, the remaining member or members may complete the hearing or make a decision. [2024, c. 28](#), Sched. 25, s. 1.

Failure to meet reasonable time frame

(3) If the chair of the tribunal is of the opinion that a panel has failed to complete a hearing or make a decision within a reasonable time, the chair may specify a deadline by which the panel must complete the hearing or make a decision. [2024, c. 28](#), Sched. 25, s. 1.

Same

(4) For the purposes of subsection (3), the chair of the tribunal,
(a) shall consider,

- (i) the guidelines established by the tribunal under [section 16.2](#), and
 - (ii) the service standard policy developed by the tribunal under [section 5](#) of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, if applicable; and
- (b) may consider any other matter that, in the chair's opinion, is relevant in the circumstances. [2024, c. 28](#), Sched. 25, s. 1.

Failure to meet specified deadline

(5) If a panel fails to meet a deadline specified under subsection (3), the chair of the tribunal may, on a party's motion to the tribunal or on the chair's own initiative, assign another panel to complete the hearing or make a decision in the first panel's place. [2024, c. 28](#), Sched. 25, s. 1.

If assigned to another panel

- (6) The panel assigned under subsection (1) or (5) shall determine whether to,
- (a) continue the hearing or make a decision on the basis of the existing evidentiary record, subject to subsection (8); or
 - (b) rehear the proceeding. [2024, c. 28](#), Sched. 25, s. 1.

Same, submissions

(7) If the panel permits, the parties to the proceeding may make submissions on the determination to be made by the panel under subsection (6). [2024, c. 28](#), Sched. 25, s. 1.

Same, powers

(8) Despite clause (6) (a), the panel may, during or after the hearing, recall a witness or require further evidence. [2024, c. 28](#), Sched. 25, s. 1.

Other Acts and regulations

(9) This section is subject to any other Act or regulation that applies to the proceeding. [2024, c. 28](#), Sched. 25, s. 1.

Decision not to process commencement of proceeding

4.5 (1) Subject to subsection (3), upon receiving documents relating to the commencement of a proceeding, a tribunal or its administrative staff may

decide not to process the documents relating to the commencement of the proceeding if,

- (a) the documents are incomplete;
- (b) the documents are received after the time required for commencing the proceeding has elapsed;
- (c) the fee required for commencing the proceeding is not paid; or
- (d) there is some other technical defect in the commencement of the proceeding.

Notice

(2) A tribunal or its administrative staff shall give the party who commences a proceeding notice of its decision under subsection (1) and shall set out in the notice the reasons for the decision and the requirements for resuming the processing of the documents.

Rules under [s. 25.1](#)

(3) A tribunal or its administrative staff shall not make a decision under subsection (1) unless the tribunal has made rules under [section 25.1](#) respecting the making of such decisions and those rules shall set out,

- (a) any of the grounds referred to in subsection (1) upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of a proceeding; and
- (b) the requirements for the processing of the documents to be resumed.

Continuance of provisions in other statutes

(4) Despite [section 32](#), nothing in this section shall prevent a tribunal or its administrative staff from deciding not to process documents relating to the commencement of a proceeding on grounds that differ from those referred to in subsection (1) or without complying with subsection (2) or (3) if the tribunal or its staff does so in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Dismissal of proceeding without hearing

4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

- (a) the proceeding is frivolous, vexatious or is commenced in bad faith;

- (b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or
- (c) some aspect of the statutory requirements for bringing the proceeding has not been met.

Notice

(2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,

- (a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or
- (b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.

Same

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Right to make submissions

(4) A party who receives a notice under subsection (2) may make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Dismissal

(5) A tribunal shall not dismiss a proceeding under this section until it has given notice under subsection (2) and considered any submissions made under subsection (4).

Rules

(6) A tribunal shall not dismiss a proceeding under this section unless it has made rules under [section 25.1](#) respecting the early dismissal of proceedings and those rules shall include,

- (a) any of the grounds referred to in subsection (1) upon which a proceeding may be dismissed;
- (b) the right of the parties who are entitled to receive notice under subsection (2) to make submissions with respect to the dismissal; and
- (c) the time within which the submissions must be made.

Continuance of provisions in other statutes

(7) Despite [section 32](#), nothing in this section shall prevent a tribunal from dismissing a proceeding on grounds other than those referred to in subsection (1) or without complying with subsections (2) to (6) if the tribunal dismisses the proceeding in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Classifying proceedings

4.7 A tribunal may make rules under [section 25.1](#) classifying the types of proceedings that come before it and setting guidelines as to the procedural steps or processes (such as preliminary motions, pre-hearing conferences, alternative dispute resolution mechanisms, expedited hearings) that apply to each type of proceeding and the circumstances in which other procedures may apply. 1999, c. 12, Sched. B, s. 16 (3).

Alternative dispute resolution

4.8 (1) A tribunal may direct the parties to a proceeding to participate in an alternative dispute resolution mechanism for the purposes of resolving the proceeding or an issue arising in the proceeding if,

- (a) it has made rules under [section 25.1](#) respecting the use of alternative dispute resolution mechanisms; and
- (b) all parties consent to participating in the alternative dispute resolution mechanism.

Definition

(2) In this section,

“alternative dispute resolution mechanism” includes mediation, conciliation, negotiation or any other means of facilitating the resolution of issues in dispute.

Rules

(3) A rule under [section 25.1](#) respecting the use of alternative dispute resolution mechanisms shall include procedural guidelines to deal with the following:

1. The circumstances in which a settlement achieved by means of an alternative dispute resolution mechanism must be reviewed and approved by the tribunal.

2. Any requirement, statutory or otherwise, that there be an order by the tribunal.

Mandatory alternative dispute resolution

(4) A rule under subsection (3) may provide that participation in an alternative dispute resolution mechanism is mandatory or that it is mandatory in certain specified circumstances.

Person appointed to mediate, etc.

(5) A rule under subsection (3) may provide that a person appointed to mediate, conciliate, negotiate or help resolve a matter by means of an alternative dispute resolution mechanism be a member of the tribunal or a person independent of the tribunal. However, a member of the tribunal who is so appointed with respect to a matter in a proceeding shall not subsequently hear the matter if it comes before the tribunal unless the parties consent.

Continuance of provisions in other statutes

(6) Despite [section 32](#), nothing in this section shall prevent a tribunal from directing parties to a proceeding to participate in an alternative dispute resolution mechanism even though the requirements of subsections (1) to (5) have not been met if the tribunal does so in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Mediators, etc.: not compellable, notes not evidence

Mediators, etc., not compellable

4.9 (1) No person employed as a mediator, conciliator or negotiator or otherwise appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism shall be compelled to give testimony or produce documents in a proceeding before the tribunal or in a civil proceeding with respect to matters that come to his or her knowledge in the course of exercising his or her duties under this or any other Act.

Evidence in civil proceedings

(2) No notes or records kept by a mediator, conciliator or negotiator or by any other person appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism under this or any

other Act are admissible in a civil proceeding. 1999, c. 12, Sched. B, s. 16 (3).

Parties

5. The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding. R.S.O. 1990, c. S.22, s. 5.

Written hearings

5.1 (1) A tribunal whose rules made under [section 25.1](#) deal with written hearings may hold a written hearing in a proceeding. 1997, c. 23, s. 13 (6).

Exception

(2) The tribunal shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so.

Same

(2.1) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters. 1999, c. 12, Sched. B, s. 16 (4).

Documents

(3) In a written hearing, all the parties are entitled to receive every document that the tribunal receives in the proceeding. 1994, c. 27, s. 56 (10).

Electronic hearings

5.2 (1) A tribunal whose rules made under [section 25.1](#) deal with electronic hearings may hold an electronic hearing in a proceeding. 1997, c. 23, s. 13 (7).

Exception

(2) The tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.

Same

(3) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters.

Participants to be able to hear one another

(4) In an electronic hearing, all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing. 1994, c. 27, s. 56 (10).

Different kinds of hearings in one proceeding

5.2.1 A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings. 1997, c. 23, s. 13 (8).

Pre-hearing conferences

5.3 (1) If the tribunal's rules made under [section 25.1](#) deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

- (a) the settlement of any or all of the issues;
- (b) the simplification of the issues;
- (c) facts or evidence that may be agreed upon;
- (d) the dates by which any steps in the proceeding are to be taken or begun;
- (e) the estimated duration of the hearing; and
- (f) any other matter that may assist in the just and most expeditious disposition of the proceeding. 1994, c. 27, s. 56 (11); 1997, c. 23, s. 13 (9).

Other Acts and regulations

(1.1) The tribunal's power to direct the parties to participate in a pre-hearing conference is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (10).

Who presides

(2) The chair of the tribunal may designate a member of the tribunal or any other person to preside at the pre-hearing conference.

Orders

(3) A member who presides at a pre-hearing conference may make such orders as he or she considers necessary or advisable with respect to the conduct of the proceeding, including adding parties.

Disqualification

(4) A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent. 1994, c. 27, s. 56 (11).

Application of s. 5.2

(5) [Section 5.2](#) applies to a pre-hearing conference, with necessary modifications. 1997, c. 23, s. 13 (10).

Disclosure

5.4 (1) If the tribunal's rules made under [section 25.1](#) deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

- (a) the exchange of documents;
- (b) the oral or written examination of a party;
- (c) the exchange of witness statements and reports of expert witnesses;
- (d) the provision of particulars;
- (e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Notice of hearing

6 (1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

Statutory authority

(2) A notice of a hearing shall include a reference to the statutory authority under which the hearing will be held.

Oral hearing

- (3) A notice of an oral hearing shall include,
- (a) a statement of the time, place and purpose of the hearing; and
 - (b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Written hearing

- (4) A notice of a written hearing shall include,
- (a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;
 - (b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;
 - (c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13); 1997, c. 23, s. 13 (13); 1999, c. 12, Sched. B, s. 16 (5).

Electronic hearing

- (5) A notice of an electronic hearing shall include,
- (a) a statement of the time and purpose of the hearing, and details about the manner in which the hearing will be held;
 - (b) a statement that the only purpose of the hearing is to deal with procedural matters, if that is the case;
 - (c) if clause (b) does not apply, a statement that the party notified may, by satisfying the tribunal that holding the hearing as an electronic hearing is likely to cause the party significant prejudice, require the tribunal to hold the hearing as an oral hearing, and an indication of the procedure to be followed for that purpose; and
 - (d) a statement that if the party notified neither acts under clause (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party

will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Effect of non-attendance at hearing after due notice

7 (1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. R.S.O. 1990, c. S.22, s. 7; 1994, c. 27, s. 56 (14).

Same, written hearings

(2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under [clause 6 \(4\)](#) (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

Same, electronic hearings

(3) Where notice of an electronic hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under [clause 6 \(5\)](#) (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (15).

Where character, etc., of a party is in issue

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. R.S.O. 1990, c. S.22, s. 8.

Hearings to be public; maintenance of order

Hearings to be public, exceptions

9 (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,

- (a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public.
R.S.O. 1990, c. S.22, s. 9 (1); 1994, c. 27, s. 56 (16).

Written hearings

(1.1) In a written hearing, members of the public are entitled to reasonable access to the documents submitted, unless the tribunal is of the opinion that clause (1) (a) or (b) applies. 1994, c. 27, s. 56 (17).

Electronic hearings

(1.2) An electronic hearing shall be open to the public unless the tribunal is of the opinion that,

(a) it is not practical to hold the hearing in a manner that is open to the public; or

(b) clause (1) (a) or (b) applies. 1997, c. 23, s. 13 (14).

Maintenance of order at hearings

(2) A tribunal may make such orders or give such directions at an oral or electronic hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

R.S.O. 1990, c. S.22, s. 9 (2); 1994, c. 27, s. 56 (18).

Proceedings involving similar questions

9.1 (1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may,

(a) combine the proceedings or any part of them, with the consent of the parties;

(b) hear the proceedings at the same time, with the consent of the parties;

- (c) hear the proceedings one immediately after the other; or
- (d) stay one or more of the proceedings until after the determination of another one of them.

Exception

(2) Subsection (1) does not apply to proceedings held under [section 21](#) of the *Ontario Land Tribunal Act, 2021*. 1994, c. 27, s. 56 (19); 2021, c. 4, Sched. 6, s. 91.

Same

- (3) Clauses (1) (a) and (b) do not apply to a proceeding if,
 - (a) any other Act or regulation that applies to the proceeding requires that it be heard in private;
 - (b) the tribunal is of the opinion that [clause 9 \(1\)](#) (a) or (b) applies to the proceeding. 1994, c. 27, s. 56 (19); 1997, c. 23, s. 13 (15).

Conflict, consent requirements

(4) The consent requirements of clauses (1) (a) and (b) do not apply if another Act or a regulation that applies to the proceedings allows the tribunal to combine them or hear them at the same time without the consent of the parties. 1997, c. 23, s. 13 (16).

Use of same evidence

(5) If the parties to the second-named proceeding consent, the tribunal may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time under clause (1) (b). 1994, c. 27, s. 56 (19).

Right to representation

10 A party to a proceeding may be represented by a representative. [2006, c. 21](#), Sched. C, s. 134 (3).

Examination of witnesses

- 10.1** A party to a proceeding may, at an oral or electronic hearing,
 - (a) call and examine witnesses and present evidence and submissions; and
 - (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues

in the proceeding. 1994, c. 27, s. 56 (20).

Rights of witnesses to representation

11 (1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal. 2006, c. 21, Sched. C, s. 134 (4).

Idem

(2) Where an oral hearing is closed to the public, the witness's representative is not entitled to be present except when that witness is giving evidence. R.S.O. 1990, c. S.22, s. 11 (2); 1994, c. 27, s. 56 (22); 2006, c. 21, Sched. C, s. 134 (5).

Summonses

12 (1) A tribunal may require any person, including a party, by summons,

- (a) to give evidence on oath or affirmation at an oral or electronic hearing; and
- (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at a hearing. R.S.O. 1990, c. S.22, s. 12 (1); 1994, c. 27, s. 56 (23).

Form and service of summons

(2) A summons issued under subsection (1) shall be in the prescribed form (in English or French) and,

- (a) where the tribunal consists of one person, shall be signed by him or her;
- (b) where the tribunal consists of more than one person, shall be signed by the chair of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal. 1994, c. 27, s. 56 (24).

Same

(3) The summons shall be served personally on the person summoned. 1994, c. 27, s. 56 (24).

Fees and allowances

(3.1) The person summoned is entitled to receive the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice. 1994, c. 27, s. 56 (24); 2006, c. 19, Sched. C, s. 1 (1).

Bench warrant

(4) A judge of the Superior Court of Justice may issue a warrant against a person if the judge is satisfied that,

- (a) a summons was served on the person under this section;
- (b) the person has failed to attend or to remain in attendance at the hearing (in the case of an oral hearing) or has failed otherwise to participate in the hearing (in the case of an electronic hearing) in accordance with the summons; and
- (c) the person's attendance or participation is material to the ends of justice. 1994, c. 27, s. 56 (25); 2006, c. 19, Sched. C, s. 1 (1).

Same

(4.1) The warrant shall be in the prescribed form (in English or French), directed to any police officer, and shall require the person to be apprehended anywhere within Ontario, brought before the tribunal forthwith and,

- (a) detained in custody as the judge may order until the person's presence as a witness is no longer required; or
- (b) in the judge's discretion, released on a recognizance, with or without sureties, conditioned for attendance or participation to give evidence. 1994, c. 27, s. 56 (25).

Proof of service

(5) Service of a summons may be proved by affidavit in an application to have a warrant issued under subsection (4). 1994, c. 27, s. 56 (26).

Certificate of facts

(6) Where an application to have a warrant issued is made on behalf of a tribunal, the person constituting the tribunal or, if the tribunal consists of more than one person, the chair of the tribunal may certify to the judge the facts relied on to establish that the attendance or other participation of the

person summoned is material to the ends of justice, and the judge may accept the certificate as proof of the facts. 1994, c. 27, s. 56 (26).

Same

(7) Where the application is made by a party to the proceeding, the facts relied on to establish that the attendance or other participation of the person is material to the ends of justice may be proved by the party's affidavit. 1994, c. 27, s. 56 (26).

Contempt proceedings

13 (1) Where any person without lawful excuse,

(a) on being duly summoned under [section 12](#) as a witness at a hearing makes default in attending at the hearing; or

(b) being in attendance as a witness at an oral hearing or otherwise participating as a witness at an electronic hearing, refuses to take an oath or to make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his or her power or control legally required by the tribunal to be produced by him or her or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. S.22, s. 13; 1994, c. 27, s. 56 (27).

Same

(2) Subsection (1) also applies to a person who,

(a) having objected under [clause 6 \(4\)](#) (b) to a hearing being held as a written hearing, fails without lawful excuse to participate in the oral or electronic hearing of the matter; or

(b) being a party, fails without lawful excuse to attend a pre-hearing conference when so directed by the tribunal. 1997, c. 23, s. 13 (17).

Protection for witnesses

14 (1) A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. R.S.O. 1990, c. S.22, s. 14 (1); 1994, c. 27, s. 56 (28);. [2021, c. 25](#), Sched. 27, s. 2.

(2) REPEALED: 1994, c. 27, s. 56 (29).

Evidence

What is admissible in evidence at a hearing

15 (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

- (2) Nothing is admissible in evidence at a hearing,
- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
 - (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4) Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. R.S.O. 1990, c. S.22, s. 15.

Use of previously admitted evidence

15.1 (1) The tribunal may treat previously admitted evidence as if it had been admitted in a proceeding before the tribunal, if the parties to the proceeding consent. 1994, c. 27, s. 56 (30).

Definition

(2) In subsection (1),

“previously admitted evidence” means evidence that was admitted, before the hearing of the proceeding referred to in that subsection, in any other proceeding before a court or tribunal, whether in or outside Ontario.

Additional power

(3) This power conferred by this section is in addition to the tribunal’s power to admit evidence under [section 15](#). 1997, c. 23, s. 13 (18).

Witness panels

15.2 A tribunal may receive evidence from panels of witnesses composed of two or more persons, if the parties have first had an opportunity to make submissions in that regard. 1994, c. 27, s. 56 (31).

Notice of facts and opinions

16 A tribunal may, in making its decision in any proceeding,

- (a) take notice of facts that may be judicially noticed; and
- (b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

R.S.O. 1990, c. S.22, s. 16.

Interim decisions and orders

16.1 (1) A tribunal may make interim decisions and orders.

Conditions

(2) A tribunal may impose conditions on an interim decision or order.

Reasons

(3) An interim decision or order need not be accompanied by reasons. 1994, c. 27, s. 56 (32).

Time frames

16.2 A tribunal shall establish and make publicly available guidelines setting out the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings. 1999, c. 12, Sched. B, s. 16 (6); [2024, c. 28](#), Sched. 25, s. 2.

Decision; interest

Decision

17 (1) A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party. R.S.O. 1990, c. S.22, s. 17; 1993, c. 27, Sched.

Interest

(2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated. 1994, c. 27, s. 56 (33).

Costs

17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of

another party's costs in a proceeding. 2006, c. 19, Sched. B, s. 21 (2).

Exception

- (2) A tribunal shall not make an order to pay costs under this section unless,
- (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
 - (b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Amount of costs

- (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Rules

- (4) A tribunal may make rules with respect to,
- (a) the ordering of costs;
 - (b) the circumstances in which costs may be ordered; and
 - (c) the amount of costs or the manner in which the amount of costs is to be determined. 2006, c. 19, Sched. B, s. 21 (2).

Same

- (5) Subsections 25.1 (3), (4), (5) and (6) apply with respect to rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Continuance of provisions in other statutes

- (6) Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on February 14, 2000. 2006, c. 19, Sched. B, s. 21 (2).

Submissions must be in writing

- (7) Despite sections 5.1, 5.2 and 5.2.1, submissions for a costs order, whether under subsection (1) or under an authority referred to in subsection (6), shall be made by way of written or electronic documents, unless a party satisfies

the tribunal that to do so is likely to cause the party significant prejudice. 2015, c. 23, s. 5.

(8), (9) REPEALED: 2015, c. 23, s. 5.

Notice of decision

18 (1) The tribunal shall send each party who participated in the proceeding, or the party's representative, a copy of its final decision or order, including the reasons if any have been given,

- (a) by regular lettermail;
- (b) by electronic transmission;
- (c) by telephone transmission of a facsimile; or
- (d) by some other method that allows proof of receipt, if the tribunal's rules made under [section 25.1](#) deal with the matter. 1994, c. 27, s. 56 (34); 1997, c. 23, s. 13 (19); 2006, c. 21, Sched. C, s. 134 (6).

Use of mail

(2) If the copy is sent by regular lettermail, it shall be sent to the most recent addresses known to the tribunal and shall be deemed to be received by the party on the fifth day after the day it is mailed. 1994, c. 27, s. 56 (34).

Use of electronic or telephone transmission

(3) If the copy is sent by electronic transmission or by telephone transmission of a facsimile, it shall be deemed to be received on the day after it was sent, unless that day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday. 1994, c. 27, s. 56 (34).

Use of other method

(4) If the copy is sent by a method referred to in clause (1) (d), the tribunal's rules made under [section 25.1](#) govern its deemed day of receipt. 1994, c. 27, s. 56 (34).

Failure to receive copy

(5) If a party that acts in good faith does not, through absence, accident, illness or other cause beyond the party's control, receive the copy until a later date than the deemed day of receipt, subsection (2), (3) or (4), as the case may be, does not apply. 1994, c. 27, s. 56 (34).

Enforcement of orders

19 (1) A certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such. 1994, c. 27, s. 56 (35); 2006, c. 19, Sched. C, s. 1 (1).

Notice of filing

(2) A party who files an order under subsection (1) shall notify the tribunal within 10 days after the filing. 1994, c. 27, s. 56 (35).

Order for payment of money

(3) On receiving a certified copy of a tribunal's order for the payment of money, the sheriff shall enforce the order as if it were an execution issued by the Superior Court of Justice. 1994, c. 27, s. 56 (35); 2006, c. 19, Sched. C, s. 1 (1).

Record of proceeding

20 A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
- (b) the notice of any hearing;
- (c) any interlocutory orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefor, where reasons have been given. R.S.O. 1990, c. S.22, s. 20.

Adjournments

21 A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. S.22, s. 21.

Correction of errors

21.1 A tribunal may at any time correct a typographical error, error of calculation or similar error made in its decision or order. 1994, c. 27, s. 56 (36).

Power to review

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under [section 25.1](#) deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order. 1997, c. 23, s. 13 (20).

Time for review

(2) The review shall take place within a reasonable time after the decision or order is made.

Conflict

(3) In the event of a conflict between this section and any other Act, the other Act prevails. 1994, c. 27, s. 56 (36).

Administration of oaths

22 A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation. R.S.O. 1990, c. S.22, s. 22.

Powers re control of proceedings

Abuse of processes

23 (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. R.S.O. 1990, c. S.22, s. 23 (1).

Limitation on examination

(2) A tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (37).

Exclusion of representatives

(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser. 2006, c. 21, Sched. C, s. 134 (7).

Notice, etc.

24 (1) Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable,

(a) to give notice of the hearing; or

(b) to send its decision and the material mentioned in [section 18](#),

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

Contents of notice

(2) A notice of a decision given by a tribunal under clause (1) (b) shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained. R.S.O. 1990, c. S.22, s. 24.

Appeal operates as stay, exception

25. (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

(a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or

(b) the tribunal or the court or other appellate body orders otherwise. 1997, c. 23, s. 13 (21).

Idem

(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2 (1) of that Act is not an appeal within the meaning of subsection (1). R.S.O. 1990, c. S.22, s. 25 (2).

Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

- (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
- (b) establish rules under [section 25.1](#). 1999, c. 12, Sched. B, s. 16 (8).

Rules

25.1 (1) A tribunal may make rules governing the practice and procedure before it. 1994, c. 27, s. 56 (38).

Application

(2) The rules may be of general or particular application. 1994, c. 27, s. 56 (38).

Consistency with Acts

(3) The rules shall be consistent with this Act and with the other Acts to which they relate. 1994, c. 27, s. 56 (38).

Public access

(4) The tribunal shall make the rules available to the public in English and in French. 1994, c. 27, s. 56 (38).

Legislation Act, 2006, Part III

(5) Rules adopted under this section are not regulations as defined in Part III (Regulations) of the [Legislation Act, 2006](#). 1994, c. 27, s. 56 (38); [2006, c. 21](#), Sched. F, s. 136 (1).

Additional power

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act. 1994, c. 27, s. 56 (38).

Regulations

26 The Lieutenant Governor in Council may make regulations prescribing forms for the purpose of [section 12](#). 1994, c. 27, s. 56 (41).

Rules, etc., available to public

27 A tribunal shall make any rules or guidelines established under this or any other Act available for examination by the public. 1999, c. 12, Sched. B, s. 16 (9).

Substantial compliance

28 Substantial compliance with requirements respecting the content of forms, notices or documents under this Act or any rule made under this or any other Act is sufficient. 1999, c. 12, Sched. B, s. 16 (9).

Prohibition on photographs, recordings, dissemination

29 (1) No person shall,

(a) take or attempt to take a photograph, audio or video recording or other record capable of producing or transmitting visual or aural representations by electronic means or otherwise,

(i) at a hearing,

(ii) of any person entering or leaving the room in which a hearing is to be or has been convened, or

(iii) of any person in the building in which a hearing is to be or has been convened if there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing, other than in an area of the building designated by the tribunal for the purpose and with the person's consent;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, recording or record taken in contravention of clause (a); or

(c) broadcast, reproduce or otherwise disseminate an audio recording described in clause (2) (b). [2021, c. 25](#), Sched. 27, s. 3.

Non-application

(2) Subsection (1) does not apply with respect to,

(a) the unobtrusive making of notes or sketches of events at a hearing by a person;

(b) the making of an audio recording at a hearing, unobtrusively and in a manner authorized by the tribunal, by a representative, a party acting on

their own behalf or a journalist, for the sole purpose of supplementing or replacing notes; or

(c) subject to the authorization of the tribunal, any act referred to in subsection (1),

(i) if it is required for the presentation of evidence, the making of a record or any other purpose of the hearing,

(ii) with the consent of the parties and witnesses, or

(iii) in connection with any ceremonial proceeding. 2021, c. 25, Sched. 27, s. 3.

Offence and penalty

(3) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than \$25,000. 2021, c. 25, Sched. 27, s. 3.

30, 31 REPEALED: 1994, c. 27, s. 56 (40).

Conflict

32 Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith. R.S.O. 1990, c. S.22, s. 32; 1994, c. 27, s. 56 (42).

33, 34 REPEALED: 1994, c. 27, s. 56 (43).

FORMS 1, 2 REPEALED: 1994, C. 27, S. 56 (44).

TAB 24

Forms, O Reg 116/95

Current version: in force since 2015-09-01

Link to the latest version ⓘ: <https://canlii.ca/t/37q>

Stable link to this version ⓘ: <https://canlii.ca/t/52hqd>

Citation to this version: Forms, O Reg 116/95, <<https://canlii.ca/t/52hqd>> retrieved on 2025-10-28

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Statutory Powers Procedure Act

ONTARIO REGULATION 116/95

FORMS

Consolidation Period: From September 1, 2015 to the [e-Laws currency date](#).

Last amendment: 271/15.

This is the English version of a bilingual regulation.

1. A summons issued under subsection 12 (1) of the Act shall be in the form entitled “Summons”, labelled as Form 1 and dated November 2014, that is available on the website of the Government of Ontario Central Forms Repository. O. Reg. 116/95, s. 1; O. Reg. 271/15, s. 2.

2. A warrant issued under subsection 12 (4) of the Act shall be in the form entitled “Warrant for Arrest (Defaulting Witness)”, labelled as Form 2 and dated November 2014, that is available on the website of the Government of Ontario Central Forms Repository. O. Reg. 116/95, s. 2; O. Reg. 271/15, s. 3.

3. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 116/95, s. 3.

FORMS 1, 2 REVOKED: O. REG. 271/15, S. 4.

TAB 25

Code of Procedure

for appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

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PART I – INTRODUCTION

1. APPLICATION

- 1.01 This Code applies to appeals under the **Freedom of Information and Protection of Privacy Act (FIPPA)** and the **Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)**.

2. PURPOSE AND INTERPRETATION

- 2.01 Subject to the provisions of FIPPA and MFIPPA, this Code is to be broadly interpreted in the public interest to secure the most fair, just, and expeditious determination on the merits of every Appeal.
- 2.02 Where specific procedures are not set out in this Code, the IPC may do whatever is permitted by law to enable it to effectively and completely resolve an Appeal and to ensure compliance with the provisions of any decision or Order.
- 2.03 The IPC may, in its discretion, waive or vary any of its own procedures in accordance with section 17.
- 2.04 If the IPC omits to follow any procedure in this Code, it does not for that reason alone render an Appeal, or any step in an Appeal, invalid.
- 2.05 Any individual participating in an Appeal is entitled to accommodation in accordance with the Human Rights Code and should notify the IPC as soon as possible if accommodation is required.
- 2.06 Any individual participating in an Appeal may participate in IPC proceedings in English or French and Parties may provide written materials in either English or French.
- 2.07 During the IPC's consideration of an Appeal, Parties shall adhere to the IPC's **Public Code of Conduct**.

3. DEFINITIONS

3.01 In this Code, the following definitions apply:

Act (or collectively, **Acts**) means the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, whichever applies.

Adequacy of Decision Appeal means an Appeal in which the sole issue is whether the Institution's written decision complies with the requirements of the *Act*.

Adjudication means a stage of the appeal process in which an Adjudicator may conduct an Inquiry.

Adjudicator means the Commissioner or any other person to whom the Commissioner has delegated the power to conduct an Inquiry.

Affected Person means an individual, organization, or any other entity whose interests may be affected by an Appeal.

Appeal means a proceeding in which the IPC is asked to review a decision of an Institution concerning a Request under the *Act*.

Appellant means a person who appeals a decision of an Institution concerning a Request under the *Act*.

Code means the *Code of Procedure for Appeals under the Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*, together with its accompanying Policies and Practice Directions.

Commissioner means the Information and Privacy Commissioner of Ontario.

Constitutional Question means a question regarding the constitutional validity or applicability of: legislation, a regulation, or a by-law made under legislation; a rule of common law; or a claim for a remedy under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Deemed Refusal Appeal means an Appeal in which the sole issue is whether the Institution has responded to a Request within the time frame required by the *Act*.

Early Resolution means an early stage of the appeal process in which the IPC resolves or dismisses an Appeal or moves it to another stage of the appeal process.

Expedited Process means a single-person processing model that seeks to expedite the resolution of select types of Appeals in an efficient and effective manner, either by way of informal resolution or Inquiry.

Failure to Disclose Appeal means an Appeal in which the sole issue is whether the Institution has failed to disclose records in accordance with its decision to grant access.

Fee Appeal means an Appeal in which the sole issue is whether the Institution's fee, fee estimate, or fee waiver decision should be upheld.

FIPPA means the *Freedom of Information and Protection of Privacy Act*.

Index of Records means the documentation provided by an Institution when responding to a Request under the *Act* or when providing information to the IPC during an Appeal, and which includes:

- the name, type or description of each responsive record;
- the creation date of the record;
- whether the record was or is to be disclosed in whole or in part, or entirely withheld; and
- the exemption that has been claimed for each withheld record or part.

Inquiry means a formal process in which the IPC examines the issues raised by an Appeal and disposes of some or all of the issues by making an Order.

Institution means an organization subject to the *Act*.

Intake means the initial stage of the appeal process in which the IPC receives and reviews an Appeal for completeness and, if it meets the requirements of the *Act* and this Code, moves it to another stage in the appeal process.

IPC means the Office of the Information and Privacy Commissioner of Ontario.

Mediation means a stage of the appeal process in which a Mediator investigates the circumstances of an Appeal and attempts to effect a settlement of the issues.

Mediator means a person the Commissioner has authorized to investigate and try to settle an Appeal.

MFIPPA means the *Municipal Freedom of Information and Protection of Privacy Act*.

Notice of Appeal means a document prepared by the IPC confirming that an Appeal has been filed against an Institution's decision concerning a Request under the *Act*, and includes the names of the Parties, the IPC's file number, and the Institution's file number (if any).

Notice of Inquiry means a document prepared by the IPC setting out the issues in an Appeal and inviting Representations on those issues.

Order means a decision of an Adjudicator or other delegated decision-maker of the IPC disposing of some or all of the issues in an Appeal or making procedural determinations binding on one or more Parties.

Party (or collectively, **Parties**) means an individual or organization with a direct interest in an Appeal, including the Appellant, the Institution, another Institution, and the Third-Party Appellant.

Reasonable Search Appeal means an Appeal in which the sole issue is whether the Institution has conducted a reasonable search for records responsive to a Request.

Registrar means a person employed by the IPC who receives, reviews, and streams Appeals at the Intake stage.

Report of Mediator means a document prepared by a Mediator outlining background information and any issues in the Appeal which remain outstanding following an attempt to effect a settlement.

Representations means the documents, affidavits, other evidence and/or arguments a Party or Affected Person provides to an Adjudicator in an Inquiry, or as may otherwise be required by the IPC.

Request means the letter or form, together with the applicable fee, sent to an Institution by a person seeking access to a record or sent by an individual seeking access to or correction of their personal information under the *Act*.

Third-Party Appellant means an Affected Person who appeals a decision of an Institution regarding a Request by another person seeking access to a record.

Time Extension Appeal means an Appeal in which the sole issue is an Institution's decision to extend the time for responding to a Request beyond the time frame required by the *Act*.

Transfer Appeal means an Appeal in which the sole issue is an Institution's decision to transfer or forward the Request to another Institution.

PART II – THE APPEAL PROCESS

4. INITIATING AN APPEAL

- 4.01 A person who has made a Request under the *Act* may appeal any decision of the Institution concerning the Request.
- 4.02 An Affected Person who is notified by an Institution of a Request under the *Act* may appeal a decision by the Institution to grant the Request in whole or in part.
- 4.03 Where a person has made a Request, and the Institution does not give the person notice of its decision within the time frame required by the *Act*, the Institution is deemed to have refused the Request, and the person may submit a Deemed Refusal Appeal.
- 4.04 A person who wishes to appeal a decision shall send a written Appeal to the Registrar, by way of a completed **IPC Appeal form** or in any other form specified by the IPC.
- 4.05 The Appeal shall be made within thirty (30) days after the notice of decision was given by the Institution, in accordance with the *Act*.
- 4.06 An Appeal filed beyond the thirty (30) days' time limit for making an Appeal will not be accepted. However, if the time limit presents a "barrier" to the individual, as defined in the *Accessibility for Ontarians with Disabilities Act, 2005*, it may be extended for a period of time that is reasonably required in the circumstances to accommodate the individual for the purpose of making the Appeal.
- 4.07 The Appeal shall include:
 - (a) the Appellant's legal name, address, email address, and telephone number;
 - (b) the Institution's name and the file number assigned by the Institution to the Request (if any);
 - (c) a copy of the Institution's decision;
 - (d) a copy of the Request;
 - (e) a brief explanation of the basis for the Appeal; and
 - (f) an acknowledgment and agreement by the Appellant that the Appeal will be processed in accordance with this Code.
- 4.08 The failure of the Appellant to comply with the requirements of section 4.07 may result in the IPC refusing to accept an Appeal.

- 4.09 In accordance with the *Act*, an Appellant shall pay the applicable Appeal fee as set by regulation at the time the Appeal is made.
- (a) An Appellant who requested access to, or correction of, his or her own personal information must pay a fee of \$10.00.
 - (b) An Appellant who requested access to general information must pay a fee of \$25.00.
 - (c) A Third-Party Appellant who is appealing an Institution's decision to disclose information relating to the Third-Party Appellant, is not required to pay an Appeal fee.
 - (d) Appeal fees cannot be waived and are generally non-refundable.
- 4.10 The Appeal fee may be paid by credit card through the **IPC's online Appeal submission and payment portal**, or by cheque or money order payable to "The Minister of Finance."
- 4.11 An Appellant is not required to pay an additional Appeal fee for any subsequent Appeal from a decision of an Institution concerning the same Request.
- 4.12 Counsel or an agent may file an Appeal on behalf of an Appellant. The IPC may require the Appellant to complete a **form authorizing counsel or the agent** to act as such for the purpose of the Appeal.

5. INTAKE

- 5.01 The Registrar reviews all Appeals received in accordance with the *Act* and this Code and may refuse to accept an Appeal that does not meet the requirements of the *Act* or this Code.
- 5.02 The Registrar will determine at which stage of the appeal process an Appeal will begin and will stream the Appeal accordingly.
- 5.03 Unless an Appeal or part of an Appeal is dismissed for lack of jurisdiction under section 6.01, a Notice of Appeal will be sent to the Parties.
- 5.04 In accordance with section 11 and the statutory authority contained in the *Act*, the Registrar may request, and if necessary, order, that copies of the records at issue and/or an Index of Records be produced to the IPC.

6. EARLY RESOLUTION

- 6.01 An Appeal assigned to Early Resolution is examined to determine if it falls within the jurisdiction of the IPC. If an Appeal or part of an Appeal is found to be outside of the IPC's jurisdiction, it will be dismissed and a letter confirming the same will be sent to the Appellant.
- 6.02 At Early Resolution, the IPC will contact the Parties to attempt to reach an informal resolution.
- 6.03 If an informal resolution is not possible, the IPC will decide if the Appeal should be dismissed or moved to another stage of the appeal process.
- 6.04 Before deciding whether to dismiss an Appeal, the IPC may invite submissions from the Appellant and/or the Institution.
- 6.05 The IPC will give the Appellant and the Institution written notice of any decision to dismiss an Appeal at Early Resolution.
- 6.06 Where an Appeal is not dismissed or resolved at Early Resolution, the Appeal will move to another stage of the appeal process.

7. MEDIATION

- 7.01 At Mediation, the IPC may contact the Parties to investigate the circumstances of the Appeal and attempt to:
 - (a) effect a settlement of all of the issues in the Appeal; or
 - (b) if all of the issues in the Appeal cannot be settled in a timely fashion, narrow the issues that move to the next stage of the appeal process.
- 7.02 Mediation may be conducted on a fixed date, through telephone or a virtual meeting platform, as determined by the Mediator in consultation with the Parties.
- 7.03 Where an Appeal is not fully settled in Mediation, a Report of Mediator will be prepared and sent to the Parties at the end of the Mediation.
- 7.04 If a Party believes that the Report of Mediator contains an error or omission, the Party may ask the Mediator to amend the report. Such a request shall be made in writing within the time period stipulated by the Mediator.
- 7.05 Where the Mediator decides not to amend the Report of Mediator in response to a request of a Party, the Mediator will advise the relevant Party of that decision.

- 7.06 Where the Mediator decides to amend the Report of Mediator, either at the request of a Party or on the Mediator's own initiative, the Mediator will send a copy of the amended report to the Parties.
- 7.07 If the Mediator does not receive a request to amend the Report of Mediator by the stipulated time, and if the Mediator does not revise the report on the Mediator's own initiative, the report is final and will be moved to the next stage in the appeal process.
- 7.08 Where an Appeal is fully settled in Mediation, the IPC will close the Appeal and notify the Parties.
- 7.09 Where the IPC advises an Appellant that further Mediation is not possible to fully settle the matter, and the Appellant responds that they do not want the Appeal to move to Adjudication or another stage of the appeal process identified by the IPC, the Appeal will be closed.

8. ADJUDICATION

- 8.01 At Adjudication, an Adjudicator may conduct an Inquiry to dispose of some or all of the issues in the Appeal.
- 8.02 The Adjudicator may consider the information contained in the Report of Mediator to determine whether the circumstances warrant conducting an Inquiry.
- 8.03 Without limiting the Adjudicator's authority to decline to conduct an Inquiry for any other reason, the Adjudicator may decline to conduct an Inquiry where:
 - (a) there is no issue to adjudicate;
 - (b) the record is clearly not in the custody or under the control of an Institution;
 - (c) the IPC has previously issued a decision with respect to the same record;
 - (d) the request is for a record which will, by definition, be subject to an exemption;
 - (e) the mandatory exemption being claimed for a record has been upheld for this type of record in a comparable fact situation in previous IPC decisions;
 - (f) an exclusion in the Act will clearly apply to the record;
 - (g) the sole issue is reasonable search and the Appellant has provided no cogent basis for believing additional records may exist;

- (h) the issue is better dealt with in another forum; or
 - (i) the Appellant has failed or refused to engage in meaningful efforts to resolve the dispute prior to Adjudication, and the Adjudicator is of the opinion that such efforts would have resolved the Appeal or substantially narrowed the issues or the number of records, in which case the Adjudicator may decline to conduct an Inquiry in the areas identified.
- 8.04 Before deciding whether to dismiss an Appeal without conducting an Inquiry, the Adjudicator may invite submissions from the Appellant, the Institution, and/or any other Party.
 - 8.05 If the Adjudicator decides to dismiss an Appeal without conducting an Inquiry, the Adjudicator will give the Appellant and the Institution written notice of such decision with reasons.
 - 8.06 Generally, an Inquiry is conducted in writing by the Adjudicator. However, the Adjudicator may decide to conduct an oral Inquiry on a specified date as determined by the Adjudicator in consultation with the Parties.
 - 8.07 In an oral Inquiry, the Adjudicator will send a Notice of Inquiry to the Parties, and the Adjudicator may invite the Parties to make Representations either in person, by telephone, or through a virtual meeting platform, in the presence of the other Parties.
 - 8.08 If a Party is unavailable for an oral Inquiry on the date specified in the Notice of Inquiry, that Party must request an adjournment in writing to the Adjudicator, including the reasons for the request and alternate dates within the same general time period. The Adjudicator will rule on the request and may consult the other Parties before doing so.
 - 8.09 If a Party is not present to provide Representations on the date set for the oral Inquiry, the Adjudicator may make an Order in the absence of Representations from that Party.
 - 8.10 In a written Inquiry, the Adjudicator will send a Notice of Inquiry to the Party or Parties bearing the initial onus (the first Party), as determined by the Adjudicator, requesting Representations on the issues in the Appeal.
 - 8.11 Upon receipt of the first Party's Representations, the Adjudicator may, if they consider it necessary, send a Notice of Inquiry to the responding Party or Parties (the second Party), requesting Representations on the issues in the Appeal.
 - 8.12 Upon receipt of the second Party's Representations, the Adjudicator may, if they consider it necessary, send a Notice of Inquiry to the first Party, requesting Representations in reply.
 - 8.13 In an Appeal, the Adjudicator may send a Notice of Inquiry to an Affected Person seeking Representations on issues concerning the Affected Person.

- 8.14 The Adjudicator may also notify and invite Representations from any individual or organization who may be able to present useful information to assist in the disposition of an Appeal.
- 8.15 At any point during an Inquiry, the Adjudicator may request further particulars from any Party regarding their Representations.
- 8.16 The Adjudicator may provide some or all of the Representations received from a Party to the other Party or Parties in accordance with **Practice Direction Number 7**.
- 8.17 A Party who chooses to submit Representations to the IPC shall do so by the date specified in the Notice of Inquiry and shall follow the requirements set out in **Practice Direction Number 2**.
- 8.18 A Party seeking a time extension shall make this request in writing, in accordance with the procedure in section 17, which the Adjudicator may consider.
- 8.19 If any Party does not submit Representations by the date specified in the Notice of Inquiry, or such other date as may be determined by the Adjudicator in response to a request for a time extension, then:
- (a) in the case of any Party other than the Institution, the Appeal may be deemed to be abandoned and the file will be closed in accordance with section 16 of this Code; or
 - (b) the Inquiry may proceed, and an Order may be issued in the absence of such Representations.
- 8.20 Unless an Appeal is settled, abandoned, withdrawn, or otherwise terminated, the Adjudicator will make an Order disposing of some or all of the issues in the Appeal.
- 8.21 The IPC will give the Parties written confirmation of any settlement, abandonment, withdrawal, or other termination of an Appeal and written notice of any Order made under the *Act*.
- 8.22 On making an Order disposing of some or all of the substantive issues in the Appeal, the IPC will publish the Order. The IPC may also publish an Order disposing of a procedural issue.
- 8.23 Institutions and organizations are generally named in an Order, whereas individuals are generally not named.

PART III – EXPEDITED PROCESS

9. EXPEDITED PROCESS – GENERAL

- 9.01 Where appropriate, the IPC may, in its sole discretion, waive or vary its processes and procedures or create specific processes and procedures to expedite the resolution of issues under appeal. If the IPC decides to move an Appeal through an Expedited Process, this will be communicated to the Parties at the commencement of the Appeal.
- 9.02 Appeals that may proceed through an Expedited Process include an Adequacy of Decision, Deemed Refusal, Failure to Disclose, Fee, Reasonable Search, Time Extension, Transfer, or other types of Appeals the IPC determines should use an Expedited Process. Generally, an Expedited Process for Appeals will follow **Practice Direction Number 13**.
- 9.03 For Appeals utilizing an Expedited Process, the IPC may abbreviate its usual processes and procedures, including (without limitation) by:
- (a) having a single decision-maker attempt to find a mutually agreeable resolution to the issues between the Parties, dismiss the Appeal, or issue an Order;
 - (b) shortening timelines for submissions and responses by the Parties;
 - (c) strictly adhering to established deadlines;
 - (d) conducting fixed-day informal dispute resolution;
 - (e) conducting an oral Inquiry;
 - (f) relying on affidavit evidence of the Parties; or
 - (g) issuing an Order without hearing further from the Parties.
- 9.04 The IPC's discretion to move an Appeal through an Expedited Process does not limit in any way the IPC's discretion to waive or vary its processes and procedures for other types of Appeals, in accordance with section 17.

PART IV – GENERAL

10. GENERAL POWERS OF THE IPC

- 10.01 The IPC may require to be produced to the IPC and may examine any record that is in the custody or under the control of an Institution, and may enter and inspect any premises occupied by an Institution.
- 10.02 The IPC may summon and examine on oath any individual who, in the IPC's opinion, may have information relating to the Appeal.
- 10.03 The IPC may require an Institution to produce to the IPC affidavit evidence in support of a position taken or an action undertaken by an Institution.
- 10.04 The IPC may create, issue, and require compliance with practice directions, policies, procedures, forms, guidance documents, rulings, codes of conduct, or any other document that the IPC deems necessary to give effect to the requirements of this Code, and to ensure the effective and efficient processing of Appeals under the *Acts*.

11. PROVIDING RECORDS TO THE IPC

- 11.01 Where records are at issue, the IPC requires copies of the records and may require an Index of Records to process an Appeal. In such cases, the IPC will send to the Institution a written request for the records and/or an Index of Records to be produced to the IPC and the date by which the records and/or the Index of Records are to be received.
- 11.02 Where an Institution fails to provide the records at issue, or any of them, within the specified time, the IPC may issue an Order requiring the Institution to produce the records to the IPC.
- 11.03 The IPC may also make an Order requiring the Institution to organize the records as directed, which may include a requirement to number the records, number the pages of records, provide legible copies, provide highlighted copies, and/or provide an Index of Records corresponding to the IPC's directions for organizing the records.
- 11.04 An Institution shall not in any way willfully obstruct or frustrate the IPC's ability to obtain accurate records and shall ensure that all affidavits provided in connection with an Appeal are truthful, complete, and accurate.

11.05 It is an offence under the *Acts* for anyone to:

- (a) alter, conceal, or destroy a record, or cause any other individual to do so, with the intention of denying a right to access a record or the information contained in a record;
- (b) willfully obstruct the Commissioner in the performance of his or her functions;
- (c) willfully make a false statement to, mislead, or attempt to mislead the Commissioner in the performance of his or her functions; or
- (d) willfully fail to comply with an Order of the Commissioner or his or her delegates.

12. NEW DISCRETIONARY EXEMPTION CLAIMS

- 12.01 In an Appeal, an Institution may make a new discretionary exemption claim only within 35 days after the Institution is notified of the Appeal by the IPC. A new discretionary exemption claim made within this period shall be contained in a revised written decision sent to the person making the Request and to the IPC.
- 12.02 If the Appeal moves to Adjudication, the Adjudicator may decide in exceptional circumstances to consider a new discretionary exemption claim made after the 35-day period.
- 12.03 An Institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision that resolves a Deemed Refusal Appeal.

13. CONSTITUTIONAL QUESTIONS

- 13.01 Where a Party intends to raise a Constitutional Question, the Party shall serve a notice of Constitutional Question on the Attorney General of Canada and the Attorney General Ontario and file the notice with the IPC.
- 13.02 A notice of Constitutional Question shall be in the **form posted on the IPC's website**, or in a similar form that contains the same information.
- 13.03 When filing the notice of Constitutional Question with the IPC, the Party shall also file proof of its service on the Attorneys General of Canada and Ontario.
- 13.04 A Party shall serve and file a notice of Constitutional Question as soon as the circumstances requiring it become known and, in any event, no later than 15 days after the day on which the Notice of Inquiry was sent to the Party.

- 13.05 The IPC will consider a Constitutional Question only if the Appellant or the other Party, as the case may be, complies with the time limit specified in section 13.04.
- 13.06 The IPC may at any time during an Appeal notify a Party that, in its opinion, a position taken by the Party in the Appeal raises a Constitutional Question. A Party receiving this notice shall within the time period specified by the IPC either:
- (a) comply with section 13.01; or
 - (b) provide the IPC with Representations as to why the Party believes a notice of a Constitutional Question is not required.
- 13.07 Before deciding whether an Appeal raises a Constitutional Question, the IPC may notify and invite Representations from the Parties.
- 13.08 If a Party fails to provide a notice of a Constitutional Question in accordance with section 13, the IPC will not address the question.
- 13.09 The IPC may share Representations on Constitutional Questions with all parties in accordance with this Code and **Practice Direction Number 7**.

14. STAYS

- 14.01 An Adjudicator may stay any provision of an Order, at any time, at the request of a Party or on the Adjudicator's own initiative.
- 14.02 Before deciding whether to stay a provision of an Order, the Adjudicator may notify and invite Representations from the Parties.
- 14.03 The stay of a provision of an Order may be for a specified time period, or until the occurrence of some specifically designated event.

15. RECONSIDERATION

- 15.01 IPC decisions are final. The IPC may only reconsider an Order or other decision where it is established that there is:
- (a) a fundamental defect in the Adjudication process;
 - (b) a jurisdictional defect in the decision; or
 - (c) a clerical error, accidental error or omission or other similar error in the decision.
- 15.02 The IPC will not reconsider a decision simply on the basis that:
- (a) new evidence is provided, whether or not that evidence was available at the time of the decision; or
 - (b) a Party disagrees or is dissatisfied with the result.
- 15.03 The IPC may reconsider a decision or an Order at the request of a person who has an interest in the Appeal or on the IPC's own initiative. The IPC will not consider more than one (1) reconsideration request per decision or Order, and will not consider a reconsideration request of a reconsideration Order.
- 15.04 A reconsideration request shall be made in writing to the IPC and consist of no more than ten (10) 8.5" x 11" (letter-size) single-sided pages in no less than 12-point font. The request must be received by the IPC within 21 days after the date of the decision or Order.
- 15.05 A reconsideration request shall include:
- (a) the relevant Order number and/or Appeal number;
 - (b) the reasons why the Party is making the reconsideration request;
 - (c) the reasons why the request fits within the grounds for reconsideration listed in section 15.01;
 - (d) the desired outcome; and
 - (e) a request for a stay, if necessary.
- 15.06 A reconsideration request does not automatically stay any provision of a decision or Order. Compliance with a decision or Order must occur within the specified time period unless the IPC or a court directs otherwise.
- 15.07 A reconsideration request does not preclude an individual from seeking other legal remedies that may be available.

- 15.08 All requests for reconsideration are subject to an initial review by the Assistant Commissioner and/or his/her delegate(s). If the IPC determines that a Party requesting reconsideration has not made a clear case that any of the grounds for reconsideration are established or has not met the requirements of sections 15.04 and 15.05, the reconsideration request will be denied without further deliberation. The Parties will be informed of the denial in writing.
- 15.09 If the request for reconsideration is not denied on initial review, the reconsideration will be assigned to the person who made the decision in question, unless for any reason they are unable to deal with the matter, in which case the IPC will assign another person to conduct the reconsideration.
- 15.10 The assignment of a request for reconsideration does not indicate that the grounds for reconsideration have been established. The determination of the merits of the reconsideration will be made by the individual assigned to consider it.
- 15.11 Before deciding whether to grant a reconsideration on its merits, the IPC may notify and invite Representations from the Parties.
- 15.12 The final decision to grant or deny a reconsideration on its merits will be made in writing in the form of an Order with a copy sent to the Parties.

16. “ON HOLD” AND ABANDONED APPEALS

- 16.01 The IPC may, on written request of a Party or at its own discretion, and with notice to the Parties, place an Appeal “on hold” for a limited period of time due to:
- (a) the documented illness of a Party rendering them incapable of participating in the Appeal process;
 - (b) a court proceeding related to the Appeal, which may include awaiting the results of a court decision in a related matter;
 - (c) the existence of multiple active Appeals from the same or related Appellant(s); or
 - (d) the failure of an Appellant or Third-Party Appellant to provide current contact information to the IPC and the inability of the IPC to contact them.

- 16.02 An Appeal referred to in section 16.01(d) will remain “on hold” until the Appellant or Third-Party Appellant contacts the IPC or 30 days have passed without any response from the Appellant or Third-Party Appellant from the IPC’s last attempt to contact them, whichever occurs first.
- 16.03 If the 30 days have passed without any response from the Appellant or Third-Party Appellant, the IPC may deem the Appeal to be abandoned and proceed to close the Appeal without further notice to the Appellant or Third-Party Appellant, as the case may be. The IPC will notify the other Parties in writing that the Appeal is closed.
- 16.04 Except as otherwise provided for in this Code, where an Appellant or Third-Party Appellant does not respond to the IPC by the deadline specified in correspondence sent to them, the IPC will attempt to contact them in writing. After two failed attempts to contact them, the IPC may deem the appeal to be abandoned without further notice to the Appellant or Third-Party Appellant. The IPC will notify the other Parties in writing that the Appeal is closed.

17. VARYING THE PROCESS

- 17.01 The IPC may in its discretion waive or vary any of the procedures prescribed or adopted by or under this Code, including any requirement or specified time period where the IPC considers it advisable to secure the fair, just, and expeditious resolution of the proceedings.
- 17.02 A Party who wishes the IPC to waive or vary any of the procedures prescribed by or under this Code shall submit a request in writing to the IPC staff member assigned to the Appeal.
- 17.03 A request to vary the process should include all relevant information in support of the request, including:
 - (a) the Appeal number;
 - (b) the reasons the Party is making the request;
 - (c) any prejudice to the Party if the request is not granted; and
 - (d) the reasons any prejudice under paragraph (c) outweighs any prejudice to the other Party or Parties to the Appeal.
- 17.04 Before deciding whether to vary a process in a manner that may significantly impact the rights and interests of the Parties, the IPC may notify and invite Representations from the other Parties within a specified time period.

- 17.05 Failure to provide a response within the specified time period will be deemed to constitute an absence of objection by the other Party.
- 17.06 Where the IPC decides to grant or decline a request to vary the process, the IPC will issue a written decision to the Parties.
- 17.07 At any time during the appeal process, the IPC may move an Appeal to another stage in the appeal process that the IPC determines will be most effective in securing the fair, just, and expeditious resolution of the proceedings.

18. COMPUTATION OF TIME

- 18.01 Where the *Act*, this Code, or an Order or decision of the IPC establishes a timeframe:
 - (a) the days are calculated as calendar days, and the deadline to complete an action (or actions) is deemed to be 5:00 p.m. local Toronto, Ontario time on the due date;
 - (b) where there is a reference to a number of days between two events, they are counted by excluding the day on which the first event happens and including the day on which the second event happens; and
 - (c) where any deadline falls on a day when the IPC's office is not open for business, the deadline is deemed to be on the next day that the IPC's office is open.

19. ABUSE OF PROCESS / VEXATIOUS APPELLANT

- 19.01 The IPC may make such Orders or give such directions in an Appeal as it considers proper to prevent abuse of its processes.
- 19.02 Where the IPC finds that an Appellant has persistently instituted vexatious Appeals or conducted an Appeal in a vexatious manner, the IPC may find that Appellant to be a vexatious litigant.
- 19.03 Where an Appellant is found to be a vexatious litigant, the IPC may, at any stage of the IPC's appeal process, close an Appeal made by that Appellant on the basis that it is an abuse of process, and/or require that the Appellant obtain permission from the IPC to take further steps or make further Appeals, subject to any conditions imposed by the IPC.

20. USE OF ARTIFICIAL INTELLIGENCE

20.01 Where a Party makes Representations to the IPC and relies on artificial intelligence (AI) in the preparation of those Representations, the Party must disclose to the IPC:

- (a) that AI was used;
- (b) the type of AI used; and
- (c) how AI was used.

20.02 Where AI is used to prepare Representations, Parties must review the accuracy and content of legal references or analysis contained in their Representations that are created or generated by AI and certify in writing to the IPC that they have completed that review. When referring to jurisprudence, statutes, policies, or commentaries in Representations, Parties must use only well-recognized and reliable sources.



Code of Procedure

for appeals under the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*

Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

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September 2024

TAB 26

PRACTICE DIRECTION

#13

Expedited Processes

EXPEDITED APPEALS TEAM

1. The IPC's Expedited Appeals Team is comprised of a specialized group of IPC staff members, called Case Leads, each of whom has the delegated authority to resolve, dismiss, or issue an order disposing of an Appeal utilizing expedited processes. This is a single-person processing model.
2. The Expedited Appeals Team will employ a process to handle Appeals relating to straightforward, preliminary, or procedural issues, where there is no potential for an Order to disclose information/records.
3. The goal of the Expedited Appeals Team is to expedite the resolution of the issue(s) in an efficient and effective manner, while maintaining fairness and impartiality.

APPLICATION

4. This Practice Direction applies to Appeals processed under section 9 of the Code of Procedure.
5. The following Appeals, as defined in the Code of Procedure, will routinely utilize expedited processes:
 - (a) Adequacy of Decision
 - (b) Deemed Refusal
 - (c) Failure to Disclose
 - (d) Fee
 - (e) Reasonable Search
 - (f) Time Extension
 - (g) Transfer
6. At its own discretion, the IPC may determine other types of Appeals that should utilize expedited processes.



7. At any point, the Case Lead may determine that an Appeal is unsuitable to utilize expedited processes, or the Appeal type has changed, and refer the Appeal to the Registrar to be streamed to a more appropriate stage.

PROCESSES AND PROCEDURES

8. The expedited processes and procedures for selected Appeals will be communicated to the Parties at the commencement of the Appeal.
9. The Registrar may stream Appeals to the Expedited Appeals Team to be processed using the single-person processing model. An Appeal will be assigned to a Case Lead who may resolve, dismiss, or issue an Order using expedited processes.
10. The Registrar sends a notice to the Parties, notifying them that the Appeal is being assigned to the Expedited Appeals Team. The notice may request missing or additional documentation, including a copy of the access request and the Institution's decision.
11. The Case Lead contacts the Parties and reviews information about the Appeal, such as any correspondence or documentation, to understand the record(s) or information requested and/or the nature of the issue(s) raised in the Appeal.
12. The Case Lead works with the Parties to clarify the issue(s), educate the Parties about the law, and determine whether a mutually agreeable resolution is possible.
13. If a mutually agreeable resolution is not possible, the Case Lead either dismisses the Appeal or conducts an Inquiry and issues an Order.
14. As necessary, the Case Lead may utilize sections 6.01 and 8.03 of the Code of Procedure to dismiss Appeals.
15. Before deciding whether to dismiss an Appeal without conducting an Inquiry, the Case Lead may invite submissions from the Appellant, the Institution, and/or any other Party. If an Appeal is dismissed without conducting an Inquiry, the Case Lead will give the Parties written notice with reasons.
16. If an Inquiry is commenced, the Parties are sent Notices of Expedited Inquiry, seeking specific information from the Parties on the issue(s) raised in the Appeal. Generally, this process occurs through the following procedure, which may be varied as the Case Lead deems appropriate based on the specific circumstances:
 - (a) If an Inquiry is commenced, the Case Lead will send a Notice of Expedited Inquiry to the Party bearing the initial onus (the first Party), as determined by the Case Lead, requesting Representations on the issues in the Appeal.
 - (b) Upon receipt of the first Party's Representations, the Case Lead may, if they consider it necessary, send a Notice of Expedited Inquiry

to the second Party, requesting Representations on the issues in the Appeal and in reply to the first Party's Representations.

(c) Upon receipt of the second Party's Representations, the Case Lead may, if they consider it necessary, request Representations in reply from the first Party.

17. Parties must submit written Representations in response to the Notice of Expedited Inquiry within the time period specified in the Notice. If an Appellant does not submit Representations within the specified time period, the Appeal will be closed, and no order will be issued. If an Institution does not submit Representations within the specified time period, an Order will be issued without the benefit of the Institution's Representations.
18. Notwithstanding sections 7 and 8 of Practice Direction Number 2,
 - (a) initial Representations should be:
 - (i) if typewritten, no longer than 15 pages in point size 12 or larger, double-spaced, on paper not larger than 8 1/2 x 11 inches; or
 - (ii) 15 handwritten pages of the same size;
 - (b) reply and sur-reply Representations should be:
 - (i) if typewritten, no longer than 5 pages in point size 12 or larger, double-spaced, on paper not larger than 8 1/2 x 11 inches; or
 - (ii) 5 handwritten pages of the same size.
19. The Case Lead may provide some or all the Representations received from a Party to the other Party or Parties in accordance with Practice Direction Number 7.
20. All communications, including those forming part of any attempt to informally resolve the Appeal, may be relied upon by the Case Lead in deciding the Appeal.

GENERAL

21. The Case Lead may utilize any of the processes outlined in section 9.03 of the Code.
22. Subject to limited exceptions, all responses to requests for information from the Parties must be received by the IPC within the following timelines:
 - (a) up to 14 days for general requests, including information about the request and decision giving rise to the Appeal, and information that requires consultation with others; and
 - (b) up to 21 days for complex requests, including providing an affidavit or Representations in response to a Notice of Expedited Inquiry.

TAB 27

McInerney v. MacDonald, 1992 CanLII 57 (SCC), [1992] 2 SCR 138

Date:	1992-06-11
File number:	21899
Other citations:	126 NBR (2d) 271 — 137 NR 35 — 93 DLR (4th) 415 — 34 ACWS (3d) 164 — 317 APR 271 — 12 CCLT (2d) 225 — 7 CPC (3d) 269 — JE 92-917 — [1992] SCJ No 57 (QL) — [1992] ACS no 57
Citation:	McInerney v. MacDonald, 1992 CanLII 57 (SCC), [1992] 2 SCR 138, < https://canlii.ca/t/1fsbl >, retrieved on 2025-10- 28

McInerney v. MacDonald, [1992] 2 S.C.R. 138

Elizabeth A. McInerney

Appellant

v.

Margaret R. MacDonald

Respondent

Indexed as: McInerney v. MacDonald

File No.: 21899.

1992: February 5; 1992: June 11.

Present: La Forest, L'Heureux-Dubé, Gonthier, Stevenson* and Iacobucci JJ.

on appeal from the court of appeal for new brunswick

Physicians and surgeons -- Medical records -- Patient's right of access -- Patient requesting copies of her complete medical records -- Patient's physician delivering copies of her notes but refusing to produce copies of reports and records received from other physicians -- No legislation in province regulating patient's access to information contained in medical records -- Whether patient entitled to inspect and obtain copies of her medical records upon request.

A patient made a request to her doctor for copies of the contents of her complete medical file. The doctor delivered copies of all notes, memoranda and reports she had prepared herself but refused to produce copies of consultants' reports and records she had received from other physicians who had previously treated the patient, stating that they were the property of those physicians and that it would be unethical for her to release them. She suggested to her patient that she contact the other physicians for release of their records. The patient's application in the Court of Queen's Bench for an order directing her doctor to provide a copy of her entire medical file was granted. A majority of the Court of Appeal affirmed the judgment.

Held: The appeal should be dismissed.

In the absence of legislation, a patient is entitled, upon request, to examine and copy all information in her medical records which the physician considered in administering advice or treatment, including records prepared by other doctors that the physician may have received. Access does not extend to information arising outside the doctor-patient relationship. The patient is not entitled to the records themselves. The physical medical records of the patient belong to the physician.

The physician-patient relationship is fiduciary in nature and certain duties arise from that special relationship of trust and confidence. These include the duties of the doctor to act with utmost good faith and loyalty, to hold information received from or about a patient in confidence, and to make proper disclosure of information to the patient. The doctor also has an obligation to grant access

to the information used in administering treatment. This fiduciary duty is ultimately grounded in the nature of the patient's interest in the medical records. Information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. While the doctor is the owner of the actual record, the information is held in a fashion somewhat akin to a trust and is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue. The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, she should have a right of access to the information and that the physician should have a corresponding obligation to provide it. The patient's interest being in the information, it follows that the interest continues when that information is conveyed to another doctor who then becomes subject to the duty to afford the patient access to that information. Further, since the doctor has a duty to act with utmost good faith and loyalty, it is also important that the patient have access to the records to ensure the proper functioning of the doctor-patient relationship and to protect the well-being of the patient. Disclosure serves to reinforce the patient's faith in her treatment and to enhance the trust inherent in the doctor-patient relationship. As well, the duty of confidentiality that arises from the doctor-patient relationship is meant to encourage disclosure of information and communication between doctor and patient. The trust reposed in the physician by the patient mandates that the flow of information operate both ways.

The patient's general right of access to medical records is not absolute. If the physician reasonably believes it is not in the patient's best interests to inspect the medical records, the physician may consider it necessary to deny access to the information. Considering the equitable base of the patient's entitlement, when a physician refuses a request for access, the patient may apply to the court for protection against an improper exercise of the physician's discretion. The court will then exercise its superintending jurisdiction and may order access to the records in whole or in part. The onus lies on the physician to justify a denial of access. Patients should have access to their medical records in all but a small number of circumstances. In the ordinary case, these records should be disclosed upon the patient's request unless there is a significant likelihood of a substantial adverse effect on her physical, mental or emotional health or harm to a third party.

Here, there is no evidence that access to the records would cause harm to the patient or a third party; nor does the doctor offer other compelling reasons for non-disclosure. Accordingly, the patient is entitled to her medical records.

Cases Cited

Referred to: *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; *Halls v. Mitchell*, 1928 CanLII 1 (SCC), [1928] S.C.R. 125; *Kenny v. Lockwood*, 1931 CanLII 184 (ON CA), [1932] O.R. 141; *Henderson v. Johnston*, 1956 CanLII 125 (ON SC), [1956] O.R. 789; *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534; *Reibl v. Hughes*, 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880; *Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 (1967); *Cannell v. Medical and Surgical Clinic*, 315 N.E.2d 278 (1974); *Re Mitchell and St. Michael's Hospital* (1980), 1980 CanLII 1780 (ON SC), 112 D.L.R. (3d) 360; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *Strazdins v. Orthopaedic & Arthritic Hospital Toronto* (1978), 1978 CanLII 1699 (ON SC), 7 C.C.L.T. 117.

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APPEAL from a judgment of the New Brunswick Court of Appeal (1990), [1990 CanLII 3892 \(NB CA\)](#), 103 N.B.R. (2d) 423, 259 A.P.R. 423, 66 D.L.R. (4th) 736, affirming a judgment of Turnbull J., ordering a physician to provide copies of medical records to a patient. Appeal dismissed.

B. A. Crane, Q.C., and *Wayne Brynaert*, for the appellant.

J. George Byrne and *Barry R. Morrison*, as *amici curiae*, for the respondent.

//*La Forest J.*//

The judgment of the Court was delivered by

LA FOREST J. -- The central issue in this case is whether in the absence of legislation a patient is entitled to inspect and obtain copies of his or her medical records upon request.

Facts

The facts are simple. The appellant, Dr. Elizabeth McInerney, is a medical doctor who is licensed to practise in New Brunswick. The respondent, Mrs. Margaret MacDonald, was her patient. Before her consultations with Dr. McInerney, Mrs. MacDonald was treated by various physicians over a period of years. On Dr. McInerney's advice, Mrs. MacDonald ceased taking thyroid pills previously prescribed by other physicians. She then became concerned about her medical care before consulting

Dr. McInerney, and wrote the latter requesting copies of the contents of her complete medical file. The doctor delivered copies of all notes, memoranda and reports she had prepared herself but refused to produce copies of consultants' reports and records she had received from other physicians, stating that they were the property of those physicians and that it would be unethical for her to release them. She suggested that Mrs. MacDonald contact the other physicians for release of their records.

An application was then made on behalf of Mrs. MacDonald to the New Brunswick Court of Queen's Bench for an order directing Dr. McInerney to provide a copy of her entire medical file relating to Mrs. MacDonald. Turnbull J. granted the application. The appeal to the Court of Appeal of New Brunswick was dismissed, Rice J.A. dissenting: (1990), [1990 CanLII 3892 \(NB CA\)](#), 103 N.B.R. (2d) 423, 259 A.P.R. 423, 66 D.L.R. (4th) 736. Dr. McInerney then sought and was granted leave to appeal to this Court, [1990] 2 S.C.R. viii.

Following the judgment of Turnbull J., copies of the requested records were filed with the court, and at some point Mrs. MacDonald obtained a copy of the filed material. That being so, she had no interest in contesting the appeal. Given the importance of the issues, however, her counsel appeared before the Court as *amici curiae*.

The Courts Below

Court of Queen's Bench (Trial Division)

Turnbull J. equated the law respecting physicians with that relating to the legal profession.

He stated:

Ownership of documents prepared by a lawyer on behalf of a client rests with the client in a solicitor-client relationship and with the patient in a physician-patient relationship. To me it is akin to a person engaging an artist to paint a portrait. When paid for it belongs to that person, and not the artist. The Government pays the doctor in the physician-patient relationship and the patient pays the Government. To me anything further is complicating what should be clear. In our mobile society many people prefer to keep complete dossiers on their medical records, not only for themselves, but their children.

Consequently, Turnbull J. concluded, the patient has a sufficient property interest in the photocopy of documents prepared by other physicians to request an additional photocopy from his or her physician without having to go back to the other physicians to obtain a photocopy of the original.

Court of Appeal (1990), [1990 CanLII 3892 \(NB CA\)](#), 103 N.B.R. (2d) 423

Ryan J.A., Hoyt J.A. concurring, noted that, unlike some provinces, there was no legislation in New Brunswick regulating a patient's access to the information contained in his or her medical record. He also observed that a noticeable trend has developed favouring an individual's right of access to personal information.

Ryan J.A. stated that the issue was not ownership but the right of the patient to have access to his or her medical record. He focused on the contractual relationship between the parties. In his view, Mrs. MacDonald's contract for treatment included an implied contract for information relating to the treatment. He stated, at p. 439:

I imply a right in the patient of access to all the information in her chart which the physician considered in providing professional services to the patient subject only to regulatory legislation and any superintending role which a court may assume. To my mind, the supervisory responsibility must rest with the courts as guided by the common law or regulations adopted by the state. People must generally have access to all the information in their charts. We live in a mobile society with a growing emphasis on access to information. This claim to information is simply one facet of a many sided repository of rights aimed at self-determination insisted upon by Canadians today. To hold otherwise would plunge the judgment making power of whether or not to grant access into a sea of subjective decisions.

Ryan J.A. concluded that, subject to the court's supervisory role, a patient has a right of access to material in his or her record if it relates to the treatment or advice provided by the physician to the patient. Since Mrs. MacDonald had a right to copies of documentation in her record, there was no purpose in forcing her to make individual demands upon the other five doctors or to commence similar lawsuits against them. He, therefore, dismissed the appeal.

Rice J.A., dissenting, observed that even in a solicitor-client relationship, a client does not enjoy a right to the notes made by a solicitor for the benefit of the solicitor in rendering services for a

client. He pointed out that the court has ruled in several decisions that the solicitor is the owner of such notes and need not transmit them to the client. Since the contents of the records sought were unknown, it was impossible to ascertain their ownership.

If the question was not one of ownership but one of a right to information, it was not clear to Rice J.A. on what legal basis this right rested. In the absence of legislation, the only possible applicable principle would be that of an implied term to the contract of service between the physician and the patient. Rice J.A. noted that courts, in certain circumstances, have imposed a term to a contract by implying that the parties had intended to agree to what was fair and reasonable having regard to the interest of both parties and the object of the contract. However, he held, at p. 430:

Taking into account the guidelines of the Canadian Medical Association which restrict a physician to disclose the information contained in a physician's record, I cannot conclude that the appellant would have agreed to such a term had the matter been discussed with the respondent.

Notwithstanding, to imply such a term in this contract of service between the appellant and respondent would unduly extend the existing principles of contract law. Essentially, the physician (appellant) undertook to provide a service, and the respondent to pay for it through the Medicare provisions of the related legislation in this province. To imply a term in that relationship as suggested would, in my view, go beyond an ordinary and incremental evolution of the law of contract established through precedents, and to transcend the power of the judiciary to change that law.

Although legislation could provide patients with a right of access to their records, in its absence, Rice J.A. did not see fit to alter established rules of law. He would have allowed the appeal and set aside the order of Turnbull J.

Issues

The appellant raises two issues in this appeal:

1. Are a patient's medical records prepared by a physician the property of that physician or are they the property of the patient?
2. If a patient's medical records are the property of the physician who prepares them, does a patient nevertheless have the right to examine and obtain copies of all documents in the physician's medical record, including records that the physician may have received which were prepared by other physicians?

Analysis

The current position of the medical profession with respect to the right of patients to information in their medical records is reflected in the policy statement of the Canadian Medical Association published in 1985:

CONFIDENTIALITY, OWNERSHIP AND TRANSFER OF MEDICAL RECORDS

The Canadian Medical Association (CMA) regards medical records as confidential documents, owned by the physician/institution/clinic that compiled them or had them compiled. Patients have a right to medical information contained in their records but not to the documents themselves. The first consideration of the physician is the well-being of the patient, and discretion must be used when conveying information contained in a medical record to a patient. This medical information often requires interpretation by a physician or other health care professional. Other disclosures of information contained in medical records to third parties (eg. physician-to-physician transfer for administrative purposes, lawyer, insurance adjuster) require written patient consent or a court order. CMA is opposed to legislation at any level which threatens the confidentiality of medical records.

I am prepared to accept that the physician, institution or clinic compiling the medical records owns the physical records. This leaves the remaining issue of whether the patient nevertheless has a right to examine and obtain copies of all documents in the physician's medical records. The majority of the Court of Appeal based the patient's right of access on an implied contractual term. While it may be possible to pursue the contractual route in the civil law system, I do not find it particularly helpful in the common law context. Accordingly, I am not entirely comfortable with the approach taken by the Court of Appeal. However, I do agree that a patient has a vital interest in the information contained in his or her medical records.

Medical records continue to grow in importance as the health care field becomes more and more specialized. As L. E. Rozovsky and F. A. Rozovsky put it in *The Canadian Law of Patient Records* (1984), at pp. 73-74:

The twentieth century has seen a vast expansion of the health care services. Rather than relying on one individual, a physician, the patient now looks directly and indirectly to dozens and sometimes hundreds of individuals to provide him with the services he requires. He is cared for not simply by his own physician but by a veritable army of nurses, numerous consulting physicians, technologists and technicians, other allied health personnel and administrative personnel.

While a patient may, in the past, have relied primarily upon one personal physician, the trend now tends to favour referrals to a number of professionals. Each of the pieces of information provided by this "army" of health care workers joins with the other pieces to form the complete picture. As the number and use of specialists increase, the more difficult it is for the patient to gain access to that picture. If the patient is only entitled to obtain particular information from each health care provider, the number of contacts he or she may be required to make may become enormous. The problem is intensified when one considers the mobility of patients in modern society.

Medical records are also used for an increasing number of purposes. This point is well made by A. F. Westin, *Computers, Health Records, and Citizen Rights* (1976), at p. 27:

As to medical records, when these were in fact used only by the physician or the hospital, it may have been only curiosity when patients asked to know their contents. But now that medical records are widely shared with health insurance companies, government payers, law enforcement agencies, welfare departments, schools, researchers, credit grantors, and employers, it is often crucial for the patient to know what is being recorded, and to correct inaccuracies that may affect education, career advancement or government benefits.

This then is the general context in which medical records are compiled and the broad purposes they serve in our day. The nature of the information contained in medical records must now be examined.

When a patient approaches a physician for health care, he or she discloses sensitive information concerning personal aspects of his or her life. The patient may also bring into the relationship information relating to work done by other medical professionals. The policy statement of the Canadian Medical Association cited earlier indicates that a physician cannot obtain access to this information without the patient's consent or a court order. Thus, at least in part, medical records contain information about the patient revealed by the patient, and information that is acquired and recorded on behalf of the patient. Of primary significance is the fact that the records consist of information that is highly private and personal to the individual. It is information that goes to the personal integrity and autonomy of the patient. As counsel for the respondent put it in oral argument: "[The respondent] wanted access to information on her body, the body of Mrs. MacDonald." In *R. v.*

Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 429, I noted that such information remains in a fundamental sense one's own, for the individual to communicate or retain as he or she sees fit. Support for this view can be found in *Halls v. Mitchell*, 1928 CanLII 1 (SCC), [1928] S.C.R. 125, at p. 136. There Duff J. held that professional secrets acquired from a patient by a physician in the course of his or her practice are the patient's secrets and, normally, are under the patient's control. In sum, an individual may decide to make personal information available to others to obtain certain benefits such as medical advice and treatment. Nevertheless, as stated in the report of the Task Force on *Privacy and Computers* (1972), at p. 14, he or she has a "basic and continuing interest in what happens to this information, and in controlling access to it".

A physician begins compiling a medical file when a patient chooses to share intimate details about his or her life in the course of medical consultation. The patient "entrusts" this personal information to the physician for medical purposes. It is important to keep in mind the nature of the physician-patient relationship within which the information is confided. In *Kenny v. Lockwood*, 1931 CanLII 184 (ON CA), [1932] O.R. 141 (C.A.), Hodgins J.A. stated, at p. 155, that the relationship between physician and patient is one in which "trust and confidence" must be placed in the physician. This statement was referred to with approval by LeBel J. in *Henderson v. Johnston*, 1956 CanLII 125 (ON SC), [1956] O.R. 789, who himself characterized the physician-patient relationship as "fiduciary and confidential", and went on to say: "It is the same relationship as that which exists in equity between a parent and his child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward" (p. 799). Several academic writers have similarly defined the physician-patient relationship as a fiduciary or trust relationship; see, for example, E. I. Picard, *Legal Liability of Doctors and Hospitals in Canada* (2nd ed. 1984), at p. 3; A. Hopper, "The Medical Man's Fiduciary Duty" (1973), 7 *Law Teacher* 73; A. J. Meagher, P. J. Marr and R. A. Meagher, *Doctors and Hospitals: Legal Duties* (1991), at p. 2; M. V. Ellis, *Fiduciary Duties in Canada* (1988), at p. 10-1. I agree with this characterization.

In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in *Canson Enterprises Ltd. v. Boughton & Co.*, 1991

[CanLII 52 \(SCC\)](#), [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others. That being said, certain duties do arise from the special relationship of trust and confidence between doctor and patient. Among these are the duty of the doctor to act with utmost good faith and loyalty, and to hold information received from or about a patient in confidence. (Picard, *supra*, at pp. 3 and 8; Ellis, *supra*, at pp. 10-1 and 10-12, and Hopper, *supra*, at pp. 73-74.) When a patient releases personal information in the context of the doctor-patient relationship, he or she does so with the legitimate expectation that these duties will be respected.

The physician-patient relationship also gives rise to the physician's duty to make proper disclosure of information to the patient; see *Reibl v. Hughes*, [1980 CanLII 23 \(SCC\)](#), [1980] 2 S.C.R. 880, at p. 884; and *Kenny v. Lockwood*, *supra*, at p. 155. The appellant concedes that a patient has a right to be advised about the information concerning his or her health in the physician's medical record. In my view, however, the fiducial qualities of the relationship extend the physician's duty beyond this to include the obligation to grant access to the information the doctor uses in administering treatment. This approach has been taken by one stream of American cases. In *Emmett v. Eastern Dispensary and Casualty Hospital*, 396 F.2d 931 (D.C. Cir. 1967), Robinson J. held, at p. 935, that the fiducial qualities of the physician-patient relationship impose a duty on the physician "to reveal to the patient that which in his best interests it is important that he should know". Thus, in that case, the decedent patient's son was entitled to inspect the decedent's medical records. Similarly, in *Cannell v. Medical and Surgical Clinic*, 315 N.E.2d 278 (Ill. App. Ct. 1974), the court, having referred to the decision in *Emmett*, held that the fiducial qualities of the physician-patient relationship require the disclosure of medical data to a patient or his agent upon request, and that the patient need not engage in legal proceedings to obtain the information.

The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records. As discussed earlier, information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion

somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue.

Certain textbooks and case law go further and assert that the patient has a "proprietary" or "property" interest in the medical records. For example, Meagher et al., *supra*, write, at p. 289:

In the absence of an agreement, a doctor or hospital owns the records of the patient, but the patient is considered to have a property interest in the medical information contained in the record, with a right of access to it, but not to its possession.

Judicial support for the "proprietary interest" of the patient can be found in *Re Mitchell and St. Michael's Hospital* (1980), [1980 CanLII 1780 \(ON SC\)](#), 112 D.L.R. (3d) 360 (Ont. H.C.). Although Maloney J. there held that he did not have jurisdiction to order the release of hospital records on an originating notice of motion, he had this to say, at p. 364:

By virtue of s. 11 of the [*Public Hospitals Act*, R.S.O. 1970, c. 378], medical records are "the property of the hospital and shall be kept in the custody of the administrator", but it seems to me that a patient, or the personal representative of a deceased patient, has something akin to a proprietary interest in the contents of those records and s. 11 should in no way operate to prevent appropriate inspection or provision of copies.

A similar sentiment is expressed in the American text by R. D. Miller, *Problems in Hospital Law* (4th ed. 1983). The author has this to say, at pp. 276-77:

The medical record is an unusual type of property because physically it belongs to the hospital and the hospital must exercise considerable control over access, but the patient and others have an interest in the information in the record. One way of viewing this is that the hospital owns the paper or other material on which the information is recorded, but it is just a custodian of the information. Thus, as stated in *Cannell v. Medical and Surgical Clinic*, 21 Ill.App.3d 383, 315 N.E.2d 278 (1974), the patient and others have a right of access to the information in many circumstances, but they do not have a right to possession of the original records.

I find it unnecessary to reify the patient's interest in his or her medical records and, in particular, I am not inclined to go so far as to say that a doctor is merely a "custodian" of medical information. The fiduciary duty I have described is sufficient to protect the interest of the patient.

The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it. The patient's interest being in the information, it follows that the interest continues when that information is conveyed to another doctor who then becomes subject to the duty to afford the patient access to that information.

There is a further matter that militates in favour of disclosure of patient records. As mentioned earlier, one of the duties arising from the doctor-patient relationship is the duty of the doctor to act with utmost good faith and loyalty. If the patient is denied access to his or her records, it may not be possible for the patient to establish that this duty has been fulfilled. As I see it, it is important that the patient have access to the records for the very purposes for which it is sought to withhold the documents, namely, to ensure the proper functioning of the doctor-patient relationship and to protect the well-being of the patient. If there has been improper conduct in the doctor's dealings with his or her patient, it ought to be revealed. The purpose of keeping the documents secret is to promote the proper functioning of the relationship, not to facilitate improper conduct.

Disclosure is all the more important in our day when individuals are seeking more information about themselves. It serves to reinforce the faith of the individual in his or her treatment. The ability of a doctor to provide effective treatment is closely related to the level of trust in the relationship. A doctor is in a better position to diagnose a medical problem if the patient freely imparts personal information. The duty of confidentiality that arises from the doctor-patient relationship is meant to encourage disclosure of information and communication between doctor and patient. In my view, the trust reposed in the physician by the patient mandates that the flow of information operate both ways. As B. Knoppers puts it in "Confidentiality and Accessibility of Medical Information: A Comparative Analysis" (1982), 12 *R.D.U.S.* 395, at p. 431:

In a relationship often characterized as fiduciary, that is, based on mutual trust and confidence, reciprocity implies an exchange. The personal privacy of the patient which he entrusts to a certain extent to the physician must be met with a corresponding openness and full disclosure. . . . Personal privacy and access to medical information are not incompatible partners but interchangeable rights.

Robinson J., in *Emmett, supra*, at p. 935, note 19, also notes the link between disclosure of medical records and doctor-patient trust: "The duty of disclosure is a concomitant of the patient's inescapable reliance upon the unadulterated good faith as well as the professional skill of those to whom he has entrusted his treatment." Rather than undermining the trust inherent in the doctor-patient relationship, access to medical records should enhance it. Indeed, H. E. Emson observes that the practice of giving patients their own records "has been said to improve patient understanding, cooperation and compliance"; see *The Doctor and the Law: A Practical Guide for the Canadian Physician* (2nd ed. 1989), at p. 214. In this sense, reciprocity of information between the patient and physician is *prima facie* in the patient's best interests. It strengthens the bond of trust between physician and patient which, in turn, promotes the well-being of the patient.

While patients should, as a general rule, have access to their medical records, this policy need not and, in my mind, should not be pursued blindly. The related duty of confidentiality is not absolute. In *Halls v. Mitchell, supra*, at p. 136, Duff J. stated that, *prima facie*, the patient has a right to require that professional secrets acquired by the practitioner shall not be divulged. This right is absolute unless there is some paramount reason that overrides it. For example, "there may be cases in which reasons connected with the safety of individuals or of the public, physical or moral, would be sufficiently cogent to supersede or qualify the obligations *prima facie* imposed by the confidential relation". Similarly, the patient's general right of access to his or her records is not absolute. The patient's interest in his or her records is an equitable interest arising from the physician's fiduciary obligation to disclose the records upon request. As part of the relationship of trust and confidence, the physician must act in the best interests of the patient. If the physician reasonably believes it is not in the patient's best interests to inspect his or her medical records, the physician may consider it necessary to deny access to the information. But the patient is not left at the mercy of this discretion. When called upon, equity will intervene to protect the patient from an improper exercise of the physician's discretion. In other words, the physician has a discretion to deny access, but it is circumscribed. It must be exercised on proper principles and not in an arbitrary fashion. Where a person, in this case a doctor, is under a fiduciary duty to inform another, equity acts *in personam* to prevent that person from acting in a manner inconsistent with the interests of the person to whom the

duty is owed. As stated by Dickson J. (as he then was) in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at p. 384:

. . . where by statute, agreement, or perhaps by unilateral undertaking^{*}, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

I hasten to add that, just as a relationship may be fiduciary for some purposes and not for others, this characterization of the doctor's obligation as "fiduciary" and the patient's interest in the records as an "equitable interest" does not imply a particular remedy. Equity works in the circumstances to enforce the duty. This foundation in equity gives the court considerable discretion to refuse access to the records where non-disclosure is appropriate.

In my view, the onus properly lies on the doctor to justify an exception to the general rule of access. Not only is the information in some fundamental sense that of the patient; the doctor has primary access to it. In comparison, the records are unavailable to the patient. To some extent, what the documents contain is a matter of speculation for the patient. Consequently, there is a marked disparity in the ability of each party to prove its case. The burden of proof should fall on the party who is in the best position to obtain the facts.

If a physician objects to the patient's general right of access, he or she must have reasonable grounds for doing so. Although I do not intend to provide an exhaustive analysis of the circumstances in which access to medical records may be denied, some general observations may be useful. I shall make these in a response to a number of arguments that have been advanced by the appellant and in the literature for denying a patient access to medical records. These include: (1) disclosure may facilitate the initiation of unfounded law suits; (2) the medical records may be meaningless; (3) the medical records may be misinterpreted; (4) doctors may respond by keeping less thorough notes; and (5) disclosure of the contents of the records may be harmful to the patient or a third party.

The argument that patients may commence unfounded litigation if they are permitted to examine their medical records is not a sufficient ground for withholding them. The comments of Eberle J. in *Strazdins v. Orthopaedic & Arthritic Hospital Toronto* (1978), 1978 CanLII 1699 (ON SC), 7 C.C.L.T. 117 (Ont. H.C.), at pp. 119-20, are helpful in this regard. He states:

. . . I believe that it is part of our system of government and of the administration of justice that persons are entitled to start law suits against persons whom they feel have wronged them. The persons who start such actions do so at the risk of costs, the risk of having the action dismissed at some stage if it turns out that it is groundless or even if not groundless turns out to be unsuccessful, and that right of any person to start a law suit does carry with it a correlative obligation on the part of every person in our society; that is, that any one of us may be subject to groundless law suits and it may be that our only weapon to fight them is the penalty in costs. . . . I am not forgetting that if any particular person makes a habit of starting groundless law suits or repetitive law suits against a particular person or persons, there are controls which may be exercised to prevent such matters from occurring.

Denial of access may actually encourage unfounded law suits. If a law suit is started, a patient can generally obtain access to his or her records under rules of civil procedure relating to discovery of documents. Thus, if a patient strongly wishes to see his or her records, one way of achieving this result is to commence an action before ascertaining whether or not there is a valid basis for the action.

The arguments that the records may be meaningless or that they may be misinterpreted do not justify non-disclosure in the ordinary case. If the records are, in fact, meaningless, they will not help the patient but neither will they cause harm. It is always open to the patient to obtain assistance in understanding the file. In the *Report of the Commission of Inquiry into the Confidentiality of Health Information* (Ontario, 1980) (the "Krever Report"), vol. 2, at p. 469, Krever J. expressed the opinion that habitual use of jargon or technical terminology is not a sufficiently sound reason for denying a patient access to health records. He did note, however, that a re-evaluation of record keeping methodology may be necessary if a general rule of access is established. If it is possible that the patient will misconstrue the information in the record (for example, misinterpret the relevance of a particular laboratory test), the doctor may wish to advise the patient that the medical record should be explained and interpreted by a competent health-care professional.

The concern that disclosure will lead to a decrease in the completeness, candour and frankness of medical records, can be answered by reference to the obligation of a physician to keep accurate records. A failure to do so may expose the physician to liability for professional misconduct or negligence. It is also easy to exaggerate the importance of this argument. Certainly physicians may become more cautious in what they record, but it cannot be assumed as a natural consequence that this will detrimentally affect the standard of care given to the patient. Generally I doubt that the quality of medical records will be measurably affected by a general rule allowing access to the patient. As Krever J. put it in the "Krever Report", *supra*, at p. 487: "I say, at once, that I do not believe that any responsible and ethical physician would omit from a medical record any information that, in the interests of proper medical care, belongs in it because of the possibility that the patient may ask to inspect it."

Non-disclosure may be warranted if there is a real potential for harm either to the patient or to a third party. This is the most persuasive ground for refusing access to medical records. However, even here, the discretion to withhold information should not be exercised readily. Particularly in situations that do not involve the interests of third parties, the court should demand compelling grounds before confirming a decision to deny access. As H. Beatty observes in "The Consumer's Right of Access to Health Care Records" (1986), 3:4 *Just Cause* 3, at p. 3, paternalistic assumptions such as the "best interests of the patient" may have carried more weight in an era where patients had little education or information with respect to health care and relied upon the trusted family doctor. However, these assumptions "do not apply today, where consumers typically have brief contacts with many health care providers and institutions, none of which knows the person well enough to determine his or her 'best interests'". Assessing the "best interests of the patient" is a complex task. Non-disclosure can itself affect the patient's well-being. If access is denied, the patient may speculate as to what is in the records and imagine difficulties greater than those that actually exist. In addition, the physical well-being of the patient must be balanced with the patient's right to self-determination. Both are worthy of protection. In short, patients should have access to their medical records in all but a small number of circumstances. In the ordinary case, these records should be disclosed upon the request of the patient unless there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party.

If a physician refuses a request for access to a patient's medical records, the patient may apply to the court for a remedy. The court will then exercise its superintending jurisdiction and may order access to the records in whole or in part notwithstanding the physician's refusal. Even though the court may ultimately disagree with the physician's view that access should be denied, I have no doubt that in many cases it will be satisfied that the physician acted in good faith in the performance of his or her fiduciary duties. However, if the court is not satisfied that the physician acted in good faith, it should not hesitate to exercise its discretion to grant appropriate relief by way of costs. The general rule of access should not be frustrated by the patient's fear of incurring costs in the pursuit of what is fundamentally his or her right.

Since I have held that the tangible records belong to the physician, the patient is not entitled to the records themselves. Medical records play an important role in helping the physician to remember details about the patient's medical history. The physician must have continued access to the records to provide proper diagnosis and treatment. Such access will be disrupted if the patient is able to remove the records from the premises. Accordingly, the patient is entitled to reasonable access to examine and copy the records, provided the patient pays a legitimate fee for the preparation and reproduction of the information. Access is limited to the information the physician obtained in providing treatment. It does not extend to information arising outside the doctor-patient relationship.

Conclusion

In the absence of regulatory legislation, the patient is entitled, upon request, to inspect and copy all information in the patient's medical file which the physician considered in administering advice or treatment. Considering the equitable base of the patient's entitlement, this general rule of access is subject to the superintending jurisdiction of the court. The onus is on the physician to justify a denial of access. The majority of the Court of Appeal came to essentially the same conclusion, although, as is evident from the above discussion, for different reasons.

In this case, there is no evidence that access to the records would cause harm to the patient or a third party; nor does the appellant offer other compelling reasons for non-disclosure. Accordingly, in my opinion, the lower courts quite properly held that the respondent was entitled to copies of the documentation in her medical chart.

Disposition

I would dismiss the appeal. There should be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: Gowling, Strathy & Henderson, Ottawa.

Solicitors for the respondent: Clark, Drummie & Company, Saint John, New Brunswick.

* Stevenson J. took no part in the judgment.

* See Erratum [1993] 1 S.C.R. iv

TAB 28

Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53 (CanLII), [2002] 2 SCR 773

Date:	2002-06-20
File number:	28188
Other citations:	214 DLR (4th) 1 — 289 NR 282 — 114 ACWS (3d) 365 — [2002] CarswellNat 1357 — JE 2002-1156 — [2002] SCJ No 55 (QL) — [2002] ACS no 55
Citation:	Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53 (CanLII), [2002] 2 SCR 773, < https://canlii.ca/t/51qz >, retrieved on 2025-10-28

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53

The Commissioner of Official Languages *Appellant/Respondent on cross-appeal*

v.

Robert Lavigne *Respondent/Appellant on cross-appeal*

and

The Privacy Commissioner of Canada *Intervener*

Indexed as: Lavigne v. Canada (Office of the Commissioner of Official Languages)

Neutral citation: 2002 SCC 53.

File No.: 28188.

2002: January 17; 2002: June 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Privacy – Access to personal information – Exceptions – Right of access under Privacy Act to information collected in private in investigation conducted under Official Languages Act – Commissioner of Official Languages disclosing to complainant only part of personal information concerning him obtained during investigation – Whether exception to right of access provided for in s. 22(1)(b) of Privacy Act applies to Commissioner's investigations that have concluded – If so, whether Commissioner has established that disclosure of personal information requested could reasonably be expected to be injurious to conduct of investigations – Whether request for disclosure made under Privacy Act can cover information other than personal information – Privacy Act, R.S.C. 1985, c. P-21, ss. 12(1), 22, 47 – Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), ss. 60, 72, 73.

Official languages – Complaints and investigations – Private nature of investigations conducted by Commissioner of Official Languages – Information obtained in investigations collected in private – Complainant making request under Privacy Act for disclosure of personal information collected in files on complaints he had made to Commissioner of Official Languages – Reconciliation of Privacy Act with Commissioner's right to keep investigations confidential and private – Privacy Act, R.S.C. 1985, c. P-21, ss. 12(1), 22, 47 – Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), ss. 60, 72, 73.

The respondent, a federal public servant, filed complaints with the Commissioner of Official Languages (“COL”) alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. In conducting their investigation the investigators working for the Office of the Commissioner of Official Languages (“OCOL”) encountered problems because certain employees were reluctant to give information, fearing reprisals by the respondent. The investigators gave assurances that the interviews would remain confidential within the limits prescribed by the *Official Languages Act* (“OLA”). The investigation report concluded that the complaints were well founded and submitted recommendations to the Department concerned, which agreed to implement them.

While those proceedings were going on, the respondent made a request to the COL, under s. 12 of the *Privacy Act* (“PA”), for disclosure of the personal information contained in the files on the complaints he had made. A copy of this information was sent to the respondent, except for the portions which were withheld under the exemption set out in s. 22(1)(b) PA. That provision gives the COL the power to refuse access to information requested “the disclosure of which could reasonably be expected to be injurious to . . . the conduct of lawful investigations”. Several other requests by the respondent were refused. He filed a complaint with the Privacy Commissioner (“PC”) and following a process of mediation, a number of witnesses who had been questioned agreed to a copy of the personal information contained in the notes of the OCOL investigators being given to the respondent. The PC ruled that the personal information contained in the testimony of the other people questioned, for which consent to disclosure had not been obtained, had been properly exempted from disclosure under s. 22(1)(b) PA. The respondent then brought an application for judicial review of the COL’s decision refusing to disclose the information requested. The dispute relates to the personal information concerning the respondent as well as non-personal information contained in the interview notes of the OCOL investigators. In the case of the personal information, the respondent’s request relates only to the notes of the interview with his supervisor. The Federal Court, Trial Division ordered disclosure of the personal information requested by the respondent. The respondent was denied disclosure of the non-personal information. The Federal Court of Appeal affirmed that decision. The issue on the main appeal is

whether, pursuant to s. 22(1)(b) PA, disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the conduct of lawful investigations by the COL. The issue on the cross-appeal is whether the respondent is entitled to information other than personal information.

Held: The main appeal and the cross-appeal should be dismissed.

This case concerns the application of the OLA and the PA in relation to each other. The provisions at issue must therefore be reconciled and read together. Parliament has made it plain that the PA applies to the OCOL. However, the PA, including the power provided in s. 22(1)(b), must be applied to the OCOL in a manner consistent with the objective of the OLA of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions and with the unique context in which the COL's investigations, the private and confidential nature of which is important, are conducted. The participation of witnesses and complainants is central to the effectiveness of the Act. If Parliament had not enacted the provisions requiring that investigations be conducted in private and be kept confidential to protect them, it might have been difficult to achieve the objectives of the OLA. This confidentiality is not absolute, however, given the limits imposed by ss. 72, 73 and 74 OLA and the PA. When a request for disclosure of information is made under the PA, the COL may refuse access to the information requested under s. 22(1)(b) PA. That provision allows the exception to disclosure to be used once an investigation is over. Neither the definition of the word "investigation" in s. 22(3) nor the wording of s. 22(1)(b) should be interpreted as restricting the scope of the word "investigation" to investigations that are underway, those that are about to commence or specific investigations. There is therefore no justification for limiting the scope of that provision. The non-disclosure of personal information provided in s. 22(1)(b), however, is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that

justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The COL has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly.

In this case, it cannot reasonably be concluded from the COL's statements that disclosure of the interview notes that are the subject of the judicial review application could reasonably be expected to be injurious to the conduct of his future investigations. The COL has not established, as required by [s. 47 PA](#), that his discretion was properly exercised. His decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the COL shows instead that his decision not to disclose the personal information requested was based on the fact that the person interviewed had not consented to disclosure, and does not establish what risk of injury to his investigations the latter might cause. Rather than showing the harmful consequences of disclosing the interview notes on future investigations, an attempt was made to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the PA and the OLA. The COL must exercise his discretion based on the facts of each specific case. In this case, the COL has not shown that it is reasonable to maintain confidentiality.

With respect to the cross-appeal, the respondent cannot obtain disclosure of information other than personal information since his request is based on [s. 12\(1\) PA](#), which provides that only personal information may be disclosed.

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Referred to: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 1997 CanLII 5922 (FC), 140 F.T.R. 140; *Rubin v. Canada (Minister of Transport)*, 1997 CanLII 6385 (FCA), [1998] 2 F.C. 430; *Ruby v. Canada (Solicitor General)*, 2000 CanLII 17145 (FCA), [2000] 3 F.C. 589; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768; *Canada (Attorney General) v. Viola*, 1990 CanLII 13036 (FCA), [1991] 1 F.C. 373; *Rogers v. Canada (Correctional Service)*, 2001 CanLII 22031 (FC), [2001] 2 F.C. 586; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, 1996 CanLII 4084 (FC), [1996] 3 F.C. 609; *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403; *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595; *Canada (Information Commissioner) v. Canada (Solicitor General)*, 1988 CanLII 9396 (FC), [1988] 3 F.C. 551; *Reyes v. Secretary of State* (1984), 9 Admin. L.R. 296; *British Columbia Development Corp. v. Friedmann*, 1984 CanLII 121 (SCC), [1984] 2 S.C.R. 447; *St. Peter's Evangelical Lutheran Church, Ottawa v. City of Ottawa*, 1982 CanLII 60 (SCC), [1982] 2 S.C.R. 616.

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Privacy Act, R.S.C. 1985, c. P-21, ss. 2, 3 “personal information”, (g), 4, 7, 8(1), (2) [am. c. 1 (3rd Supp.), s. 12 (Sch., item 4)], 10 [*idem*], 12, 12(1), 16(1)(b), 18 à 28, 22(1)(b), (3), 29(1)(a), (b), (c), (3), 34(1), (2), 35, 36, 37, 41, 47, 49, Schedule [am. c. 31 (4th Supp.), s. 101].

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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal (2000), 261 N.R. 19, [2000] F.C.J. No. 1412 (QL), affirming a decision of the Trial Division (1998), 1998 CanLII 8632 (FC), 157 F.T.R. 15, [1998] F.C.J. No. 1527 (QL). Appeal and cross-appeal dismissed.

Barbara A. McIsaac, Q.C., Johane Tremblay and Gregory S. Tzemenakis, for the appellant/respondent on the cross-appeal.

Robert Lavigne, on his own behalf.

Dougald E. Brown and Steven Welchner, for the intervener.

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English version of the judgment of the Court delivered by

GONTHIER J. —

I. Introduction

1 This case involves the application of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), and the *Privacy Act*, R.S.C. 1985, c. P-21, in relation to each other, and at issue is the

right of access to personal information collected in private in an investigation conducted under the *Official Languages Act*. More precisely, we must decide whether disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the conduct of lawful investigations by the Commissioner of Official Languages.

II. Facts

2 The respondent, Robert Lavigne, worked in the Montreal office of the Department of National Health and Welfare (now the Department of Human Resources Development Canada (“the Department”)). Between November 1992 and March 1993 he filed four complaints with the Commissioner of Official Languages (“the Commissioner”) alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. The respondent complained that he had been forced to use French.

3 In the course of their investigation, the investigators working for the Office of the Commissioner of Official Languages questioned some 25 employees of the Department, including the respondent, his immediate supervisor and some of his co-workers, as well as managers and other employees. The investigators encountered problems in conducting their investigation because a number of Department employees were reluctant to give information, fearing reprisals by the respondent. In those instances, the investigators explained the role and mandate of the Commissioner as an ombudsman, and the private nature of the investigations. They gave assurances that the interviews would remain confidential within the limits of ss. 72, 73 and 74 of the *Official Languages Act*.

4 After the interviews were conducted, the investigation report concluded that the respondent's four complaints were well founded and made five recommendations to the Department. The Department did not question the Commissioner's findings, and agreed to implement the recommendations.

5 After the Commissioner's report was submitted, the respondent applied to the Federal Court, Trial Division for a remedy from the Department under Part X of the *Official Languages Act*. The Federal Court, being of the opinion that an application under that Part is a proceeding *de novo*, based its decision on the evidence submitted in affidavit form, and not on the evidence contained in the Commissioner's investigation files. The affidavits included those of France Doyon, Jacqueline Dubé and Normand Chartrand. The respondent had an opportunity to cross-examine the Department's witnesses, including those three individuals, but did not do so. On October 30, 1996, the Federal Court (whose decision was affirmed on appeal (1998), 228 N.R. 124) ordered the Department to pay the respondent \$3,000 in damages and to write him a letter of apology: [1996 CanLII 3854 \(FC\)](#), [1997] 1 F.C. 305.

6 On July 7, 1993, while those proceedings were going on, the respondent made an initial request to the Commissioner for disclosure of the personal information contained in the files on the complaints he had made to him. On September 10, 1993, a copy of this information was sent to the respondent, except for the portions which were withheld under the exemption set out in [s. 22\(1\)\(b\)](#) of the *Privacy Act*, *inter alia*. Several additional requests for information were subsequently submitted to the Commissioner, but they were denied.

In September 1994, the respondent filed a complaint with the Privacy Commissioner, who launched an investigation in the course of which he attempted to settle the respondent's complaints by mediation. Through this process, a number of witnesses who had been questioned by the Commissioner's representatives agreed to a copy of the personal information contained in the investigators' notes being given to the respondent. However, the testimony of 10 other individuals was not covered by the settlement agreement, either because they could not be located or because they had denied or not responded to the request. On April 25, 1997, the Privacy Commissioner ruled that the personal information contained in the testimony of those 10 people, for which consent to disclosure had not been obtained, had been properly exempted from disclosure under s. 22(1)(b) of the *Privacy Act*.

Following the proceedings before the Privacy Commissioner, the Commissioner again refused to disclose certain personal information to the respondent. The respondent then brought an application for judicial review of the Commissioner's decision. The documents originally in issue in his application to the Federal Court are the complete notes taken by the investigators in the Office of the Commissioner of Official Languages during the interviews held with the following people: the district manager of the Montreal office, Normand Chartrand; the respondent's immediate supervisor, Jacqueline Dubé; and the regional coordinator of official languages, France Doyon. Normand Chartrand and France Doyon subsequently agreed to disclosure by the Commissioner of the personal information concerning the respondent in the notes of their interviews. The dispute therefore relates to the personal information contained in the notes of the interview with Ms. Dubé and the notes relating to these three individuals that do not contain any personal information about the respondent.

9 The Federal Court, Trial Division and the Federal Court of Appeal set aside the Commissioner’s decision in part and ordered disclosure of the personal information requested. The respondent was denied disclosure of the non-personal information. It is those decisions that are the subject of these appeals.

10 In the main appeal, the appellant is seeking to have the decision of the Federal Court of Appeal ordering him to disclose the personal information he holds set aside. In the cross-appeal, the respondent is seeking to have all of the relevant information (whether or not it is personal information) disclosed by the Commissioner.

III. Relevant Statutory Provisions

11 *Privacy Act*, R.S.C. 1985, c. P-21

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

3. . . .

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

. . .

(g) the views or opinions of another individual about the individual,

. . .

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the *Immigration Act* has a right to and shall, on request, be given access to

(a) any personal information about the individual contained in a personal information bank; and

(b) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide

sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

...

(b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

...

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(b) or (c) or 24(a), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)

60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.

(2) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any federal institution, the Commissioner shall, before completing the investigation, take every reasonable measure to give to that individual or institution a full and ample opportunity to answer any adverse allegation or criticism, and to be assisted or represented by counsel for that purpose.

72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

73. The Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(a) that, in the opinion of the Commissioner, is necessary to carry out an investigation under this Act; or

(b) in the course of proceedings before the Federal Court under Part X or an appeal therefrom.

74. The Commissioner or any person acting on behalf or under the direction of the Commissioner is not a compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than proceedings before the Federal Court under Part X or an appeal therefrom.

IV. Decisions of the Lower Courts

A. *Federal Court, Trial Division* (1998), 1998 CanLII 8632 (FC), 157 F.T.R. 15

12 Dubé J. allowed the application for judicial review of the Commissioner's decision. Section 2 of the *Privacy Act* provides, *inter alia*, that the purpose of the Act is to extend the present laws of Canada that provide individuals with a right of access to personal information about themselves. Consequently, in the opinion of Dubé J., disclosure is the rule and withholding is the exception. Section 22(1)(b) of the *Privacy Act* is an exception to the general rule and accordingly must be narrowly construed. It provides a limited exemption relating solely to investigations that are underway or about to begin, and not future investigations. Being of the view that the investigation was over, Dubé J. concluded that s. 22(1)(b) did not apply.

13 In addition, Dubé J. concluded that the Commissioner had not established that the disclosure of the personal information could reasonably be expected to be injurious to

the conduct of its investigations (*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 1997 CanLII 5922 (FC), 140 F.T.R. 140). Promises of confidentiality are not essential because the Commissioner has the power to issue *subpoenas*.

14 Under s. 49 of the *Privacy Act*, Dubé J. ordered the appellant to disclose the “personal information” requested by the respondent. However, the *Privacy Act* does not entitle the respondent to require the disclosure of information other than “personal information”.

B. *Federal Court of Appeal* (2000), 261 N.R. 19

15 Sharlow J.A., on behalf of the court, affirmed the decision of Dubé J. and dismissed the appeal. The Federal Court of Appeal was also of the opinion that s. 22(1)(b) of the *Privacy Act* does not apply to protect the information that the Commissioner collected in the course of an investigation, once the investigation has concluded (*Rubin v. Canada (Minister of Transport)*, 1997 CanLII 6385 (FCA), [1998] 2 F.C. 430; *Ruby v. Canada (Solicitor General)*, 2000 CanLII 17145 (FCA), [2000] 3 F.C. 589; *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*).

16 Sharlow J.A. also rejected the appellant's argument that Dubé J. had failed to consider whether disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada, within the meaning of s. 22(1)(b) of the *Privacy Act*. In the opinion of Sharlow J.A., the evidence in the record was not capable of supporting such a conclusion. It established, at most, the possibility that witnesses may be reluctant to cooperate in an investigation unless they have an absolute assurance of secrecy. Sharlow

J.A. upheld Dubé J.'s decision ordering the appellant to disclose the "personal information" requested by the respondent.

17 The Federal Court of Appeal also dismissed the cross-appeal on the ground that a request under the *Privacy Act* may be made only to obtain personal information.

V. Issues

A. *Main Appeal*

- 18 1. Did the Federal Court of Appeal err in concluding that the Commissioner may not rely on s. 22(1)(b) of the *Privacy Act* to refuse to disclose personal information that was collected in the course of an investigation conducted under the *Official Languages Act*, when the Commissioner's investigation has concluded?
2. Did the Federal Court of Appeal err in concluding that there were no reasonable grounds for the Commissioner's refusal?

B. *Cross-Appeal*

- 19 Did the Federal Court of Appeal err in concluding that the respondent was not entitled to information other than personal information?

VI. Analysis

A. *Applicable Legislation*

20 The issue in this case is the application of the *Official Languages Act* and the *Privacy Act* in relation to each other. What we must first do is to ascertain the purpose and scope of the two Acts, and analyse the respective roles of the two Commissioners. It will then be possible, having regard to those general principles, to consider the statutory provisions on which the parties rely.

21 The *Official Languages Act* is a significant legislative response to the obligation imposed by the Constitution of Canada in respect of bilingualism in Canada. The preamble to the Act refers expressly to the duties set out in the Constitution. It cites the equality of status of English and French as to their use in the institutions of the Parliament and government of Canada and the guarantee of full and equal access in both languages to Parliament and to the laws of Canada and the courts. In addition, the preamble states that the Constitution provides for guarantees relating to the right of any member of the public to communicate with and receive services from any institution of the Parliament or government of Canada in English and French. The fact that the *Official Languages Act* is a legislative measure taken in order to fulfil the constitutional duty in respect of bilingualism is not in doubt.

22 *Section 2* of the *Official Languages Act* sets out the purpose of the Act:

2. The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

Those objectives are extremely important, in that the promotion of both official languages is essential to Canada's development. As this Court said in *Reference re Manitoba Language Rights*, [1985 CanLII 33 \(SCC\)](#), [1985] 1 S.C.R. 721, at p. 744:

The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The *Official Languages Act* is more than just a statement of principles. It imposes practical requirements on federal institutions, as Bastarache J. wrote in *R. v. Beaulac*, [1999 CanLII 684 \(SCC\)](#), [1999] 1 S.C.R. 768, at para. 24:

The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create

obligations for the State; see *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 73; *Mahe*, *supra*, at p. 365. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [Emphasis added.]

23 The importance of these objectives and of the constitutional values embodied in the *Official Languages Act* gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. For instance, in *Canada (Attorney General) v. Viola*, 1990 CanLII 13036 (FCA), [1991] 1 F.C. 373, at p. 386 (see also *Rogers v. Canada (Correctional Service)*, 2001 CanLII 22031 (FC), [2001] 2 F.C. 586 (T.D.), at pp. 602-3), the Federal Court of Appeal said:

The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects “certain basic goals of our society” and must be so interpreted “as to advance the broad policy considerations underlying it.” [Emphasis added.]

The Federal Court was correct to recognize the special status of the *Official Languages Act*. The constitutional roots of that Act, and its crucial role in relation to bilingualism, justify that interpretation.

24 The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2). Obviously, it is the second objective that is in issue in these appeals. Until 1983, the core elements of the legal guarantees of the confidentiality of personal information were set out in Part IV of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33. Part IV of the *Canadian Human Rights Act* was repealed (S.C. 1980-81-82-83, c. 111 (Sch. IV, s. 3)) and replaced by the *Privacy Act* (S.C. 1980-81-82-83, c. 111, Sch. II). In view of the quasi-constitutional mission of that Act, the courts have recognized its special nature. In *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, 1996 CanLII 4084 (FC), [1996] 3 F.C. 609, at p. 652, Noël J. of the Federal Court, Trial Division wrote:

The enactment by Parliament of Part IV of the *Canadian Human Rights Act*, later replaced by the *Privacy Act*, illustrated its recognition of the importance of the protection of individual privacy. A purposive approach to the interpretation of the *Privacy Act* is thus justified by the statute's quasi-constitutional legislative roots.
[Emphasis added.]

25 The *Privacy Act* is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society. In *Dagg v.*

Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at paras. 65-66, La Forest J. wrote (although he dissented, he spoke for the entire Court on this point):

The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions; see *R. v. Dymont*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 427, *per* La Forest J.; see also Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1982), 58 *Notre Dame L. Rev.* 445.

Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*; see *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, and *R. v. Broyles*, 1991 CanLII 15 (SCC), [1991] 3 S.C.R. 595.

La Forest J. also did not hesitate in that case to recognize "the privileged, foundational position of privacy interests in our social and legal culture" (para. 69). La Forest J. added, at para. 61, that the overarching purpose of access to information legislation is to facilitate democracy:

It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

And lastly, L'Heureux-Dubé J., dissenting, but not on this point, wrote on the question of the importance of protecting privacy in *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595, at p. 614:

The importance of privacy as a fundamental value in our society is underscored by the protection afforded to everyone under s. 8 of the *Charter* “to be secure against unreasonable search or seizure”. This value finds expression in such legislation as the *Privacy Act*, R.S.C., 1985, c. P-21, which restricts the purposes for which information may be used to those for which it was received. [Emphasis in original.]

The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation, defined by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The quasi-constitutional status of the *Official Languages Act* and the *Privacy Act* is one indicator to be considered in interpreting them, but it is not conclusive in itself. The only effect of this Court’s use of the expression “quasi-constitutional” to describe these two Acts is to recognize their special purpose.

26 The *Privacy Act* deals with “personal information”, which is defined in s. 3 of the Act. As Jerome A.C.J. said in *Canada (Information Commissioner) v. Canada (Solicitor General)*, 1988 CanLII 9396 (FC), [1988] 3 F.C. 551 (T.D.), at p. 557, s. 3 is “deliberately broad” and “is entirely consistent with the great pains that have been taken to safeguard individual identity”. (See also *Dagg, supra*, at para. 69.) Section 3 provides, *inter alia*:

3. . . .

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

. . .

(g) the views or opinions of another individual about the individual,

27 To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s. 4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s. 7). As a rule, personal information may never be disclosed to third parties except with the consent of the individual to whom it relates (s. 8(1)) and subject to the exceptions set out in the Act (s. 8(2)).

28 The Act also governs the retention of personal information, which must be stored in personal information banks (s. 10). The Act provides that every individual who is a Canadian citizen or permanent resident has a right to be given access to personal information about the individual held by a government institution (s. 12). It is that section that Mr. Lavigne relies on in requesting access to personal information about him.

29 The Act also sets out the circumstances in which a government institution may or must refuse to disclose personal information to the individual to whom the

information relates (ss. 18 to 28). B. McIsaac, R. Shields and K. Klein describe those exceptions as follows in *The Law of Privacy in Canada* (loose-leaf), at p. 3-15:

Sections 18 through 28 of the *Privacy Act* provide for the establishment of exempt banks of personal information and establish various provisions for the exemption of personal information which has been requested. These exempting provisions fall into two major types. First there are exemptions which are based on the classification or type of personal information involved. In these cases, the personal information is subject to exemption from disclosure simply because it falls into the class described in the exempting provision. The other exemptions require that the head of the institution be satisfied that the use of the personal information in question would result in an injury or other consequence which is specified in the exempting section. The reasonable expectation of injury test requires that there be a reasonable expectation of “probable” harm. . . . In most cases, even if the personal information falls within a class which is exempt from disclosure simply because of the nature of the personal information in question, the head of the institution still has a discretion to release the personal information. There are only three situations in which the head of the institution is statutorily obliged to refuse to release personal information [ss. 19, 22(2) and 26].

30 Given that one of the objectives of the *Privacy Act* is to provide individuals with access to personal information about themselves, the courts have generally interpreted the exceptions to the right of access narrowly. For instance, in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, Richard J. of the Federal Court, Trial Division said, at paras. 34-35:

The general preamble as contained in s. 2 of the *Privacy Act*, has the same general effect as s. 2(1) of the *Access to Information Act*. The *Privacy Act* must also be guided by the purposive clause. . . .

The *Privacy Act*'s purpose is to provide access to personal information maintained by government. The rules of interpretation described above also apply in this instance. The necessary exceptions to the access must be strictly construed.

31 Similarly, in *Reyes v. Secretary of State* (1984), 9 Admin. L.R. 296, at p. 299, the Federal Court, Trial Division said:

It must also be emphasized that since the main purpose of these “access to information” statutes is to codify the right of public access to government information, two things follow: first, such public access ought not be frustrated by the Courts except upon the clearest of grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure, in this case the government.

32 The *Privacy Act* provides for the appointment of a Commissioner responsible for administering and enforcing the Act. The Privacy Commissioner's duties include:

- Receiving (and investigating) complaints from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with s. 7 or 8 (s. 29(1)(a)), and receiving (and investigating) complaints from individuals who have been refused access to personal information requested under s. 12(1) or who allege that they are not being accorded the rights to which they are entitled under s. 12(2) (s. 29(1)(b) and (c));

- Initiating a complaint where the Privacy Commissioner is satisfied there are reasonable grounds to investigate a matter under the *Privacy Act* (s. 29(3));

– Carrying out investigations of the files contained in personal information banks designated as exempt banks under s. 18, to determine whether the files should in fact be in those banks (s. 36);

– Carrying out investigations in respect of compliance with ss. 4 to 8 (collection, retention and protection of personal information) (s. 37).

33 The Privacy Commissioner has broad powers for the purposes of conducting investigations into complaints that are filed. He has access to all information held by a government institution, with the exception of confidences of the Queen's Privy Council for Canada, and no information to which he has access may be withheld from him (s. 34(2)). He has the right to summon and enforce the appearance of witnesses before him and to compel them to give oral or written evidence on oath and to produce such documents and things as he deems requisite to the full investigation and consideration of the complaint. In addition, he may administer oaths and receive such evidence and other information, whether on oath or by affidavit or otherwise, as the Privacy Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law. The Commissioner may also enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises, converse in private with any person therein, and carry out such inquiries within the Privacy Commissioner's authority under the *Privacy Act* as he sees fit. Lastly, the Privacy Commissioner may examine or obtain copies of or extracts from books or other records found in the premises occupied by a government institution containing any matter relevant to the investigation (s. 34(1)).

34 After completing his investigation, the Privacy Commissioner reports his findings to the head of the government institution in question, if he finds that a complaint is

well-founded. Where appropriate, the Privacy Commissioner may report his findings to the complainant. In his report, he may ask the head of the government institution in question to disclose the personal information in issue or to make changes in the management or use of personal information (ss. 35, 36 and 37).

35 Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

- (a) the status of an official language was not or is not being recognized,
- (b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or
- (c) the spirit and intent of this Act was not or is not being complied with

in the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

36 As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

37 In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

- They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

- They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

- They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

- They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

- As a rule, they may not disclose information they receive.

38 The Privacy Commissioner and the Official Languages Commissioner follow an approach that distinguishes them from a court. Their unique mission is to resolve tension in an informal manner: one reason that the office of ombudsman was created was to address the limitations of legal proceedings. As W. Wade wrote (*Administrative Law* (8th ed. 2000), at pp. 87-88):

If something illegal is done, administrative law can supply a remedy, though the procedure of the courts is too formal and expensive to suit many complainants. But justified grievances may equally well arise from action which is legal, or at any rate not clearly illegal, when a government department has acted inconsiderately or unfairly or where it has misled the complainant or delayed his case excessively or treated him badly. Sometimes a statutory tribunal will be able to help him both cheaply and informally. But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. . . . What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. . . . It was because it filled that need that the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.

39 An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia Development Corp. v. Friedmann*, 1984 CanLII 121 (SCC), [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, *circa* 1809. He described their genesis (at pp. 458-59):

As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the

recommendation of corrective action to the governmental official or department involved.

The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p. 15, as “one of the dilemmas of our times” namely, that “(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic — if it is not properly controlled — is itself destructive of democracy and its values”.

The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

B. *The Connection Between the Official Languages Act and the Privacy Act*

40 Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

41 Section 12 of the *Privacy Act* creates a right of access to personal information, “[s]ubject to this Act”. Exceptions to the right of access must therefore be

prescribed by that Act. Where a government institution refuses to give access to the information, it is required to state the specific provision of the Act on which the refusal is based (s. 16(1)(b)) and to establish that it is authorized to refuse to disclose the information (s. 47). In this case, the refusal to disclose is based on s. 22(1)(b).

42 The *Privacy Act* must therefore be applied to the Office of the Commissioner of Official Languages in a manner consistent with the objective of the *Official Languages Act* of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions. Parliament has expressly provided that investigations by the Commissioner shall be conducted in private and that investigators shall not disclose information that comes to their knowledge in the performance of their duties and functions:

60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.

72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.
[Emphasis added.]

These provisions illustrate Parliament's desire to facilitate access to the Commissioner and to recognize the very delicate nature of the use of an official language at work by a minority group. The private and confidential nature of investigations is an important aspect of the implementation of the *Official Languages Act*. Without protections of this nature, complainants might be reluctant to file complaints with the Commissioner, for example because they are afraid that their opportunities for advancement would be reduced, or their workplace relationships would suffer. As well, these provisions encourage witnesses to participate in the Commissioner's investigations. They are less likely to be afraid that their participation might have a negative impact on the

employer-employee relationship or their relations with other employees, and to refuse to cooperate for fear of getting in trouble or damaging their careers. The affidavit of Mr. Langelier, Assistant Director General of the Investigations Branch, explains the importance of preserving a measure of confidentiality in the Commissioner's investigations, for the following reasons, among others:

[TRANSLATION] – the investigators gave assurances to the people interviewed that the information gathered would be kept confidential in order to secure the cooperation of those people

– . . . members of the public, and in particular public servants, will hesitate to file complaints ... if they are warned that their identities and any information that they disclose to the OCOL investigators is likely to be disclosed otherwise than where required in order to comply with the principles of natural justice or, as an exception, in an application for a remedy under Part X of the [*Official Languages Act*];

– members of the public, and in particular public servants, will be more reluctant to cooperate with OCOL investigators, and in order to give effect to the obligation imposed on the COL to investigate complaints, investigators will have to resort to their powers in relation to investigations, including summoning witnesses to attend and compelling them to testify and produce documents;

– the OCOL's investigatory process will become much more formal and rigid, and this will compromise the COL's ombudsman role;

– the fact that the COL is required to disclose information could interfere with his role as mediator and facilitator and thereby jeopardize the power of persuasion and the credibility that an ombudsman must have in order to discharge his functions.

43 In *Beaulac*, *supra*, at para. 20, Bastarache J. explained the importance of providing conditions in which language rights may be exercised:

The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence

of a duty of the State to take positive steps to implement language guarantees

[Emphasis added.]

Marshall and Reif, *supra*, at p. 219, explain the importance of confidentiality for an ombudsman:

The confidentiality of the ombudsman's proceedings helps to ensure his independence as well as to facilitate cooperation throughout the investigation. The ombudsman's investigation must be held in private and his reports and investigation may not be made the subject of an inquiry or review, apart from a review ordered by the Legislative Assembly, its committees or another body which the Legislative Assembly authorizes. [Emphasis added.]

44 In addition to enacting specific provisions to ensure that investigations are held in private, Parliament gave the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board (s. 62(2) (a)). The Minister of Justice at the time, Ray Hnatyshyn, discussed that provision in addressing the legislative committee (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, Issue No. 20, June 7, 1988, at pp. 20:25 and 20:29) as follows:

It is appropriate, after we have talked about the ombudsman character of the office, that in this case the commissioner has the opportunity to examine the kind of harassment, intimidation, discrimination or obstruction that might take place with respect to any individual and have an opportunity to examine these matters and bring them to the attention of the President of the Treasury Board. I think this is an opportunity to make sure all Canadians and all people who are involved and employed and against whom a complaint could be laid under this bill can do so freely without fear of discrimination. I think it is important for all Canadians to feel they have the right to use this bill and use the office of the commissioner without fear of retribution or recrimination for taking a complaint forward.

. . .

But if you have raised a complaint in the first place, you are on record, and maybe you are being discriminated against.

Certainly the commissioner's function is to protect you; not to make life any more difficult for you but make sure you are not going to suffer negative consequences. If you prevent him from doing that, or have a veto, then it may be counterproductive in the legislation to the interests of all your fellow employees. It would certainly allow the same discrimination to take place with other people if they feel they cannot beat the system. [Emphasis added.]

The *Privacy Act* must be applied to the Office of the Commissioner of Official Languages in such a way as to recognize the unique context in which the Commissioner's investigations are conducted. In ss. 60, 62 and 72, Parliament clearly recognized the delicate situation involved in the use of an official language at work by a minority group, by requiring that investigations be conducted in private and be kept confidential, to protect complainants and witnesses from any prejudice that might result from their involvement in the complaints and the investigation process, and by giving the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board. If Parliament had not enacted those provisions, it might have been difficult to achieve the objectives of the *Official Languages Act*. The participation of witnesses and complainants is central to the effectiveness of the Act. Because the purpose of the investigation is to determine the truth and understand the individuals' experience of the situation, the investigators must be circumspect in collecting information and assessing the information obtained.

45 Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is

the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

46 The appellant contends that the access to information mechanism set out in ss. 73 and 74 of the *Official Languages Act* is a complete scheme, and that those provisions enabled the respondent to obtain disclosure of the information he needed in order to submit his complaint and secure redress. In the appellant's submission, Parliament intended that the information collected by the Commissioner would remain private, unless, and only in the event that, it could be disclosed under the *Official Languages Act*. The effect of that interpretation is to exempt the *Official Languages Act* from the application of the *Privacy Act*. It defeats the complainant's right to obtain access to personal information about him under the *Privacy Act*. It would be contrary to the clear intention of Parliament, which was that the Office of the Commissioner of Official Languages was to be subject to the *Privacy Act*, to accept that interpretation, and it must be rejected. The two Acts must be interpreted and applied harmoniously.

47 At the time in question, the policy of the Office of the Commissioner of Official Languages was to explain to witnesses that ss. 60 and 72 of the *Official Languages Act* provided that investigations were conducted in private, and that ss. 73 and 74 of the Act

provided for limited circumstances in which testimony could be disclosed. As

Mr. Langelier said in his affidavit:

[TRANSLATION] The credibility of the Commissioner, in my view, requires that the information disclosed to the Commissioner and his representatives in the course of investigations is kept strictly confidential, subject to the following exceptions:

A) situations in which the Commissioner must disclose information which, in his opinion, is necessary for the conduct of his investigations. These include compliance with the principles of natural justice, where it is essential that the person or institution that is the subject of a recommendation know the identity of the complainant and what the complainant has said;

B) situations in which the Commissioner is involved in an application for a court remedy under Part X of the *OLA*. In those cases, the Commissioner may disclose or authorize the disclosure of information. [Emphasis added.]

The Commissioner's policy was therefore to assure witnesses that the information they disclosed to investigators would be kept confidential, within the limits of ss. 72, 73 and 74. In this case, the promise of confidentiality was also made subject to those sections; as the appellant's factum states:

The investigators explained the role and mandate of the Commissioner as an Ombudsman and gave their assurances that the interviews would be kept confidential in light of sections 60(1), 72, 73 and 74 of the *Official Languages Act*. The investigators explained that pursuant to these sections, the investigations are conducted "in private". [Emphasis added.]

The promise of confidentiality made to the witnesses in the course of the investigation concerning Mr. Lavigne's complaint was therefore not absolute.

48 After the respondent filed his complaint, the Commissioner of Official Languages altered the policy concerning the instructions to be given to witnesses. His new policy required that investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act*. Investigators still inform witnesses that

investigations are conducted in private, as provided in s. 60(1) of the *Official Languages Act*, and that the information that comes to the investigators' knowledge, including the testimony they give, will not be disclosed unless disclosure is necessary for the investigation or in the course of proceedings under Part X, or in cases where disclosure is required for reasons of procedural fairness under s. 60(2) of the *Official Languages Act*. In addition, investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act* and that the information collected may be exempt from the disclosure requirement where an exception to disclosure applies.

C. *The Exception to the Right of Access to Personal Information under Section 22(1)(b)*

49 The purpose of s. 55 of the *Official Languages Act* is to limit the powers of the Commissioner to those powers provided by the Act or another Act of Parliament:

55. The Commissioner shall carry out such duties and functions as are assigned to the Commissioner by this Act or any other Act of Parliament, and may carry out or engage in such other related assignments or activities as may be authorized by the Governor in Council.

Section 22(1)(b) of the *Privacy Act* gives the Commissioner of Official Languages the power to refuse access to information that is requested if disclosure could reasonably be expected to be injurious to the conduct of his investigations. It is primarily on this provision that the Commissioner bases his refusal to grant access to the information.

50 It is this decision by the Commissioner that is the subject of the application for judicial review. Any analysis of that decision necessarily rests on a determination of the

meaning of the expression “lawful investigations”. The following question arises in this respect: are future investigations covered by s. 22(1)(b)?

51 In the case before us, the appellant is not arguing that the disclosure of information would be injurious to investigations that are underway, because all of the investigations had been concluded at the time when the respondent requested the personal information in question from him. However, he submits that disclosure of the personal information could reasonably be expected to be injurious to his future investigations. The appellant contests the argument made by the respondent and the intervener, which is that s. 22(1)(b) applies only to investigations that are underway and cannot be relied on to protect future investigations or the investigative process in general. In his submission, this is a needlessly narrow interpretation of that provision, and it is injurious to the implementation of the Act and the attainment of its objectives.

52 First, it must be noted that the word “investigation” is defined in [s. 22\(3\)](#) of the *Privacy Act*:

22. . . .

(3) For the purposes of paragraph (1)(b), “investigation” means an investigation that

- (a) pertains to the administration or enforcement of an Act of Parliament;
- (b) is authorized by or pursuant to an Act of Parliament; or
- (c) is within a class of investigations specified in the regulations.

That definition does not suggest that the word is limited to a specific investigation, or an investigation that is circumscribed in time. Indeed, Parliament has not limited the scope of that expression by any qualifier whatever. None of the paragraphs of s. 22(3) limits the word “investigation” to investigations that are underway, or excludes future investigations or the

investigative process in general from its protection. It therefore seems, *prima facie*, that the word retains its broad meaning and may refer equally to investigations that are underway, are about to commence, or will take place. We shall now consider whether Parliament restricted the scope of that definition for the purpose of the application of the exception to disclosure set out in s. 22(1)(b).

53 Parliament made it plain that s. 22(1)(b) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word “*notamment*”, in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression “without restricting the generality of the foregoing”. This Court has had occasion in the past to examine the interpretation of the expression “without restricting the generality of the foregoing” in similar circumstances: in *Dagg, supra*, at para. 68, La Forest J. analyzed s. 3 of the *Privacy Act*, the wording of which resembles the wording of s. 22(1)(b) of that Act:

In its opening paragraph, the provision states that “personal information” means “information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing”. On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254, at pp. 289-91.

Although s. 22(1)(b)(i) relates specifically to a particular investigation, it in no way alters the generality of the introductory sentence. In fact, s. 22(1)(b)(ii), which authorizes refusal to disclose information that would reveal the identity of a confidential source of information, contemplates the protection of future investigations as well as existing investigations. A reliable confidential source may be useful beyond the confines of one specific investigation.

54 In short, there is nothing in s. 22(1)(b) that should be interpreted as restricting the scope of the word “investigation” to investigations that are underway or are about to commence, or limiting the general meaning of that word to specific investigations. There is therefore no justification for limiting the scope of that section.

55 Exceptions to the disclosure of personal information have generally been narrowly construed by the courts. Nonetheless, as McDonald J.A. of the Federal Court of Appeal said, “[i]f the meaning [of the wording of a provision] is plain, it is not for this Court, or any other court, to alter it” (*Rubin, supra*, at para. 24; see also *St. Peter’s Evangelical Lutheran Church, Ottawa v. City of Ottawa*, 1982 CanLII 60 (SCC), [1982] 2 S.C.R. 616, at p. 626). The argument made by the intervener and the respondent, that it is never possible to invoke the exemption from disclosure once the investigation is over, is an interpretation that is not supported by the wording of the provision. The disclosure of personal information may be as damaging to future investigations as to investigations that are underway.

56 The appellant relies on another portion of s. 22(1)(b). He contends that disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the enforcement of a law of Canada or a province, and more specifically of the *Official Languages Act*:

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

...

(b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

22. (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :

...

b) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment [Emphasis added.]

The respondent and the intervener submit that the Commissioner of Official Languages does not have the power to enforce the *Official Languages Act* and that, consequently, this argument must be rejected. They contend that the power to enforce that Act is set out in Part X of the Act, entitled “Court Remedy”, and that only the Federal Court has that power. In their submission, the English expression “enforcement of any law” expressly refers to activities to compel compliance.

57 The question is whether “the enforcement of any law of Canada” refers only to activities the purpose of which is to compel certain individuals or institutions to comply with the provisions of a law of Canada, or whether mediation and making non-coercive recommendations, as provided by the *Official Languages Act*, also constitute “the enforcement of any law of Canada”. I do not believe that it is necessary for this Court to construe that expression in order to dispose of this matter. The appeal essentially addresses the question of how the *Privacy Act*, which provides for access to personal information by the person concerned, may be reconciled with the right of the Commissioner of Official Languages to keep investigations confidential and private. The question of confidentiality arises in this case only in relation to investigations.

58 The non-disclosure of personal information provided in s. 22(1)(b) is authorized only where disclosure “could reasonably be expected” to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, at para. 43, “[t]he reasonable expectation of probable harm implies a confident belief”. There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly. The power provided in s. 22(1)(b) must be exercised in a manner that respects the nature and objectives of the *Official Languages Act*. The Commissioner must have regard to, *inter alia*, the private and confidential nature of investigations, as provided by Parliament. As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the *Official Languages Act*. Section 22(1)(b) must be applied in a way that is consistent with both Acts.

D. *Application of the Law to the Facts of the Case*

59 The only interview notes that Mr. Lavigne is attempting to obtain in this application are the notes in respect of Jacqueline Dubé: during the course of the proceedings, Normand Chartrand and France Doyon agreed to allow the Commissioner of Official Languages to give the respondent access to the personal information about him.

The issue that remains to be determined is whether it can reasonably be concluded from the Commissioner's statements that disclosure of the notes of the interview with Jacqueline Dubé could reasonably be expected to be injurious to the conduct of the Commissioner's future investigations.

60 As I have said, s. 22(1)(b) is not an absolute exemption clause. The decision of the Commissioner of Official Languages to refuse disclosure under s. 22(1)(b) must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a reasonable expectation of injury in order to refuse to disclose information under that provision. In addition, s. 47 of the *Privacy Act* provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on reasonable grounds, the Federal Court may then vary that decision and authorize access to the personal information (s. 49). The appellant relied primarily on Mr. Langelier's affidavit to establish the reasonable expectation of injury.

61 I do not believe that Mr. Langelier's statements provide a reasonable basis for concluding that disclosure of the notes of the interview with Ms. Dubé could reasonably be expected to be injurious to future investigations. Mr. Langelier contends that disclosure would have an injurious effect on future investigations, without proving this to be so in the circumstances of this case. The Commissioner's decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner's decision not to disclose the personal information requested was based on the fact that Ms. Dubé had not consented to disclosure, and does not establish what risk of injury to the Commissioner's investigations the latter might cause. If Ms. Dubé had given permission, the Commissioner would have disclosed the information. The appellant's factum states:

Jacqueline Dubé did not give permission to disclose to the Respondent the personal information concerning him that was recorded in the course of the interview she gave the OCOL [Office of the Commissioner of Official Languages] [and so] [t]he OCOL did not disclose any of this personal information. [Emphasis added.]

The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the *Privacy Act* and the *Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case. In the case of Ms. Dubé, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner's investigations.

62 The evidence presented by the intervener is no more persuasive. The intervener submits that it is not necessary for the Commissioner's investigations to be confidential by referring to the affidavit of Gerald Neary, the Director of Investigations in the Office of the Privacy Commissioner of Canada, said:

OCOL argues that providing promises of confidentiality to witnesses in the context of its investigations is both a necessary and consistent part of its alleged role as an ombudsman. However, the nature of the role of the Commissioner of Official

Languages is similar to the role of the Privacy Commissioner of Canada. As an Ombudsman, the Privacy Commissioner has found that blanket promises of confidentiality are not necessary in order to preserve the role of ombudsman, or in order to ensure effective investigations. [Emphasis added.]

The Director of Investigations in the Office of the Privacy Commissioner is not necessarily the person most suited to determining the best way for investigations to be conducted by the Commissioner of Official Languages. Mr. Neary's affidavit does not establish that he has any expertise in the specific field of official languages. Mr. Langelier, unlike Mr. Neary, has lengthy experience in that field. For a number of years, he worked as the Director of the Complaints and Audits Branch and as a complaints officer in the Office of the Commissioner of Official Languages. When his affidavit was filed, he had over 20 years' experience.

63 Although the role of the Commissioner of Official Languages is similar to that of the Privacy Commissioner, the two Acts that they are responsible for enforcing, and the situations in which those Acts apply, are different in a number of respects. Language is a means of expression proper to an individual. It is the vehicle by which a cultural group transmits its distinct culture and traditions, and it is an essential tool for expressing and communicating ideas. It is not surprising that the history of Canada is marked by a number of conflicts over language, considering the presence of two dominant languages in this country. As A. Braën explained, language is a cultural benchmark that may be the source of conflicts ("Language Rights", in M. Bastarache, ed., *Language Rights in Canada* (1987), 1, at pp. 15-16:

Language is an essential means of cultural expression and its vitality, according to the Commission [Royal Commission on Bilingualism and Biculturalism], is a necessary although insufficient condition for the survival of a culture as a whole. However, in a bilingual or multilingual society language will be a constant focus of tensions to the extent [that] it expresses the community interests of cultural or language groups. [Emphasis added.]

On the history of bilingualism in Canada, see: C.-A. Sheppard, *The Law of Languages in Canada* (1971), Study No. 10 of the Royal Commission on Bilingualism and Biculturalism, at pp. 1-96, and F. Chevette and H. Marx, *Droit constitutionnel: notes et jurisprudence* (1982), at pp. 1583-88.

64 In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate context in which the Commissioner carries out his functions.

65 Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is reasonable to maintain confidentiality. For these reasons, I would dismiss the main appeal.

66 In the cross-appeal, the respondent is seeking disclosure of information other than personal information that is held by the Commissioner in connection with the official languages complaint he made. Mr. Lavigne's request to the Office of the Commissioner of

Official Languages is based on s. 12(1) of the *Privacy Act*. Section 12 of that Act provides that only personal information may be requested. I agree with Sharlow J.A. of the Federal Court of Appeal that a person who makes a request under the *Privacy Act* is not entitled to information other than personal information. For those reasons, I would dismiss the cross-appeal.

VII. Conclusion

67 The main appeal and the cross-appeal are dismissed, without costs.

Appeal and cross-appeal dismissed.

Solicitors for the appellant/respondent on the cross-appeal: McCarthy Tétrault, Ottawa; The Office of the Commissioner of Official Languages, Ottawa.

Solicitors for the intervener the Privacy Commissioner of Canada: Nelligan O'Brien Payne, Ottawa.

TAB 29

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), [2010] 1 SCR 815

Date: 2010-06-17

File number: 32172

Other citations: 319 DLR (4th) 385 — 402 NR 350 — 189 ACWS (3d) 675 — 262 OAC 258 — [2010] EXP 1990 — 255 CCC (3d) 545 — 76 CR (6th) 283 — 1 Admin LR (5th) 235 — 212 CRR (2d) 300 — 84 CPR (4th) 81 — 88 WCB (2d) 628 — EYB 2010-175469 — JE 2010-1089 — [2010] SCJ No 23 (QL)

Citation: Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, <<https://canlii.ca/t/2b5ss>>, retrieved on 2025-10-28



SUPREME COURT OF CANADA

CITATION: Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815

DATE: 20100617
DOCKET: 32172

BETWEEN:

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants
and

Criminal Lawyers' Association

Respondent
- and -

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of**

**Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
Association, Canadian Association of Journalists and
British Columbia Civil Liberties Association
Interveners**

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: McLachlin C.J. and Abella J. (Binnie, LeBel, Fish, Charron
(paras. 1 to 76) and Rothstein JJ. concurring)

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1
S.C.R. 815

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants

v.

Criminal Lawyers' Association

Respondent

and

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of
Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
Association, Canadian Association of Journalists and
British Columbia Civil Liberties Association**

Interveners

Indexed as: Ontario (Public Safety and Security) v. Criminal Lawyers' Association

File No.: 32172.

2008: December 11; 2010: June 17.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Access to information — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under s. 14 (law enforcement) and s. 19 (solicitor-client privilege) of Ontario Freedom of Information and Protection of Privacy Act — Whether s. 23 of Act violates guarantee of freedom of expression by failing to extend “public interest” balancing to exemptions found in ss. 14 and 19 — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Constitutional law — Charter of Rights — Freedom of expression — Scope — Access to government held information — Whether freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b).

Access to information — Access to records — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under freedom of information legislation — Whether constitutional guarantee of freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

The trial judge ordered a stay of proceedings in a murder trial, finding many instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without giving reasons for their finding. Concerned about the disparity between the findings at trial and the conclusion of the police investigation, the Criminal Lawyers' Association ("CLA") made a request under the [Ontario Freedom of Information and Protection of Privacy Act](#) ("*FIPPA*") to the responsible Minister for disclosure of records relating to the investigation. The records at issue were a lengthy police report and two documents containing legal advice. *FIPPA* exempts various categories of documents from disclosure, some of which may be disclosed pursuant to a discretionary ministerial decision, including law enforcement records under s. 14 and solicitor-client privileged records under s. 19. Some records in the ministerial discretion category, but not those under ss. 14 and 19, are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*.

The Minister refused to disclose any of the records without explanation, claiming exemptions under, among other provisions, ss. 14 and 19 of *FIPPA*. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the [Act](#), including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of *FIPPA*, and accordingly, did not determine whether there was a compelling public interest at play. He also concluded that the omission of ss. 14 and 19 from the public interest override in s. 23 did not constitute a breach of the CLA's right to freedom of expression guaranteed under s. 2(b) of the [Canadian Charter of Rights and Freedoms](#). The Divisional Court upheld the decision not to disclose the documents and agreed with the conclusion that the exclusion of ss. 14 and 19 from s. 23 did not violate s. 2(b) of the *Charter*. In a majority decision, the Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*.

Held: The appeal should be allowed. The Assistant Commissioner's order confirming the constitutionality of s. 23 of *FIPPA* should be restored. The documents protected by s. 19 of

FIPPA dealing with solicitor-client privilege should be exempted from disclosure. The claim under the law enforcement provision, s. 14 of *FIPPA*, should be returned to the Commissioner for reconsideration.

The real constitutional issue before the Court is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*. Section 2(b) of the *Charter* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Determining whether s. 2(b) of the *Charter* protects such access is essentially a question of how far s. 2(b) protection extends. It asks whether s. 2(b) is engaged at all and is best approached by building on the methodology set out in *Irwin Toy*.

To demonstrate that there is expressive content in accessing these documents, a claimant must establish that the denial of access effectively precludes meaningful public discussion on matters of public interest. If this necessity is established, a *prima facie* case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(b) of the *Charter*. It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged, and the only remaining question is whether the government action infringes that protection.

The legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Charter*. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place under the current legislative

scheme. Even if the first step were met, the CLA would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. Sections 14 and 19 are intended to protect documents from disclosure on these very grounds.

On the record before us, it is not established that the CLA could satisfy the requirements of the framework and, as a result, s. 2(b) is not engaged. In any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(b) were engaged it would not be breached. The ultimate answer to the CLA's claim is that the absence of a second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents given that those sections, properly interpreted, already incorporate considerations of the public interest. The CLA therefore would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

In reviewing the Minister's decision not to disclose the records, the Commissioner must determine whether the exemptions were properly claimed and, if so, whether the Minister's exercise of discretion was reasonable. In this case, the order pertaining to the claim under s. 14 of *FIPPA* should be returned to the Commissioner for reconsideration. The Commissioner upheld the Minister's decision without reviewing the Minister's exercise of discretion under ss. 14 and 19 of *FIPPA* because s. 23 did not apply to these sections. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought raise concerns which should have been investigated by the Commissioner. Had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Commissioner's decision on the s. 19 claim, however, should be upheld. It is difficult to see how these records could have been disclosed under the established rules on solicitor-client privilege and based on the facts and interests at stake.

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Higgins (1999), 118 O.A.C. 108, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447.

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Daniel Guttman, Sophie Nunnelley and Don Fawcett, for the appellants.

David Stratas, Brad Elberg, Trevor Guy and Ryan Teschner, for the respondent.

Christopher Rupar and Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Dominique A. Jobin, for the intervener the Attorney General of Quebec.

Written submissions only by *Edward A. Gores, Q.C.*, for the intervener the Attorney General of Nova Scotia.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Nathaniel Carnegie and Deborah Carlson, for the intervener the Attorney General of Manitoba.

Allan Seckel, Q.C., and *Deanna Billo*, for the intervener the Attorney General of British Columbia.

Barbara Barrowman, for the intervener the Attorney General of Newfoundland and Labrador.

William S. Challis, Stephen McCammon and Allison Knight, for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario.

Mahmud Jamal and Karim Renno, for the intervener the Canadian Bar Association.

Marlys Edwardh, Daniel Brunet and Jessica Orkin, for the intervener the Information Commissioner of Canada.

Guy J. Pratte and Nadia Effendi, for the intervener the Federation of Law Societies of Canada.

Paul B. Schabas and Ryder Gilliland, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists.

Catherine Beagan Flood and Iris Fischer, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

1. Overview

[1] Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

[2] Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "*Act*"). The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.

[3] The [Act](#) exempts various categories of documents from disclosure. This case concerns records that *may* be disclosed pursuant to a discretionary ministerial decision. More particularly, this case concerns records prepared in the course of law enforcement investigations (s. 14) and records protected by solicitor-client privilege (s. 19). The Act provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*. The Act does not require this additional public interest review for solicitor-client records or law enforcement records.

[4] The Criminal Lawyers' Association ("CLA") is an advocacy group representing members of the criminal defence bar in Ontario. It is seeking records in the hands of the Crown relating to a murder case which gave rise to judicial expressions of concern: two documents containing legal advice and a 318-page report looking into alleged police misconduct. The Minister refused to disclose either the report or related documents, stating that the exemptions in the [Act](#) for solicitor-client privilege and law enforcement privilege covered all the material. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including [ss. 14\(2\)\(a\)](#) and [19](#). He noted that s. 23 did not apply to these two provisions of the Act and, as such, he did not determine whether there was a compelling public interest at play here in the context of [ss. 14](#) and [19](#).

[5] [Section 2\(b\)](#) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

[6] The CLA argues that the [Act](#)'s failure in s. 23 to include a public interest review for solicitor-client and law enforcement privileged documents violates freedom of expression in [s. 2\(b\)](#) of the [Charter](#). For the reasons that follow, we conclude that there is no such violation.

[7] This said, it is not clear on the material before us that the Assistant Commissioner, in applying the [Act](#), fully considered the scope of his discretion under s. 14, the law enforcement provision. We therefore remit this matter to the Commissioner for reconsideration to determine whether any or all of the report should be disclosed.

2. Background

[8] This case arises out of the murder of Domenic Racco in 1983, for which four men (Anthony Musitano, Domenic Musitano, Guiseppe Avignone, and William Rankin) were originally charged. They pled guilty to lesser charges in 1985. In 1990, two other individuals, Graham Rodney Court and Peter Dennis Monaghan, were alleged to have been hired to kill Racco. Court and Monaghan were convicted after a jury trial in 1991.

[9] In 1995, the Ontario Court of Appeal ordered a new trial for Monaghan on the basis, *inter alia*, of fresh evidence (*R. v. Court* (1995), [1995 CanLII 1741 \(ON CA\)](#), 23 O.R. (3d) 321). It was evidence that had been lost before trial, but the police did not reveal its loss to the defence until two-and-a-half years after the trial. A new trial was also ordered, for both Monaghan and Court, based on inadequate jury instructions at trial.

[10] Both men applied for a stay of proceedings in 1997 on the grounds of a breach of their *Charter* rights. Glithero J. concluded that their rights under ss. 7, 11(b) and 11(d) of the *Charter* had been violated to such a degree that the proceedings should be stayed, stating:

. . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996. [Emphasis added.]

(*R. v. Court* (1997), 1997 CanLII 12180 (ON SC), 36 O.R. (3d) 263 (Gen. Div.), p.

300)

[11] As a result of Glithero J.'s rebuke, the Ontario Provincial Police ("OPP") undertook an investigation into the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police, and the Crown Attorney in the case. In a terse press release on April 3, 1998, the OPP exonerated the police on the grounds that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice". Despite the clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges, the OPP offered no explanation for its conclusions.

[12] Concerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP, the CLA made a request under *FIPPA* to the Minister of the Solicitor General and Correctional Services (later the Minister of Public Safety and Security and now the Minister of Community Safety and Correctional Services) for disclosure of records relating to the OPP investigation. The records at issue were a 318-page police report detailing the results of the OPP's investigation; a March 12, 1998 memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a March 24, 1998 letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation.

[13] The Minister refused to disclose any of these records, claiming several exemptions under the [Act](#), including: s. 14 (law enforcement), s. 19 (solicitor-client privilege), s. 20 (danger to health and safety), and s. 21 (personal privacy). He did not explain how or why each of these exemptions applied to the material in question and did not address the possibility of partial disclosure.

[14] The CLA appealed the Minister's decision not to disclose the records to the Commissioner pursuant to s. 50(1)(a) of *FIPPA*.

[15] The Minister's decision was reviewed by the Assistant Information and Privacy Commissioner, Tom Mitchinson. Reliance on the s. 20 exemption was withdrawn. On May 5, 2000, Mr. Mitchinson upheld the propriety of the Minister's decision not to disclose the records (IPC Order PO-1779). He found that the public interest in disclosure "clearly outweigh[ed]" the purpose of the exemption on the facts of this case, and would have applied the s. 23 override with respect to the s. 21 personal privacy exemption; however, he upheld the Minister's refusal because the other claimed exemptions (ss. 14 and 19) are not included within the s. 23 override. He was also asked to consider whether the omission of ss. 14 and 19 from the public interest override

constituted a breach of the CLA's *Charter* right to freedom of expression. He concluded that it did not.

[16] At the Divisional Court, Blair R.S.J. upheld the decision not to disclose the documents and agreed with the conclusion that the *FIPPA* exemption scheme did not violate s. 2(b) of the *Charter*: (2004), 2004 CanLII 18977 (ON SCDC), 70 O.R. (3d) 332.

[17] The appeal was allowed by the Court of Appeal: 2007 ONCA 392, 86 O.R. (3d) 259. LaForme J.A., for the majority, concluded that the exemption scheme in *FIPPA* violated the *Charter*. Juriansz J.A. dissented, concluding that there was no *Charter* violation, and questioned whether expression was genuinely at issue at all.

[18] The Minister appealed the matter to this Court on the issue of the constitutionality of s. 23, given the exclusion of ss. 14 and 19 from its scope. Before this Court, and before the Court of Appeal for that matter, the CLA based its attack on the constitutionality of the statutory scheme and not on the Minister's exercise of discretion under either s. 14 or s. 19.

3. The Legislative Scheme

[19] The *Act* provides for limited access to information in the government's hands. Section 10(1) provides for general rights of access to information, subject to a limited number of statutory exemptions:

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,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[20] The exemptions include Cabinet records (s. 12); advice to government (s. 13); law enforcement records (s. 14); records relating to relations with other governments (s. 15); defence records (s. 16); third-party information (s. 17); records related to Ontario's economic and other interests (s. 18); records to which solicitor-client privilege applies (s. 19); records whose disclosure might reasonably be expected to seriously threaten the safety or health of an individual (s. 20); personal information (s. 21); records putting species at risk (s. 21.1); and information already or soon to be publicly available (s. 22).

[21] There is no discretion, and disclosure must be refused in the case of some categories of exemptions, including Cabinet records, records containing certain third-party information, and records containing personal information. Other categories of exemptions are discretionary. They include the exemptions at issue in this case: law enforcement records under s. 14 and solicitor-client privileged records under s. 19.

[22] Section 14, dealing with law enforcement records, states:

14.—(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
 - (e) endanger the life or physical safety of a law enforcement officer or any other person;
 - (f) deprive a person of the right to a fair trial or impartial adjudication;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
 - (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
 - (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
 - (j) facilitate the escape from custody of a person who is under lawful detention;
 - (k) jeopardize the security of a centre for lawful detention; or
 - (l) facilitate the commission of an unlawful act or hamper the control of crime.
- (2) A head may refuse to disclose a record,
- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
 - (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
 - (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
 - (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.
- (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.
- (4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.
- (5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure

of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Section 19 deals with solicitor-client privilege. At the material time, it stated:

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.

[23] The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner. In reviewing ministerial decisions made pursuant to certain exemptions, the Commissioner considers the public interest pursuant to s. 23, the “public interest override”:

23. An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy] and 21.1 [species at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[24] The s. 23 public interest override does not apply to documents exempted from disclosure for law enforcement (s. 14) and solicitor-client privilege (s. 19). The main issue in this case, as it was argued before us, is whether this renders s. 23 unconstitutional.

[25] When an exemption is invoked by the head of an institution (the Minister) under ss. 13, 15, 17, 18, 20, 21 and 21.1, the effect of s. 23 is to require the Commissioner to not only review whether the exemption was validly claimed, but whether the public interest in the

disclosure of the record “clearly outweighs the purpose of the exemption” (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175 (Ont. Div. Ct.), rev’d (1999), 1999 CanLII 1104 (ON CA), 13 Admin. L.R. (3d) 1 (C.A.)).

[26] This public interest override was a late addition to the legislation. The Attorney General took the position that it would undermine the context of the [Act](#):

You are just saying to them, ignore the standards of the [Act](#) that the Legislature has set up and do what you please by looking at the public interest.

[27] Nevertheless, a public interest provision was eventually introduced for some but not all categories of exemptions on the insistence of some of the members of the legislature. This was despite the fact that the Williams Commission Report on which the [Act](#) was based had not specifically recommended its adoption (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the “Williams Commission” Report); Speech by Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commissioner, “*Public Interest*” and *Ontario’s Freedom of Information and Protection of Privacy Act*, February 16, 2001).

[28] This review of the general statutory scheme brings us to the specific challenge before us. The CLA argued that s. 23 of *FIPPA* infringes s. 2(b) of the [Charter](#) by failing to extend the “public interest” balancing to the exemptions found in ss. 14 and 19 concerning law enforcement and solicitor-client privileged records.

4. Is the Legislation Constitutional?

[29] It is essential to correctly frame the real constitutional issue before the Court.

That issue is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*.

(a) Access to Information Under Section 2(b) of the *Charter*

[30] The first question to be addressed is whether s. 2(b) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

[31] Determining whether s. 2(b) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(b) protection extends. A question arises as to how the issue should be approached. The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed

more fully below, that in this case these requirements are not satisfied. As a result, s. 2(b) is not engaged.

[32] The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(b) requires the production of government documents.

[33] This leads us to more detailed comments on the scope of s. 2(b) protection where the issue is access to documents in government hands. To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.

[34] The first inquiry into expressive content asks whether the demand for access to information furthers the purposes of s. 2(b). In the case of demands for government documents, the relevant s. 2(b) purpose is usually the furtherance of discussion on matters of public importance.

[35] Not every demand for government information serves this purpose. Thus the jurisprudence holds that there is no general right of access to information. The position is well put in *Ontario (Attorney General) v. Fineberg* (1994), [1994 CanLII 10563 \(ON SC\)](#), 19 O.R. (3d) 197 (Div. Ct.), *per* Adams J.:

By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. . . . Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation. [Emphasis added; p. 204.]

[36] To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998 CanLII 829 \(SCC\)](#), [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: “members of the public have a right to information pertaining to public institutions and particularly the courts” (*Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326, at p. 1339). The “open courts” principle is “inextricably tied to the rights guaranteed by s. 2(b)” because it “permits the public to discuss and put forward opinions and criticisms of court practices and proceedings” (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 \(SCC\)](#), [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).

[37] In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful

public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in *Harper's Weekly* entitled “What Publicity Can Do”: “Sunlight is said to be the best of disinfectants” Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

[38] If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

[39] Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(b) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well settled, providing predictability and certainty to what must be produced and what remains protected.

[40] It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers

another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

(b) *The Constitutionality of Section 23*

[41] The CLA argues that the failure of the legislature to make the s. 23 public interest override applicable to the exemptions in ss. 14 and 19 denies it access to the documents it seeks and thus violates s. 2(b) of the *Charter*. The CLA argues that if the override were applicable, the CLA would be entitled to the records in question due to their public interest nature.

[42] We first address the question of the extent to which the absence of a s. 23 public interest override impairs the ability to obtain documents protected by ss. 14 and 19 of the *Act*. Against this background, we ask whether s. 2(b) is engaged in the case at bar, and if so, whether it is breached.

(i) The Impact of the Absence of the Section 23 Public Interest Override in This Case

[43] In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the *Act*.

[44] We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the [Act](#). As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, [2009 SCC 52](#), [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999 CanLII 676 \(SCC\)](#), [1999] 1 S.C.R. 565, at para. 33; *R. v. Power*, [1994 CanLII 126 \(SCC\)](#), [1994] 1 S.C.R. 601, at p. 623, *per* L’Heureux-Dubé J.; *R. v. Regan*, [2002 SCC 12](#), [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, [2007 SCC 5](#), [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the Act reflects this. The legislature in s. 14(1) has in effect declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.

[45] However, by stipulating that “[a] head may refuse to disclose” a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

[46] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

[47] By way of example, we consider s. 14(1)(a) where a head “may refuse to disclose a record where the disclosure could reasonably be expected to . . . interfere with a law enforcement matter”. The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word “may” which confers a discretion on the head to make the decision whether or not to disclose the information.

[48] In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[49] The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply “where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption”. But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word “may” and order disclosure of the document.

[50] The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head “may refuse to disclose a record . . . that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law”. The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word “may” recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

[51] This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO’s submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.

(IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

[52] We therefore conclude that s. 14 already provides for adequate consideration of the public interest in the disclosure of the records. In reviewing a claim for an exemption under s. 14, the Commissioner, as discussed more fully below, focuses on the exercise of discretion under that section. A further consideration under s. 23 would add essentially another level of review.

[53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. [Section 19](#) of the [Act](#) provides that 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”. The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzewski*, [1982 CanLII 22 \(SCC\)](#), [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. [49](#); *R. v. McClure*, [2001 SCC 14](#), [2001] 1 S.C.R. 445, at paras. [35 and 41](#); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002 SCC 61](#), [2002] 3 S.C.R. 209, at paras. [36-37](#); *Maranda v. Richer*, [2003 SCC 67](#), [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31](#), [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006 SCC 31](#), [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, [2006 SCC 39](#), [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008 SCC 44](#), [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999 CanLII 674 \(SCC\)](#), [1999] 1 S.C.R. 455; *R. v. Brown*, [2002 SCC 32](#), [2002] 2 S.C.R. 185.

[54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word “may” would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

[55] The conclusion that the s. 23 override in the case of the law enforcement and solicitor-client exemptions adds little more than a second level of review is consistent with the legislative history of the [Act](#). The Williams Commission Report, on which the Act was based, did not recommend a public interest override, presumably not finding such an override necessary. The Minister who spoke to the legislation resisted suggestions for a public interest override. It was tacked on by amendment, but made applicable only to certain exemptions. These are generally exemptions of a political or personal nature — advice to government; third-party information; economic and other interests of Ontario; danger to health and safety; personal privacy; and species at risk. These exemptions reflect a legislative choice that is not at issue in this appeal. But by way of comparison, it may be possible to argue that the s. 23 public interest override might serve a purpose with respect to these issues, since they may not inherently raise the need to balance all conflicting interests, raising the risk that the public interest in disclosure might be overlooked. But that cannot be said of the law enforcement and solicitor-client exemptions.

[56] We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.

(ii) Is the Section 23 Public Interest Override Constitutionally Required?

[57] Having examined the impact of the legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override, we are in a position to address the ultimate question: Does this decision violate the right to free expression guaranteed by [s. 2\(b\)](#) of the [Charter](#)? To answer this question, we must return to our earlier discussion of when disclosure of documents in government hands may be constitutionally required under the *Irwin Toy* framework.

[58] The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.

[59] In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:

. . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]

The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the [Act](#), as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[60] If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect

documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

[61] It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(b) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

5. Exercise of the Discretion Under the Act

[62] Having decided that s. 23 of the Act itself is constitutional, our focus shifts now to determining whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the Act.

(a) *The Decisions*

[63] The Minister's decision not to disclose the records in question was conveyed to the CLA in a letter dated November 27, 1998, citing a number of statutory exemptions as the reason for the denial, including s. 21 (the personal privacy exemption), s. 19, and a number of subsections of s. 14. The letter provided no explanation for applying these exemptions; nor did it explain why no part of the records sought would be disclosed.

[64] On review, the Assistant Commissioner recognized that the documents contained personal information about people involved in the case, including police officers, Crown counsel, witnesses, the victim, the accused and others. He concluded, however, that there was “a compelling public interest” in disclosure that “clearly outweigh[ed]” the interest in non-disclosure. Therefore, if only the s. 21 personal privacy exemption were at issue, he would have ordered disclosure pursuant to the s. 23 override.

[65] The Assistant Commissioner also determined that the discretionary exemptions in ss. 14 and 19 could be applied to the records at issue. Because s. 23 does not apply to ss. 14 and 19, he upheld the Minister’s decision not to disclose without reviewing the Minister’s exercise of discretion under ss. 14 and 19 of the Act.

(b) *The Duty of the “Head” (or Minister)*

[66] As discussed above, the “head” making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

[67] The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, “the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions”.

(c) *The Duty of the Reviewing Commissioner*

[68] The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

[69] In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the [Act](#). While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

[70] Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), [1999 CanLII 1104 \(ON CA\)](#), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), [1999 CanLII 19925 \(ON CA\)](#), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney*

General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

[71] The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[72] In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

[73] The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.

[74] Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[75] We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

6. Conclusion

[76] We would allow the appeal, set aside the decision of the Court of Appeal, and restore the Assistant Commissioner's Order confirming the constitutionality of s. 23 of *FIPPA*. The documents protected by s. 19 of *FIPPA* are exempted from disclosure. We would, however, order that the claim under s. 14 of the *Act* be returned to the Commissioner for reconsideration in light of these reasons. In accordance with the request of the parties, there will be no order for costs.

Appeal allowed.

Solicitor for the appellants: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Heenan Blaikie, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Québec.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

TAB 30

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), [2010] 1 SCR 815

Date: 2010-06-17

File number: 32172

Other citations: 319 DLR (4th) 385 — 402 NR 350 — 189 ACWS (3d) 675 — 262 OAC 258 — [2010] EXP 1990 — 255 CCC (3d) 545 — 76 CR (6th) 283 — 1 Admin LR (5th) 235 — 212 CRR (2d) 300 — 84 CPR (4th) 81 — 88 WCB (2d) 628 — EYB 2010-175469 — JE 2010-1089 — [2010] SCJ No 23 (QL)

Citation: Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), [2010] 1 SCR 815, <<https://canlii.ca/t/2b5ss>>, retrieved on 2025-10-28



SUPREME COURT OF CANADA

CITATION: Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815

DATE: 20100617
DOCKET: 32172

BETWEEN:

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants
and

Criminal Lawyers' Association

Respondent

- and -

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of**

**Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
Association, Canadian Association of Journalists and
British Columbia Civil Liberties Association
Interveners**

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: McLachlin C.J. and Abella J. (Binnie, LeBel, Fish, Charron
(paras. 1 to 76) and Rothstein JJ. concurring)

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1
S.C.R. 815

**Ministry of Public Safety and Security (Formerly
Solicitor General) and Attorney General of Ontario**

Appellants

v.

Criminal Lawyers' Association

Respondent

and

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New
Brunswick, Attorney General of Manitoba, Attorney General
of British Columbia, Attorney General of Newfoundland and
Labrador, Tom Mitchinson, Assistant Commissioner, Office
of the Information and Privacy Commissioner of Ontario,
Canadian Bar Association, Information Commissioner of
Canada, Federation of Law Societies of Canada, Canadian
Newspaper Association, Ad IDEM/Canadian Media Lawyers'
Association, Canadian Association of Journalists and
British Columbia Civil Liberties Association**

Interveners

Indexed as: Ontario (Public Safety and Security) v. Criminal Lawyers' Association

File No.: 32172.

2008: December 11; 2010: June 17.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Access to information — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under s. 14 (law enforcement) and s. 19 (solicitor-client privilege) of Ontario Freedom of Information and Protection of Privacy Act — Whether s. 23 of Act violates guarantee of freedom of expression by failing to extend “public interest” balancing to exemptions found in ss. 14 and 19 — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Constitutional law — Charter of Rights — Freedom of expression — Scope — Access to government held information — Whether freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b).

Access to information — Access to records — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under freedom of information legislation — Whether constitutional guarantee of freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

The trial judge ordered a stay of proceedings in a murder trial, finding many instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without giving reasons for their finding. Concerned about the disparity between the findings at trial and the conclusion of the police investigation, the Criminal Lawyers' Association ("CLA") made a request under the [Ontario Freedom of Information and Protection of Privacy Act](#) ("*FIPPA*") to the responsible Minister for disclosure of records relating to the investigation. The records at issue were a lengthy police report and two documents containing legal advice. *FIPPA* exempts various categories of documents from disclosure, some of which may be disclosed pursuant to a discretionary ministerial decision, including law enforcement records under s. 14 and solicitor-client privileged records under s. 19. Some records in the ministerial discretion category, but not those under ss. 14 and 19, are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*.

The Minister refused to disclose any of the records without explanation, claiming exemptions under, among other provisions, ss. 14 and 19 of *FIPPA*. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the [Act](#), including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of *FIPPA*, and accordingly, did not determine whether there was a compelling public interest at play. He also concluded that the omission of ss. 14 and 19 from the public interest override in s. 23 did not constitute a breach of the CLA's right to freedom of expression guaranteed under s. 2(b) of the [Canadian Charter of Rights and Freedoms](#). The Divisional Court upheld the decision not to disclose the documents and agreed with the conclusion that the exclusion of ss. 14 and 19 from s. 23 did not violate s. 2(b) of the *Charter*. In a majority decision, the Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*.

Held: The appeal should be allowed. The Assistant Commissioner's order confirming the constitutionality of s. 23 of *FIPPA* should be restored. The documents protected by s. 19 of

FIPPA dealing with solicitor-client privilege should be exempted from disclosure. The claim under the law enforcement provision, s. 14 of *FIPPA*, should be returned to the Commissioner for reconsideration.

The real constitutional issue before the Court is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*. Section 2(b) of the *Charter* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Determining whether s. 2(b) of the *Charter* protects such access is essentially a question of how far s. 2(b) protection extends. It asks whether s. 2(b) is engaged at all and is best approached by building on the methodology set out in *Irwin Toy*.

To demonstrate that there is expressive content in accessing these documents, a claimant must establish that the denial of access effectively precludes meaningful public discussion on matters of public interest. If this necessity is established, a *prima facie* case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(b) of the *Charter*. It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged, and the only remaining question is whether the government action infringes that protection.

The legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override does not violate the right to free expression guaranteed by s. 2(b) of the *Charter*. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place under the current legislative

scheme. Even if the first step were met, the CLA would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. Sections 14 and 19 are intended to protect documents from disclosure on these very grounds.

On the record before us, it is not established that the CLA could satisfy the requirements of the framework and, as a result, s. 2(b) is not engaged. In any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(b) were engaged it would not be breached. The ultimate answer to the CLA's claim is that the absence of a second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents given that those sections, properly interpreted, already incorporate considerations of the public interest. The CLA therefore would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

In reviewing the Minister's decision not to disclose the records, the Commissioner must determine whether the exemptions were properly claimed and, if so, whether the Minister's exercise of discretion was reasonable. In this case, the order pertaining to the claim under s. 14 of *FIPPA* should be returned to the Commissioner for reconsideration. The Commissioner upheld the Minister's decision without reviewing the Minister's exercise of discretion under ss. 14 and 19 of *FIPPA* because s. 23 did not apply to these sections. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought raise concerns which should have been investigated by the Commissioner. Had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Commissioner's decision on the s. 19 claim, however, should be upheld. It is difficult to see how these records could have been disclosed under the established rules on solicitor-client privilege and based on the facts and interests at stake.

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Higgins (1999), 118 O.A.C. 108, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447.

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Daniel Guttman, Sophie Nunnelley and Don Fawcett, for the appellants.

David Stratas, Brad Elberg, Trevor Guy and Ryan Teschner, for the respondent.

Christopher Rupar and Jeffrey G. Johnston, for the intervener the Attorney General of Canada.

Dominique A. Jobin, for the intervener the Attorney General of Quebec.

Written submissions only by *Edward A. Gores, Q.C.*, for the intervener the Attorney General of Nova Scotia.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Nathaniel Carnegie and Deborah Carlson, for the intervener the Attorney General of Manitoba.

Allan Seckel, Q.C., and *Deanna Billo*, for the intervener the Attorney General of British Columbia.

Barbara Barrowman, for the intervener the Attorney General of Newfoundland and Labrador.

William S. Challis, Stephen McCammon and Allison Knight, for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario.

Mahmud Jamal and Karim Renno, for the intervener the Canadian Bar Association.

Marlys Edwardh, Daniel Brunet and Jessica Orkin, for the intervener the Information Commissioner of Canada.

Guy J. Pratte and Nadia Effendi, for the intervener the Federation of Law Societies of Canada.

Paul B. Schabas and Ryder Gilliland, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists.

Catherine Beagan Flood and Iris Fischer, for the intervener the British Columbia Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

1. Overview

[1] Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

[2] Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "*Act*"). The relationship between them under this scheme is at the heart of this appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.

[3] The [Act](#) exempts various categories of documents from disclosure. This case concerns records that *may* be disclosed pursuant to a discretionary ministerial decision. More particularly, this case concerns records prepared in the course of law enforcement investigations (s. 14) and records protected by solicitor-client privilege (s. 19). The Act provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*. The Act does not require this additional public interest review for solicitor-client records or law enforcement records.

[4] The Criminal Lawyers' Association ("CLA") is an advocacy group representing members of the criminal defence bar in Ontario. It is seeking records in the hands of the Crown relating to a murder case which gave rise to judicial expressions of concern: two documents containing legal advice and a 318-page report looking into alleged police misconduct. The Minister refused to disclose either the report or related documents, stating that the exemptions in the [Act](#) for solicitor-client privilege and law enforcement privilege covered all the material. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including [ss. 14\(2\)\(a\)](#) and [19](#). He noted that s. 23 did not apply to these two provisions of the Act and, as such, he did not determine whether there was a compelling public interest at play here in the context of [ss. 14](#) and [19](#).

[5] [Section 2\(b\)](#) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

[6] The CLA argues that the [Act](#)'s failure in s. 23 to include a public interest review for solicitor-client and law enforcement privileged documents violates freedom of expression in [s. 2\(b\)](#) of the [Charter](#). For the reasons that follow, we conclude that there is no such violation.

[7] This said, it is not clear on the material before us that the Assistant Commissioner, in applying the [Act](#), fully considered the scope of his discretion under s. 14, the law enforcement provision. We therefore remit this matter to the Commissioner for reconsideration to determine whether any or all of the report should be disclosed.

2. Background

[8] This case arises out of the murder of Domenic Racco in 1983, for which four men (Anthony Musitano, Domenic Musitano, Guiseppe Avignone, and William Rankin) were originally charged. They pled guilty to lesser charges in 1985. In 1990, two other individuals, Graham Rodney Court and Peter Dennis Monaghan, were alleged to have been hired to kill Racco. Court and Monaghan were convicted after a jury trial in 1991.

[9] In 1995, the Ontario Court of Appeal ordered a new trial for Monaghan on the basis, *inter alia*, of fresh evidence (*R. v. Court* (1995), [1995 CanLII 1741 \(ON CA\)](#), 23 O.R. (3d) 321). It was evidence that had been lost before trial, but the police did not reveal its loss to the defence until two-and-a-half years after the trial. A new trial was also ordered, for both Monaghan and Court, based on inadequate jury instructions at trial.

[10] Both men applied for a stay of proceedings in 1997 on the grounds of a breach of their *Charter* rights. Glithero J. concluded that their rights under ss. 7, 11(b) and 11(d) of the *Charter* had been violated to such a degree that the proceedings should be stayed, stating:

. . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996. [Emphasis added.]

(*R. v. Court* (1997), 1997 CanLII 12180 (ON SC), 36 O.R. (3d) 263 (Gen. Div.), p.

300)

[11] As a result of Glithero J.'s rebuke, the Ontario Provincial Police ("OPP") undertook an investigation into the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police, and the Crown Attorney in the case. In a terse press release on April 3, 1998, the OPP exonerated the police on the grounds that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice". Despite the clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges, the OPP offered no explanation for its conclusions.

[12] Concerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP, the CLA made a request under *FIPPA* to the Minister of the Solicitor General and Correctional Services (later the Minister of Public Safety and Security and now the Minister of Community Safety and Correctional Services) for disclosure of records relating to the OPP investigation. The records at issue were a 318-page police report detailing the results of the OPP's investigation; a March 12, 1998 memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a March 24, 1998 letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation.

[13] The Minister refused to disclose any of these records, claiming several exemptions under the [Act](#), including: s. 14 (law enforcement), s. 19 (solicitor-client privilege), s. 20 (danger to health and safety), and s. 21 (personal privacy). He did not explain how or why each of these exemptions applied to the material in question and did not address the possibility of partial disclosure.

[14] The CLA appealed the Minister's decision not to disclose the records to the Commissioner pursuant to s. 50(1)(a) of *FIPPA*.

[15] The Minister's decision was reviewed by the Assistant Information and Privacy Commissioner, Tom Mitchinson. Reliance on the s. 20 exemption was withdrawn. On May 5, 2000, Mr. Mitchinson upheld the propriety of the Minister's decision not to disclose the records (IPC Order PO-1779). He found that the public interest in disclosure "clearly outweigh[ed]" the purpose of the exemption on the facts of this case, and would have applied the s. 23 override with respect to the s. 21 personal privacy exemption; however, he upheld the Minister's refusal because the other claimed exemptions (ss. 14 and 19) are not included within the s. 23 override. He was also asked to consider whether the omission of ss. 14 and 19 from the public interest override

constituted a breach of the CLA's *Charter* right to freedom of expression. He concluded that it did not.

[16] At the Divisional Court, Blair R.S.J. upheld the decision not to disclose the documents and agreed with the conclusion that the *FIPPA* exemption scheme did not violate s. 2(b) of the *Charter*: (2004), 2004 CanLII 18977 (ON SCDC), 70 O.R. (3d) 332.

[17] The appeal was allowed by the Court of Appeal: 2007 ONCA 392, 86 O.R. (3d) 259. LaForme J.A., for the majority, concluded that the exemption scheme in *FIPPA* violated the *Charter*. Juriansz J.A. dissented, concluding that there was no *Charter* violation, and questioned whether expression was genuinely at issue at all.

[18] The Minister appealed the matter to this Court on the issue of the constitutionality of s. 23, given the exclusion of ss. 14 and 19 from its scope. Before this Court, and before the Court of Appeal for that matter, the CLA based its attack on the constitutionality of the statutory scheme and not on the Minister's exercise of discretion under either s. 14 or s. 19.

3. The Legislative Scheme

[19] The *Act* provides for limited access to information in the government's hands. Section 10(1) provides for general rights of access to information, subject to a limited number of statutory exemptions:

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,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[20] The exemptions include Cabinet records (s. 12); advice to government (s. 13); law enforcement records (s. 14); records relating to relations with other governments (s. 15); defence records (s. 16); third-party information (s. 17); records related to Ontario's economic and other interests (s. 18); records to which solicitor-client privilege applies (s. 19); records whose disclosure might reasonably be expected to seriously threaten the safety or health of an individual (s. 20); personal information (s. 21); records putting species at risk (s. 21.1); and information already or soon to be publicly available (s. 22).

[21] There is no discretion, and disclosure must be refused in the case of some categories of exemptions, including Cabinet records, records containing certain third-party information, and records containing personal information. Other categories of exemptions are discretionary. They include the exemptions at issue in this case: law enforcement records under s. 14 and solicitor-client privileged records under s. 19.

[22] Section 14, dealing with law enforcement records, states:

14.—(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
 - (e) endanger the life or physical safety of a law enforcement officer or any other person;
 - (f) deprive a person of the right to a fair trial or impartial adjudication;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
 - (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
 - (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;
 - (j) facilitate the escape from custody of a person who is under lawful detention;
 - (k) jeopardize the security of a centre for lawful detention; or
 - (l) facilitate the commission of an unlawful act or hamper the control of crime.
- (2) A head may refuse to disclose a record,
- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
 - (b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;
 - (c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or
 - (d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.
- (3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.
- (4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.
- (5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure

of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Section 19 deals with solicitor-client privilege. At the material time, it stated:

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.

[23] The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner. In reviewing ministerial decisions made pursuant to certain exemptions, the Commissioner considers the public interest pursuant to s. 23, the “public interest override”:

23. An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy] and 21.1 [species at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[24] The s. 23 public interest override does not apply to documents exempted from disclosure for law enforcement (s. 14) and solicitor-client privilege (s. 19). The main issue in this case, as it was argued before us, is whether this renders s. 23 unconstitutional.

[25] When an exemption is invoked by the head of an institution (the Minister) under ss. 13, 15, 17, 18, 20, 21 and 21.1, the effect of s. 23 is to require the Commissioner to not only review whether the exemption was validly claimed, but whether the public interest in the

disclosure of the record “clearly outweighs the purpose of the exemption” (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175 (Ont. Div. Ct.), rev’d (1999), 1999 CanLII 1104 (ON CA), 13 Admin. L.R. (3d) 1 (C.A.)).

[26] This public interest override was a late addition to the legislation. The Attorney General took the position that it would undermine the context of the [Act](#):

You are just saying to them, ignore the standards of the [Act](#) that the Legislature has set up and do what you please by looking at the public interest.

[27] Nevertheless, a public interest provision was eventually introduced for some but not all categories of exemptions on the insistence of some of the members of the legislature. This was despite the fact that the Williams Commission Report on which the [Act](#) was based had not specifically recommended its adoption (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the “Williams Commission” Report); Speech by Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commissioner, “*Public Interest*” and *Ontario’s Freedom of Information and Protection of Privacy Act*, February 16, 2001).

[28] This review of the general statutory scheme brings us to the specific challenge before us. The CLA argued that s. 23 of *FIPPA* infringes s. 2(b) of the [Charter](#) by failing to extend the “public interest” balancing to the exemptions found in ss. 14 and 19 concerning law enforcement and solicitor-client privileged records.

4. Is the Legislation Constitutional?

[29] It is essential to correctly frame the real constitutional issue before the Court.

That issue is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(b) of the *Charter*.

(a) Access to Information Under Section 2(b) of the *Charter*

[30] The first question to be addressed is whether s. 2(b) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(b) does not guarantee access to all documents in government hands. Section 2(b) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

[31] Determining whether s. 2(b) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(b) protection extends. A question arises as to how the issue should be approached. The courts below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. The main question in this case is whether s. 2(b) is engaged at all. We conclude that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed

more fully below, that in this case these requirements are not satisfied. As a result, s. 2(b) is not engaged.

[32] The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(b)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(b) requires the production of government documents.

[33] This leads us to more detailed comments on the scope of s. 2(b) protection where the issue is access to documents in government hands. To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(b) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged. The only remaining question is whether the government action infringes that protection.

[34] The first inquiry into expressive content asks whether the demand for access to information furthers the purposes of s. 2(b). In the case of demands for government documents, the relevant s. 2(b) purpose is usually the furtherance of discussion on matters of public importance.

[35] Not every demand for government information serves this purpose. Thus the jurisprudence holds that there is no general right of access to information. The position is well put in *Ontario (Attorney General) v. Fineberg* (1994), [1994 CanLII 10563 \(ON SC\)](#), 19 O.R. (3d) 197 (Div. Ct.), *per* Adams J.:

By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. . . . Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation. [Emphasis added; p. 204.]

[36] To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998 CanLII 829 \(SCC\)](#), [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: “members of the public have a right to information pertaining to public institutions and particularly the courts” (*Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326, at p. 1339). The “open courts” principle is “inextricably tied to the rights guaranteed by s. 2(b)” because it “permits the public to discuss and put forward opinions and criticisms of court practices and proceedings” (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 \(SCC\)](#), [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).

[37] In sum, there is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful

public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in *Harper's Weekly* entitled “What Publicity Can Do”: “Sunlight is said to be the best of disinfectants” Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

[38] If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

[39] Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(b) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well settled, providing predictability and certainty to what must be produced and what remains protected.

[40] It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers

another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

(b) *The Constitutionality of Section 23*

[41] The CLA argues that the failure of the legislature to make the s. 23 public interest override applicable to the exemptions in ss. 14 and 19 denies it access to the documents it seeks and thus violates s. 2(b) of the *Charter*. The CLA argues that if the override were applicable, the CLA would be entitled to the records in question due to their public interest nature.

[42] We first address the question of the extent to which the absence of a s. 23 public interest override impairs the ability to obtain documents protected by ss. 14 and 19 of the *Act*. Against this background, we ask whether s. 2(b) is engaged in the case at bar, and if so, whether it is breached.

(i) The Impact of the Absence of the Section 23 Public Interest Override in This Case

[43] In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the *Act*.

[44] We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the [Act](#). As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, [2009 SCC 52](#), [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999 CanLII 676 \(SCC\)](#), [1999] 1 S.C.R. 565, at para. 33; *R. v. Power*, [1994 CanLII 126 \(SCC\)](#), [1994] 1 S.C.R. 601, at p. 623, *per* L’Heureux-Dubé J.; *R. v. Regan*, [2002 SCC 12](#), [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, [2007 SCC 5](#), [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the Act reflects this. The legislature in s. 14(1) has in effect declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.

[45] However, by stipulating that “[a] head may refuse to disclose” a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

[46] A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

[47] By way of example, we consider s. 14(1)(a) where a head “may refuse to disclose a record where the disclosure could reasonably be expected to . . . interfere with a law enforcement matter”. The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word “may” which confers a discretion on the head to make the decision whether or not to disclose the information.

[48] In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[49] The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply “where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption”. But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word “may” and order disclosure of the document.

[50] The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head “may refuse to disclose a record . . . that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law”. The main purpose of this section is to protect the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word “may” recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

[51] This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO’s submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.

(IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

[52] We therefore conclude that s. 14 already provides for adequate consideration of the public interest in the disclosure of the records. In reviewing a claim for an exemption under s. 14, the Commissioner, as discussed more fully below, focuses on the exercise of discretion under that section. A further consideration under s. 23 would add essentially another level of review.

[53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. [Section 19](#) of the [Act](#) provides that 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”. The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzewski*, [1982 CanLII 22 \(SCC\)](#), [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. [49](#); *R. v. McClure*, [2001 SCC 14](#), [2001] 1 S.C.R. 445, at paras. [35 and 41](#); *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002 SCC 61](#), [2002] 3 S.C.R. 209, at paras. [36-37](#); *Maranda v. Richer*, [2003 SCC 67](#), [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31](#), [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006 SCC 31](#), [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, [2006 SCC 39](#), [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008 SCC 44](#), [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999 CanLII 674 \(SCC\)](#), [1999] 1 S.C.R. 455; *R. v. Brown*, [2002 SCC 32](#), [2002] 2 S.C.R. 185.

[54] Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word “may” would permit and, if relevant, require the head to consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

[55] The conclusion that the s. 23 override in the case of the law enforcement and solicitor-client exemptions adds little more than a second level of review is consistent with the legislative history of the [Act](#). The Williams Commission Report, on which the Act was based, did not recommend a public interest override, presumably not finding such an override necessary. The Minister who spoke to the legislation resisted suggestions for a public interest override. It was tacked on by amendment, but made applicable only to certain exemptions. These are generally exemptions of a political or personal nature — advice to government; third-party information; economic and other interests of Ontario; danger to health and safety; personal privacy; and species at risk. These exemptions reflect a legislative choice that is not at issue in this appeal. But by way of comparison, it may be possible to argue that the s. 23 public interest override might serve a purpose with respect to these issues, since they may not inherently raise the need to balance all conflicting interests, raising the risk that the public interest in disclosure might be overlooked. But that cannot be said of the law enforcement and solicitor-client exemptions.

[56] We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.

(ii) Is the Section 23 Public Interest Override Constitutionally Required?

[57] Having examined the impact of the legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override, we are in a position to address the ultimate question: Does this decision violate the right to free expression guaranteed by [s. 2\(b\)](#) of the [Charter](#)? To answer this question, we must return to our earlier discussion of when disclosure of documents in government hands may be constitutionally required under the *Irwin Toy* framework.

[58] The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(b) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(b) is not engaged.

[59] In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:

. . . I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]

The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the [Act](#), as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

[60] If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect

documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

[61] It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(b) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

5. Exercise of the Discretion Under the Act

[62] Having decided that s. 23 of the Act itself is constitutional, our focus shifts now to determining whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the Act.

(a) *The Decisions*

[63] The Minister's decision not to disclose the records in question was conveyed to the CLA in a letter dated November 27, 1998, citing a number of statutory exemptions as the reason for the denial, including s. 21 (the personal privacy exemption), s. 19, and a number of subsections of s. 14. The letter provided no explanation for applying these exemptions; nor did it explain why no part of the records sought would be disclosed.

[64] On review, the Assistant Commissioner recognized that the documents contained personal information about people involved in the case, including police officers, Crown counsel, witnesses, the victim, the accused and others. He concluded, however, that there was “a compelling public interest” in disclosure that “clearly outweigh[ed]” the interest in non-disclosure. Therefore, if only the s. 21 personal privacy exemption were at issue, he would have ordered disclosure pursuant to the s. 23 override.

[65] The Assistant Commissioner also determined that the discretionary exemptions in ss. 14 and 19 could be applied to the records at issue. Because s. 23 does not apply to ss. 14 and 19, he upheld the Minister’s decision not to disclose without reviewing the Minister’s exercise of discretion under ss. 14 and 19 of the Act.

(b) *The Duty of the “Head” (or Minister)*

[66] As discussed above, the “head” making a decision under ss. 14 and 19 of the Act has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

[67] The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, “the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions”.

(c) *The Duty of the Reviewing Commissioner*

[68] The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

[69] In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the [Act](#). While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

[70] Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), [1999 CanLII 1104 \(ON CA\)](#), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), [1999 CanLII 19925 \(ON CA\)](#), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney*

General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

[71] The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[72] In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

[73] The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.

[74] Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[75] We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

6. Conclusion

[76] We would allow the appeal, set aside the decision of the Court of Appeal, and restore the Assistant Commissioner's Order confirming the constitutionality of s. 23 of *FIPPA*. The documents protected by s. 19 of *FIPPA* are exempted from disclosure. We would, however, order that the claim under s. 14 of the *Act* be returned to the Commissioner for reconsideration in light of these reasons. In accordance with the request of the parties, there will be no order for costs.

Appeal allowed.

Solicitor for the appellants: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Heenan Blaikie, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Québec.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

TAB 31

Cardoso v. LECA, 2025 ONSC 3450 (CanLII)

Date: 2025-06-17

File number: 708/24

Citation: Cardoso v. LECA, 2025 ONSC 3450 (CanLII),
<<https://canlii.ca/t/kcqjv>>, retrieved on 2025-10-28

CITATION: Cardoso v. LECA, 2025 ONSC 3450
DIVISIONAL COURT FILE NO.: 708/24
DATE: 20250617

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Coats, Matheson and Nakatsuru JJ.

BETWEEN:

TOM CARDOSO and THE GLOBE AND MAIL

Applicants

— and —

INFORMATION AND PRIVACY

COMMISSIONER OF ONTARIO and
THE LAW ENFORCEMENT
COMPLAINTS AGENCY

Respondents

Frank Addario, James Foy and Cori Singe
r, for the Applicants

Linda Hsiao-Chia Chen, for the Respondent

Information and Privacy Commissioner
of Ontario

Pamela Stephenson Welch, for the Law
Enforcement Complaints Agency

HEARD at Toronto: June 10, 2025

REASONS FOR JUDGMENT

[1] The applicants seek judicial review of the decision of the Information and Privacy Commissioner dated October 16, 2024 (the IPC Decision), regarding an access to information request made to the Office of the Independent Police Review Director (now the respondent Law Enforcement Complaints Agency or LECA).^[1] The Director is the statutory decision-maker responsible for receiving, managing and overseeing complaints about police officers in Ontario.

[2] The IPC Decision upheld a decision that LECA disclose some but not all of the requested information regarding police officers who were the subject of misconduct complaints. In particular, the IPC Decision upheld the refusal to include the names and badge numbers of the police officers.

[3] Although other issues were raised on this application for judicial review, the applicants' main focus is the alleged failure of the IPC Adjudicator to engage with the *Canadian Charter of Rights and Freedoms*, specifically the s. 2(b) guarantee of freedom of expression, including freedom of the press. The failure to address the *Charter* is the basis upon which I would grant this application, for the reasons set out below.

Background

[4] The applicant Tom Cardoso, a reporter, requested access to information from LECA under the *Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (FIPPA)*. He requested information regarding complaints against police officers, including the name and badge number of the police officer who was the subject of each complaint, the date the complaint was received, the allegations, the findings and screening outcome, and other data. The access request covered a period of more than ten years.

[5] In response, Mr. Cardoso was provided with a detailed spreadsheet with about 40,000 rows of data, but the names and badge numbers of the police officers were withheld on the basis that they were subject to exclusions and exemptions under *FIPPA*. Mr. Cardoso appealed to the Information and Privacy Commissioner/Ontario (the IPC).

[6] Among the next steps, the IPC provided Mr. Cardoso with a lengthy Notice of Inquiry, which invited his submissions on the matters set out in the Notice as well as his response to the LECA submissions. The Notice contained extensive information about the IPC process, the legislation, and how aspects of the legislation had been interpreted in prior IPC decisions.

[7] The Notice included a discussion of the *FIPPA* sections relied upon by LECA for non-disclosure. LECA submitted that the names and badge numbers were personal information as defined in s. 2(1) of *FIPPA* and were subject the mandatory exemption in s. 21(1) of *FIPPA* for unjustified invasions of personal privacy. LECA relied on s. 21(3)(b), which provides that personal information compiled as part of an investigation into a possible violation of the law is presumed to constitute an unjustified invasion of privacy and therefore need not be disclosed. LECA also relied on s. 14, which provides a discretion to refuse disclosure for certain law enforcement reasons.

[8] The Notice also acknowledged that Mr. Cardoso had raised what is sometimes called the public interest override in s. 23 of *FIPPA*. Under s. 23, an exemption from disclosure under certain sections does not apply "where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[9] Mr. Cardoso made detailed written submissions in response to the Notice. He disagreed with LECA's submissions that the names and badge numbers were personal information as defined in s. 2(1) of *FIPPA*. Mr. Cardoso also disagreed with LECA's reliance on ss. 14 and 21(3)(b).

Lastly, Mr. Cardoso submitted that if the requested information was exempted under s. 21, the public interest override in s. 23 of *FIPPA* applied and there should be disclosure.

[10] Within his submissions about s. 23 and the public interest, Mr. Cardoso cited and quoted from *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 37, as follows:

[T]here is a *prima facie* case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. ...

[11] The *Criminal Lawyers' Association* case also arose from an access request under *FIPPA* that included an issue about s. 23.

[12] It is apparent from Mr. Cardoso's submissions that he was not seeking any of the relief that would require the service of a notice of constitutional question either under s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or under the parallel rule at the IPC. He was submitting that the *Charter* was relevant to the public interest analysis in s. 23 of *FIPPA*.

[13] Mr. Cardoso, then unrepresented, did not mention what is sometimes referred to as a *Doré/Loyola* balancing analysis. The *Doré/Loyola* cases address the required approach to a *Charter* review of an administrative decision, by asking whether the decision reflects a proportionate balance of the decision-maker's statutory mandate with the *Charter* right at issue: *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613.

The IPC Decision

[14] In summary, the IPC Decision concluded as follows:

- (i) The spreadsheet contained "personal information" as defined in s. 2(1) of *FIPPA*. The inclusion of the names and badge numbers meant that the police officers were identifiable. Having regard for the context, the disclosure of the names and badge numbers would reveal something of a personal nature about each named individual.
- (ii) The mandatory personal privacy exemption at s. 21(1) applied to the information at issue. Considering s. 21(3), which lists several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy, s. 21(3)(b), relied on by LECA, was not applicable (investigation into a possible violation of the law). However, s. 21(3)(d) did apply (employment history). The Adjudicator observed that although LECA had not relied on s. 21(3)(d), the Adjudicator was obliged to consider all the presumptions in determining whether there was a mandatory personal privacy exemption.
- (iii) Although the names and badge numbers alone did not constitute "employment history", taken together with the rest of the data in the spreadsheet, the complaints were part of that history. The mandatory exemption in s. 21(1)(d) applied.
- (iv) Because of this finding, it was unnecessary to consider other sections relied upon by LECA.
- (v) Section 23 of *FIPPA* did not apply. Although insight into LECA and police oversight were matters of public interest, there were many existing sources of information about that topic through LECA and other parts of the police oversight process. There was insufficient evidence to accept that there was a public interest

in disclosure of the names and badge numbers in the spreadsheet. There was therefore no need to go on and consider whether the public interest was “compelling” – the next requirement of s. 23.

(vi) On the *Charter*, the reasons for decision said as follows, at para. 76:

The appellant [Mr. Cardoso] also appears to raise a constitutional argument, albeit in passing (not having taken the steps required to raise constitutional questions), submitting that “the disclosure of documents that would serve the public interest is such an important concept that it was even recognized by the Supreme Court of Canada as a potential *Charter* right”.

Footnote to paragraph: “The appellant cites *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 SCR 815.”

[Emphasis added.]

[15] The applicants then commenced this application for judicial review.

Issues and Standard of Review

[16] The applicants raise these issues:

- (1) whether the Adjudicator erred by failing to consider *Charter* rights and values in reaching the IPC Decision, specifically s. 2(b) of the *Charter*;
- (2) whether the process was unfair due to the lack of notice that s. 21(3)(d) (employment history) would be used to justify non-disclosure; and,
- (3) whether the IPC Decision is, in any event, unreasonable.

[17] The parties disagree on the standard of review for the *Charter* issue. The applicants submit that it is correctness. The respondents submit that this Court should ask whether there was a *Doré/Loyola* balancing (which they submit there was) and whether it was reasonable. This is further addressed below.

[18] On procedural fairness, the question is whether the appropriate process was provided to Mr. Cardoso. On the third issue, the standard of review is reasonableness.

Charter Issues

[19] The applicants submit that the Adjudicator erred in failing to consider *Charter* rights and values, focusing on the s. 2(b) guarantee of freedom of expression and freedom of the press. The applicants submit that the Adjudicator should have both considered the *Charter* under s. 23 of *FIPPA* and engaged in a *Doré/Loyola* balancing of the LECA decision. Neither was done.

[20] The applicants rely on *York Region District School Board v. Elementary Teachers’ Federation of Ontario*, 2024 SCC 22, at para. 91. The Supreme Court held that where a *Charter* right applies, an administrative decision-maker should perform an analysis that is consistent with the relevant *Charter* provision.

[21] The applicants further rely on the *Criminal Lawyers’ Association* case, which Mr. Cardoso quoted in his submissions to the IPC as set out above.

[22] LECA acknowledges that the Adjudicator did not expressly reference the *Charter* (other than to say it was not properly raised). However, LECA submits that the Adjudicator's discussion of the public interest under s. 23 implicitly considered and balanced freedom of expression. The IPC similarly submits that a *Doré/Loyola* balancing is embedded into *FIPPA* because its structure requires considering the public's right to access as well as privacy interests. In short, the respondents do not dispute the relevance of the *Charter* but submit that it was implicitly addressed in the IPC Decision.

[23] I am not prepared to imply that the *Charter* was properly considered in this case. In my view, the single paragraph in the reasons for decision that mentions the *Charter* is inconsistent with an implication that the Adjudicator considered the *Charter* at all. The applicants submit that the adjudicator wrongly focused on the lack of a notice of constitutional question. I agree. As a result of that error, the *Charter* was ignored.

[24] I therefore conclude that the Adjudicator erred in failing to properly consider the *Charter*. Some of the reasons for decision may well overlap with what may be said in the consideration of freedom of expression and the public interest under s. 23, or a *Doré/Loyola* analysis, but that is insufficient.

[25] Given the stark nature of this error, even if the standard of review was reasonableness, this error alone would render the IPC Decision unreasonable.

[26] In the circumstances, the appeal to the IPC should be done anew. Given that the issues have developed somewhat since the original submissions to the IPC, the parties should have the opportunity for new or supplementary written submissions to the new adjudicator. In that regard, the issues would benefit from submissions on the *Charter* under s. 23 in particular, and the role of the *Doré/Loyola* analysis in this case, as well as any other submissions the parties choose to advance about this or the other issues on the appeal.

Other Issues

[27] The applicants submit that the process leading up to the IPC Decision was unfair because Mr. Cardoso should have been given notice and an opportunity to make submissions about s. 21(3)(d) – employment history. That subsection had not been relied upon by LECA, nor was it discussed in the very lengthy and detailed Notice of Inquiry.

[28] It will not necessarily be the case that a notice must include everything that might come up. Nonetheless, given the particular form of this lengthy notice, and its focus on the sections relied on by LECA, I conclude that there is some merit to this issue. However, given the remedy that I would order arising from the *Charter* issue, Mr. Cardoso will have a fresh opportunity to make submissions about all issues. There is therefore no need to analyze this issue further. Similarly, there is no need to analyze the other grounds raised in support of a submission that the IPC Decision is unreasonable. There will be a fresh decision on all issues, not constrained by the IPC Decision.

Order

[29] I would therefore grant this application on the following terms: The IPC Decision is quashed. The matter is remitted to the IPC for a new appeal decision by a different adjudicator. In accordance with the remedy requested by the applicants, the IPC appeal will proceed on the current IPC record except that both sides shall have the opportunity to make fresh or additional written submissions on all issues. As agreed, there shall be no order as to costs.

Matheson J.

I agree:

Coats J.

I agree:

Nakatsuru J.

Date: June 17, 2025

[\[1\]](#) The OIRPD is called LECA in the rest of these reasons, for ease of readability.

TAB 32

Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 SCR 403

Date:	1997-06-26
File number:	24786
Other citations:	132 FTR 55 — 148 DLR (4th) 385 — 213 NR 161 — 72 ACWS (3d) 5 — 46 Admin LR (2d) 155 — [1997] CarswellNat 869 — JE 97-1384 — [1997] SCJ No 63 (QL) — [1997] ACS no 63
Citation:	Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 SCR 403, < https://canlii.ca/t/1fr0r >, retrieved on 2025-10-28

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

Michael A. Dagg

Appellant

v.

The Minister of Finance

Respondent

and

**The Privacy Commissioner of Canada and
the Public Service Alliance of Canada**

Interveners

Indexed as: Dagg v. Canada (Minister of Finance)

File No.: 24786.

1997: January 22; 1997: June 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Access to information -- Privacy -- Personal information -- Request made for sign-in logs of government department -- Personal identifying features deleted from information -- Whether information should be disclosed -- Whether part of information can be withheld because “personal information” -- [Access to Information Act, R.S.C., 1985, c. A-1, ss. 2, 4, 19\(1\), \(2\), 21\(1\)\(b\), 25, 31, 41, 48, 49, 54](#) -- [Privacy Act, R.S.C., 1985, c. P-21, ss. 2, 3\(i\), \(j\), 8\(2\)\(m\)](#).

The appellant filed a request with the Department of Finance for copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. These logs were kept by security personnel for safety and security reasons but not for the purpose of verifying overtime claims. The appellant intended to present this information to the union anticipating that the union would find it helpful in the collective bargaining process and that the union would as a consequence be disposed to retain his services. The respondent disclosed the relevant logs but deleted the employees' names, identification numbers and signatures on the ground that this information constituted personal information and was thus exempted from disclosure. The appellant unsuccessfully sought a review by the Minister of this decision and filed a complaint with the Information Commissioner, arguing that deleted information should be disclosed by virtue of exceptions related to personal information in the [Privacy Act](#). The Federal Court, Trial Division, on a review of the Minister's decision, found the information not to be personal but this decision was reversed on appeal. At issue here is whether the information in the logs constitutes “personal information” within the meaning of [s. 3](#) of the *Privacy Act* and whether the Minister failed to exercise his discretion properly in refusing to disclose the requested

information pursuant to s. 19(2)(c) of the *Access to Information Act* and s. 8(2)(m)(i) of the *Privacy Act*.

Held (La Forest, L'Heureux-Dubé, Gonthier and Major JJ. dissenting): The appeal should be allowed.

Per Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ.: Agreement was expressed with La Forest J.'s approach to interpreting the *Access to Information Act* and the *Privacy Act*, particularly that they must be interpreted together. La Forest J.'s general approach to the interpretation of s. 3 "personal information" (j) of the *Privacy Act* (hereinafter s. 3(j)) was also agreed with.

The number of hours spent at the workplace is information that is "related to" the position or function of the individual in that it permits a general assessment to be made of the amount of work required for a particular employee's position or function. For the same reason, the requested information is related to the "responsibilities of the position held by the individual" and falls under the specific exception set out at s. 3(j)(iii) of the *Privacy Act*. The information provides a general indication of the extent of the responsibilities inherent in the position. There is neither a subjective aspect nor an element of evaluation contained in a record of an individual's presence at the workplace beyond normal working hours. Rather, that record discloses information generic to the position itself.

Per La Forest, L'Heureux-Dubé, Gonthier and Major JJ. (dissenting): The *Access to Information Act* and *Privacy Act* have equal status and must be given equal effect. The courts must have regard to the purposes of both in considering whether a government record constitutes "personal information". Both recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the *Privacy Act*, privacy is paramount over access.

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. While the *Access to Information Act* recognizes a broad right of access to any record under the control of the government, the overarching purposes of the Act must be considered in determining whether an exemption to that general right should be granted. The purpose of the *Privacy Act* is to protect the privacy of individuals with respect to personal information about themselves held by a government institution and to provide individuals with a right of access to that information.

The definition of “personal information” in s. 3 of the *Privacy Act* -- “information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing” -- indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition. The language is deliberately broad and entirely consistent with the great pains that have been taken to safeguard individual liberty. Its intent is to capture any information about a specific person, subject only to specific exceptions.

In the present case, the information requested by the appellant revealed the times during which employees of the Department of Finance attended their workplace on weekends over a period of one month. It is patently apparent that this constitutes “information about an identifiable individual” within the meaning of s. 3. It thus *prima facie* constitutes “personal information” under s. 3 of the *Privacy Act*.

Although it is not strictly necessary to so find, it is relevant that employees of the respondent would have a reasonable expectation that the information in the sign-in logs would not be revealed to the general public. A reasonable person would not expect strangers to have access to detailed, systematic knowledge of an individual’s location during non-working hours, even if that location is his or her workplace.

Once it is determined that a record falls within the opening words of the definition of “personal information” in s. 3 of the *Privacy Act*, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (a) to (i). It should be noted, nevertheless, that the records requested by the appellant in this case clearly fall within para. (i), which states that “personal information” includes “the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual”. In this case, the appellant did not request only the names of the employees. He also wanted access to the times of their arrivals and departures. The time entries thus constitute “other personal information” within the meaning of the first part of para. (i).

It is also clear that disclosure of the names themselves, i.e., without the time entries or signatures, would disclose information about the individual within the meaning of the second part of para. (i). In his access request, the appellant asked for copies of the logs signed by employees on specific days. Even if the Minister disclosed only the names of the employees listed on those logs, the disclosure would reveal that certain identifiable persons attended their workplace on those days.

Section 48 of the *Access to Information Act* places the onus on the government to show that it is authorized to refuse to disclose a record. The Act makes no distinction between the determination as to whether a record is *prima facie* personal information and whether it is encompassed by one of the exceptions. Even where it has been shown that the record is *prima facie* personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in s. 3.

The section 3 personal information provision exempts information attaching to positions but not information relating to specific individuals. Information relating to the position is thus not “personal information”, even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in

which they choose to perform the tasks assigned to them is “personal information”. Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description.

The information requested in the present case is not information about the nature of a particular position. While it may give the appellant a rough, overall picture of weekend work patterns, it provides no specific, accurate information about any specific employee’s duties, functions or hours of work. Rather, it reveals information about the activities of a specific individual which may or may not be work-related. Even if the logs can be said to record an employee’s overtime hours accurately, such information is “personal information”. The specific hours worked by individual employees reveal nothing about either the nature or quantity of their work.

The names on the sign-in logs do not constitute a “document prepared by . . . individual[s] in the course of employment”. First, these logs are not prepared by the employees who sign them; they are the responsibility of security officers. Second, they are not made “in the course of employment” and have nothing to do with the responsibilities of their positions.

A *de novo* review of the decision of the head of the institution, under [s. 8\(2\)\(m\)\(i\)](#) of the *Privacy Act*, that the public interest in disclosure clearly outweighed any invasion of privacy is not mandated by [s. 2](#) of the *Access to Information Act* which provides that decisions on disclosure should be reviewed independently of government. The reviewing court, under s. 49 of that Act, is to determine whether the refusal to disclose by the head of a government institution was authorized. If the information does not fall within one of the exceptions to a general right of access, the head of the institution is not “authorized” to refuse disclosure, and the court may order that the record be released pursuant to s. 49. In making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. [Section 49](#) of the *Access to Information Act*, then, only permits the court to overturn

the decision of the head of the institution where that person is “not authorized” to withhold a record. Where the requested record constitutes personal information, the head of the institution is authorized to refuse and the *de novo* review power set out in s. 49 is exhausted.

The head of a government institution, under s. 19(2) of the *Access to Information Act*, has a discretion to disclose personal information in certain circumstances. A decision is not immune from judicial oversight merely because it is discretionary. Abuse of discretion may be alleged but where the discretion has been exercised in good faith, and, where required, in accordance with principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

The Minister properly examined the evidence and carefully weighed the competing policy interests. He was entitled to make the conclusion that the public interest did not outweigh the privacy interest. For this Court to overturn this decision would not only amount to a substitution of its view of the matter for his but also do considerable violence to the purpose of the legislation. The Minister’s failure to give extensive, detailed reasons for his decision did not work any unfairness upon the appellant.

The head of a government institution, pursuant to s. 48 of the *Access to Information Act*, has the burden of establishing that he or she is “authorized to refuse” to disclose a requested record. The Minister satisfied this burden when he showed that the information in the sign-in logs constituted “personal information”. Once that fact is established, the Minister’s decision to refuse to disclose pursuant to s. 8(2)(m)(i) of the *Privacy Act* may only be reviewed on the basis that it constituted an abuse of discretion. The Minister did not have a “burden” to show that his decision was correct because that decision is not reviewable by a court on the correctness standard. The Minister weighed the conflicting interests at stake. The fact that he stated that the appellant failed to demonstrate that the public interest should override the privacy rights of the employees named in the sign-in logs was therefore irrelevant.

Cases Cited

By Cory J.

Considered: *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988 CanLII 9396 \(FC\)](#), [1988] 3 F.C. 551; *Rubin v. Clerk of Privy Council (Can.)* (1993), [1993 CanLII 17546 \(FC\)](#), 62 F.T.R. 287.

By La Forest (dissenting)

R. v. Morgentaler, [1993 CanLII 74 \(SCC\)](#), [1993] 3 S.C.R. 463; *St. Peter's Evangelical Lutheran Church, Ottawa v. City of Ottawa*, [1982 CanLII 60 \(SCC\)](#), [1982] 2 S.C.R. 616; *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988 CanLII 9396 \(FC\)](#), [1988] 3 F.C. 551; *Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs)*, [1989 CanLII 9478 \(FC\)](#), [1990] 1 F.C. 395; *Information Commissioner v. Minister of Employment and Immigration* (1986), [1986 CanLII 6836 \(FC\)](#), 5 F.T.R. 287; *Bland v. National Capital Commission*, [1991 CanLII 13595 \(FC\)](#), [1991] 3 F.C. 325; *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1988 CanLII 5656 \(FCA\)](#), [1989] 1 F.C. 265; *R. v. Dymont*, [1988 CanLII 10 \(SCC\)](#), [1988] 2 S.C.R. 417; *Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145; *R. v. Hebert*, [1990 CanLII 118 \(SCC\)](#), [1990] 2 S.C.R. 151; *R. v. Broyles*, [1991 CanLII 15 \(SCC\)](#), [1991] 3 S.C.R. 595; *R. v. Duarte*, [1990 CanLII 150 \(SCC\)](#), [1990] 1 S.C.R. 30; *R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595; *Schwartz v. Canada*, [1996 CanLII 217 \(SCC\)](#), [1996] 1 S.C.R. 254; *Order M-35 (Re Corporation of the Township of Osprey*, September 4, 1992), [1992] O.I.P.C. No. 119 (QL); *Order P-718 (Re Ontario Science Centre*, July 6 1994), [1994] O.I.P.C. No. 211 (QL); *Order M-438 (Re Town of Amherstburg Police Services Board*, December 30, 1994), [1994] O.I.P.C. No. 434 (QL); *Katz. v. United States*, 389 U.S. 347 (1967); *R. v. Wong*, [1990 CanLII 56 \(SCC\)](#), [1990] 3 S.C.R. 36; *R. v. Wise*, [1992 CanLII 125 \(SCC\)](#), [1992] 1 S.C.R. 527; *R. v. Plant*, [1993 CanLII 70 \(SCC\)](#), [1993] 3 S.C.R. 281; *Canadian Jewish Congress*

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APPEAL from a judgment of the Federal Court of Appeal, 1995 CanLII 3587 (FCA), [1995]

3 F.C. 199, 124 D.L.R. (4th) 553, 181 N.R. 139, allowing an appeal from a judgment of Cullen J.

(1993), 70 F.T.R. 54, 22 Admin. L.R. (2d) 171. Appeal allowed, La Forest, L’Heureux-Dubé, Gonthier and Major JJ. dissenting.

Alan Riddell and Sean Gaudet, for the appellant.

Graham Garton, Q.C., and *Anne M. Turley*, for the respondent.

Denis J. Power, Q.C., and *Holly Harris*, for the intervener the Privacy Commissioner of Canada.

Andrew Raven and David Yazbeck, for the intervener the Public Service Alliance of Canada.

//Cory J.//

The judgment of Lamer C.J. and Sopinka, Cory, McLachlin and Iacobucci JJ. was delivered by

1 CORY J. -- I have read the careful and extensive reasons of Justice La Forest. I agree with his approach to the interpretation of the *Access to Information Act*, R.S.C. 1985, c. A-1, and the *Privacy Act*, R.S.C., 1985, c. P-21, particularly that they must be interpreted and read together. I also agree that the names on the sign-in logs are “personal information” for the purposes of s. 3 of the *Privacy Act*. However, I arrive at a different conclusion with respect to the application of s. 3 “personal information” (j) (hereinafter s. 3(j)) of that Act.

2 Subsection 3(j) of the *Privacy Act* provides that:

. . . for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, [“personal information”] does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

. . .

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment. . . .

3 I agree with La Forest J. that the names on the sign-in logs do not fall under s. 3(j)(iv) of the *Privacy Act*. It would be difficult to conclude that the sign-in logs were “prepared by” the employees, as that expression is commonly understood.

4 However, I am of the view that both the opening words of s. 3(j) and the specific provisions of s. 3(j)(iii) of the *Privacy Act* are sufficiently broad to encompass the information sought by the appellant.

5 La Forest J. holds, at para. 94, that the purpose of s. 3(j) and s. 3(j)(iii) of the *Privacy Act* is:

. . . to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not “personal information”, even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is “personal information”. [Emphasis in original.]

6 I agree. Moreover, I agree with La Forest J. that “[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description”, such as

“the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range” (para. 95).

7 However, in applying these considerations to the facts, La Forest J. concludes that the information requested by the appellant is not information about the nature of a particular position. It is on this point that I must differ.

8 The number of hours spent at the workplace is generally information “that relates to” the position or function of the individual, and thus falls under the opening words of s. 3(j). It is no doubt true that employees may sometimes be present at their workplace for reasons unrelated to their employment. Nevertheless, I am prepared to infer that, as a general rule, employees do not stay late into the evening or come to their place of employment on the weekend unless their work requires it. Ordinarily the workplace cannot be mistaken for either an entertainment centre or the setting for a party. The sign-in logs therefore provide information which would at the very least permit a general assessment to be made of the amount of work which is required for an employee’s particular position or function.

9 For the same reason, the information in the sign-in logs is related to “the . . . responsibilities of the position held by the individual” and falls under the specific exception set out at s. 3(j)(iii) of the *Privacy Act*. Although this information may not disclose anything about the nature of the responsibilities of the position, it does provide a general indication of the extent of those responsibilities. Generally, the more work demanded of the employee, the longer will be the hours of work required to complete it in order to fulfil the “responsibilities of the position held by the individual”. Nothing in s. 3(j)(iii) of the Act indicates that the information must refer to “responsibilities” in a qualitative, as opposed to quantitative, sense.

10 The reasons of the Federal Court in *Canada (Information Commissioner) v. Canada (Solicitor General)*, 1988 CanLII 9396 (FC), [1988] 3 F.C. 551 (T.D.) (hereinafter “*Information Commissioner*”) and *Rubin v. Clerk of Privy Council (Can.)* (1993), 1993 CanLII 17546 (FC), 62 F.T.R. 287 (hereinafter “*Rubin*”) are in my view distinguishable.

11 In *Information Commissioner*, Jerome A.C.J. held that certain opinions expressed about the training, personality, experience or competence of individual employees did not fall under any of the exemptions set out at s. 3(j) of the *Privacy Act*. In construing these specific exceptions, it was observed that, apart from s. 3(j)(v) (the individual’s own views or opinions given in the course of employment), each of them are examples of “matters of objective fact” (pp. 557-58). According to Jerome A.C.J., at p. 558:

There is no indication that qualitative evaluations of an employee’s performance were ever intended to be made public. Indeed, it would be most unjust if the details of an employee’s job performance were considered public information simply because that person is in the employ of the government.

12 In my view, there is neither a subjective aspect nor an element of evaluation contained in a record of an individual’s presence at the workplace beyond normal working hours. Rather, that record discloses information generic to the position itself.

13 In *Rubin*, it was held that, although the salary range attaching to a position fell under s. 3(j) (iii) of the *Privacy Act*, the actual salary earned by the employee filling the position did not. However, unlike the information contained in the sign-in sheets, the actual salary which a person receives does not reveal anything inherent about the position. On the contrary, it is information that relates to the individual employee.

14 My conclusion that the names on the sign-in logs fall within the opening words of s. 3(j) of the *Privacy Act* and, alternatively, within s. 3(j)(iii) of the Act, is sufficient to dispose of this appeal. It follows that the information must be disclosed.

15 There remain two additional matters which I would like to mention. First, there might be another acceptable manner of resolving the dispute which would go further in protecting the privacy and security of the individuals. Perhaps this could be achieved by setting out the hours worked and indicating which of the employees appearing on the sign-in sheets were members of the bargaining unit, without revealing their names. That solution might satisfy all concerned. Yet, in the absence of submissions on such a proposed solution, it would be unfair and improper to consider it in this appeal.

16 Second, in light of the conclusion that the information must be disclosed, it is not necessary for me to consider whether the Minister erred in his exercise of the discretion conferred upon him pursuant to s. 19(2) of the *Access to Information Act* and s. 8 of the *Privacy Act*. In general, I agree with La Forest J.'s conclusion that a Minister's discretionary decision under s. 8(2)(m)(i) is not to be reviewed on a *de novo* standard of review. Perhaps it will suffice to observe that the Minister is not obliged to consider whether it is in the public interest to disclose personal information. However in the face of a demand for disclosure, he is required to exercise that discretion by at least considering the matter. If he refuses or neglects to do so, the Minister is declining jurisdiction which is granted to him alone.

17 Furthermore, it could be determined that the Minister committed an error in principle resulting in a loss of jurisdiction when he stated:

I do not believe that you have demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy. [Emphasis added.]

18 From this, it appears that the Minister of Finance placed upon the appellant the burden of demonstrating that the public interest in disclosure clearly outweighed any privacy interest. Yet, s. 8 of the *Privacy Act* does not mention any burden of proof. It simply provides that the Minister must be satisfied that the public interest in disclosure clearly outweighs privacy. The quoted words from the Minister's ruling could lead to the conclusion that he abused the discretion conferred upon him. If this had been the conclusion reached, I would have referred the matter back to the Minister for consideration without the imposition of the onus on the appellant.

19 In the result, I would allow the appeal, with costs.

//La Forest J.//

The reasons of La Forest, L'Heureux-Dubé, Gonthier and Major JJ. were delivered by

20 LA FOREST J. (dissenting) -- This appeal involves a conflict between access to information and privacy rights under federal legislation. For the first time, this Court has the opportunity to consider an application pursuant to s. 41 of the *Access to Information Act*, R.S.C., 1985, c. A-1, to review a decision as to whether certain information under the control of the Government of Canada should be disclosed. Specifically, the appellant challenges the decision of the respondent Minister of Finance to refuse to disclose portions of departmental sign-in logs on the basis that they constitute "personal information" within the meaning of s. 3 of the *Privacy Act*, R.S.C., 1985, c. P-21.

Factual Background

21 On October 16, 1990, the appellant, Dagg, a professional access to information consultant, filed a request with the Department of Finance for copies of logs signed by employees entering and leaving the workplace on weekends during the month of September, 1990. On November 6, 1990, the respondent Minister disclosed the relevant logs to the appellant. The Minister had, however, deleted the employees' names, identification numbers and signatures. In his letter accompanying the disclosed logs, the Minister explained that this information constituted personal information and was thus exempted from disclosure in accordance with [s. 19\(1\)](#) of the *Access to Information Act*.

22 On November 29, 1990, the appellant filed a complaint with the Information Commissioner pursuant to [s. 31](#) of the *Access to Information Act*. On March 18, 1991, he wrote to the Minister seeking a review of his earlier decision. He argued that the names of the employees which had been deleted from the record should be disclosed by virtue of s. 3 “personal information” (*j*) (hereinafter [s. 3\(j\)](#)) or [s. 8\(2\)\(m\)](#) of the *Privacy Act*. The Minister confirmed his decision by way of a letter dated July 3, 1991. In his report of September 4, 1991, the Information Commissioner concluded that the appellant had not been deprived of a right under the *Access to Information Act* and indicated that he was unable to support his complaint.

23 The appellant applied to the Federal Court, Trial Division, for a review of the Minister's decision pursuant to [s. 41](#) of the *Access to Information Act*. The evidence of R. Langille, the Department's Director of Security Services, revealed that the sign-in logs recorded the names, identification numbers and signatures of the individuals entering the Department, as well as their location in the building and the times of their arrival and departure. According to Langille, the primary purpose of the sign-in logs was to locate personnel in case of fire. He also stated that they had been used to assist in investigations

of theft and vandalism, though they were not kept for that purpose. On occasion, he testified, logs had been shown to managers in order to verify that an employee was present in the building at a particular time. As far as Langille was aware, however, the logs were not used to verify overtime claims.

24 In his own evidence, the appellant stated that he sought the information as part of a marketing initiative. He wanted to determine whether union members were working overtime on weekends without claiming compensation. He intended to present this information to the union anticipating that it would find it helpful in the collective bargaining process and thereby be disposed to retain his services. He also hoped to obtain a legal precedent on the release of names that would force government departments to adopt a consistent response to such requests.

25 On November 8, 1993, Cullen J. held that the names were not personal information and should be released. The respondent appealed to the Federal Court of Appeal. In a unanimous decision dated April 21, 1995, the court allowed the appeal.

Applicable Legislation

26 Before proceeding further, it will be useful to set out the relevant provisions of the *Access to Information Act* and the *Privacy Act*. Section 2 of each Act sets out the statute's purpose:

Access to Information Act

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Privacy Act

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a

government institution and that provide individuals with a right of access to that information.

27 [Section 4](#) of the *Access to Information Act* sets out the basic right to government-held information:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of the *Immigration Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

28 This right to government information is limited by a number of exemptions set out in the *Access to Information Act* beginning at s. 13. Of relevance here is s. 19(1), the personal information exemption, which states:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in [section 3](#) of the *Privacy Act*.

29 “Personal information” is defined by [s. 3](#) of the *Privacy Act*. It reads:

3. . . .

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

. . .

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of [sections 7, 8 and 26](#) and [section 19](#) of the *Access to Information Act*, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

- (ii) the title, business address and telephone number of the individual,
- (iii) the classification, salary range and responsibilities of the position held by the individual,
- (iv) the name of the individual on a document prepared by the individual in the course of employment, and
- (v) the personal opinions or views of the individual given in the course of employment. . . .

30 Even if a record constitutes “personal information” under this definition, however, [s. 19\(2\)](#) of the *Access to Information Act* provides the head of a government institution with a residual discretion to release the information under the following circumstances:

19. . . .

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

- (a) the individual to whom it relates consents to the disclosure;
- (b) the information is publicly available; or
- (c) the disclosure is in accordance with [section 8](#) of the *Privacy Act*.

31 [Section 8](#) of the *Privacy Act*, in relevant part, states:

8. . . .

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . .

(m) for any purpose where, in the opinion of the head of the institution,

- (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. . . .

32 The Information Commissioner is appointed under [s. 54](#) of the *Access to Information Act* by the Governor in Council after approval by resolution of the Senate and House of

Commons. He has the responsibility of receiving and investigating complaints under the Act including from those who have been denied access to a record or part of a record.

33 Section 41 of the *Access to Information Act* provides for the review of a decision to refuse access to a record. It states:

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

34 Section 48 of the Act sets out the burden of proof to be employed by a reviewing court:

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

35 Finally, s. 49 sets out the powers of the reviewing court to order disclosure of government information:

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Judicial History

Federal Court, Trial Division (1993), 70 F.T.R. 54

36 Cullen J. held that the question whether a record is “personal information” is to be determined according to whether its predominant characteristic is personal or professional.

In his view, the information in the sign-in logs, even if potentially usable to ascertain personal information about the individuals thereon, is nonetheless predominantly of a professional and non-personal nature. Taken as a whole, he concluded, they indicate how many individuals are working overtime for the Department.

37 Cullen J. found that the broad definition of “personal information” proposed by the respondent would mean that virtually all government information would be exempt from disclosure. Such an interpretation, he held, deviates from Parliament’s intention that most information emanating from government should be disclosed.

38 Cullen J. also held that the sign-in logs did not fall within s. 3(i) of the *Privacy Act*. Because the identification numbers and signatures had been excised from the logs, he determined, the names did not “appear” with other personal information. He concluded, moreover, at p. 58, that the names themselves did not disclose any “other personal information” as defined in s. 3(i).

39 Having determined that the names on the sign-in logs were not personal information, Cullen J. found it unnecessary to determine whether they fell within the exemption provided in s. 3(j) of the *Privacy Act* or whether the public interest override in s. 8(2)(m) militated in favour of disclosure.

Federal Court of Appeal, 1995 CanLII 3587 (FCA), [1995] 3 F.C. 199

40 On appeal to the Federal Court of Appeal, Isaac C.J., for the court, held that Cullen J. erred by giving the *Access to Information Act* pre-eminence over the *Privacy Act*. In his view, the statutes are complementary and must be construed harmoniously with one another. He also found that Cullen J. erred in using the so-called “predominant characteristic test” to determine whether the names in the sign-in logs constituted personal information. The plain language of s. 3 of the *Privacy Act*, he held, states simply that

“personal information” is information about an identifiable individual that is recorded in any form.

41 Isaac C.J. then determined that s. 3 “personal information” (i) (hereinafter s. 3(i)) of the *Privacy Act* also applied to the sign-in logs. He held so, first, because the names appeared in the logs together with identification numbers and signatures of the individuals concerned, and secondly, because the names, in and of themselves, would disclose the individuals’ whereabouts at specified times.

42 Isaac C.J. next considered whether the sign-in logs fell within the exceptions set out in s. 3(j) of the *Privacy Act*. In his view, the information revealed in the logs was not related to the employees’ positions or functions. There was no evidence, he held, that this information indicated the employees’ working hours. He also dismissed the appellant’s arguments that the logs disclosed information about the employees’ overtime responsibilities and that the logs are documents prepared in the course of employment.

43 Finally, Isaac C.J. addressed the argument that the Minister exercised his discretion improperly in declining to disclose the information pursuant to s. 8(2)(m) of the *Privacy Act*. In rejecting the appellant’s contention that there was a public interest in the disclosure of the information, he noted that the sign-in logs did not indicate whether the employees were working or whether they were working overtime and, if so, the number of hours they worked. He concluded, therefore, that the disclosure of the names would not produce the result desired by the appellant.

Issues

44 There are three issues to be decided in this appeal:

1. Do the names on the sign-in logs constitute “personal information” as defined in s. 3 of the *Privacy Act*?
2. Do the names on the logs fall within the exception set out in s. 3(j) of the *Privacy Act*?
3. Did the Minister exercise his discretion properly in refusing to disclose the names on the sign-in sheets pursuant to s. 8(2)(m)(i) of the *Privacy Act*?

Analysis

General Interpretive Principles: Access to Information v. Privacy

45 This appeal involves a clash between two competing legislative policies -- access to information and privacy. For obvious reasons, the appellant and respondent have opposing views as to which of these policies should prevail in this case. It should also come as no surprise that the litigants have markedly different conceptions of the statutes that embody those policies. Recognizing the conflicting nature of governmental disclosure and individual privacy, Parliament attempted to mediate this discord by weaving the *Access to Information Act* and the *Privacy Act* into a seamless code. In my opinion, it has done so successfully and elegantly. While the two statutes do not efface the contradiction between the competing interests -- no legislation possibly could -- they do set out a coherent and principled mechanism for determining which value should be paramount in a given case.

46 The appellant contends that the personal information exemption in the *Access to Information Act* should be construed narrowly so as to favour full disclosure. The Act, he points out, provides that members of the public have a “right of access” to government information (ss. 2, 4) and that exceptions to this right should be “limited and specific” (s. 2). He argues, in effect, that where there is any ambiguity as to whether a record

constitutes personal information, the right to disclosure should prevail over the right of privacy.

47 This position is belied, however, by both the wording and history of the legislation. As already noted, the *Access to Information Act* and the *Privacy Act* are parallel statutes, designed to work in concert to restrict the federal government's control over certain kinds of information. The *Access to Information Act* gives individuals a right of access to government information. The *Privacy Act* permits them to gain access to information about themselves held in government data banks, and limits the government's ability to collect, use and disclose personal information.

48 Both statutes regulate the disclosure of personal information to third parties. Section 4(1) of the *Access to Information Act* states that the right to government information is "[s]ubject to this Act". Section 19(1) of the Act prohibits the disclosure of a record that contains personal information "as defined in section 3 of the *Privacy Act*". Section 8 of the *Privacy Act* contains a parallel prohibition, forbidding the non-consensual release of personal information except in certain specified circumstances. Personal information is thus specifically exempted from the general rule of disclosure. Both statutes recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the *Privacy Act*, privacy is paramount over access.

49 This interpretation is buttressed by the legislative history of the Acts. As this Court has recently confirmed, evidence of a statute's history, including excerpts from *Hansard*, is admissible as relevant to the background and purpose of the legislation, provided, of course, that the court remains mindful of its limited reliability and weight; see *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at pp. 483-85.

50 The *Access to Information Act* and the *Privacy Act* were originally considered together by Parliament as Bill C-43, and were enacted simultaneously as Schedules I and II to S.C.

1980-81-82-83, c. 111. In introducing the Bill for third reading, the Minister of Communications made the following comments (*House of Commons Debates*, vol. XVI, 1st sess., 32nd Parl., at p. 18853 (June 28, 1982)):

. . . I would like to take a few moments to discuss the relationship between access to information and privacy legislation. Combining access to information and privacy legislation in one bill has permitted the complete integration of these two complimentary [*sic*] types of legislation.

Parallel rights of access to information held by the government and parallel rights of review of decisions to refuse access have been created. At the same time, however, the principle that the right to privacy takes precedence over the general right of access has been clearly recognized. This is a principle with which I am sure all hon. members agree. Thus the term “personal information” has the same meaning in both the privacy and access to information legislation.

Also the disclosure of information under the access to information portion of the bill is determined by the principles regarding disclosure of personal information to third persons set out in the privacy portion. This approach will ensure complete consistency between the treatment of personal information under both statutes, thus avoiding the situation which has developed in some countries where competing rights to privacy and to access to government-held information have been created. [Emphasis added.]

51 It is clear, therefore, that Parliament did not intend access to be given preeminence over privacy. The appellant correctly points out that under the *Access to Information Act*, access is the general rule. It is also true that exceptions to that rule must be confined to those specifically set out in the statute and that the government has the burden of showing that information falls into one of these exceptions. It does not follow, however, that the “personal information” exemption should receive a cramped interpretation. To do so would effectively read the *Privacy Act* as subordinate to the *Access to Information Act*. As stated in s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, every enactment is to be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”. A court may not disregard, “in an effort to give effect to what is taken to be the purpose of the statute . . . certain provisions of the *Act*”; see *St. Peter’s Evangelical Lutheran Church, Ottawa v. City of Ottawa*, 1982 CanLII 60 (SCC), [1982] 2 S.C.R. 616, at p. 626. The *Access to Information Act* expressly incorporates the definition of “personal

information” from the *Privacy Act*. Consequently, the underlying purposes of both statutes must be given equal effect. As Isaac C.J. stated in the Court of Appeal below, at p. 217:

It is obvious that both statutes are to be read together, since section 19 of the Access Act does incorporate by reference certain provisions of the *Privacy Act*. Nevertheless, there is nothing in the language of either statute which suggests, let alone compels, the conclusion that the one is subordinate to the other. They are each on the same footing. Neither is pre-eminent. There is no doubt that they are complementary and must be construed harmoniously with each other according to well-known principles of statutory interpretation in order to give effect to the stated parliamentary intention and in order to ensure the attainment of the stated parliamentary objectives.

52 This position has been confirmed in a number of decisions of the Federal Court. In *Canada (Information Commissioner) v. Canada (Solicitor General)*, 1988 CanLII 9396 (FC), [1988] 3 F.C. 551 (T.D.), Jerome A.C.J. stated the following, at pp. 556-57:

On the issue of which purpose is to govern interpretation in this case, I do not believe that either statute should be given pre-eminence. Clearly, what Parliament intended by the incorporation of a section of the *Privacy Act* in subsection 19(1) of the *Access to Information Act* was to ensure that the principles of both statutes would come into play in the decision whether to release personal information. In *Re Robertson and Minister of Employment and Immigration* (1987), 1987 CanLII 5279 (FC), 42 D.L.R. (4th) 552; 13 F.T.R. 120 (F.C.T.D.), I considered the purposes of both statutes in determining whether the information sought required protection from disclosure, (at pages 557 D.L.R.; 124 F.T.R.):

The two main purposes of the *Access to Information Act* and *Privacy Act* are to provide access to information under the control of a government institution and to protect the privacy of individuals with respect to personal information about themselves. These principles do not appear to me to require protection from disclosure for a submission made by a public body to another public body about a publicly funded programme. The issue is whether the Acts provide protection for an individual who adds to such a public submission his own personal opinion on the subject and his signature.

Similarly, in the present case, the report is the product of a publicly-funded study of a publicly-operated institution, and ought to be available to the public, unless it is protected by one of the specific exemptions in the *Access to Information Act*. The intent of subsection 19(1), and its incorporation of section 3 of the *Privacy Act*, is clearly to protect the privacy or identity of individuals who may be mentioned in otherwise releasable material. I note that the definition of personal information is deliberately broad. It is entirely consistent with the great pains that have been taken to safeguard individual identity.

Similarly, Dubé J. noted in *Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs)*, 1989 CanLII 9478 (FC), [1990] 1 F.C. 395 (T.D.), that the objects of the two acts

should be read together. He concluded, at p. 401, that the joint objective of the acts was “that information shall be provided to the public, except personal information relating to individuals”.

53 Admittedly, there are *dicta* in some decisions implying that access should, in some circumstances, be favoured over privacy. In *Information Commissioner v. Minister of Employment and Immigration* (1986), 1986 CanLII 6836 (FC), 5 F.T.R. 287, Jerome A.C.J., in contradistinction to his later comments in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, relied solely on the *Access to Information Act*’s purpose clause in concluding that doubt ought to be resolved in favour of disclosure. In that case, however, it was not contested that the information requested constituted “personal information” under s. 8 of the *Privacy Act*. Rather, the dispute was whether the head of a government institution may refuse to disclose personal information pursuant to s. 19(2) of the *Access to Information Act* if the individual to whom the information relates consents to the disclosure.

54 Similarly, in *Bland v. National Capital Commission*, 1991 CanLII 13595 (FC), [1991] 3 F.C. 325 (T.D.), at p. 335, Muldoon J. referred to Heald J.A.’s comments in *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, 1988 CanLII 5656 (FCA), [1989] 1 F.C. 265, at p. 274, where he stated that the exemptions to the general right of access must be interpreted “strictly”. As in *Information Commissioner v. Minister of Employment and Immigration*, *supra*, however, Muldoon J.’s comments were made in the context of deciding whether the head of the National Capital Commission exercised her discretion properly in refusing to release the requested information pursuant to s. 19(2) of the *Access to Information Act*. The *Rubin* case, moreover, did not even involve the issue of personal information. In that decision, the dispute was whether the Canada Mortgage and Housing Corporation could refuse to disclose certain records containing accounts of consultations or deliberations involving Crown employees pursuant to s. 21(1)(b) of the *Access to Information Act*.

55 In summary, it is clear that the *Access to Information Act* and *Privacy Act* have equal status, and that courts must have regard to the purposes of both statutes in considering whether a government record constitutes “personal information”. Some commentators have suggested that this “parallel” interpretive model permits judges too much discretion and has led to inconsistency and contradiction in the jurisprudence. See, for example, Tom Onyshko, “The Federal Court and the *Access to Information Act*” (1993), 22 *Man. L.J.* 73, at p. 106. It is suggested that the two statutes should be considered conceptually distinct and that the right to access should be the paramount consideration under the access legislation.

56 As I have indicated, however, this interpretation flies in the face of the language, structure and history of the legislation. I do not believe, moreover, that the parallel interpretation model is inherently contradictory or necessarily leads to inconsistent results. The *Access to Information Act* clearly provides that “personal information” is not to be disclosed except in certain specified circumstances. Of course, the determination of what constitutes “personal information” will involve a balancing of competing values. Such a balancing process, where mandated by legislation, cannot be avoided simply because it might be easier to apply a clear, bright-line rule that favours one interest over another. By employing the considerations set out in the *Privacy Act*, courts are perfectly capable of developing a jurisprudence that achieves consistency in principle.

57 That being said, I cannot agree with the respondent that, the words of the “personal information” exemption being clear and unambiguous, the task of statutory interpretation does not arise in this case. The determination of what constitutes “personal information” is an interpretive exercise; an exercise that will inevitably require a consideration of the competing values of access and privacy. I will next consider the meaning of “personal information” with these values in mind.

58 Before attempting to determine whether the sign-in logs requested by the appellant in this case constitute “personal information” within the meaning of s. 3 of the *Privacy Act*, it will be helpful to consider the purposes of the Acts in somewhat greater detail.

59 As earlier set out, s. 2(1) of the *Access to Information Act* describes its purpose, *inter alia*, as providing “a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public”. The idea that members of the public should have an enforceable right to gain access to government-held information, however, is relatively novel. The practice of government secrecy has deep historical roots in the British parliamentary tradition; see Patrick Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (1988), at pp. 61-84.

60 As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, “Access to Information and Rule-Making”, in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.

61 The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald

C. Rowat explains in his classic article, “How Much Administrative Secrecy?” (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.

62 Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:

There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

63 Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to “any record under the control of a government institution” (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

64 The purpose of the *Privacy Act*, as set out in s. 2 of the Act, is twofold. First, it is to “protect the privacy of individuals with respect to personal information about themselves

held by a government institution”; and second, to “provide individuals with a right of access to that information”. This appeal is, of course, concerned with the first of these purposes.

65 The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual’s unique personality or personhood, privacy is grounded on physical and moral autonomy -- the freedom to engage in one’s own thoughts, actions and decisions; see *R. v. Dymment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 427, *per* La Forest J.; see also Joel Feinberg, “Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?” (1982), 58 *Notre Dame L. Rev.* 445.

66 Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*; see *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, and *R. v. Broyles*, 1991 CanLII 15 (SCC), [1991] 3 S.C.R. 595.

67 Privacy is a broad and somewhat evanescent concept, however. It is thus necessary to describe the particular privacy interests protected by the *Privacy Act* with greater precision. In *Dymment*, I referred to *Privacy and Computers*, the Report of the Task Force established jointly by the Department of Communications/Department of Justice (1972), especially at pp. 428-30. That “report classifies these claims to privacy as those involving territorial and spatial aspects, those related to the person, and those that arise in the information context”. It is the latter type of privacy interest that is of concern in the present appeal. As I put it in *Dymment*, at pp. 429-30:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): “This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.” In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*. . . .

See also *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, at p. 46 (“privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself”); *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595, at pp. 613-15 (*per* L’Heureux-Dubé J., dissenting); Westin, *supra*, at p. 7 (“[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others”); Charles Fried, “Privacy” (1968), 77 *Yale L.J.* 475, at p. 483 (“[p]rivacy . . . is control over knowledge about oneself”).

68 With these broad principles in mind, I will now consider whether the information requested by the appellant constitutes personal information under s. 3 of the *Privacy Act*. In its opening paragraph, the provision states that “personal information” means “information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing”. On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.

69

As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, at p. 557, the language of this section is “deliberately broad” and “entirely consistent with the great pains that have been taken to safeguard individual identity”. Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, “How Much Privacy for Public Officials?”, speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture.

70

In the present case, the information requested by the appellant revealed the times during which employees of the Department of Finance attended their workplace on weekends over a period of one month. It is patently apparent that this constitutes “information about an identifiable individual” within the meaning of s. 3 of the *Privacy Act*. As a result, I believe that the information *prima facie* constitutes “personal information” under s. 3. Notably, information relating to the number of hours worked by an employee during a particular period has been held to be personal information under the *Ontario Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56: *Order M-35 (Re Corporation of the Township of Osprey*, September 4, 1992), [1992] O.I.P.C. No. 119 (QL); *Order P-718 (Re Ontario Science Centre*, July 6, 1994), [1994] O.I.P.C. No. 211 (QL). Similarly, it has been held that information that would reveal the number of overtime hours worked by an identifiable individual is personal information: *Order M-438 (Re Town of Amherstburg Police Services Board*, December 30, 1994), [1994] O.I.P.C. No. 434 (QL). The general definition of “personal information” under s. 2(1) of the Ontario Acts is virtually identical to that contained in s. 3 of the federal *Privacy Act*.

71 Although it is not strictly necessary for my analysis, I believe that employees of the respondent would have a reasonable expectation that the information in the sign-in logs would not be revealed to the general public. The “reasonable expectation of privacy” principle is a tool used in search and seizure jurisprudence to determine whether or not a search is “reasonable” in constitutional terms; see *Hunter v. Southam Inc.*, *supra*; *Katz v. United States*, 389 U.S. 347 (1967). The principle ensures that, at a conceptual level, the dignity and autonomy interests at the heart of privacy rights are only compromised when there is a compelling state interest for doing so.

72 In my view, a reasonable person would not expect strangers to have access to detailed, systematic knowledge of an individual’s location during non-working hours, even if that location is his or her workplace. The motions judge, at p. 60, concluded that “revealing the masses of individuals entering and leaving a government premise [*sic*] for a certain time frame is hardly the stuff of revealing personal information”. There are numerous reasons, however, why individuals may not wish members of the general public to have access to records of their comings and goings from work during non-office hours. Consider the case of an employee, physically abused by her spouse, who is permitted by management to work after normal working hours in order to avoid detection and harassment. Would this individual consider the disclosure of her sign-in logs to be innocuous? See Leadbeater, *supra*, at p. 18. To take a less foreboding example, is it fair to expect that the sign-in logs of government employees who regularly work after hours could be made available to corporations with an interest in targeting such persons for marketing certain products or services?

73 In the *Charter* context, this Court has recognized that individuals have a right to be free from various forms of state surveillance. In *Duarte*, *supra*, the Court determined that the electronic taping of private communications by state authorities violated the privacy interests protected by s. 8 of the *Charter*. In *R. v. Wong*, 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36, it held that the videotaping of events in a private hotel room also ran afoul of the

s. 8 right against unreasonable search and seizure. And in *R. v. Wise*, 1992 CanLII 125 (SCC), [1992] 1 S.C.R. 527, the Court concluded that a person's reasonable expectation of privacy extended to protection from unrecorded, electronic surveillance of a person's physical movements. In that case, the Court held that the accused's s. 8 rights were violated by the placement of a crude electronic tracking device in his car, though the majority concluded that the search was only "minimally intrusive" for the purposes of determining whether the evidence obtained should be excluded pursuant to s. 24(2) of the *Charter*.

74 It must be remembered, however, that in the criminal law context, the countervailing state interest in surveillance may be very strong. In *Wise*, for example, the targeted individual was a prime suspect in a series of murders. The state interest in disclosing the information in the present case, if any, is certainly far less compelling than the interest at stake in *Wise*. Of course, the recording of a person's presence at his or her workplace may be less intrusive than the kind of state-controlled electronic surveillance at issue in cases like *Wise*, *Duarte* and *Wong*. Nevertheless, as I noted in my dissent in *Wise*, at p. 557, "[a]n individual has a reasonable expectation of privacy not only in the communications he makes, but in his movements as well".

75 In determining whether an individual has a reasonable expectation of privacy in a particular piece of information, it is important to have regard to the purpose for which the information was divulged; see *Dyment*, *supra*, at pp. 429-30, *per* La Forest J.; *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, at pp. 292-93. Generally speaking, when individuals disclose information about themselves they do so for specific reasons. Sometimes, information is revealed in order to receive a service or advantage. At other times, persons will release information because the law requires them to do so. In either case, they do not expect that the information will be broadcast publicly or released to third parties without their consent. As I stated in *Dyment*, *supra*, at pp. 429-30, "situations abound where the reasonable expectations of the individual that the information shall

remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected”.

76 In the present case, the information on the sign-in logs was collected in order to determine who was in the building in the case of a fire or other emergency. Although the logs were occasionally used for other purposes, there is no evidence that they were ever used to verify overtime claims. More important, it is clear that the persons signing the logs would not have expected that they might be released to the general public. At the very least, employees of the Department should be entitled to expect that the information in the logs would be retained by their employer to be used by it for legitimate business purposes.

77 As earlier stated, once it is determined that a record falls within the opening words of the definition of “personal information” in [s. 3](#) of the *Privacy Act*, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (a) to (i). I note, nevertheless, that the records requested by the appellant in this case clearly fall within para. (i). That provision states that “personal information” includes:

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual. . . .

78 The Court of Appeal found that the names on the sign-in sheets are encompassed by the first part of para. (i); i.e., they “appea[r] with other personal information relating to the individual”, namely, the signatures and identification numbers of the person making the entry. It also concluded that the disclosure of the name itself would reveal information about the individual as set out in the second branch of the provision.

79 The appellant avers that the names do not fall within the first part of para. (i) because he did not request the disclosure of their accompanying identification numbers and

signatures. The respondent contends, in contrast, that the s. 4(1) of the *Access to Information Act* does not grant a right of access to a discrete piece of information, but rather to a record, a term defined in s. 3 of that statute. The inquiry as to whether a name should be disclosed, he asserts, must consider the whole of the document in which the personal information appears, not merely a truncated version of it.

80 The respondent's submission on this point is unconvincing. While it is true that Act speaks of access to a "record", I do not believe this should be interpreted as meaning only an entire physical document. Under any practical, contextualized definition, "record" would refer to a particular piece of information under the control of a government institution, regardless of whether that piece is located within a larger "document". If the physical nature of the document is such that non-personal information appears together with personal information, it generally should be possible to disclose only the non-personal portion of the document. As the Minister's actions demonstrate, it was possible in the instant case simply to excise the identification numbers and signatures from the sign-in logs. Indeed, s. 25 of the *Access to Information Act* requires the Minister to disclose any portion of a record that does not contain information that he is authorized to withhold, so long as the portion can reasonably be severed from any part that does contain such information.

81 While the Court of Appeal thus erred in concluding that the fact that names on the sign-in logs appeared with the signatures and identification numbers rendered the names "personal information", this does not end the matter. The appellant did not request only the names of the employees. He also wanted access to the times of their arrivals and departures. It was this information that the appellant believed would help him determine whether union members were working overtime in violation of their collective agreement. For the reasons set out in my analysis of the general definition of "personal information", the time entries made in the sign-in logs thus constitute "other personal information" within the meaning of the *Privacy Act*.

82 As noted above, the Court of Appeal also held that disclosing the names on the sign-in logs would itself reveal information about the individual in contravention of the second branch of the test set out in para. (i). Isaac C.J. explained, at pp. 223-24:

The names in the sign-in logs would certainly disclose that those individuals were on specific premises, on particular days and between specified times. In other words, they were information about the whereabouts of the individuals concerned at specific times. . . . I have no doubt that this information is personal and relates to identifiable individuals.

From a purely technical standpoint, this analysis is misleading. The Court of Appeal seems to have considered the disclosure of the names together with the times of ingress and egress recorded in the logs. The second branch of para. (i) refers, however, to the “disclosure of the name itself”. The passage quoted above, therefore, is more properly characterized as relating to the first branch of para. (i).

83 The proper question to be asked in relation to the second branch is whether the disclosure of the names themselves, i.e., without the time entries or signatures, would disclose information about the individual. On a plain reading, it is obvious that it would. In his access to information request, the appellant asked for copies of the logs signed by employees on specific days. Even if the Minister disclosed only the names of the employees listed on those logs, the disclosure would reveal that certain identifiable persons attended their workplace on those days. The disclosure of the names would thus “reveal information about the individual” within the meaning of the second part of para. (i).

84 The appellant argues, however, that this provision should be so read as to require that the disclosure of the name itself reveal personal information about the individual. In his view, a literal interpretation of para. (i) fails to recognize that the disclosure of a document will always reveal some information about the individual by connecting him or her with other information contained in the document. Such an interpretation, he states, would prohibit any disclosure where the name revealed any information whatsoever about the

individual. In the result, names on documents would invariably constitute “personal information”.

85 I cannot accept this submission. Paragraph (i) clearly states that a record is personal information if the disclosure of the name itself would reveal information about the individual. It simply does not require this information to be “personal”. Notably, the first part of para. (i) does refer to “personal” information that appears with the name of the individual. It is highly unlikely that the drafters of this provision would have inadvertently omitted to include the word “personal” in the second part of para. (i) when they included it in the first.

86 In any event, it is apparent that the disclosure of the names themselves would reveal “personal” information. As I have discussed, even if the time entries were not included in the disclosure, the names would reveal that certain employees attended their workplace on particular days. This constitutes “information about an identifiable individual” within the meaning of s. 3 of the *Privacy Act*. Indeed, each of the examples set out in paras. (a) to (i) is simply that -- an example of information about identifiable individuals that is typically kept in government records.

87 Underlying the appellant’s objection to this straightforward interpretation of para. (i) is the notion that the inclusion of records containing the names of individuals would prevent the disclosure of an unjustifiably broad array of government documents. As will be discussed later, however, s. 3(j)(iv) of the *Privacy Act* specifically exempts “the name of the individual on a document prepared by the individual in the course of employment” from the definition of “personal information”. There is no danger, therefore, that the names of government officials will be kept secret merely because they are contained on documents prepared by those individuals in the course of employment.

88 The appellant submits that, even if the information he requested is *prima facie* “personal information”, it falls into the exemption provided in s. 3(j) of the *Privacy Act*. That provision states:

3. . . .

“personal information”

. . . does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment. . . .

Specifically, the appellant contends that the sign-in logs are captured by the general opening words of para. (j) as well as the specific examples set out in subparas. (iii) and (iv).

89 Before dealing with the merits of these submissions, it is necessary to consider a procedural question. In the Court of Appeal, Isaac C.J. held that once it is determined that a record is *prima facie* personal information, the onus of establishing that one of the exceptions applies lies with the person making the access request. Similar conclusions were reached in *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 3539 (FC), [1996] 1 F.C. 268 (T.D.), at p. 283; *Sutherland v. Canada (Minister of Indian and Northern Affairs)*, 1994 CanLII 3493 (FC), [1994] 3 F.C. 527 (T.D.), at p. 539; *Terry v. Canada (Minister of National Defence)* (1994), 86 F.T.R.

266, at p. 269; and *MacKenzie v. Canada (Minister of National Health and Welfare)* (1994), 1994 CanLII 19589 (FC), 88 F.T.R. 52, at pp. 55-56.

90 Section 48 of the *Access to Information Act*, however, places the onus on the government to show that it is authorized to refuse to disclose a record. The Act makes no distinction between the determination as to whether a record is *prima facie* personal information and whether it is encompassed by one of the exceptions. As a result, it is clear that even where it has been shown that the record is *prima facie* personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in s. 3(j).

91 That being said, it remains to determine whether the Minister has discharged his onus of showing that the information does not fall into one of the exemptions. Reading the opening clause of para. (j) in conjunction with subpara. (iii), it is apparent that information about government employees that relates to their position and function, including the responsibilities of their position, does not constitute “personal information”. The appellant and his supporting interveners contend that information about hours of work relates to employees’ position or function. Such information, they assert, reveals that it is a requirement of their positions that they work overtime or on weekends.

92 In considering this issue, it is helpful to characterize the precise nature of the information requested. The sign-in logs reveal the presence of certain employees during specified hours on the weekends. They do not indicate whether those employees were working during those periods or whether any work performed constituted “overtime”. At best, the logs disclose that certain individuals were likely, although not necessarily, required to work for some period during weekends. They may also indicate a probability that these persons were working overtime.

In my view, this information does not relate to the positions or functions of government employees, or to the responsibilities associated with their positions. In *Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs)*, *supra*, the court made a distinction between information relating to a position and that relating to an individual. In that case, the head of the government institution revealed the names of persons named in a list of temporary employees. The Privacy Commissioner found that the names constituted “personal information” and that the disclosure thus violated the *Privacy Act*. In an attempt to avoid compounding this error, the department refused to release information on the security level attaching to the positions that these individuals occupied. The court held, however, that the security classifications pertained to particular positions and not to the individuals who filled them. Dubé J. stated the following, at pp. 399-400:

The Commissioner argues that security classification is a condition attached to the position itself and not to the individual and, as such, it is not personal information. It is merely a minimum requirement and its inclusion on the call-up form does not indicate the level of security clearance actually held by the employee, but merely that the employee has met the minimum clearance for that position.

The Department agrees that the security classification in question is a condition attached to the position, but submits that it is personal information as well, since the names of the individuals have already been revealed.

Clearly, security classification pertains to a position and not to the individual who applied for that position or who eventually filled it. Personal information as defined in [section 3](#) of the *Privacy Act* means information relating to an individual whether it be his race, colour, religion, personal record, opinions, etc. Nowhere does security classification fall within the heads of personal information listed under section 3 of the *Privacy Act*. Even paragraph 3(c), which deals with identifying numbers, symbols or other particulars, limits such particulars to the individual, not to the position held by the individual. Thus, in my view, security classification is not information to be withheld on the ground that it is “personal information”.

This approach is fundamentally sound and is fully consistent with the wording and objects of the legislation. The same approach, I pause to note, has been used in interpreting like language in the Newfoundland *Freedom of Information Act*, R.S.N. 1990, c. F-25, s. 10(2)(a); see *Thorne v. Newfoundland and Labrador Hydro Electric Corp.* (1993), [1993 CanLII 8345 \(NL SC\)](#), 109 Nfld. & P.E.I.R. 233, at p. 235. [Section 3\(j\)](#) of the *Privacy Act*

expressly exempts information about an individual that relates to their position or functions. Similarly, para. (iii) refers to “the classification, salary range and responsibilities of the position held by the individual”. The purpose of these provisions is clearly to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not “personal information”, even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is “personal information”. It has been held, for instance, that while a general report on the food service operations at a regional psychiatric centre should be released, the author’s opinions about specified individuals and their training, personality, experience or competence was “personal information” that was not exempted by s. 3(j) of the *Privacy Act*. *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*. Similarly, in *Rubin v. Clerk of the Privy Council (Can.)* (1993), [1993 CanLII 17546 \(FC\)](#), 62 F.T.R. 287, the court held that while the salary range attaching to a position could be disclosed pursuant to s. 3(j)(iii) of the *Privacy Act*, the specific salary or per diem remuneration paid to a particular government official could not.

95 Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description. It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range. (For an example of a job description, see *Orth v. Macdonald Dettwiler & Associates Ltd.* (1986), [1986 CanLII 170 \(BC CA\)](#), 16 C.C.E.L. 41 (B.C.C.A.), at pp. 44-46). The information requested in the present case is not information about the nature of a particular position. While it may give the appellant a rough, overall picture of weekend work patterns, it provides no specific, accurate information about any specific employee’s duties, functions or hours of work. Rather, it reveals information about the activities of a specific individual which may or may not be work-related. As already noted, the sign-in logs do not reveal whether any particular employee is working overtime. In order to determine this, one

would need to know whether the employee was actually working while on the premises and the number of hours he or she had worked during the week.

96

In any event, even if the logs can be said to record accurately an employee's overtime hours, I am of the view that information concerning when an individual works overtime is "personal information". Whether a person works overtime, and for how long, relates to how he or she performs his or her duties and not to the responsibilities and functions inherent in the position itself. An individual may work overtime for any number of different reasons, relating, for instance, to his or her productivity during normal working hours. The specific hours worked by individual employees, therefore, reveal nothing about either the nature or quantity of their work. In his letter to the appellant reporting the results of the investigation of his complaint, the Information Commissioner stated the following, which I endorse:

The information to which you seek to have access in this case does not, in my view, provide any insight into the positions held by nor the functions performed by the persons whose names appear on the sign-in sheets. While it may indicate the hours during which they attended at their work premises on a given day, this is not the type of information which, in my view, Parliament intended should be publicly accessible. To conclude otherwise would mean that a public official's conditions of work -- Does he or she work regular or compressed or flexible hours? What are the person's break and meal periods? Has the person received medical or other special leave? -- could become matters of public record. That would go far beyond the spirit and intent of this derogation which, in my view, is to ensure that the public can conduct business with identifiable, not anonymous, public officials. The information at issue here is not at all about the nature of the work of named public officials but only about their whereabouts at a specific time. There is simply no indication that Parliament intended this derogation to be interpreted in a way which would result in public officials being subjected to a form of physical surveillance through records disclosure.

97

This conclusion is consistent with the purposes of the *Access to Information Act* and the *Privacy Act*. As discussed above, the collective purpose of the legislation is to provide Canadians with access to information about the workings of their government without unduly infringing individual privacy. As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, at p. 557, s. 3(j) of the *Privacy Act* does not exempt government employees from this general rule of privacy. The fact that

persons are employed in government does not mean that their personal activities should be open to public scrutiny. By limiting the release of information about specific individuals to that which relates to their position, the Act strikes an appropriate balance between the demands of access and privacy. In this way, citizens are ensured access to knowledge about the responsibilities, functions and duties of public officials without unduly compromising their privacy.

98 The intervener PSAC argues, however, that there are compelling policy reasons for disclosure in this case. In its view, the disclosure of employment-related information is designed, in part, to ensure that the operation of the *Access to Information Act* and *Privacy Act* is consistent with the collective bargaining regime. The disclosure of the information requested by the appellant, it submits, would facilitate bargaining agents in exercising their rights and ensure that the public is able to determine whether public servants are appropriately compensated for their work.

99 I do not find this argument convincing. It is true that there is a general public interest in the smooth functioning of the collective bargaining process and in ensuring that employers, including those in the public sector, live up to their obligations under collective agreements. I do not believe, however, that this interest is embodied in the access to information or privacy statutes. As I have discussed, the *Access to Information Act* is concerned with securing the values of participation and accountability in the democratic process. Of course, collective bargaining plays an important role in the democratic system. However, it is in many ways an autonomous regime, with its own enabling legislation and comprehensive system of dispute resolution. This system attempts to mediate the conflict between the private interests of employers and the private, collective interests of workers. In this sense, a union's interest in obtaining helpful information from its employer is no greater than the employer's interest in obtaining like information. Conflicts regarding such information should be resolved within the confines of that system, i.e., by recourse to the usual dispute resolution methods of labour relations -- negotiation,

arbitration and administrative review. There is no indication that access to information legislation was intended to enable one side in this conflict to obtain information that it would not otherwise be entitled to under the collective bargaining system. It is acceptable, of course, if the legislation permits this incidentally, i.e. by permitting someone with a particular private interest to benefit because disclosure accords with the public goals of the legislation. The legislation should not be interpreted, however, with the collective bargaining system specifically in mind. In my view, the fact that disclosure of the sign-in logs in this case would be helpful to the union is not relevant to determining whether the information relates to an employee's position or functions within the meaning of s. 3(j) of the *Privacy Act*.

100 The appellant also argues that the names on the sign-in logs fall within the scope of s. 3(j)(iv) in that they constitute a “document prepared by . . . individual[s] in the course of employment”. This argument has little merit. Firstly, it is misleading to say that the sign-in logs are “prepared” by the employees who sign them. As disclosed in the evidence, the sign-in logs are the responsibility of the Corps of Commissionaires security officers. Secondly, the logs are not made “in the course of employment”. As noted above, the sign-in logs are designed for security purposes. Employees are required to fill them out in order to gain access to the building. They have nothing to do with the responsibilities of their positions. For the same reasons that the logs do not relate to the employees' positions, functions or responsibilities, they should not be considered to have been prepared “in the course of employment”.

Did the Minister Exercise his Discretion Properly?

101 The appellant submits that the Minister failed to exercise his discretion properly in refusing to disclose the requested information pursuant to s. 19(2)(c) of the *Access to Information Act* and s. 8(2)(m)(i) of the *Privacy Act*. Section 19(2)(c) of the *Access to Information Act* states that the head of a government institution may disclose a record that

contains personal information if the disclosure is in accordance with s. 8 of the *Privacy Act*. Section 8, in relevant part, states:

8. . . .

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed . . .

. . .

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. . . . [Emphasis added.]

102 The appellant argues that there is no evidence that the Minister weighed the privacy interests of the employees whose names appeared on the sign-in logs against the public interest in disclosure. He asserts that if the Minister had properly exercised his discretion, he would have concluded that the public interest in disclosure clearly outweighed the minimal invasion of privacy that would have resulted.

103 The first step in evaluating this submission is to determine the appropriate standard of review of the Minister's decision. The appellant notes that pursuant to s. 2 of the *Access to Information Act*, decisions on the disclosure of government information "should be reviewed independently of government". He also relies on the fact that s. 48 of that statute specifies that "the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned". From this, the appellant argues that the Minister's exercise of discretion under s. 8(2)(m) of the *Privacy Act* should be strictly limited by the courts.

104 The determination of the appropriate standard of review of discretionary decisions under the *Access to Information Act* has been the source of considerable controversy in the Federal Court. In a number of decisions, the court has implied that discretionary decisions

are to be reviewed on a correctness or *de novo* standard. In *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, *supra*, the Federal Court of Appeal considered the effect of s. 21(1)(b) of the *Access to Information Act*. That provision states that the head of a government institution may refuse to disclose a record that contains “an account of consultations or deliberations” involving Crown employees or officers. The court held, at p. 273, that the exercise of this discretion was “not unfettered” and that it must be exercised in accordance with “recognized legal principles” and “in a manner which is in accord with the conferring statute”. In considering whether the minutes of the CMHC’s Board meeting from 1975 to 1988 should have been disclosed pursuant to s. 21(1)(b), the court concluded that the sheer volume of the material involved indicated that the delegate of the Corporation did not make a proper examination and determination as to whether any of the information requested came within the parameters of the provision. It was also apparent from the position taken by the General Counsel and Corporate Secretary of the CMHC, the court found, that the CMHC concluded that the records could be withheld without actually examining the material. The court rejected the holding in *Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission*, [1986] 3 F.C. 413 (T.D.), that once it is determined that a record falls within the class referred to in s. 21(1), the right to disclosure becomes subject to the head of the government institution’s discretion to disclose it. Such a conclusion, the court held, ignores the directive expressed in s. 2 of the Act that decisions respecting access to public documents are to be reviewed “independently of government”. Accordingly, the court overturned the decision to withhold the records and referred the matter back to the delegate of the CMHC for redetermination.

105 The *Rubin* case was relied on by Muldoon J. in *Bland*, *supra*, where he considered the provision at issue in the instant case, s. 8(2)(m)(i) of the *Privacy Act*. In *Bland*, a newspaper reporter investigating allegations of favouritism in the allocation of subsidized rents by the National Capital Commission (“NCC”) was denied access to a list of the addresses and rental charges of NCC tenants on the grounds that it was “personal information”. Curiously, although he held that the information related to a “discretionary

benefit of a financial nature” pursuant to s. 3(l) of the *Privacy Act* and did not therefore constitute “personal information”, Muldoon J. also found that even if it was, it should have been disclosed pursuant to s. 8(2)(m)(i). In coming to this conclusion, the court found, at p. 340, that the mere assertion that the public interest in disclosure did not outweigh the invasion of privacy was not sufficient as it “evinces no weighing of the factor of invasion of privacy against that of the public interest in disclosure”. He went on to conclude that the tenant’s privacy interest was negligible and that any invasion of it was clearly outweighed by the public interest in disclosure. See also *Rubin v. Clerk of the Privy Council (Can.)*, *supra*, at p. 291, and *MacKenzie v. Canada (Minister of National Health and Welfare)*, *supra*, at p. 57.

106 To the extent that these decisions can be said to stand for the proposition that the Minister’s decision to refuse to disclose a record pursuant to the public interest exception set out in s. 8(2)(m)(i) of the *Privacy Act* is to be reviewed on a *de novo* standard, they are clearly incorrect. It is true, of course, that s. 2(1) of the *Access to Information Act* states that “decisions on the disclosure of government information should be reviewed independently of government”. Reading the Act as a whole, however, it is clear that this exhortation does not mandate the *de novo* review of the s. 8(2)(m)(i) discretion. Section 49 of the *Access to Information Act* sets out the power of the Federal Court to order disclosure in the circumstances of the present case:

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate. [Emphasis added.]

107 Section 49 directs the reviewing court to determine whether or not the head of the government institution who has refused disclosure was in fact “authorized” to do so. As I have discussed, the *Access to Information Act* provides a general right of access to

government-held information, subject to certain exceptions. If the information does not fall within one of these exceptions, the head of the institution is not “authorized” to refuse disclosure, and the court may order that the record be released pursuant to s. 49 of the Act. It is clear that in making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. [Section 19\(1\)](#) of the *Access to Information Act* states that, subject to s. 19(2), the head of the institution shall refuse to disclose personal information. [Section 49](#) of the *Access to Information Act*, then, only permits the court to overturn the decision of the head of the institution where that person is “not authorized” to withhold a record. Where, as in the present case, the requested record constitutes personal information, the head of the institution is authorized to refuse and the *de novo* review power set out in s. 49 is exhausted.

108 Of course, [s. 19\(2\)](#) of the *Access to Information Act* provides that the head of a government institution may disclose personal information in certain circumstances. Generally speaking, the use of the word “may”, especially when it is used, as in this case, in contradistinction to the word “shall”, indicates that an administrative decision maker has the discretion, and not the duty, to exercise a statutory power; see *McHugh v. Union Bank of Canada*, [1913 CanLII 397 \(UK JCPC\)](#), [1913] A.C. 299 (P.C.); *Smith & Rhuland Ltd. v. The Queen, on the relation of Brice Andrews*, [1953 CanLII 234 \(SCC\)](#), [1953] 2 S.C.R. 95; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 11.

109 In the present case, moreover, any ambiguity regarding the use of the word “may” is removed by the language of [s. 8\(2\)\(m\)\(i\)](#) of the *Privacy Act*. That section, which is incorporated into [s. 19\(2\)\(c\)](#) of the *Access to Information Act*, states that personal information may be disclosed where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs the invasion of privacy that could result. It is difficult to imagine statutory language setting out a broader discretion. Courts have

repeatedly held that the use of such language indicates a discretionary power; see *Boulis v. Minister of Manpower and Immigration*, 1972 CanLII 4 (SCC), [1974] S.C.R. 875; *Vancouver (City of) v. Simpson*, 1976 CanLII 148 (SCC), [1977] 1 S.C.R. 71; *Isinger v. Buckland (Rural Municipality No. 491)* (1986), 1986 CanLII 2935 (SK CA), 48 Sask. R. 207 (C.A.); *Re Michelin Tires Manufacturing (Canada) Ltd.* (1975), 1975 CanLII 2439 (NS SC), 13 N.S.R. (2d) 587 (S.C.T.D.). And in a series of decisions, the Federal Court has specifically found that the power to disclose personal information in the public interest pursuant to s. 8(2)(m)(i) of the *Privacy Act* is discretionary; see *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, *supra*; *Sutherland v. Canada (Minister of Indian and Northern Affairs)*, *supra*; *Terry v. Canada (Minister of National Defence)*, *supra*; *Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade)*, [1996] F.C.J. No. 903 (QL).

110 In *Kelly v. Canada (Solicitor General)* (1992), 53 F.T.R. 147, Strayer J. discussed the general approach to be taken with respect to discretionary exemptions under the *Privacy Act*. He stated, at p. 149:

It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.

The first type of factual decision is one which, I believe, the court can review and in respect of which it can substitute its own conclusion. This is subject to the need, I believe, for a measure of deference to the decisions of those whose institutional responsibilities put them in a better position to judge the matter. . . .

The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not itself attempt to exercise the discretion *de novo* but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.

In my view, this is the correct approach to reviewing the exercise of discretion under s. 8(2)(m)(i) of the *Privacy Act*.

111 The fact that a statutory power is discretionary does not mean, of course, that a decision made pursuant to it is immune from judicial oversight. It may always be alleged that the discretion was abused. The correct standard of review was articulated by McIntyre J. in *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, at pp. 7-8:

It is . . . a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

See also *Vancouver (City of) v. Simpson*, *supra*.

112 The appellant makes no allegations of bad faith, unfair procedure or consideration of irrelevant matters. Rather, he contends that the Minister failed to weigh the privacy interests of the employees named on the sign-in logs against the public interest in disclosure. It is clear, however, that the Minister did carefully weigh the competing policy interests in the present case. The appellant's request to the Minister to exercise his discretion to disclose the personal information was made in the following terms:

Disclosure of the names is in the public interest because it enables citizens to determine who is working, who authorized the work and prevents abuse of staff by overzealous managers and upholds the spirit of the collective agreement. Thus the names on the sign-in sheets should be disclosed.

The Minister's reply stated:

As I am sure you can appreciate, any waiver of the protection provided individuals in the *Privacy Act* must be undertaken only after very careful consideration and must be balanced against the threat to an individual's privacy. I do not believe that you have demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy. [Emphasis added.]

113 There is no evidence, as was the case in *Rubin, supra*, that the Minister failed to examine the evidence properly. It is apparent that he considered the appellant's request for a public interest waiver in the light of the objects of the legislation and came to a determination that the public interest did not "clearly outweigh" the violation of privacy that could result from disclosure. This was a conclusion that he was entitled to make. For this Court to overturn this decision would amount to a substitution of its view of the matter for his. Such a result would do considerable violence to the purpose of the legislation and would amount to an unjustified usurpation of the Minister's statutory role.

114 In essence, the appellant's objection to the Minister's decision is that he did not give sufficient reasons for it. Generally speaking, however, in the absence of a specific statutory requirement, administrative decision makers have no duty to give reasons for their decisions; see *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987 CanLII 19 \(SCC\)](#), [1987] 2 S.C.R. 219, at p. 233; *Canadian Arsenal Ltd. v. Canadian Labour Relations Board*, [1978 CanLII 3573 \(FCA\)](#), [1979] 2 F.C. 393 (C.A.); *Macdonald v. The Queen*, [1976 CanLII 140 \(SCC\)](#), [1977] 2 S.C.R. 665; *Northwestern Utilities Ltd. v. City of Edmonton*, [1978 CanLII 17 \(SCC\)](#), [1979] 1 S.C.R. 684. While it has been suggested that the failure to give reasons, even when there is no statutory requirement to do so, may amount to a breach of the duty to be fair in certain circumstances (David P. Jones and Anne S. de Villars, *Principles of Administrative Law* (2nd ed. 1994), at p. 299), the Minister's failure to give extensive, detailed reasons for his decision did not work any unfairness upon the appellant.

115 Finally, it should be noted that in oral argument before this Court, the respondent is said to have asserted that by stating that he did "not believe that [the appellant] . . . demonstrated that if there were any public interest that it clearly overrides the individual's right to privacy", the Minister incorrectly reversed the onus set out in [s. 48](#) of the *Access to Information Act*. That provision states that the head of a government institution has the burden of establishing that he or she is "authorized to refuse" to disclose

a requested record. As I have discussed in relation to s. 49 of that Act, the Minister satisfied this burden when he showed that the information in the sign-in logs constituted “personal information”. Once that fact is established, the Minister’s decision to refuse to disclose pursuant to s. 8(2)(m)(i) of the *Privacy Act* may only be reviewed on the basis that it constituted an abuse of discretion. The Minister did not have a “burden” to show that his decision was correct because that decision is not reviewable by a court on the correctness standard. Reading his statement in context, it is clear that the Minister weighed the conflicting interests at stake. The fact that he stated that the appellant failed to demonstrate that the public interest should override the privacy rights of the employees named in the sign-in logs is therefore irrelevant.

-

Disposition

116 From the foregoing, I have concluded that the appeal should be dismissed. It remains to consider the special provision regarding costs set out in s. 53(2) of the *Access to Information Act*. It states that “[w]here the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result”. Though ultimately unsuccessful, I believe that the appellant has raised a number of important and novel legal issues. Under the circumstances, it would be appropriate to award costs to the appellant from the respondent.

117 Accordingly, I would dismiss the appeal, but would award the appellant’s costs from the respondent.

Appeal allowed, LA FOREST, L’HEUREUX-DUBÉ, GONTHIER and MAJOR JJ. dissenting.

Solicitors for the appellant: Soloway, Wright, Ottawa.

Solicitor for the respondent: The Attorney General of Canada, Ottawa.

*Solicitors for the intervener the Privacy Commissioner of Canada: Nelligan, Power,
Ottawa.*

*Solicitors for the intervener the Public Service Alliance of Canada: Raven, Jewitt &
Allen, Ottawa.*

TAB 33

Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502 (CanLII)

Date: 2007-07-04

File number: C45055

Other citations: 86 OR (3d) 401 — 158 ACWS (3d) 1003 — 226 OAC 104 — 67 Admin LR (4th) 103 — [2007] OJ No 2613 (QL) — 35 MPLR (4th) 161

Citation: Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502 (CanLII), <<https://canlii.ca/t/1rxpx>>, retrieved on 2025-10-28

**Cash Converters Canada Inc. et al. v. The Corporation of
The City of Oshawa, and The Attorney General of Ontario and
Information and Privacy Commissioner of Ontario, Intervenors
[Indexed as: Cash Converters Canada Inc. v. Oshawa (City)]**

86 O.R. (3d) 401

**Court of Appeal for Ontario,
O'Connor A.C.J.O., Feldman and Rouleau JJ.A.
July 4, 2007**

Municipal law -- By-laws -- Validity -- Licensing by-law requiring dealers of second-hand goods to submit daily reports to police including detailed personal information about vendors of each item -- By-law being authorized under s. 150(2) of Municipal Act as "consumer protection" legislation -- By-law conflicting with s. 28(2) of Municipal Freedom of Information and Privacy Protection Act -- Impugned sections of by-law being of no force or effect -- [Municipal Act, 2001, S.O. 2001, c. 25, s. 150](#) -- [Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 28\(2\)](#).

In 2004, the City replaced its licensing by-law for second-hand goods dealers with a new by-law which requires dealers of second-hand goods to submit daily reports to the police, electronically, which include detailed personal information about the vendors of each item. The applicants brought an application attacking the validity of the by-law. The application was dismissed. The applicants appealed.

Held, the appeal should be allowed.

The by-law was enacted under s. 150(1) of the [Municipal Act, 2001](#). Section 150(2) of the Act provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely, health and safety, nuisance control and consumer protection. The City submitted that collecting information about goods and vendors may deter unscrupulous vendors from attempting to sell stolen goods and that this can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace.

Under s. 14 of the [Municipal Act, 2001](#), to the extent of any conflict with a provincial or federal Act or regulation, a by-law is "without effect". Section 28(2) of the [Municipal Freedom of Information and Protection of Privacy Act](#) ("MFIPPA") provides that no person shall collect information on behalf of an institution (which includes a municipality) unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. The application judge erred in finding that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2) of the [Municipal Act, 2001](#). The phrase "expressly authorized by statute" means that the specific types of personal information collected must be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. It was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected. Although some of the information collected might ultimately be used for law enforcement, the purpose of the by-law was consumer protection, not law enforcement. In order to show that the collection of personal information is "necessary to the proper administration of a lawfully authorized activity", an institution is required to show that each item or [page402] class of personal information that is to be collected is necessary to properly administer that activity. Where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the MFIPPA. Similarly, where the purpose could be accomplished another way, the institution is obliged to choose the other route. In this case, the City failed to demonstrate that the impugned provisions of the new by-law were necessary for an effective consumer protection regime to license second-hand dealers. The impugned provisions did not come within the exceptions in s. 28(2) of the MFIPPA. The provisions were of no force or effect.

APPEAL from the judgment of Belobaba J., [2006] O.J. No. 490, [2006] O.T.C. 120 (S.C.J.), dismissing an application for declaration that parts of a municipal by-law were invalid.

Cases referred to *Toronto Taxi Alliance Inc. v. Toronto (City)* (2005), [2005 CanLII 47232 \(ON CA\)](#), 77 O.R. (3d) 721, [2005] O.J. No. 5460, 205 O.A.C. 160, 18 M.P.L.R. (4th) 89 (C.A.), affg (2005), [2005 CanLII 2324 \(ON SC\)](#), 74 O.R. (3d) 447, [2005] O.J. No. 320 (S.C.J.), conso Other cases referred to *114957 Canada Ltée (Spraytech, Société d'aérosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42, 200 D.L.R. (4th) 419, 171 N.R. 201, 19 M.P.L.R. (3d) 1, [2001 SCC 40](#); *Croplife Canada v. Toronto (City)* (2005), [2005 CanLII 15709 \(ON CA\)](#), 75 O.R. (3d) 357, [2005] O.J. No. 1896, 198 O.A.C. 35, 254 D.L.R. (4th) 40, 14 C.E.L.R. (3d) 207, 10 M.P.L.R. (4th) 1 (C.A.) [Leave to appeal to S.C.C. denied [2005] S.C.C.A. No. 329]; *Dagg v. Canada (Minister of Finance)*, [1997 CanLII 358 \(SCC\)](#), [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63, 148 D.L.R. (4th) 385, 213 N.R. 161; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006 SCC 13 \(CanLII\)](#), [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, 266 D.L.R. (4th) 675; *Institution: A Board of Education*, [1996] O.I.P.C. No. 449; *Institution: A College of Applied Arts and Technology*, [1995] O.I.P.C. No. 546; *Institution: A Municipality*, [1993] O.I.P.C. No. 381; *Institution: A Public School Board*, [1994] O.I.P.C. No. 457; *Institution: Ministry of Community and Social Services*, [1995] O.I.P.C. No. 534; *Institution: Ministry of Housing*, [1995] O.I.P.C. No. 315; *Institution: Ministry of Natural Resources*, [1994] O.I.P.C. No. 447; *K.E. Gostlin Enterprises Ltd.*, [2005] B.C.I.P.C.D. No. 18; *Kirkpatrick v. Maple Ridge (District)*, [1986 CanLII 25 \(SCC\)](#), [1986] 2 S.C.R. 124, [1986] S.C.J. No. 47, 6 B.C.L.R. (2d) 273, 30 D.L.R. (4th) 431, 69 N.R. 100, [1986] 6 W.W.R. 97, 34 M.P.L.R. 128; *Lavigne v. Canada (Office of the Commissioner of Official*

Languages), [2002] 2 S.C.R. 773, [2002] S.C.J. No. 55, 214 D.L.R. (4th) 1, 289 N.R. 282, [2002 SCC 53](#), (sub nom. Lavigne v. Commissioner of Official Languages (Can.)); Longueuil Navigation Co. v. Montreal (City) (1888), [1888 CanLII 32 \(SCC\)](#), 15 S.C.R. 566, [1888] S.C.J. No. 28; Montreal (City) v. Civic Parking Centre Ltd., [1981 CanLII 214 \(SCC\)](#), [1981] 2 S.C.R. 541, [1981] S.C.J. No. 96, 41 N.R. 393, 18 M.P.L.R. 239; Nanaimo (City) v. Rascal Trucking Ltd., [2000 SCC 13 \(CanLII\)](#), [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14, 76 B.C.L.R. (3d) 201, 183 D.L.R. (4th) 1, 251 N.R. 42, [2000] 6 W.W.R. 403, 9 M.P.L.R. (3d) 1; Regional Municipality of Niagara (Re), [2004] O.I.P.C. No. 261; Rick Arsenault Enterprises Inc. (Re), [2005] A.I.P.C.D. No. 45; Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, 257 Sask. R. 171, 250 D.L.R. (4th) 411, 331 N.R. 116, 342 W.A.C. 171, [2005 SCC 13](#), [2005] 9 W.W.R. 403; Sarnia Police Service (Re), [2005] O.I.P.C. No. 28; Toronto Community Housing Corp. (Re), [2004] O.I.P.C. No. 196; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19, 346 A.R. 4, 236 D.L.R. (4th) 385, 318 N.R. 170, 320 W.A.C. 4, [2004] 7 W.W.R. 603, 46 M.P.L.R. (3d) 1, [2004 SCC 19](#), 50 M.V.R. (4th) 1, 26 Alta. L.R. (4th) 1, 18 R.P.R. (4th) 1 Statutes referred to [Canadian Charter of Rights and Freedoms](#), ss. 7, 8. [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31 [Municipal Act](#), 2001, S.O. 2001, c. 25, ss. 14 [as am.], 150 [page403] [Municipal Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. M.56, ss. 10(2), 14(1)(a) [as am.], 28(2), 29(1) [as am.], 31(a), 32(b) [as am.], 46(a) [Pawnbrokers Act](#), R.S.O. 1990, c. P.6, as am. by [S.O. 2002, c. 17](#), Sched. F, ss. 9, 13 [Privacy Act](#), R.S.C. 1985, c. P-21 Authorities referred to Ontario, Commission on Freedom of Information and Protection of Individual Privacy, Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980, Vol. 3 (Toronto: Queen's Printer, 1980)

David Sterns, for appellants.

David J. Potts, for respondent.

William S. Challis and Stephen L. McCammon, for the Information and Privacy Commissioner.

The judgment of the court was delivered by

[1] FELDMAN J.A.: -- The City of Oshawa replaced its licensing by-law for second-hand goods dealers on April 24, 2004. The new by-law requires dealers of second-hand goods to submit electronically to police daily reports of all transactions, including detailed personal information about the vendors of each item. The by-law also requires dealers to pay an administrative fee for each report submitted. The application judge held that the by-law was validly enacted and did not contravene provincial privacy legislation. For the reasons that follow, I would allow the appeal.

Background

[2] The City of Oshawa has been licensing dealers of second-hand goods since 1974. The original licensing by-law required every licensed dealer to maintain at the store a register of daily transactions. The record included particulars of each item purchased as well as the name, address and description of the person from whom the purchase was made. Between 1974 and 1983, these records were open to police inspection and the dealer was also required to deliver the information to the local police by 9 a.m. each day. In 1983, the by-law was amended to require dealers simply to maintain the register, which was subject to inspection by police. The purposes of the record inspection system were to help monitor by-law compliance and to assist police in the investigation and recovery of stolen property. [page404]

[3] By 2003, there were 33 licensed second-hand goods dealers operating in Oshawa. In order to improve enforcement of the by-law, it was recommended that the City eliminate both the manual

recording of information and the need for police officers to attend the second-hand stores to review the records by replacing those procedures with a system of electronic collection and reporting of information by the dealers.

[4] On April 26, 2004, the City replaced the former by-law regulating second-hand shops with By-Law 46-2004, which requires that comprehensive electronic records be maintained and transmitted to police at least daily, and in some cases in real time. The impugned provisions, found in Schedule "A" to the by-law, are as follows.

10. No second hand dealer shall permit the acquisition of a second hand good unless a record respecting the second hand good is created at the time of acquisition that includes the following particulars:

a. Date and time of acquisition

.....

c. The identity of the person from whom the second hand good was acquired including each of the following:

i. Name;

ii. Gender;

iii. Date of birth;

iv. Residential address;

v. Telephone number; and

vi. Approximate height

d. Personal identification to verify the person's identification . . . in accordance with section 15 . . .

.....

15. For the purposes of paragraph 10(d) . . . a second hand dealer must review an original, current, valid copy of at least three of the following types of personal identification, one of which must include a photograph of the person from whom the second hand good is acquired:

a. Driver's licence issued by a province or territory of Canada including a photograph of the person;

b. Birth certificate issued by a province or territory of Canada;

c. Canadian passport including a photograph of the person;

d. Canadian citizenship card including a photograph of the person;

e. Certificate of Indian Status issued by the government of Canada; [page405]

f. Conditions Release card issued by the government of Canada;

g. Canadian Armed Forces identification card; and

h. "Bring Your Identification" card issued by the Alcohol and Gaming Commission.

.....

20. Each second hand dealer shall transmit to Durham Regional Police Service as soon as is practicable but, in any event, no less frequently than weekly, copies of the records contemplated by sections 10, 12 and 13 of this Schedule.

.....

22. For the purposes of section 21 of this Schedule, the following are the standards that the City Clerk may prescribe for a particular second hand dealer, at any time during the term of the licence and to the City Clerk's satisfaction:

a. Daily transmission of each record to Durham Regional Police Service, provided, however, that in the event that the second hand dealer is determined by a court of competent jurisdiction to have failed to comply with any provision of this Schedule, the City Clerk may require real time transmission of each such record;

b. Maintenance of each record in a particular digitized electronic format capable of transmission via the internet within a secure environment including 128-bit encryption;

.....

f. Payment on a monthly basis in the manner from time to time prescribed by the City Clerk of a fee up to \$1.00 for each record required pursuant to section 10 and 12 of this Schedule . . .

[5] The by-law was enacted under [s. 150\(1\)](#) of the [Municipal Act, 2001, S.O. 2001, c. 25](#), which provides that a municipality may license, regulate and govern any business wholly or partly carried on within the municipality. Section 150(2) of the Act provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely health and safety, nuisance control and consumer protection.

[6] Schedule "B" to the by-law sets out the City's explanation of its reasons for licensing. Although the City makes reference to health and safety and nuisance control, it relies primarily on the consumer protection purpose as follows:

The City of Oshawa has chosen to licence [sic], regulate and govern owners of second hand goods and salvage yard to enhance and encourage equal, fair and courteous treatment of customers, protect the property of customers, ensure products made available for resale are not stolen, promote accountability, and support proper and good business practices. [page406]

This reason relates to consumer protection as licensing and regulation aim to prevent, mitigate or redress losses to, or practices which might negatively impact on second hand goods and

salvage yard owners and members of the public.

[7] The appellant Cash Converters Canada Inc. is the Canadian franchisor or the Cash Converters chain of second-hand stores. The appellant 1151245 is a Cash Converters franchisee and carries on business as a licensed dealer of second-hand goods in the City of Oshawa. The appellants brought an application to quash the provisions of the by-law set out above on the ground that they exceed the statutory and constitutional authority of the municipality. The appellants also argued that the impugned provisions conflict with both federal and provincial privacy legislation and that they are discriminatory insofar as they apply only to some dealers of second-hand goods. Finally, the appellants submitted that the transaction fee is invalid because it exceeds the cost of administering and enforcing the by-law.

[8] The application judge rejected all of the appellants' arguments. He held that the by-law was properly rooted in the province's property and civil rights power and was not in relation to criminal law; that it was authorized under s. 150 of the [Municipal Act, 2001](#); and that it was not discriminatory. He further held that the by-law did not conflict with federal or provincial privacy laws, and that the challenge to the transaction fee was premature.

[9] On appeal to this court, the appellants maintain that the by-law exceeds the city's legislative competence and violates provincial privacy legislation. The appellants also maintain that the transaction fee is not authorized. The appellants do not appeal the application judge's findings that the by-law was properly grounded in the province's power over property and civil rights and that it was not discriminatory.

[10] The Attorney General intervened in the application in support of the constitutionality of the provisions. As no constitutional issue was raised on appeal, the Attorney General did not intervene before this court. The Information and Privacy Commissioner of Ontario intervened in the appeal as a friend of the court.

Issues

[11] The appellants challenge three conclusions reached by the application judge as the basis for upholding the validity of the by-law and raises them as issues on this appeal:
[page407]

- (1) Is the by-law authorized under the [Municipal Act, 2001](#)?
- (2) Does the by-law conflict with s. 28(2) of the Municipal Freedom of Information and Privacy Protection Act, [R.S.O. 1990, c. M.56](#)?
- (3) Is the transaction fee authorized under the [Municipal Act, 2001](#)?

Analysis

- (1) Is the by-law authorized under s. 150(2) of the [Municipal Act, 2001](#) as "consumer protection" legislation?

[12] [Subsections 150\(1\)](#) and [\(2\)](#) of the [Municipal Act, 2001](#) provide:

150(1) Subject to the Theatres Act and the Retail Business Holidays Act, a local municipality may license, regulate and govern any business wholly or partly carried on within the municipality even if the business is being carried on from a location outside the municipality.

- (2) Except as otherwise provided, a municipality may only exercise its licensing powers under this section, including imposing conditions, for one or more of the following

purposes:

1. Health and safety.
2. Nuisance control.
3. Consumer protection.

Although in Schedule "B" to the by-law, titled, "Explanation of Reasons for Licensing", the city relies on all three purposes to support the by-law, on this application, it says that the essential purpose of the by-law is consumer protection.

[13] In her affidavit, the deputy city clerk states that the record-keeping requirements imposed on second-hand dealers by the impugned by-law and its predecessor by-laws are:

. . . integral to its consumer protection objective as they are regulatory in nature and effect and are aimed at the suppression of conditions that may lead to the commission of crimes. Specifically, the identification of the person from whom a second hand dealer acquires a second hand good, the matching of that information to particulars of the second hand good acquired and the collection of the record on behalf of the city are intended to discourage unscrupulous individuals from transacting business with second hand dealers. These measures are intended to protect second hand dealers as purchasers of second hand goods and to also protect the dealers' customers.

[14] The deputy clerk also points to timely and effective assistance to dealers and their customers where the dealer acquires [page408] and resells a stolen good as an ancillary benefit of the record collection function.

[15] She then states that the effectiveness of the record collection function is directly related to the consumer protection objective of the by-law because vendors of second- hand goods "are less likely to be unscrupulous if they know the records are being collected in a timely and effective fashion". She identifies para. 22(a) of the impugned by-law, which is the paragraph that allows the city clerk to require a dealer to transmit the records to the police daily or in some circumstances, in real time, as a provision directly aimed at improving the record collection component of the record-keeping requirements.

[16] In other words, the city justifies the new by-law on the same basis as the one it replaced, as consumer protection legislation that protects dealers and their customers by collecting information about the vendors of second-hand goods. It is the collection of this information that deters those who deal in stolen property from trying to sell such goods to licensed dealers. The new features of the by-law enhance or improve the information collection function and therefore the consumer protection purpose of the by-law.

[17] The appellants' objection to the new licensing conditions is that dealers are now obliged to collect personal, private information about the vendor of the second-hand goods, including a photograph and three pieces of official identification that many people would not ordinarily carry, and to transmit that information electronically to the police at least daily if not in real time. The appellants state that in this way, "the by-law gives the police access to sensitive profiling information on a targeted, partly low-income group of consumers, for unlimited uses including criminal investigation and prosecution, without search warrant protection, judicial supervision or any legal safeguards whatsoever".

[18] The appellant 1151245 Ontario Inc. is the Oshawa franchisee of the Cash Converters group of stores. These stores buy and sell second-hand goods. They are not pawn-brokers nor do they provide pay-day loans. Of the over 28,000 items the Oshawa franchisee purchased in 2003, 30

items valued at approximately \$1,200 were seized in connection with police investigations, and the store was not told whether any of these items was later found to be stolen. The city adduced no evidence of any actual problem involving the purchase and sale of stolen goods by second-hand dealers.

[19] The appellants submit that the new by-law is not intended to protect consumers, but rather to assist the police in [page409] investigating and prosecuting crimes related to stolen property. The evidence is that a software dealer called BWI promoted the system described in the by-law for use by the city and the local police. Its system allows the police to collect for their own use the data required by the by-law about each person who sells any second-hand good to a dealer. The fees proposed to be charged for each transmittal are to defray the cost of the system to the city.

[20] The proper approach to the interpretation of municipal powers has recently been discussed by the Supreme Court and followed by this court in such cases as *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42; *Croplife Canada v. Toronto (City)* (2005), 2005 CanLII 15709 (ON CA), 75 O.R. (3d) 357, [2005] O.J. No. 1896 (C.A.), leave to appeal denied [2005] S.C.C.A. No. 329; *Toronto Taxi Alliance Inc. v. Toronto (City)* (2005), 2005 CanLII 47232 (ON CA), 77 O.R. (3d) 721, [2005] O.J. No. 5460 (C.A.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485, [2004] S.C.J. No. 19. The question whether a by-law is ultra vires the jurisdiction of the enacting municipality is a question of law which is reviewed on the standard of correctness. However, in determining the question, courts are to take a broad and purposive approach to the construction and interpretation of municipal powers. See *United Taxi* at para. 6.

[21] It is common ground that under the 2001 version of the Municipal Act pursuant to which this by-law was passed, the municipality's licensing power can be exercised only for the three purposes set out in s. 150(2). In *Toronto Taxi*, the application judge [at para. 50] had concluded that the city had not shown that Toronto's new taxi cab licensing by-law was enacted for the purposes of health and safety and consumer protection as asserted by the city and that the real purpose was to "re-engineer the taxi-cab industry in order to eliminate middlemen and to redistribute revenues generated by the industry in favour of active participants". This court disagreed with the narrow approach taken by the application judge. The court reviewed the Task Force Report that led to the enactment of the by-law and concluded that the report provided both a factual basis and a rational connection between the means chosen to overhaul the taxi licensing system and the health and safety and consumer protection objectives of the city. The court acknowledged that these objectives would only be indirect effects of the new system, but deferred to the municipality on the issue of the potential effectiveness of its legislative initiatives. [page410]

[22] In my view, a similar approach should be taken in this case. I agree with the applicants that there is no suggestion that the former licensing by-law was ineffective or that the new and much more onerous provisions regarding the collection and transmittal to the police of personal information about vendors of second-hand goods is a necessary addition to the by-law for the consumer protection purpose. It appears that what drove the adoption of this new licensing by-law was the initiative of the BWI software vendor together with the desire of the police to be able to obtain this information for their database electronically without attending personally at the dealers' premises.

[23] However, the fundamental premise that collection of information about the goods and the vendors may deter unscrupulous vendors from attempting to sell stolen goods can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace and possibly thereby deterring those who may be inclined to steal goods for that purpose. As this court stated in *Toronto Taxi*, referring to the Supreme Court of Canada decision in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14, "A reviewing

court should not second-guess the municipality as to whether the by-law will be more or less effective in achieving the intended purpose or purposes" (para. 46).

[24] Giving "consumer protection" a broad and generous interpretation that allows the municipality to achieve its legitimate interests (see *Croplife* at para. 37), I am satisfied that the enactment of this by-law fell within the municipality's authority and is not ultra vires. I would therefore not give effect to this ground of appeal.

(2) Does the by-law conflict with s. 28(2) of the Municipal Freedom of Information and Privacy Protection Act?

[25] Under s. 14 of the [Municipal Act, 2001](#), to the extent of any conflict with a provincial or federal Act or regulation, a by-law is "without effect". [Section 28\(2\)](#) of the [Municipal Freedom of Information and Protection of Privacy Act](#) ("MFIPPA") provides:

28(2) No person shall collect personal information on behalf of an institution [which includes a municipality: s. 2] unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

[26] The appellants submit that the provisions of the by-law that mandate the collection of personal information about vendors of goods to licensed second-hand goods dealers and the daily [page411] transmission of that information electronically to the police, conflict with s. 28(2).

[27] The Information and Privacy Commissioner of Ontario intervened on the appeal as friend of the court, for the purposes of providing the court with the history of privacy legislation, the role of the Commissioner under that legislation and the case law and jurisprudence on privacy issues, including the interpretation and application of [MFIPPA](#). In that role, the Commissioner took no position on the specific question to be decided by the court.

[28] The Commissioner has recognized expertise in the interpretation and application of the statutes relating to personal information and the protection of privacy. The Commissioner is given primary responsibility under the privacy statutes ([MFIPPA](#), [Freedom of Information and Protection of Privacy Act](#), [R.S.O. 1990, c. F.31](#) ("FIPPA")) for supervising compliance. Most frequently, privacy issues arise by way of a complaint relating to the collection of personal information by or on behalf of a government or institution. In most cases, therefore, it is the Commissioner, not the courts, who determines whether the collection of private information contravenes MFIPPA, and if so, orders the information destroyed. Where collection is authorized under s. 28(2), the Commissioner may still determine whether the information has been properly collected in accordance with other provisions of the Act and make appropriate orders.

[29] The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the [federal Privacy Act](#), [R.S.C. 1985, c. P-21](#) as quasi- constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In *Lavigne v. Canada* (Office of the Commissioner of Official Languages), [2002 SCC 53 \(CanLII\)](#), [2002] 2 S.C.R. 773, [2002] S.C.J. No. 55, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31). In *Dagg v. Canada* (Minister of Finance), [1997 CanLII 358 \(SCC\)](#), [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in [ss. 7 and 8](#) of the [Charter](#), and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66 and 71). And in *H.J. Heinz Co. of Canada Ltd. v. Canada* (Attorney General), [2006 SCC 13 \(CanLII\)](#), [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, [page412] Deschamps J. stated [at para. 26]:

[I]n a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation.

[30] In Ontario, the Williams Commission Report led to the enactment of FIPPA in 1987 and MFIPPA in 1991. The Williams Commission identified three specific concerns respecting government data banks: (1) where government collects personal information, the individual is unlikely to have an effective choice to refuse to supply the information; (2) because its activity is so broad, government holds very extensive personal information about individuals; (3) there is public anxiety about government agencies sharing their holdings of personal information and building comprehensive personal files on individuals (Public Government for Private People: The Report of the Commission on Freedom of Information and Protection of Individual Privacy/1980, Vol. 3 (Toronto: Queen's Printer, 1980) at pp. 504-05). The commission [at p. 667] concluded that:

a privacy protection policy intended to preserve informational privacy would therefore attempt to restrict personal data-gathering activity to that which appears to be necessary to meet legitimate social objectives and would attempt to maximize the control that individuals are able to exert over subsequent use and dissemination of information surrendered to institutional records keepers.

[31] This approach underlies the three standards for the collection of personal information that are set out in s. 28(2) of MFIPPA: the collection must be either expressly authorized by statute, used for the purposes of law enforcement, or necessary to the proper administration of a lawfully authorized activity.

[32] In Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13 (CanLII), [2005] 1 S.C.R. 188, [2005] S.C.J. No. 1, the Supreme Court set out a two-pronged test to determine how to apply the paramountcy doctrine where federal and provincial legislation overlaps: (1) can a person simultaneously comply with both provisions (the "impossibility of dual compliance" test), and (2) does the provincial provision frustrate Parliament's purpose in enacting the federal provision? In Croplife, supra, this court held that the same two-pronged test should be used to interpret and apply s. 14 of the Municipal Act, 2001 (at para. 63).

[33] Applying that test, the application judge found that the by-law does not conflict with s. 28(2) of MFIPPA. He cited three rationales for his conclusion. He first found that the first prong of the test is met so long as the information is collected on consent. [page413] He also concluded, based on s. 22(e) of Schedule "A" to the by-law, which provides that the City Clerk may prescribe procedures "to ensure compliance with MFIPPA . . .", that the by-law expressly anticipates and provides for compliance with privacy laws. He found that the second prong of the test was met because there was no evidence that the information transmission requirements of the by-law frustrated the legislative purpose of MFIPPA. Finally, he concluded that the collection of personal information by licensed second-hand dealers complies with s. 28(2) on the basis that it is "expressly authorized by statute", because the by-law is authorized by s. 150(2) of the Municipal Act, 2001.

[34] It is conceded on the appeal that the application judge erred in law by finding that s. 28(2) does not apply where the information is collected on consent. Consent is not one of the three conditions set out in s. 28(2) that allow the collection of personal information by or on behalf of a municipality. This was observed by the Commissioner in Investigation I94-068P, Institution: Ministry of Community and Social Services, [1995] O.I.P.C. No. 534. In contrast, where the legislature wishes any aspect of the Act to operate based on consent it has so provided. See, for instance, the provisions regarding disclosure of certain information under s. 10(2), 14(1)(a) and 32(b), the manner of collection under s. 29(1) or the use of certain information under s. 31(a). I also agree with the appellants that contrary to the observation of the application judge, there is evidence in the record that some people who sell second-hand goods require the proceeds to meet

their daily needs and therefore, when faced with the choice of providing the information or not selling the goods, cannot confidently be said to be giving their consent freely.

[35] The application judge also erred in law when he found that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2).

[36] The phrase "expressly authorized by statute" has been interpreted by the Commissioner to mean that the specific types of personal information collected be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. See Investigation I95-030P, Institution: A College of Applied Arts and Technology, [1995] O.I.P.C. No. 546; Investigation I96-057M, Institution: A Board of Education, [1996] O.I.P.C. No. 449, at paras. 17-18.

[37] For example, s. 9 of the [Pawnbrokers Act, R.S.O. 1990, c. P.6](#) specifically obliges a pawnbroker to keep a book with the [page414] full name, address and description of the person who pawns an article sufficient to identify the person as well as details of the person's identification or a note that the person did not produce identification, and s. 13 requires pawnbrokers to make a daily report of the information to the chief of police or the person designated by by-law. There is no similar provision in the [Municipal Act, 2001](#). The structure of the Act indicates that it was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected.

[38] Section 28(2) also allows personal information to be collected on behalf of an institution if the information is "used for the purposes of law enforcement". Of significant concern in this case is the wholesale transmission to the police of a significant amount of personal information about individuals. This transmission occurs before there is any basis to suspect that the goods that were sold to the second-hand dealer were stolen and is made with no limit as to its use by the police or by those to whom the police may share the information. Although some of the information collected may ultimately be used for law enforcement, the purpose of the by-law and its intent in obliging vendors of second-hand goods to disclose so much personal information and transmitting all of it to the police is for consumer protection and not law enforcement.

[39] The City's main position on the appeal is that the reason the by-law does not conflict with s. 28(2) of the [MFIPPA](#) is because it meets the third criterion of the section: the collection of the personal information under the by-law is "necessary to the proper administration of a lawfully authorized activity", that is, the administration of the licensing of second-hand goods dealers.

[40] Again, the jurisprudence developed by the Privacy Commissioner interpreting this provision is both helpful and persuasive of the proper approach to be taken by the courts as well. In cases decided by the Commissioner's office, it has required that in order to meet the necessity condition, the institution must show that each item or class of personal information that is to be collected is necessary to properly administer the lawfully authorized activity. Consequently, where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the Act. Similarly, where the purpose can be accomplished another way, the institution is obliged to choose the other route.

[41] The Commissioner's approach in complaints that come before her office is to examine in detail the types of information [page415] being collected and to determine whether each type is necessary for the collecting institution's activity. For example, in *Re Toronto Community Housing Corp.*, [2004] O.I.P.C. No. 196, the Commissioner received a complaint from a tenant that the housing corporation was requiring tenants who wanted parking stickers to provide copies of vehicle insurance and ownership papers which the tenant said was not authorized by the lease. The corporation justified its action because it wanted to address problems of break-ins, vandalism and

illegally parked cars. These problems were caused by tenants who abused the parking system by renting out spaces to non-residents who then gained access to the building and parked in other residents' allocated parking spots. Also people were vandalizing the entry system mechanism, which then required costly repairs.

[42] The Commissioner considered individually the requirements to provide vehicle ownership documentation and vehicle insurance verification. The Commissioner determined that the ownership documents were necessary so that corporation staff could see that cars parked in the garage were owned by the tenants themselves. However, the Commissioner was not satisfied that the corporation needed the insurance information to properly administer the parking program and found that collection of the insurance information was not in compliance with s. 28(2) of the Act.

[43] The same approach is taken by other provincial privacy commissions. For example, in *Re Rick Arsenault Enterprises Inc.*, [2005] A.I.P.C.D. No. 45, the Alberta Information and Privacy Commissioner received a complaint that a Canadian Tire store, a provincially regulated organization under the jurisdiction of the Commissioner, had refused to complete a return of goods without obtaining certain personal information including the driver's licence number of the person returning the goods. As in the case on appeal, the stated purpose of collecting the information was to deter fraud. The evidence was that the store acknowledged that simply authenticating and confirming the identity of the individual returning the goods was sufficient for their purposes. The commission viewed this as a concession that the collection and retention of driver's licence numbers was not necessary for deterring fraud and therefore was not permitted under the Act. See also *Re K.E. Gostlin Enterprises Ltd.*, [2005] B.C.I.P.C.D. No. 18.

[44] The intervenor provided the court with many examples of decisions of the Ontario Commissioner under the necessity criterion where the Commissioner examined each piece or category of personal information being collected by the public institution and [page416] the reason for collecting it, and determined for each whether that collection was necessary in order to properly administer the activity that the institution was carrying on. If it was not, the institution was prohibited from collecting the information. See for example: Institution: A Public School Board, [1994] O.I.P.C. No. 457; Institution: A College of Applied Arts and Technology, *supra*; Institution: A Board of Education, *supra*; Institution: Ministry of Natural Resources, [1994] O.I.P.C. No. 447; *Re Sarnia Police Service*, [2005] O.I.P.C. No. 28; Institution: Ministry of Housing, [1995] O.I.P.C. No. 315; Institution: A Municipality, [1993] O.I.P.C. No. 381; *Re Regional Municipality of Niagara*, [2004] O.I.P.C. No. 261.

[45] In my view, this same approach to the interpretation and application of the necessity criterion in s. 28(2) ought to be employed by the court. The Commissioner's approach is both logical and effective in implementing the purposes of the privacy legislation. By using the same approach, the effect is to apply the Act in the same way whether an issue arises by complaint to the commission or in this context, where the court is asked to determine a conflict between, in this case, a by-law and [MFIPPA](#).

[46] Using that approach, the issue is whether the city has satisfied its onus to demonstrate that both the collection of all of the information and identification required by the by-law, as well as the daily transmission of that information to the police for storage in their data bank, is necessary for an effective consumer protection regime to license second-hand dealers that deters people from dealing in stolen goods. Both must be justified because it is clear that the by-law is structured to operate as a co-ordinated scheme that includes both the collection and the daily transmission of all the information to the police for storage in their data bank.

[47] In her affidavit filed on behalf of the city, the Deputy City Clerk deposes that in a 2003 report for the city by its Commissioner of Corporate Services, the Commissioner identified two issues,

manual record-keeping and the burden on the police, as reasons to consider electronic-computerized procedures to improve the enforcement of the by-law then in existence.

[48] The Deputy City Clerk states that the collection of identity information from vendors of second-hand goods is aimed at suppressing crime and is intended to discourage unscrupulous people from transacting business with second-hand dealers. If such people know that the records are being collected in a timely and effective fashion, they are less likely to be unscrupulous.
[page417]

[49] The effect of this evidence is that the new provisions are intended to improve the old system by modernizing the recording of the information using computers and by making the system easier for the police to administer because they receive the information electronically on a daily basis without travelling to the second-hand stores. However, it is clear that there is no attempt to say that the new provisions are necessary for administering the licensing system or for its effectiveness. In contrast, in *Toronto Taxi Alliance Inc. v. Toronto (City)*, supra, the city had two task force reports that discussed the problem with taxi licenses and how the new by-law would address the problem.

[50] The appellants point out that there is no evidence to suggest that there is a growing problem in the municipality regarding the sale of stolen goods to second-hand dealers. On the contrary, there were only 30 suspected stolen items with a total value of \$1,200, out of the 28,000 items dealt with by the Oshawa franchisee in 2003. Nor is there evidence that unscrupulous persons are more deterred by the electronic collection and transmission of personal information than by manual collection and transmission to the police.

[51] The effect of the new by-law is to facilitate the collection and electronic recording of detailed, identifying information about persons, mostly innocent but some unscrupulous, including their photograph and details of three pieces of identification as well as the time of their visit to the store and the nature of the goods offered for sale. This information is then transmitted and stored in a police database and available for use and transmission by the police without any restriction and without any judicial oversight. The intent of MFIPPA is to ensure that the collection and retention of private information is strictly controlled and justified.

[52] Based on the evidence in this application, the city has not demonstrated that the impugned provisions of the new by-law that mandate the collection and electronic transmission to police of detailed personal information about vendors of second-hand goods, is necessary for an effective consumer protection regime to license second-hand dealers. Given my conclusions that the impugned provisions in the new by-law do not come within the exceptions in s. 28(2) of MFIPPA, I am of the view that the application judge erred in law in his application of the Rothman's test.

[53] In this application, the city effectively took an "all or nothing approach" to the by-law, and did not seek to justify the provisions clause by clause. As a result, I would declare the challenged [page418] sections of Schedule A to the by-law:
ss. 10(c), (d), 15, 20, 22(a), and (b) to be "of no effect" under s. 14 of the [Municipal Act, 2001](#).

[54] This conclusion does not preclude the city from enacting a new second-hand goods dealers' licensing by-law with provisions regarding the collection and transmission of some personal information that it may well be able to justify under s. 28(2). I would note that s. 46(a) of MFIPPA allows the Commissioner to "offer comment on the privacy protection implications of proposed programs of institutions". There is much merit, in my view, for a city to make use of this provision to have any proposed new by-law vetted through a detailed examination of each provision and the necessity for it by the Commissioner at first instance, rather than by a court. The Commissioner has both the expertise and the experience in addressing these types of issues and can do so in a more efficient and cost-effective manner than a court.

(3) Is the transaction fee authorized under the Act?

[55] Section 22(f) of the by-law imposes a fee on licensed second-hand goods dealers of up to \$1.00 per transaction. The city relies on s. 150(8) of the Act, which allows the city to impose "special conditions" for a business license, and on s. 150(9) that restricts the total fees that can be charged for a license to the "costs directly related to the administration and enforcement of the by-law. . .". The appellants challenge s. 22(f) on the basis that it does not specifically authorize a volumetric fee as required by the Supreme Court of Canada in three cases, *Kirkpatrick v. Maple Ridge (District)*, 1986 CanLII 25 (SCC), [1986] 2 S.C.R. 124, [1986] S.C.J. No. 47, 30 D.L.R. (4th) 431; *Montréal (City) v. Civic Parking Centre Ltd.*, 1981 CanLII 214 (SCC), [1981] 2 S.C.R. 541, [1981] S.C.J. No. 96; *Longueil Navigation Co. v. Montréal (City)* (1888), 1888 CanLII 32 (SCC), 15 S.C.R. 566, [1888] S.C.J. No. 28.

[56] The application judge was not referred to these Supreme Court cases and decided the issue based on the application of s. 150(9).

[57] As I would declare of no effect the sections that mandate the transmission of the collected personal information to the police, the transaction fee provision becomes moot on this appeal. Furthermore, if the city were to reintroduce a licensing by-law that does not conflict with s. 28(2) of MFIPPA, it will do so under the new Municipal Act that came into effect on January 1, 2007. Under the new provisions, s. 150(2) of the Act has been repealed and replaced with new licensing powers and s. 150(9) has been repealed and replaced with new provisions [page419] regarding licensing fees. In those circumstances, it is unnecessary to address this issue. [See Note 1 below]

Result

[58] In the result, I would allow the appeal, set aside the order of the application judge and declare ss. 10(c) and (d), 15, 20, 22(a) and (b) of the by-law of no effect with costs of the appeal to the appellants on the partial indemnity scale fixed at \$25,000 inclusive of disbursements and GST, and costs of the original application fixed in the amount of \$20,000 inclusive of disbursements and GST.

Appeal allowed.

Notes -----

Note 1: As the amended Municipal Act (in force January 1, 2007) no longer contains s. 150(2), any replacement licensing by-law may also undergo a different analysis regarding compliance with s. 28(2) of MFIPPA in relation to the use of the information for law enforcement purposes.

TAB 34

Ontario Criminal Code Review Board v. Hale, 1999 CanLII 3805 (ON CA)

Date: 1999-11-01

File number: C28685

Other citations: 47 OR (3d) 201 — 180 DLR (4th) 657 — 126 OAC 92 — 140 CCC (3d) 400 — [1999] OJ No 4072 (QL)

Citation: Ontario Criminal Code Review Board v. Hale, 1999 CanLII 3805 (ON CA), <<https://canlii.ca/t/1f9tp>>, retrieved on 2025-10-28

**Ontario Criminal Code Review Board v. Hale, Inquiry
Officer et al.**
[Indexed as: Ontario (Criminal Code Review Board) v. Doe]

**47 O.R. (3d) 201
[1999] O.J. No. 4072
Docket No. C28685**

**Court of Appeal for Ontario
Catzman, Doherty and O'Connor JJ.A.
November 1, 1999**

Administrative law -- Freedom of information -- Backup audio tapes prepared by court reporter at disposition hearings before Ontario Criminal Code Review Board are "under the control" of Board and not of independent court reporter for purposes of s. 10 of [Freedom of Information and Protection of Privacy Act](#) -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 10.

The respondents made requests under s. 10(1) of the [Freedom of Information and Protection of Privacy Act](#) for access to backup audio tapes prepared by the court reporter at their disposition hearings before the Ontario Criminal Code Review Board. The Board refused their requests, taking the position that the backup tapes were not under its control for the purposes of s. 10 of the Act, but rather were under the control of the court reporter, who was an independent contractor hired by the Board. The respondents appealed to an Inquiry Officer. The Inquiry Officer held that the backup tapes were under the control of the Board and ordered that the Board obtain copies of them from the court reporter. The Divisional Court dismissed the Board's application for judicial review of that decision. The court reporter, supported by the Board, appealed.

Held, the appeal should be dismissed.

Under s. 672.52(1) of the [Criminal Code, R.S.C. 1985, c. C-46](#), the Board is required to keep a record of its proceedings. Obviously, whatever constitutes the record must be under the control of the Board. The "record" is not restricted to the reporter's stenographic tapes. Accepting that s. 672.52(1) requires that the record of proceedings that must be kept is an accurate record, it makes sense that there should be included in that record those documents or materials that, when taken together, provide the accurate record. The court reporter chose to use a backup audiotape to assist her in making an accurate record. The record of the Board includes all of those documents or materials that were created for the purpose of making an accurate record.

Even if the backup tapes do not constitute part of the Board's record, the Board nevertheless has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#). The sole purpose for creating the backup tapes was to fulfil the Board's statutory mandate to keep an accurate record. It is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them and to limit the disclosure of disposition information to the public or to an accused. Orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. The Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event, the Board would require access to all of the records, including backup tapes if any existed, that could be of assistance in order to satisfy itself that the record or transcript is accurate. For that reason, the Board must have access to the backup tapes regardless of who has physical custody of them.

APPEAL from a judgment of the Divisional Court dismissing an application for judicial review of a decision of the Inquiry Officer under the [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#).

Walmsley v. Ontario (Attorney General) (1997), [1997 CanLII 3017 \(ON CA\)](#), 34 O.R. (3d) 611 (C.A.), distd Canada Post Corp. v. Canada (Minister of Public Works), [1995 CanLII 3574 \(FCA\)](#), [1995] 2 F.C. 110, 30 Admin. L.R. (2d) 242, 179 N.R. 350, 60 C.P.R. (3d) 441, 91 F.T.R. 320n (C.A.); Neilson v. British Columbia (Information and Privacy Commissioner), [1998] B.C.J. No. 1640 (S.C.), consd Statutes referred to [Criminal Code, R.S.C. 1985, c. C-46](#), ss. 672.38, 672.5(6), 672.51(3), (5), 672.52(1), 672.73(1), 672.74(4) [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#), ss. 2, 10, 50 Rules and regulations referred to General Regulation, [R.R.O. 1990, Reg. 460](#) (Freedom of Information and Protection of Privacy Act), s. 1(1)

Peter J. Harte, for appellant.

Robert H. Ratcliffe, for respondent, Ontario Criminal Code Review Board.

William S. Challis and John R. Higgins, for respondent,

Donald Hale, Inquiry Officer.

Marshall A. Swadron, for respondent, John Doe III.

The judgment of the court was delivered by

[1] O'CONNOR J.A.: -- This appeal raises the issue whether a record is "under the control" of a provincial government institution giving rise to a right of access under [s. 10](#) of the [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#) ("the Act"). Each of the respondents, John Doe I, II and III, sought access to backup audio tapes prepared by the court reporter at their disposition hearings before the Ontario Criminal Code Review Board. The Board refused these requests. It took the position that the backup tapes were not under its control but rather were under the control of the court reporter who was an independent contractor hired by the Board. The John Does appealed to an Inquiry Officer. The Inquiry Officer held that the backup

tapes were under the control of the Board and ordered that the Board obtain copies of them from the court reporter.

[2] The Board applied for judicial review. The Divisional Court dismissed the application. This appeal, brought by the court reporter, supported by the Board, is from that decision. For the reasons below, I would dismiss the appeal.

Facts

[3] The Board is an administrative tribunal which was established in 1992. It was created and receives its authority from s. 672.38 of the [Criminal Code, R.S.C. 1985, c. C-46](#). [See Note 1 at end of document] The Board's mandate is to review dispositions of persons who have been found unfit to stand trial or not criminally responsible by reason of mental disorder. The proceedings of the Board are called "disposition hearings".

[4] Section 672.52(1) requires the Board to keep a record of its proceedings. It reads as follows:

672.52(1) The court or Review Board shall cause a record of the proceedings of its disposition hearings to be kept, and include in the record any assessment report submitted.

[5] The record of the Board's disposition hearings includes the verbatim record of the oral evidence given at a hearing. This record may take different forms depending on the method of recording used by the court reporter responsible for a particular hearing. Some court reporters take shorthand notes, others make stenographic notes using a stenographic machine, and others employ a tape recorder using steno mask technology. Some use a backup system, others do not.

[6] Appeals from disposition hearings of the Board lie to the Court of Appeal and are based on transcripts of the proceedings. An appellant is usually required to provide the Court of Appeal and the respondent with a transcript of the evidence taken before the Board certified to be accurate by the stenographer (court reporter). [See Note 2 at end of document]

[7] The Board employs independent fee-for-service court reporters to create records of its proceedings and to prepare transcripts of those proceedings when required. These reporters are paid a per diem fee for attending at a hearing and creating the record that the Board is required to keep under s. 672.52(1). The practice is that the court reporter maintains the physical custody of the record on behalf of the Board. In addition, the court reporters are entitled to charge a per page fee for preparing transcripts.

[8] In July 1994, the Board held separate disposition hearings for each of the three respondent John Does. The Board hired the appellant, Simcoe Court Reporting (Barrie) Inc., to provide court reporting services for each of these hearings. The individual court reporter employed by the appellant was Carol Forde, a Chartered Shorthand Reporter. Ms. Forde used a stenographic machine to make stenographic notes of each hearing. In addition, she also used a single track tape recorder and an open microphone to create tape recordings of all or portions of the proceedings. Ms. Forde described these tapes as "backup audio tapes" which were created as aids to assist her in preparing an accurate record. It is these backup tapes that are in issue in this appeal. The appellant is Ms. Forde's personal corporation. Nothing turns on this and for simplicity, I will refer to Ms. Forde as the court reporter.

[9] The three John Does each made a request under s. 10(1) of the [Act](#) for access to the backup tapes of their respective hearings. Section 10(1) provides as follows:

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,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[10] The Board refused these requests, taking the position that the backup tapes were in the custody of the court reporter and not the Board. The Board indicated that the requesters could contact the court reporter directly and obtain a copy of the record (a transcript) at a cost determined by the court reporter.

[11] The John Does appealed under s. 50 of the Act. Pursuant to s. 56(1), an appeal under this section is determined by the Commissioner of Information and Privacy or by a person designated by him.

[12] A notice of inquiry was provided to the John Does and to the Board. In addition, the court reporter and the Chartered Shorthand Reporters Association of Ontario (CCSRAO) were asked to make representations. The Board, the court reporter, the CCSRAO and also the Society of Ontario Adjudicators and Regulators made representations opposing the request for access to the backup tapes.

[13] In its written submission to the Inquiry Officer, the Board took the position that the stenographic notes constituted the official record of the Board's proceedings. The Board accepted that the stenographic notes were under its control within the meaning of s. 10(1) of the Act even though they were kept by the court reporter for safekeeping. [See Note 3 at end of document] The Board argued, however, that the backup tapes belonged to the court reporter and were not in the custody or under the control of the Board. The backup tapes were simply an aide memoire for the reporter. She could listen to them to clarify a word or phrase that might be unclear in the stenographic notes. Except for the requests by the John Does that the backup tapes be produced, the Board would not have inquired about their existence nor the circumstances under which they were created. The use the court reporter may make of the backup tapes was of no concern to the Board. Unlike the stenographic notes, the Board did not request that they be made, was not concerned about their existence, and was not concerned about whether they continued to exist or were destroyed.

[14] The Board also submitted that it did not have a right to possession of the backup tapes, nor did it exercise control over their use by the court reporter. The Board said that it was impossible for it to compel the court reporter to surrender the backup tapes. The tapes were created by the court reporter solely for her own benefit.

[15] The court reporter took essentially the same position. She said that the backup tapes were aids to her and that they may or may not be complete as she turned the tape machine on and off at various times during the proceedings. The tapes were for her own personal use. In close to 20 years' experience as a court reporter, she had never released backup tape recordings. She said the Board did not have possession of them, that they had not been voluntarily produced by her, nor had they been provided pursuant to any mandatory statutory or employment requirement. She also said "the record [the backup tapes] is being held by me for the purpose of my duties as a maker of the official record." She drew the same distinction as the Board between the stenographic notes and the backup tapes. She accepted that the Board has "... authority to the use of my stenographic notes." She concluded that she was at liberty to dispose of the backup tapes at any time.

[16] The precise contractual terms between the Board and the court reporter are not in the record. There is no indication of an agreement setting out their respective rights of property, custody or control over the stenographic notes or the backup tapes nor specifying what records the reporter must keep.

[17] The appeal was decided by an Inquiry Officer designated by the Commissioner. The Inquiry Officer allowed the John Does' appeals. He found that the backup tapes, like the stenographic notes, were created by the court reporter as a result of an engagement by the Board and he considered that both of these records, taken together, constituted the Board's record of proceedings. He rejected the argument that the backup tapes were created for the court reporter's personal purposes. He found that the court reporter was the trustee or repository of the backup tapes and that the right of control remained with the Board. The Inquiry Officer directed the Board to obtain copies of the backup tapes from the court reporter. It is important to note that this order does not necessarily mean that the John Does will be provided access to the backup tapes. The Board has not yet determined whether it will rely upon any of the exemptions set out in the Act and, on that basis, refuse access.

[18] The Board brought an application for judicial review. The Divisional Court dismissed the Board's application. The court reporter, with the support of the Board, appeals that decision.

Analysis

[19] The single issue before the Inquiry Officer was whether the backup tapes were records to which there was a right of access within the meaning of [s. 10\(1\)](#) of the [Act](#). That section limits the jurisdiction of the Board. Records in the custody or under the control of an institution are subject to the access provisions in the Act. Records that are not fall outside the scope of the Act. This court has held that a decision by the Commissioner or his designate under [s. 10\(1\)](#) of the Act is to be reviewed on a standard of correctness, not reasonableness:

Walmsley v. Ontario (Attorney General) (1997), [1997 CanLII 3017 \(ON CA\)](#), 34 O.R. (3d) 611 (C.A.). The reasoning behind this decision was threefold: [s. 10\(1\)](#) is jurisdiction limiting; the interpretation of the "custody or control" test does not require specialized expertise; and there is no privative clause.

[20] With this standard in mind, I turn to the question of the application of [s. 10\(1\)](#) to the backup tapes. For convenience, I repeat [s. 10\(1\)](#):

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,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22, or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[21] It is accepted that the backup tapes are records within the meaning of the [Act](#) ([s. 2](#)). It is also accepted that the Board has been designated as an institution in the regulations made under the Act. [See Note 4 at end of document]

[22] The only issue is whether the backup tapes are under the control of the Board. I start with the proposition that the records of the Board's disposition hearings are under its control. Under [s. 672.52\(1\)](#) of the [Criminal Code](#), the Board is required to keep a record of its proceedings. It seems obvious that whatever constitutes that record must be under the control of the Board. If the record is not physically in the Board's custody, then it must be kept under an arrangement by which the Board has access to it. Were it otherwise, the Board would be in breach of its statutory mandate "to keep a record of its proceedings."

[23] The question then is -- what constitutes the Board's record of proceedings? The court reporter now argues that even the stenographic tapes do not constitute the record. It contends that only a transcript, if prepared, is the record of proceedings referred to in [s. 672.52\(1\)](#). I disagree. In many

cases, there will be no transcript prepared; the Board nevertheless has a duty to keep a record. That record must include the non-transcribed record prepared by the court reporter responsible for making a record of the proceedings.

[24] Unlike the court reporter, the Board accepts that it has control over the stenographic notes because those notes constitute the record of its proceedings. The Board, however, argues that the stenographic notes constitute the entirety of that record. As set out above, it takes the position that the backup tapes are prepared by the court reporter for her own purposes and are, therefore, not part of the record. That argument, it seems to me, takes an unduly narrow view of the reason that the backup tapes were created.

[25] Accepting that s. 672.52(1) requires that the record of proceedings that must be kept is an accurate record, and it is inconceivable that it could be otherwise, it makes sense that there should be included in that record those documents or materials that, when taken together, provide the accurate record. The court reporter was hired for the purpose of making an accurate record. She chose to use a backup audiotape process to assist her in doing so. It may be that the backup tape in some instances will add nothing to the accuracy of her stenographic notes. However, it seems reasonable to conclude that in some cases the backup tape must be of assistance, otherwise there would be no purpose in making one.

[26] I am of the view that the record of the Board includes all of those documents or materials that were created for the purpose of making an accurate record. As Sharpe J. said in the reasons of the Divisional Court:

I fail to see how when two methods are used to record proceedings, one being the primary method and the other being a backup or check, one constitutes the "record" while the other does not. Both are created for the same purpose

[27] It is not an answer to say that some court reporters do not employ a backup system to assist with the accuracy of a record. The record includes whatever documents are created by the court reporter in carrying out the mandate to prepare an accurate record for the Board.

[28] I am also of the view that even if the backup tapes do not constitute part of the Board's record, the Board nonetheless has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#). There are three aspects to the relationship between the Board and the court reporter that are important to this conclusion.

[29] First, the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate to keep an accurate record.

[30] Next, it is within the Board's power to limit the use to which the backup tapes may be put. The Board has the broad discretion to exclude the public from hearings or portions of them, [See Note 5 at end of document] and to limit the disclosure of disposition information to the public or to an accused. [See Note 6 at end of document] It follows that orders of this nature require the Board to exercise control over all the records of a proceeding, including backup tapes. That level of control is implicit in the powers conferred upon the Board by the [Criminal Code](#).

[31] It is reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board. The Board can and should exercise control over the use of all records made by court reporters of its proceedings.

[32] Third, the Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. In either event the Board would require access to all of the records, including backup tapes if any existed, that could

be of assistance in order to satisfy itself that the record or transcript is accurate. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

[33] The Federal Court of Appeal has decided that, in the context of the federal legislation, a broad, liberal and purposive approach should be given to the interpretation of access to information legislation: *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), [1995 CanLII 3574 \(FCA\)](#), 30 Admin. L.R. (2d) 242, [1995] 2 F.C. 110. Letourneau J.A., writing for the court, held as follows, at p. 245:

The notion of control referred to in [the [Act](#)] is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the government can dispose of or which are under the lasting or ultimate control of the government.

[34] This reasoning applies equally well to the Ontario legislation and supports the conclusion that the Board should be found to have control over the backup tapes. The Federal Court's decision was cited with approval by Dorgan J. in *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640, a case involving an application under the B.C. Act for the production of notes made by a school counselor during counseling sessions with the children of the applicant parent. Dorgan J. held that the statute, which also provides for access to "any record in the custody or under the control" of a public body, was broad enough to encompass these documents. The counselor in that case argued, as did the stenographer in this case, that the notes were simply an aide memoire which she was not required to make, over which she had custody and control, and which she stored at her home. The court, however, found that the notes were under the control of the School Board because the counselor, as an employee, was required to write reports on the children she counseled and that requirement implicitly involves the keeping of notes. Although the facts of the instant case are not identical, similar reasoning applies.

[35] The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does, it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the [Act](#) by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

[36] In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable. In that case, the request was made to the Ministry of the Attorney General to provide documents in the personal possession of individual members of the Judicial Appointments Committee. In holding that the documents were not under the control of the Ministry, this court pointed out that the Advisory Committee was set up to provide recommendations for judicial appointments that were to be arrived at independently and at arms length from the Ministry. Further, in *Walmsley*, there was no statutory or contractual basis upon which the Ministry could assert the right to possess or dispose of the documents. The situation in this appeal is very different. The court reporter is specifically hired to fulfil the statutory duty of

the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the [Criminal Code](#). Unlike the situation in Walmsley, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arms length" from the Board.

[37] I am satisfied that regardless of whether the backup tapes are part of the Board's "record of proceeding", the Board has control over them within the meaning of [s. 10\(1\)](#) of the [Act](#).

[38] As an alternative argument, the court reporter submitted that if [s. 10\(1\)](#) of the [Act](#) is interpreted to provide access to records of proceedings of disposition hearings there could be a conflict between an order made under the Act and those provisions of the [Criminal Code](#) that permit the Board to restrict access to its proceedings. It is argued that the doctrine of paramountcy would result in the provisions of the Criminal Code taking precedence. That issue does not arise on the facts of this case. There were no orders restricting access to the disposition hearings involved in this appeal. If access is permitted to the backup tapes, there would be no conflict with any order of the Board.

[39] We were not told, in argument, why the respondents insisted on access to the backup tapes rather than the production of a transcript. There appeared to be an understandable concern on the part of the court reporter, and probably the Board, that if access is permitted to the backup tapes someone may be able to prepare a transcript of a disposition hearing without paying for it, i.e., that it will not be difficult to have a typed version of a backup tape prepared. Leaving aside the fact that a backup tape may not cover an entire hearing, a typed version will be of limited use. It could not be used for purposes of an appeal from a decision of the Board nor for any other legal proceedings in which a transcript must be filed. It would not be a certified transcript. Only a transcript certified by the court reporter who was present at a hearing is sufficient for an appeal or other legal proceedings.

[40] For the above reasons, I would dismiss the appeal. The order of the inquiry officer requires the Board to obtain copies of the backup tapes from the court reporter. The next step is for the Board to determine if it takes the position that any of the exemptions set out in the [Act](#) apply to the backup tapes and to advise the parties accordingly.

[41] The inquiry officer, who appeared as a respondent on this appeal, does not request an order for costs. John Doe III filed a factum and appeared by counsel on the argument of this appeal. John Doe I and II did not. I would direct that the appellant and the Board are liable for John Doe III's costs of the appeal forthwith after assessment.

Appeal dismissed.

Notes

Note 1: 672.38(1) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

(2) A Review Board shall be treated as having been established under the laws of the province.

(3) No member of a Review Board is personally liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and

functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions.

Note 2: [Sections 672.73\(1\) and 672.74\(4\)](#) of the [Criminal Code](#).

Note 3: In its submission, the Board justified this position in part by referring to its policy that court reporters do not prepare transcripts of the proceedings for anyone requesting a transcript unless the Board first gives its written consent. There is some doubt about whether this is still the policy of the Board. For the reasons that I set below, I do not think that it matters to the result of this appeal whether or not there is such a policy.

Note 4: [R.R.O. 1990, Reg. 460, s. 1\(1\)](#).

Note 5: Section 672.5(6).

Note 6: Section 672.51(5) and (3).

TAB 35

Canada (Information Commissioner) v. Canada
(Transportation Accident Investigation and Safety Board)
(F.C.A.), 2006 FCA 157 (CanLII), [2007] 1 FCR 203

Date: 2006-05-01

File number: A-165-05

Other citations: 267 DLR (4th) 451 — 348 NR 263 — 49 CPR (4th) 7 —
50 Admin LR (4th) 43 — [2006] FCJ No 704 (QL)

Citation: Canada (Information Commissioner) v. Canada
(Transportation Accident Investigation and Safety Board)
(F.C.A.), 2006 FCA 157 (CanLII), [2007] 1 FCR 203,
<<https://canlii.ca/t/1nb81>>, retrieved on 2025-10-28

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Commissioner for Federal Judicial Affairs Canada](#).

A-165-05

A-304-05

2006 FCA 157

The Information Commissioner of Canada (*Appellant*)

v.

**The Executive Director of the Canadian Transportation Accident
Investigation and Safety Board** and **NAV CANADA** (*Respondents*)

and

The Attorney General of Canada (*Intervener*)

INDEXED AS: CANADA (INFORMATION COMMISSIONER) v. CANADA (TRANSPORTATION
ACCIDENT INVESTIGATION AND SAFETY BOARD) (F.C.A.)

Federal Court of Appeal, Richard C.J., Desjardins and Evans JJ.A.—Ottawa,
February 28; March 1; May 1, 2006.

*Access to Information — Appeal from Federal Court decision dismissing applications for judicial review brought under [Access to Information Act](#) (Access Act), [s. 42\(1\)\(a\)](#) relating to refusals by Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on purported application of "personal information" exemption of Access Act, [s. 19](#) — Content of records relating to status of aircraft, weather conditions, air traffic control (ATC) matters, utterances of pilots, controllers — Information requested not "personal information" under Access Act, [Privacy Act](#), not exempted from disclosure under Access Act, [s. 19\(1\)](#) — Definition of "personal information" in Privacy Act, [s. 3](#) interpreted — Words "about an individual" in definition meaning information leading to possible identification of individual — "Personal information" equivalent to information falling within individuals' privacy rights — Distinction made by Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* regarding information attaching to positions, information relating to specific individuals not applicable as relating only to officers, employees of government institutions as stated in Privacy Act, [s. 3\(j\)](#) — Moreover, information collected by NAV CANADA during air flight not "commercial", "technical" — Information not confidential — Therefore, air traffic control (ATC) communications not meeting requirements for exemption from disclosure under Access Act, [s. 20\(1\)\(b\)](#).*

Privacy — Appeal from Federal Court decision dismissing applications for judicial review brought under [Access to Information Act](#) (Access Act), [s. 42\(1\)\(a\)](#) relating to refusals by Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on purported application of "personal information" exemption at Access Act, [s. 19](#) — Concept of privacy examined — Privacy defined as individual's right to determine for self when, how, to what extent personal information about self released — Connoting intimacy, identity, dignity, integrity of individual — Information at issue not "about" individual since air traffic control (ATC) communications not involving subjects engaging individual's right to privacy — Information professional, could identify individual, assist in determination of person's work-related performance but not qualifying as personal — Fact ATC communications could be used as basis for evaluation of authors' performances not transforming communications themselves into personal information.

This was an appeal from a Federal Court decision dismissing applications for judicial review brought by the appellant under [paragraph 42\(1\)\(a\)](#) of the [Access to Information Act](#) (Access Act), relating to refusals by the Canadian Transportation Accident Investigation and Safety Board (Safety Board) to disclose records based on the purported application of the "personal information" exemption at section 19 of the Act. The records contain communications relating to four aviation occurrences, which were subject to

distinct investigations and public reports by the Safety Board. In each case, the requesters sought access to recordings and/or transcripts of air traffic control (ATC) communications recorded by NAV CANADA and now under the control of the Safety Board.

The content of ATC communications is limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of pilots and controllers. All incoming and outgoing ATC communications are required to be recorded by NAV CANADA. Where there is an “aviation occurrence” (defined in part as any accident or incident associated with the operation of an aircraft) the relevant tape is set aside to preserve its integrity. The Safety Board concluded that the information in ATC communications was personal information but was publicly available within the meaning of subsection 19(2) of the Access Act and the public interest in disclosure did not clearly outweigh any invasion of privacy. The Federal Court concluded that the requested information was “personal information” within the meaning of section 19 of the Access Act and [section 3](#) of the *Privacy Act*. It found that the ATC communications were “about” an individual and that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. Both the ground crew of air traffic controllers and flight specialists and the air crew were involved. The Federal Court also found that the information was about an “identifiable” individual since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of the specific controller and that the individual had a reasonable expectation of privacy. Furthermore, it held that, except for the communications regarding the occurrences at Clarendville, which were already publicly available, the information should not be disclosed since it was not “publicly available” under [subsection 19\(2\)](#) of the *Access Act*. The key issue was whether ATC communications are “personal information” under the Access Act.

Held, the appeal should be allowed.

The Federal Court erred in concluding that the information requested was “personal information” under the Access Act and the *Privacy Act*. [Subsection 19\(1\)](#) of the *Access Act* exempts from disclosure “personal information” as defined in [section 3](#) of the *Privacy Act*. The term is defined as “information about an identifiable individual that is recorded in any form, including” the examples enumerated thereafter provided. The words “including, without restricting the generality of the foregoing” in the section 3 definition convey the proposition that the opening words must be given a generous

interpretation and that the enumeration which follows is not limitative but illustrative only. The definition also provides exceptions to the concept of “personal information”. The Supreme Court of Canada has often stated that the *Privacy Act* and the Access Act must be read together as a “seamless code” following a “parallel” interpretative model” that balances the competing values of access and privacy. However, within this balanced legislative scheme, the right to privacy is made paramount in certain contexts. Case law has given the definition of “personal information” a wide reach. Focussing on the general opening words of the definition, in particular the word “about” (“*concernant*” in French) information recorded in any form is relevant if it is “about” an individual and if it permits or leads to the possible identification of the individual. An “identifiable” individual is someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available. “Personal information” must however be understood as equivalent to information falling within the individuals’ right of privacy (*Privacy Act*, [section 2](#)). A privacy-based interpretation of the “personal information” definition does not definitively resolve the precise scope of “personal information” but captures the essence thereof and was sufficient to dispose of the appeal.

Privacy may be defined as an individual’s right to determine for himself when, how and to what extent he will release personal information about himself. Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual. The information at issue was not “about” an individual since the content of the communications did not involve subjects that engaged an individual’s right to privacy. The information at issue was of a professional and non-personal nature. It could lead to identifying an individual and assist in determining how an individual performed his or her task in a given situation but did not qualify as personal information. It was not about an individual, considering that it did not match the concept of “privacy” and the values that concept was meant to protect. The Federal Court misapprehended the function of the ATC communications and the Safety Board’s object. The ATC communications, when combined with other information, may in certain circumstances be used as a basis for an evaluation of their authors’ performances but that possibility could not transform the communications themselves into personal information, when the information contained therein had no personal content.

The Federal Court also erred by applying the Supreme Court of Canada case of *Dagg v. Canada (Minister of Finance)* when it referred to the evaluation of the performance of the parties to the ATC communications. In *Dagg*, the majority agreed with La Forest J.’s dissenting comment that the purpose of [paragraph 3\(j\)](#) and subparagraph 3(j)(iii) of the *Privacy Act* is to exempt only information attaching to positions and not that which relates to specific

individuals. Information relating to the position is not “personal information” whereas information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is “personal information.” The latter part of La Forest J.’s explanation related only to officers and employees of government institutions, in other words, the exception contained in paragraph 3(j) of the *Privacy Act*. The distinction between information relating to the position versus that relating to the person is inapplicable and irrelevant in respect of the general definition of “personal information.” NAV CANADA’s employees are not officers or employees of a government institution.

NAV CANADA’s alternative submission that the ATC communications were exempted from disclosure under [paragraph 20\(1\)\(b\)](#) of the [Access Act](#) was not accepted. Paragraph 20(1)(b) of the Access Act provides that, if specific requirements are met, certain types of information (i.e. financial, commercial, scientific or technical) are exempted from disclosure by the head of a government institution. “Commercial” connotes information which in itself pertains to trade. Provision of air navigation services for a fee does not render the data or information collected during an air flight “commercial” or “technical”. It is also incorrect to characterize the entire record collected as technical when only a specific part might be. Moreover, the information in question was not confidential as required by paragraph 20(1)(b). Confidentiality must be judged according to the objective standard that the information itself must be “confidential by its intrinsic nature.” Whether information is confidential will depend upon its content, purpose and the circumstances in which it is compiled and communicated. The burden of persuasion with respect to the confidential nature of the information clearly rests on the responding party who must provide “actual direct evidence” of the confidential nature of the information at issue. The evidence provided by NAV CANADA that the ATC communications were confidential within the meaning of paragraph 20(1)(b) was plainly insufficient.

statutes and regulations judicially

considered

[Access to Information Act](#), R.S.C., 1985, c. A-1, ss. 4 (as am. by [S.C. 1992, c. 1, s. 144](#), Sch. VII, item 1(F); [2001, c. 27, s. 202](#)), 19, 20(1), 24, 25, 41, 42(1)(a), Sch. II (as am. by [S.C. 1989, c. 3, s. 38](#)).

[Canada Corporations Act](#), R.S.C. 1970, c. C-32, Part II.

[Canadian Aviation Regulations](#), SOR/96-433, Part VIII, Subpart 2.

Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 2(b).

Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c. 3, ss. 2 "aviation occurrence", 7 (as am. by S.C. 1998, c. 20, s. 5), 28 (as am. *idem*, s. 17), 29(1)(a), (6) (as am. *idem*, s. 18).

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20, ss. 2 (as am. *idem*, s. 108(a); 2003, c. 22, ss. 150(E), 225(q)(E)), 9.

Convention on International Civil Aviation, December 7, 1944, [1944] Can. T.S. No. 36.

Privacy Act, R.S.C., 1985, c. P-21, ss. 2, 3 "personal information" (as am. by S.C. 1992, c. 1, s. 144, Sch. VII, item 47(F)), 8(2)(a),(b), (m)(i).

Radiocommunication Act, R.S.C., 1985, c. R-2, ss. 1 (as am. by S.C. 1989, c. 17, s. 2), 9(2) (as am. *idem*, s. 6; 1993, c. 40, s. 24).

Radiocommunication Regulations, SOR/96-484, s. 6.

cases judicially considered

distinguished:

Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403; (1997), 148 D.L.R. (4th) 385; 46 Admin. L.R. (2d) 155; 213 N.R. 161.

considered:

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13 (CanLII), [2006] 1 S.C.R. 441; (2006), 266 D.L.R. (4th) 675; 48 C.P.R. (4th) 161; 347 N.R. 1; 2006 SCC 13; *Olmstead v. United States*, 277 U.S. 438 (1928); *R. v. Dymont*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; (1988), 73 Nfld. & P.E.I.R. 13; 55 D.L.R. (4th) 503; 229 A.P.R. 13; 45 C.C.C. (3d) 244; 66 C.R. (3d) 348; 38 C.R.R. 301; 10 M.V.R. (2d) 1; 89 N.R. 249; *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30; (1990), 71 O.R. (2d) 575; 65 D.L.R. (4th) 240; 53 C.C.C. (3d) 1; 74 C.R. (3d) 281; 45 C.R.R. 278; 103 N.R. 86; 37 O.A.C. 322; *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 1989 CanLII 10334 (FC), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.); *Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency* (1999), 250 N.R. 314 (F.C.A.);

Wyeth-Ayerst Canada Inc. v. Canada (Attorney General) (2003), [2003 FCA 257 \(CanLII\)](#), 6 Admin. L.R. (4th) 73; 305 N.R. 317; 2003 FCA 257.

referred to:

Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), [2005 FC 384 \(CanLII\)](#), [2006] 1 F.C.R. 605; (2005), 40 C.P.R. (4th) 158; 271 F.T.R. 7; 2005 FC 384; *Sabourin Estate v. Watterodt Estate* (2005), [2005 BCCA 348 \(CanLII\)](#), 213 B.C.A.C. 301; 44 B.C.L.R. (4th) 244; 34 C.C.L.T. (3d) 193; 2005 BCCA 348; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003 SCC 8 \(CanLII\)](#), [2003] 1 S.C.R. 66; (2003), 224 D.L.R. (4th) 1; 47 Admin. L.R. (3d) 1; 24 C.P.R. (4th) 129; 301 N.R. 41; 2003 SCC 8; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), [2001 CanLII 32755 \(ON SCDC\)](#), 39 Admin. L.R. (3d) 112; 16 C.P.R. (4th) 460; 154 O.A.C. 97 (Ont. Div. Ct.); *affd sub nom. Ontario (Attorney General) v. Pascoe* (2002), [2002 CanLII 30891 \(ON CA\)](#), 22 C.P.R. (4th) 447; 166 O.A.C. 88 (Ont. C.A.); *Société Gamma Inc. v. Canada (Secretary of State)* (1994), [1994 CanLII 19529 \(FC\)](#), 27 Admin. L.R. (2d) 102; 17 B.L.R. (2d) 13; 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.); *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), [1992 CanLII 15386 \(FC\)](#), 41 C.P.R. (3d) 512; 52 F.T.R. 22 (F.C.T.D.); *affd* (1992), [1992 CanLII 15456 \(FCA\)](#), 9 Admin. L.R. (2d) 161; 45 C.P.R. (3d) 390; 148 N.R. 147 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2005 FCA 215 \(CanLII\)](#), [2006] 1 F.C.R. 379; (2005), 47 C.P.R. (4th) 401; 343 N.R. 221; 2005 FCA 215; *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.* (2004), [2004 FCA 99 \(CanLII\)](#), 238 D.L.R. (4th) 44; 30 C.P.R. (4th) 417; 318 N.R. 242; 2004 FCA 99; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989 CanLII 9491 \(FC\)](#), [1989] 2 F.C. 480; (1989), 23 C.P.R. (3d) 297; 24 F.T.R. 62 (T.D.).

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APPEAL from a Federal Court decision ([2005 FC 384 \(CanLII\)](#)), [2006] 1 F.C.R. 605; (2005), 40 C.P.R. (4th) 158; 271 F.T.R. 7; 2005 FC 384) dismissing applications for judicial review brought under [paragraph 42\(1\)\(a\)](#) of the [Access to Information Act](#) relating to refusals by the Canadian Transportation Accident Investigation and Safety Board to disclose records requested under the Act. Appeal allowed.

appearances:

Daniel Brunet, Raynold Langlois, Q.C., Marlys A. Edwardh and François LeBel for appellant.

Barbara A. McIsaac, Q.C. and Gregorios S. Tzemenakis for respondent Executive Director of the Canadian Transportation Accident Investigation and Safety Board.

Brian A. Crane, Q.C. and Graham S. Ragan for respondent NAV CANADA.

Christopher M. Rupar for intervener.

solicitors of record:

Office of the Information Commissioner of Canada for appellant.

McCarthy Tétrault LLP, Ottawa, for respondent Executive Director of the Canadian Transportation Accident Investigation and Safety Board.

Gowling Lafleur Henderson LLP, Ottawa, for respondent NAV CANADA.

Deputy Attorney General of Canada for intervener.

The following are the reasons for order rendered in English by

[1] DESJARDINS J.A.: This is an appeal of a decision of an application Judge of the Federal Court dismissing four applications for judicial review brought by the Information Commissioner of Canada (the Commissioner) pursuant to [paragraph 42\(1\)\(a\)](#) of the [Access to Information Act](#), R.S.C., 1985, c. A-1 (the Access Act). The applications for judicial review relate to four refusals by the Canadian Transportation Accident Investigation and Safety Board (the Safety Board) to disclose records requested under this Act, in their entirety, based on the purported application of [section 19](#) of the Access Act, namely the “personal information” exemption.

[2] The records at issue contain communications relating to four air occurrences which were subject to distinct investigations and public reports by the Safety Board. In each case, the requesters (three journalists and a legal representative of the estate of the deceased involved in one of the air accidents) seek access to recordings and/or transcripts of air traffic control communications (ATC communications) recorded by NAV CANADA and now under the control of the Safety Board.

[3] A description of the occurrences, the requests for information and the relevant decisions of the Safety Board can be found in the reported decision of the application Judge (*Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, [2005 FC 384](#) ([CanLII](#)), [2006] 1 F.C.R. 605, Snider J.).

The decision below

[4] The application Judge concluded that the requested information was “personal information” within the meaning of section 19 of the Access Act and [section 3](#) of the [Privacy Act](#), R.S.C., 1985, c. P-21.

[5] Firstly, it was her view that the ATC communications were “about” an individual. She found that the content of the communications was limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contained information about the status of the aircraft, weather conditions, matters associated with air traffic control and utterances of the pilots and controllers, except for a few lines in one of the communications which contained direct reference to names and other information which the Commissioner acknowledged was personal. She agreed with the Commissioner that the recordings were largely technical (paragraph 20). Viewed in context, however, she said they were much more.

[6] Two different types of individuals were involved: the ground crew of air traffic controllers and flight specialists, and the air crew. To establish the

nature of the communications, she looked at the purpose for which the ATC communications were made and used. She noted that a provision in Annex 10, Volume II of the *Convention on International Civil Aviation* signed at Chicago, Illinois, on December 7, 1944, [1944] Can. T.S. No. 36 (the ICAO Convention), mandated the logging of ATC communications. These standards were incorporated into Part VIII, Subpart 2 of the *Canadian Aviation Regulations*, SOR/1996-433. However, when an occurrence happened (a defined term to be examined later), NAV CANADA was under a duty to notify the Safety Board. The Safety Board could then carry on an investigation as it is empowered to do under section 7 [as am. by S.C. 1998, c. 20, s. 5] of the *Canadian Transportation Accident Investigation and Safety Board Act*, S.C. 1989, c. 3 (the Safety Board Act). The tapes were then handed to the investigators. The Safety Board, in her view, had the responsibility of examining how those individuals involved in the occurrence chose to perform the task assigned to them (paragraph 25 of her reasons).

[7] The application Judge quoted, at paragraph 14 of her reasons, the following sentence from paragraph 94 of La Forest J.'s reasons in *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 (*Dagg*):

. . . information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". [Emphasis added by application Judge.]

[8] She wrote at paragraphs 25 and 26 of her reasons:

In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.

For these reasons, I conclude that the ATC communications are "about" the individuals involved. [My emphasis.]

[9] She further held that the information was about an "identifiable" individual (paragraph 31 of her reasons) since listening to the ATC tapes would allow identification of the aircraft, the location and operating initials of

the specific controller. Moreover, the voices of the individuals involved could be heard and identified. She found that those individuals had a reasonable expectation of privacy considering that the consistent policy of NAV CANADA had been to keep ATC communications confidential, that the collective agreements governing the relationship between the unions and NAV CANADA contained a clause prohibiting use of the tapes beyond what is required by law, and that both the ICAO Convention and international practices favoured the non-disclosure of information of this nature.

[10] She then proceeded, as she was required, to an analysis under [subsection 19\(2\)](#) of the [Access Act](#). She determined that the information should not be disclosed because it was not “publicly available”, except for the occurrences at Clarendville where the communications had already been made publicly available. She considered [paragraphs 8\(2\)\(a\) and \(b\)](#) of the [Privacy Act](#) and found that those provisions were not applicable to the cases before her. She concluded that the Safety Board had properly exercised its discretion under subparagraph 8(2)(m)(i) of the [Privacy Act](#). As a result, she was satisfied that she did not need to address subsection 20(1), nor [section 25](#) of the Access Act, nor whether subsection 9(2) [as am. by S.C. 1989, c. 17, s. 6; 1993, c. 40, s. 24] of the [Radiocommunication Act](#), R.S.C., 1985, c. R-2 [s. 1 (as am. by S.C. 1989, c. 17, s. 2)], infringed [paragraph 2\(b\)](#) of the [Canadian Charter of Rights and Freedoms](#) [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter).

[11] It is my view that the application Judge erred in coming to the conclusion that the information requested was “personal information” under the Access Act and the [Privacy Act](#). I consequently do not need to determine the other issues raised in this appeal, except for [subsection 20\(1\)](#) of the [Access Act](#).

Defining ATC communications—The object of the Safety Board

[12] Prior to November 1, 1996, civil air navigation services were delivered by Transport Canada. On that date, pursuant to [section 9](#) of the [Civil Air Navigation Services Commercialization Act](#), S.C. 1996, c. 20, and to an earlier transfer agreement signed between the Government of Canada and NAV CANADA, NAV CANADA was given exclusive responsibility over the delivery of those services within Canadian airspace and within other airspace in respect of which Canada has responsibility for the provision of such services. NAV CANADA, a private corporation incorporated on May 26, 1995 under Part II of the [Canada Corporations Act](#), R.S.C. 1970, c. C-32, was given the right to charge for those services.

[13] The responding parties emphasized the important role of Canada's international obligations in structuring the policies concerning disclosure of ATC communications. The Court's attention was drawn in particular to Annex 13 [*Aircraft Accident and Incident Investigation*], article 5.12 of the ICAO Convention, which provides that, in conducting an accident investigation, a state shall protect from disclosure "all communications between persons having been involved in the operation of the aircraft" and shall not make such records available for purposes other than accident investigation "unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation". Contrary to the suggestion of the responding parties, however, I am not persuaded that the disclosure of ATC communications, in appropriate circumstances following a request under the [Access Act](#), is necessarily inconsistent with Canada's international obligations. A request under the Access Act is overseen by "the appropriate authority for the administration of justice", and the considerations mandated by article 5.12 can be accommodated within the process created by this domestic statutory regime.

[14] ATC communications are regulated by section 2 [as am. by [S.C. 1996, c. 20](#), s. 108(a); [2003, c. 22, ss. 150\(E\), 225\(q\)\(E\)](#)] of the *Civil Air Navigation Services Commercialization Act* and [section 6](#) of the [Radiocommunication Regulations](#), SOR//96-484. Their content is limited to the safety and navigation of aircraft, the general operation of the aircraft and the exchange of messages on behalf of the public. The messages are transmitted over frequencies reserved specifically for aeronautical services. Users of these frequencies are statutorily required not to identify themselves using their names (paragraph 18 of the application Judge's reasons).

[15] ATC communications may be air-to-ground, ground-to-air and ground-to-ground communications, that is, from the air control tower to the air crew in flight or on the ground, or to vehicles on the ground. Controllers also communicate by means of interphone communication with other control towers and vehicles on the runway (*Sabourin Estate v. Watterodt Estate* (2005), [2005 BCCA 348 \(CanLII\)](#), 213 B.C.A.C. 301 (C.A.)). The purpose of communications between air traffic controllers or flight specialists and the crew of any aircraft is to ensure the safe and efficient departure, flight and landing of those aircraft and surrounding aircraft (affidavit of Kathleen Fox, A.B., Vol. 4, page 834, paragraph 28).

[16] As stated earlier, all incoming and outgoing ATC communications are required to be recorded by NAV CANADA. They are retained for a period of 30 days. Where there is an "aviation occurrence", the relevant tape is set aside to

preserve its integrity. The tape is taken out of service, placed in a container and stored in a secure location where it cannot be tampered with.

[17] The term “aviation occurrence” is defined thus in [section 2](#) of the [Safety Board Act](#):

2. In this Act,

. . .

“aviation occurrence” means

(a) any accident or incident associated with the operation of an aircraft, and

(b) any situation or condition that the Board has reasonable grounds to believe could, if left unattended, induce an accident or incident described in paragraph (a);

[18] The object of the Safety Board is described in [subsection 7\(1\)](#) of the [Safety Board Act](#). An important restriction is contained in subsection 7(2). Both provisions read:

7. (1) The object of the Board is to advance transportation safety by

(a) conducting independent investigations, including, when necessary, public inquiries, into selected transportation occurrences in order to make findings as to their causes and contributing factors;

(b) identifying safety deficiencies as evidenced by transportation occurrences;

(c) making recommendations designed to eliminate or reduce any such safety deficiencies; and

(d) reporting publicly on its investigations and on the findings in relation thereto.

(2) In making its findings as to the causes and contributing factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability, but the Board shall not refrain from fully reporting on the causes and contributing factors merely because fault or liability might be inferred from the Board’s findings.

[19] The Safety Board explains (paragraph 25 of its memorandum of fact and law) that the purpose of the investigation of civil aviation occurrences is to understand what caused the occurrence and to identify factors which can be mitigated in order to avoid further occurrences. The purpose is not to assign blame or further criminal, civil or disciplinary proceedings.

[20] Communication records, including ATC communications, enjoy a degree of privilege under the [Safety Board Act](#). [Paragraph 29\(1\)\(a\)](#) of the Safety Board Act defines a communication record to include:

29. (1) In this section, “communication record” means the whole or any part of any record, recording, copy, transcript or substantial summary of

(a) any type of communications respecting air traffic control or related matters that take place between any of the following persons, namely, air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air traffic control or related matters,

[21] Subsection 29(6) [as am. by S.C. 1998, c. 20, s. 18] of the [Safety Board Act](#) specifically provides that a communication record which has been obtained by the Board pursuant to its legislative mandate is not to be used against any person referred to in subsection (1) (i.e. air traffic controllers, aircraft crew members, airport vehicle operators, flight service station specialists and persons who relay messages respecting air traffic control or related matters) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings. Subsection 29(6) reads:

29. (1) . . .

(6) A communication record obtained under this Act shall not be used against any person referred to in subsection (1) in any legal proceedings or, subject to any applicable collective agreement, in any disciplinary proceedings.

[22] A much stricter provision protects the “on-board recordings” from the flight deck of an aircraft, a term defined in subsection 28(1) [as am. *idem*, s. 17] of the [Safety Board Act](#). Subsection 28(1) of the Safety Board Act and [section 24](#) of the [Access Act](#) specifically provide for mandatory exemption with respect to such recordings and transcripts.

[23] [Section 28](#) of the [Safety Board Act](#) reads in full:

PRIVILEGE

28. (1) In this section, “on-board recording” means the whole or any part of

(a) a recording of voice communications originating from, or received on or in,

(i) the flight deck of an aircraft,

(ii) the bridge or a control room of a ship,

(iii) the cab of a locomotive, or

(iv) the control room or pumping station of a pipeline, or

(b) a video recording of the activities of the operating personnel of an aircraft, ship, locomotive or pipeline

that is made, using recording equipment that is intended to not be controlled by the operating personnel, on the flight deck of the aircraft, on the bridge or in a control room of the ship, in the cab of the locomotive or in a place where pipeline operations are carried out, as the case may be, and includes a transcript or substantial summary of such a recording.

(2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall

(a) knowingly communicate an on-board recording or permit it to be communicated to any person; or

(b) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

(3) Any on-board recording that relates to a transportation occurrence being investigated under this Act shall be released to an investigator who requests it for the purposes of the investigation.

(4) The Board may make such use of any on-board recording obtained under this Act as it considers necessary in the interests of transportation safety, but, subject to subsection (5), shall not knowingly communicate or permit to be communicated to anyone any portion thereof that is unrelated to the causes or contributing factors of the transportation occurrence under investigation or to the identification of safety deficiencies.

(5) The Board shall make available any on-board recording obtained under this Act to

(a) [Repealed, 1998, c. 20, s. 17]

(b) a coroner who requests access thereto for the purpose of an investigation that the coroner is conducting; or

(c) any person carrying out a coordinated investigation under section 18.

(6) Notwithstanding anything in this section, where, in any proceedings before a court or coroner, a request for the production and discovery of an on-board recording is made, the court or coroner shall

(a) cause notice of the request to be given to the Board, if the Board is not a party to the proceedings;

(b) in camera, examine the on-board recording and give the Board a reasonable opportunity to make representations with respect thereto; and

(c) if the court or coroner concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the privilege attached to the on-board recording by virtue of this section, order the production and discovery of the on-board recording, subject to such restrictions or conditions as the court or coroner deems appropriate, and may require any person to give evidence that relates to the on-board recording.

(7) An on-board recording may not be used against any of the following persons in disciplinary proceedings, proceedings relating to the capacity or competence of an officer or employee to perform the officer's or employee's functions, or in legal or other proceedings, namely, air or rail traffic controllers, marine traffic regulators, aircraft, train or ship crew members (including, in the case of ships, masters, officers, pilots and ice advisers), airport vehicle operators, flight service station specialists, persons who relay messages respecting air or rail traffic control, marine traffic regulation or related matters and persons who are directly or indirectly involved in the operation of a pipeline.

(8) For the purposes of subsection (6), "court" includes a person or persons appointed or designated to conduct a public inquiry into a transportation occurrence pursuant to this Act or the *Inquiries Act*.

[24] [Section 24](#) of the [Access Act](#) reads:

Statutory Prohibitions

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

. . .

SCHEDULE II [as am. by [S.C. 1989, c. 3](#), s. 38]

[Canadian Transportation Accident Investigation and Safety Board Act](#)

subsections 28(2) and 31(4)

[25] It was initially the position of the Safety Board that the information contained in ATC communications was personal information, but was publicly available because some of the information, being the conversations carried

over open radio frequencies, could be intercepted by a member of the public with the appropriate technology. Accordingly, if an access request for ATC communications was made after an investigation had been completed, the Safety Board was of the view that there was no basis to refuse disclosure.

[26] Subsequently, questions were raised as to whether the information in question should be exempted under [section 19](#) of the [Access Act](#). The Safety Board came to the conclusion that the ATC communications contained personal information. Thereafter, the Safety Board had to determine whether the ATC communications should, in any event, be released because the information was publicly available or because the public interest in disclosure clearly outweighed any invasion of privacy. The Safety Board determined that the information could not be said to be publicly available within the meaning of subsection 19(2) of the Access Act and that the public interest in disclosure did not clearly outweigh any invasion of privacy.

[27] Initially, the appellant agreed with this assessment. He, in particular, did so in the case of Swiss Air Flight 111 in 1998, but has since changed his mind.

The standard of review

[28] The parties do not dispute the application Judge's finding that the standard of review is correctness.

[29] The decision of the Safety Board relates to a mandatory refusal under subsection 19(1) of the Access Act and it has to be correct. Moreover, the application Judge is sitting as a reviewing judge in a section 41 application. She is invested with a *de novo* review power (*Dagg*, at paragraph [107](#)) and her decision also has to be correct.

The key issue in this appeal

[30] The key issue in this appeal is whether ATC communications are "personal information" under the [Access Act](#).

Structure of the relevant legislation

[31] [Subsection 19\(1\)](#) of the [Access Act](#) exempts from disclosure "personal information" as defined in [section 3](#) of the [Privacy Act](#). Subsection 19(1) of the Access Act reads:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in [section 3](#) of the [Privacy Act](#).

[32] [Section 3](#) of the *Privacy Act* reads:

3. In this Act,

. . .

“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of [sections 7, 8 and 26](#) and [section 19](#) of the *Access to Information Act*, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

[33] [Section 4](#) of the [Access Act](#), which gives the right of access, reads in part:

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of [subsection 2\(1\)](#) of the [Immigration and Refugee Protection Act](#),

has a right to and shall, on request, be given access to any record under the control of a government institution.

[34] The words “including, without restricting the generality of the foregoing”, which are found in the definition of “personal information” in [section 3](#) of the [Privacy Act](#), convey the proposition that the opening words

(“personal information” means information about an identifiable individual that is recorded in any form”) must be given a generous interpretation and that the enumeration which follows is not limitative but illustrative only. Further down, section 3 contains a list of exceptions to the concept of “personal information”. They apply only “for the purposes of [sections 7, 8 and 26](#), and [section 19](#) of the *Access to Information Act*”. One of these exceptions is paragraph 3(j), which includes subparagraph 3(j)(iii).

“Personal Information”: The key principles of interpretation

[35] The Supreme Court of Canada has stated on numerous occasions that the *Privacy Act* and the *Access Act* must be read together as a “seamless code”, following a “parallel” interpretive model” that balances the competing values of access and privacy: see *Dagg*, at paragraphs [45 and 55-57](#); [*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003 SCC 8 \(CanLII\)](#), [2003] 1 S.C.R. 66], at paragraphs 21 and 22 (*RCMP*); *H. J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* [2006 SCC 13 \(CanLII\)](#), [2006] 1 S.C.R. 441, at paragraphs [2, 22, 25 \(Heinz\)](#). However, within this balanced legislative scheme, the right to privacy is made paramount in certain contexts, as the Supreme Court recently affirmed in *Heinz*, at paragraph 26:

The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in [s. 8](#) of the *Privacy Act* and [s. 19](#) of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*. [My emphasis.]

[36] In *Dagg*, La Forest J., dissenting but confirmed by the majority on this point (see paragraph 1), described as follows the wide reach of the “personal information” definition (paragraphs 68 and 69):

With these broad principles in mind, I will now consider whether the information requested by the appellant constitutes personal information under [s. 3](#) of the *Privacy Act*. In its opening paragraph, the provision states that “personal information” means “information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing”. On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the

general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, 1996 CanLII 217 (SCC), [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.

As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, at p. 557, the language of this section is “deliberately broad” and “entirely consistent with the great pains that have been taken to safeguard individual identity”. Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see J. Alan Leadbeater, “How Much Privacy for Public Officials?”, speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture. [My emphasis.]

[37] La Forest J.’s views were cited with approval by the unanimous Court in *RCMP*, at paragraph 23.

[38] The words upon which I need to focus in the present analysis are the following: “‘personal information’ means information about an identifiable individual that is recorded in any form including” (“*renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment*”).

[38] Les mots auxquels je dois m’intéresser dans la présente analyse sont les suivants : « “renseignements personnels” Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment » (« “*personal information*” means information about an identifiable individual that is recorded in any form including »).

[39] The word “about” (*concernant*) should be considered first.

[40] The *Concise Oxford Dictionary of Current English*, 8th ed. tells us that the word encompasses the following definitions:

about: 1 a on the subject of, in connection with (*a book about birds; what are you talking about?; argued about money*). **b.** relating to (*something funny about this*).

[41] The *Petit Larousse illustré* says the following:

concernant: À propos de, au sujet de.

[42] The French *Petit Robert* states the following:

concernant: À propos de, au sujet de.—**relative** (à), 1. **touchant** . . . en ce qui concerne.

[43] These two words, “about” and “concernant”, shed little light on the precise nature of the information which relates to the individual, except to say that information recorded in any form is relevant if it is “about” an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an “identifiable” individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available (Colin H. H. McNairn and Christopher D. Woodbury, *Government Information: Access and Privacy* (Toronto: Carswell, 1992), at page 7-5; *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)* (2001), [2001 CanLII 32755 \(ON SCDC\)](#), 39 Admin. L.R. (3d) 112 (Ont. Div. Ct.); affd [*sub nom. Ontario (Attorney General) v. Pascoe*] (2002), [2002 CanLII 30891 \(ON CA\)](#), 22 C.P.R. (4th) 447 (Ont. C.A.)).

[44] “Personal information” must however be understood as equivalent to information falling within the individual’s right of privacy. [Section 2](#) of the [Privacy Act](#) sets the tone by providing that:

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

[45] The [Privacy Act](#), adopted in 1982 [S.C. 1980-81-82-83, c. 111, Sch. II], was one of the legislative responses to the development of the right to privacy. In their seminal work on “The Right to Privacy”, [1890-91] 4 *Harv. L. Rev.* 193, Samuel D. Warren and Louis D. Brandeis wrote (at page 193):

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.

[46] The concept of privacy has proven sufficiently robust to live up to its description by Justice Brandeis (*Olmstead v. United States*, 277 U.S. 438 (1928), at page 478), as the “right most valued by civilized men”, and has

shouldered its way into U.S. and Canadian constitutional doctrines (see Stanley A. Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril*, (Markham: LexisNexis Butterworths, 2005), at page 9).

[47] In *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pages 427 and 428, *per* La Forest J. (*Dyment*), the Supreme Court of Canada spoke about privacy in the following terms:

Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

[48] A privacy-based interpretation of the "personal information" definition does not provide a definite resolution to questions concerning the precise scope of "personal information". However, as I explain further below, this interpretation, as wide as it may be, captures the essence of the definition and is, in my view, sufficient to dispose of the appeal at bar.

The concept of privacy

[49] In *Dagg*, La Forest J., at paragraph 67, noted that privacy is a broad and somewhat evanescent concept and that it was necessary to describe with greater precision the particular privacy interests protected. He mentioned his earlier writing in *Dyment*, at pages 429 and 430, in which he referred to the Report of the Task Force established jointly by the Department of Communications and the Department of Justice (1972), entitled *Privacy and Computers*, in these terms:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. As the Task Force put it (p. 13): "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*. [My emphasis.]

[50] La Forest then added (at paragraph 67):

See also *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, at p. 46 (“privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself”); *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595, at pp. 613-15 (*per* L’Heureux-Dubé J., dissenting); Westin, *supra*, at p. 7 (“[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others”); Charles Fried, “Privacy” (1968), 77 *Yale L.J.* 475, at p. 483 (“[p]rivacy . . . is control over knowledge about oneself”). [My emphasis.]

[51] The Task Force cited in *Dyment* [at page 429], refers to “information about a person . . . in a fundamen-tal way his own, for him to communicate or retain for himself as he sees fit” [my emphasis]. The same concepts of intimacy and identity are found in the passage from *Duarte* [*R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, at page 46], quoted in *Dagg* [at page 435]: “. . . the right of the individual to determine for himself when, how and to what extent he will release personal information about himself” [my emphasis]. Alan F. Westin [*Privacy and Freedom*, New York: Atheneum, 1970] refers to “the claim . . . of individuals to determine for themselves when, how and to what extent information about them is communicated to others” (my emphasis) [quoted in *Dagg*, at page 435]. Charles Fried [“Privacy” (1968), 77 *Yale L.J.* 475, at page 483] says “[p]rivacy ... is control over knowledge about oneself” (my emphasis) [quoted in *Dagg*, at page 435].

[52] Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.

[53] The information at issue is not “about” an individual. As found by the application Judge (at paragraph 18 of her reasons) the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals.

[54] The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not about an individual, considering that it does not match the concept of “privacy” and the values that concept is meant to protect. It is non-personal information transmitted by an individual in job-related circumstances.

[55] The application Judge misapprehended the function of the ATC communications and the object of the Safety Board when she said that “the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong” (paragraph 25). This interpretation is not in the spirit of [subsections 7\(1\), \(2\) and 29\(6\)](#) of the [Safety Board Act](#), nor is it to be found in the submissions made by the Safety Board before this Court (paragraph 25 of its memorandum of fact and law, referred to at paragraph 19 of my reasons for judgment). The ATC communications, when combined with other information, may well in certain circumstances be used as a basis for an evaluation of their authors’ performances. However, the possibility of such eventual use cannot transform the communications themselves into personal information, when the information contained therein has no personal content.

[56] The application Judge also erred by misapplying *Dagg* when she referred, in the present context, to the evaluation of the performance of the parties to the ATC communications. An analysis of the *Dagg* case is necessary to further my thought on the matter.

The *Dagg* case

[57] As mentioned earlier, the application Judge quoted (at paragraph 14 of her reasons) the following sentence from paragraph 94 of La Forest J.’s reasons in *Dagg*:

. . . information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is “personal information”. [Emphasis added by application Judge.]

[58] She later wrote at paragraphs 25 and 26 of her reasons:

In doing its job, the TSB must examine how individuals involved with the occurrence did their jobs. What caused the accident? Were there safety deficiencies? More pointedly, did the actions of the controllers or the pilots involved contribute to the occurrence? One significant way of evaluating the individual performances of the personnel is through the ATC communications. The ATC communications are used to assess the manner in which the air traffic controllers and the aircraft personnel chose to perform the tasks assigned to them. A simple way of looking at this information is that the sole purpose for the existence of the ATC communications is to carry out an evaluation of the performance of the parties to those communications in the event that something goes wrong.

For these reasons, I conclude that the ATC communications are “about” the individuals involved.

[59] In *Dagg*, the Court was called upon to determine whether copies of logs with the names, identification numbers and signatures of Department of Finance employees entering and leaving the workplace on weekends was information that “relates to the position or functions of the individual, as defined in the exception set out in s. 3(j) of the *Privacy Act*” (per Gonthier J. in *RCMP*, at paragraph 20; my emphasis).

[60] Speaking for the *Dagg* majority comprised of Lamer C.J., Sopinka, McLachlin [as she then was] and Iacobucci JJ., Cory J. agreed with La Forest J., dissenting, with whom L’Heureux-Dubé, Gonthier and Major JJ. concurred, that the names on the sign-in logs were “personal information” for the purpose of section 3 of the *Privacy Act*. However, he said that he arrived “at a different conclusion with respect to the application of s. 3 ‘personal information’ (j)” (paragraph 1).

[61] Cory J. stated the following (at paragraphs 5 and 6 of *Dagg*):

La Forest J. holds, at para. 94, that the purpose of s. 3(j) and s. 3(j)(iii) of the *Privacy Act* is:

. . . to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not “personal information”, even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is “personal information”. [Emphasis in original.]

I agree. Moreover, I agree with La Forest J. that “[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description”, such as “the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range” (para. 95).

[62] Cory J. said that he agreed in principle with that part of paragraph 94 of La Forest J.’s decision which contains the words also quoted by the application Judge in the case at bar. He further agreed with La Forest J. (at his paragraph 95) that “[g]enerally speaking, information relating to the position . . . will consist of the kind of information disclosed in a job description” such as “the terms and conditions associated with a particular position, including . . . qualifications, duties, responsibilities, hours of work and salary range”. However, Cory J. applied these conditions differently (paragraphs 8 and 9 of *Dagg*). He disagreed with La Forest J.’s conclusion that since the requested information was not about the nature of a position, but about the individual, it should be kept confidential. Cory J. for the majority held that the requested information “related to the position or functions of the individual” and was

excepted from “personal information”. He ordered that the requested information be released.

[63] Read in context, La Forest J.’s comment at paragraph 94 of *Dagg* (“the manner in which they choose to perform the tasks assigned to them is ‘personal information’”) properly relates only to officers and employees of government institutions, that is to the exception contained in paragraph 3(j) of the *Privacy Act*. This distinction between information relating to the position versus that relating to the person is inapplicable and indeed irrelevant in respect of the general definition of “personal information” (“information about an identifiable individual”) (see also *RCMP*, at paragraphs 37 and 38).

[64] NAV CANADA’s employees are not officers or employees of a government institution. So La Forest J.’s comments, concerning the salience of the distinction between information attaching to the position and that relating to specific individuals, are not applicable to them. The application Judge thus erred when she applied this distinction directly in the case at bar.

Paragraph 20(1)(b) of the *Access Act*

[65] Having concluded that the ATC communications at issue are not personal information under section 3 of the *Privacy Act*, I must address the alternative issue raised by NAV CANADA (the only responding party pleading this point), namely, whether the disclosure of such information is prohibited under paragraph 20(1)(b) of the *Access Act*, which reads:

Third Party Information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

. . .

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

[66] For this paragraph to apply, it must be shown that:

- (i) the information is financial, commercial, scientific or technical information;
 - (ii) the information is confidential;
 - (iii) the information is supplied to a government institution by a third party;
- and

(iv) the information has been treated consistently in a confidential manner by a third party.

[67] NAV CANADA claims that as part of its business it is required by law to maintain records of all radiocommunications between controllers and pilots. In the context of its unique business, NAV CANADA claims that ATC communications are “commercial” communications under [paragraph 20\(1\)\(b\)](#) of the [Access Act](#). It also says that because the tapes and transcripts are complex and difficult to understand, they constitute “technical” information.

[68] I disagree.

[69] Common sense with the assistance of dictionaries (*Air Atonabee Ltd v. Canada (Minister of Transport)* (1989), [1989 CanLII 10334 \(FC\)](#), 37 Admin. L.R. 245 (F.C.T.D.) (*Air Atonabee*), at page 268) dictates that the word “commercial” connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as “commercial”.

[70] It is also incorrect in my view to characterize the entire record collected during an air navigation flight as being “technical” information when only a specific part might be, for instance when precise flight instructions are given.

[71] The second requirement under the [paragraph 20\(1\)\(b\)](#) disclosure exemption is that the information in question must be confidential.

[72] The jurisprudence establishes that confidentiality must be judged according to an objective standard: the information itself must be “confidential by its intrinsic nature” (*Société Gamma Inc. v. Canada (Secretary of State)* (1994), [1994 CanLII 19529 \(FC\)](#), 27 Admin. L.R. (2d) 102 (F.C.T.D.), at paragraph 8 (*Société Gamma*); *Air Atonabee*; *Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare)* (1992), [1992 CanLII 15386 \(FC\)](#), 41 C.P.R. (3d) 512 (F.C.T.D.); *affd* (1992), [1992 CanLII 15456 \(FCA\)](#), 9 Admin. L.R. (2d) 161 (F.C.A.); *Merck Frosst Canada & Co. v. Canada (Minister of Health)*, [2005 FCA 215 \(CanLII\)](#), [2006] 1 F.C.R. 379 (F.C.A.)). In *Air Atonabee*, Mackay J. suggested the following approach to determine whether a particular record contained “confidential information” (at page 272):

. . . whether information is confidential will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely:

(a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,

(b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

(c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

This Court recently endorsed this approach in *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.* (2004), [2004 FCA 99 \(CanLII\)](#), 318 N.R. 242 (F.C.A.) (*Hi-Rise*).

[73] The burden of persuasion with respect to the confidential nature of the information clearly rests upon the responding parties (*Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency* (1999), 250 N.R. 314 (F.C.A.), at paragraph 3 (*Atlantic Canada*); *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)* (2003), [2003 FCA 257 \(CanLII\)](#), 6 Admin. L.R. (4th) 73 (F.C.A.), at paragraph 19). To satisfy their burden in this regard, the responding parties must provide “actual direct evidence” of the confidential nature of the information at issue (*Atlantic Canada*, at paragraph 3), which must disclose “a reasonable explanation for exempting each record” (*Wyeth-Ayerst*, at paragraph 20); “evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1)” (*Wyeth-Ayerst*, at paragraph 20).

[74] In my opinion, the evidence provided by NAV CANADA is plainly insufficient to discharge this burden on a balance of probabilities. NAV CANADA’s submissions with respect to this issue can be divided into three categories, which I will analyse in turn: first, NAV CANADA has maintained a consistent policy and practice of confidentiality of ATC communications; second, the reasonable expectations of pilots and controllers supports such confidentiality; and third, disclosure for investigative purposes only is in the public interest.

[75] First, NAV CANADA relies upon its own policies and consistent past practice to establish the confidentiality of the records at issue. Such evidence—which essentially only substantiates a heretofore unchallenged subjective belief that the records are confidential—is insufficient to satisfy the objective test (*Wyeth-Ayerst*, at paragraph 21). The evidence does not elaborate, by

reference to the information actually contained within the records at issue, as to how or why the information is objectively confidential. The fact that information has been kept confidential in the past—and NAV CANADA’s assertion in this regard is disputed by the Commissioner—is at most only a factor to be considered in determining whether the information is confidential for the purposes of paragraph 20(1)(b) (*Hi-Rise*, at paragraph 38; *Atlantic Canada*, at paragraph 4; *Société Gamma*, at paragraph 8; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, 1989 CanLII 9491 (FC), [1989] 2 F.C. 480 (T.D.), at page 487 (*Ottawa Football*)).

[76] Second, NAV CANADA suggests that there is a reasonable expectation of privacy in the ATC communications on the part of the pilots and controllers whose voices and utterances are recorded. NAV CANADA points in this regard to the confidentiality provisions of the collective agreements with its unions. This consideration cannot, however, be determinative of the status of this information under the [Access Act](#): private parties cannot through such agreements alone contract out of the express statutory provisions of the Access Act (*Hi-Rise*, at paragraph 38; *Ottawa Football*, at page 487). At most, such agreements may be taken into account in the final analysis, to support other objective evidence of confidentiality.

[77] Third, NAV CANADA argues that the ATC communications are produced to the Board on demand as required by law, for investigative purposes only. The confidentiality of these records, NAV Canada asserts, reflects Canada’s international obligations under Article 5.12, Annex 13 of the ICAO Convention (discussed above at paragraph 13 of these reasons), and is in the public interest.

[78] Considerations of the public interest are indeed relevant to the determination of whether the records at issue are confidential for the purposes of paragraph 20(1)(b): the jurisprudence recognizes that the maintenance of confidentiality is justified under the [Access Act](#) if it fosters a confidential relationship with public benefit (see *Hi-Rise*, at paragraph 38, *Air Atonabee*, at paragraph 41). In this regard, the considerations mandated by the Access Act appear consistent with Canada’s international obligations under Article 5.12, which directs the maintenance of confidentiality unless “disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations”. However, in the case at bar, NAV CANADA has provided no supporting explanation as to how or why the maintenance of confidentiality serves the public interest, in the circumstances of the records at issue. A bald assertion in this regard is insufficient to overcome the general right of access established by the Access Act.

[79] In my view, therefore, NAV CANADA has not satisfied its burden of showing that the ATC communications are confidential within the meaning of paragraph 20(1)(b). Since the first two requirements of paragraph 20(1)(b) are not met, I need not consider the other criteria of this provision. I conclude that the ATC communications at issue do not qualify for exemption from disclosure under [paragraph 20\(1\)\(b\)](#) of the [Access Act](#).

Conclusion in file A-165-05

[80] The appeal should be allowed with costs in this Court and the decision of the application Judge should be set aside. Rendering the decision she should have rendered, I would grant the four applications for judicial review and would order the Safety Board to disclose the requested records.

[81] The Commissioner is seeking costs throughout. Since the Commissioner, the Safety Board and the Attorney General had agreed not to seek costs against each other in the Federal Court, I find that I should not disrupt their agreement. No costs should therefore be awarded to the Commissioner against those parties in the Federal Court. Considering moreover that the Commissioner indicated, in the Federal Court, that he was not seeking costs against NAV CANADA, no costs should be awarded to the Commissioner against NAV CANADA.

File A-304-05

[82] The appellant appeals an order for costs in favour of NAV CANADA pronounced by the application Judge in an order dated June 8, 2005.

[83] Since I conclude, in file A-165-05, that the appeal should be allowed and the decision of the application Judge should be set aside, her order of costs cannot stand. This appeal should be allowed and her order as to costs should be set aside.

RICHARD C.J.: I agree.

EVANS J.A.: I agree.

TAB 36

Gordon v. Canada (Health), 2008 FC 258 (CanLII)

Date: 2008-02-27

File number: T-347-06

Other citations: 324 FTR 94 — 79 Admin LR (4th) 258 —
[2008] FCJ No 331 (QL)

Citation: Gordon v. Canada (Health), 2008 FC 258 (CanLII),
<<https://canlii.ca/t/1vxt3>>, retrieved on 2025-10-28

Date: 20080227

Docket: T-347-06

Citation: 2008 FC 258

BETWEEN:

MIKE GORDON

Applicant

and

THE MINISTER OF HEALTH

Respondent

and

PRIVACY COMMISSIONER OF CANADA

Intervener

REASONS FOR ORDERGIBSON J.

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INTRODUCTION

[1] By application filed the 24th of February, 2006, Mike Gordon (the “Applicant”) sought relief against the Minister of Health (the “Respondent”) by reason of the Respondent’s refusal

to disclose the field of “province” in the Canadian Adverse Drug Reactions Information System (“CADRIS”) database maintained by the Respondent. The relief sought by the Applicant is set out in the Memorandum of Fact and Law filed on his behalf in the following terms:

The Applicant requests that this Honourable Court:

- a) Orders [sic] the Respondent to release the field of province and that the field be added to the fields currently released;
- b) Orders [sic] the Respondent to maintain the public availability of the other fields currently released to prevent the Respondent from arbitrarily withdrawing any of these fields from public availability.
- c) Orders [sic] such further or other order as shall seem just to this Honourable Court.
- d) The whole, with costs.

[2] By Order dated the 14th of November, 2006, leave was granted to the Privacy Commissioner of Canada (the “Intervener”) to intervene in the application with all the rights normally associated with party status.

[3] These reasons follow the hearing of the application on the 4th of February, 2008.

BACKGROUND

[4] By letter addressed to the “ATI Coordinator, Health Canada”, dated the 23rd of August, 2001, on “CBC/Radio-Canada” letterhead, the Applicant, describing himself as Associate Producer Disclosure, CBC-TV, wrote:

Under the [Access to Information Act](#), I request access to and a copy of the database of adverse drug reactions. This database contains information from the “Report of suspected adverse reaction due to drug products marketed in Canada”...or any similar report or communication collected by the Bureau of Drug Surveillance’s Canadian Adverse Drug Reaction Monitoring Program.

One David McKie, apparently a colleague of the Applicant at CBC/Radio-Canada, later filed a similar request and he and the Applicant, at various times, pursued their requests together. Mr. McKie was not made a party to this proceeding and took no part in the hearing before the Court although it was his affidavit that was filed in support of the application.

[5] The Canadian Adverse Drug Reaction Information System (“CADRIS”) consists of a database containing information collected by the Respondent relating to domestic suspected adverse

reactions to health products, including pharmaceuticals, biologics, natural health products and radial pharmaceuticals marketed in Canada. For the purposes of the CADRIS system, “adverse reactions” may include adverse reactions to a particular product and such reactions occurring as a result of a reaction to a combination of medications. Information regarding such reactions is collected on a voluntary basis through reports provided by health professionals and consumers and on a mandatory basis from drug manufacturers. Approximately thirty-eight percent (38%) of the adverse reaction cases reported to the Respondent are derived from voluntary reporting. The remainder, approximately sixty-two percent (62%), are provided by drug manufacturers. The total number of adverse reaction case reports received by the Respondent in 2005 was ten thousand four hundred ten (10,410). At or about the 5th of July, 2006, the CADRIS database contained information derived from over one hundred eighty thousand (180,000) suspected adverse reaction reports received since 1965.

[1]

[6] An affiant on behalf of the Respondent attests in his affidavit filed in this matter:

The data provided in adverse reaction reports vary widely in quality, accuracy and completeness. Adverse reaction reports are the observations and suspicions of those making the report. It is very difficult to make conclusive cause and effect conclusions from the information provided in a given report. A full range of different considerations may have resulted in the adverse reaction, including the possible contribution of concomitant medication or therapies, the underlying disease, and the previous medical history. Furthermore, only a small portion of suspected adverse reactions are reported to the programme. In describing the “outcome” field on Health Canada’s website, the following statement is made:

“The outcome represents the outcome of the reported cases described by the reporter at the time of reporting and does not infer causal relationship. The outcome is not based on a scientific evaluation by Health Canada.”^[2]

[7] CADRIS contains approximately one hundred twenty-five (125) data fields of which approximately twenty-five (25) are “not used”. At the time this proceeding was commenced, approximately eighty-two (82) data fields had been disclosed to the Applicant. Of the remaining nineteen (19), three (3) were not disclosed because they are “always CDN”, four (4) were not disclosed because they were “always WHOART”, presumably a reference to the World Health Organization, and the remaining twelve (12) were not provided, in whole or in part, primarily for privacy reasons.^[3] Of the twelve (12), only one data field is the subject of this proceeding, that data

field being entitled “province”. In CADRIS terminology, “province” refers to the province from within which the report in question was received, thus, not necessarily indicating the province of residence of the individual who allegedly suffered the reaction.

[8] On the 30th of October, 2002, the Applicant’s colleague, David McKie, wrote to the Access to Information Commissioner, lodging a complaint “...over Health Canada’s refusal to release adverse drug reaction data in electronic form...”. There followed a protracted intervention on the part of the Commissioner’s office which concluded with a report to the Applicant from the office of the Commissioner dated the 12th of January, 2006. That report reads in part as follows:

On August 31, 2001, HCan [Health Canada] provided you with a fee estimate for the production of a paper copy of the records contained in its Canadian Adverse Drug Reactions Information System (CADRIS) database. On that same day, you complained about HCan’s response. As well, we investigated HCan’s contention that it was not possible to provide an electronic copy of the records because personal information contained in the database could not, in all cases, be electronically de-identified and protected.

As you know, I met you, your colleague, Dave McKie, and HCan officials on May 30, 2003, to expedite the resolution of your complaint. As a result, in October 2003, HCan provided you with a reconfigured electronic copy of the information contained in the CADRIS database (1965-2002), on a CD-ROM. Moreover, until September 9, 2005 HCan officials continued to work with you to improve the quality and user-friendly nature of the information provided. Then, on February 26, 2004, HCan provided a “final” response providing the majority of the information in the data fields.

What remained withheld were twelve fields: “ethnic group”, “notifier clinic”, “notifier hospital”, “notifier name”, “notifier city”, “notifier phone number”, “patient initials”, “patient identifier”, “province”, “date of birth”, “date of conception”, and “date of death”. The information was withheld pursuant to [subsection 19\(1\)](#) of the [Act](#). As a result of my meeting with HC officials on July 12, 2005, I am informed that, on September 9, 2005, HC made a further release to you of the “year of death”, “year of birth”, and “year of conception” information held within the database.

...

Having considered the evidence and representations put forward by both parties, I am satisfied that the remaining withheld fields contain information which, if disclosed, could reveal the identities of individuals. Consequently, I find that the withheld information is “personal” for the purposes of [subsection 19\(1\)](#) of the [Act](#). As well, I am satisfied that there is no consent from individuals for release of their personal information, that the withheld information is not publicly available and that none of the provisions of [section 8](#) of the [Privacy Act](#) authorize disclosure of the withheld information.

In finding that [subsection 19\(2\)](#) of the [Act](#) does not authorize disclosure, I have given particular attention to the provisions of [subparagraph 8\(2\)\(m\)\(i\)](#) of the [Privacy Act](#). Given the extensive amount of information already disclosed from CADRIS and the

need to protect anonymity in order to encourage voluntary reporting, I am not able to conclude that the public interest in disclosure clearly outweighs any invasion of privacy that could occur.

Given HC's final response of September 9, 2005, I consider this complaint to be resolved. I am grateful to you, and Mr. McKie, for the patience and cooperation you have shown throughout this investigation.

...

[emphasis added, references to the "Act" are, of course, references to the *Access to Information Act*]

[9] This proceeding followed. As earlier noted, the sole issue before the Court is non-disclosure of the CADRIS field of "province", which non-disclosure is justified by the Respondent under [section 19](#) of the *Access to Information Act*. Also as previously noted the term "province" in the CADRIS system relates to the province from which the report of an adverse reaction was received which in the majority of cases would not necessarily be the same province as the province of residence of the individual allegedly suffering the adverse reaction.

RELEVANT LEGISLATIVE PROVISIONS

[10] The relevant legislative provisions are extensive. They are set out in full in a schedule to these reasons. What follows is a brief description of the provisions set out in the schedule.

[11] This proceeding was initiated under [section 41](#) of the *Access to Information Act*^[4] (the "Act"). The provisions of the *Act* that are relevant to the proceeding are the following:

- [Section 2](#) of the *Act* sets out its purpose and its complementarity with other existing procedures for access to government information.
- [Section 3](#) of the *Act* defines, among other words and phrases, "Court" for the purposes of the *Act*, "government institution" for the purposes of the *Act*, and "record", for the purposes of the *Act*.
- [Section 19](#) of the *Act* provides a mandatory exemption from disclosure of "personal information" as defined in [section 3](#) of the *Privacy Act* and authorizes exemption from

that prohibition where, among other circumstances, the disclosure would be in accordance with [section 8](#) of the *Privacy Act*.

- [Section 41](#) of the *Act* provides the authority for the institution and disposition of proceedings such as this before this Court.
- [Section 48](#) of the *Act* deals with the “burden of proof” in a proceeding such as this.
- [Section 49](#) of the *Act* deals with the disposition by this Court of a proceeding such as this where the Court determines that refusal of disclosure is not authorized. [Section 19](#) of the *Act* is not referred to in [section 50](#) of the *Act*.
- The inclusion of the Department of Health in Schedule I to the *Act* has the effect of including that Department within the definition of “government institution” contained in [section 3](#).

[12] The following provisions of the *Privacy Act*^[5] are relevant:

- [Section 2](#) defines the purpose of the *Privacy Act*.
- [Section 3](#) of the *Privacy Act* defines, for its purposes and among other words and phrases, the expression “personal information” but excludes for certain purposes, including for the purposes of [section 19](#) of the *Act*, certain information that would otherwise fall within the definition.
- [Section 8](#) of the *Privacy Act*, and in particular on the facts of this matter, [subparagraph 8\(2\)\(m\)\(i\)](#), interrelates with the application of [paragraph 19\(2\)\(c\)](#) of the *Act*.

RELIEFS SOUGHT

[13] The reliefs sought on behalf of the Applicant are quoted in paragraph 1 of these reasons. The Respondent seeks dismissal of the application with costs. The Intervenor seeks no

specific relief.

THE ISSUES

[14] The Applicant urges at paragraph 56 of his Memorandum of Fact and Law that the following issues are raised by this application:

- a) What is the appropriate standard of review of Health Canada's decision not to disclose the field "province" contained in the CADRIS database?
- b) Does the disclosure of the field "province" requested constitute personal information? More specifically, does disclosing the field "province" allow for the identification of an individual, thus rendering other information, personal information as defined in [section 3](#) of the *Privacy Act*?
- c) Assuming the disclosure of the field "province" or "province" is not personal information under the *Privacy Act*, can Health Canada claim another exemption of the field "province" under the *Access to Information Act*?

[15] The Respondent reformulates the issues in his Memorandum of Fact and Law as follows:

- (a) Was Health Canada correct in concluding that the "province" field in the CADRIS database is subject to the mandatory exemption from disclosure in s. 19(1) of the *Access Act*?
- (b) Did Health Canada "abuse its discretion" in finding that disclosure under [s. 19\(2\)](#) of the *Act* ought not to occur?

[16] The intervener put forward no statement of issues in the Memorandum of Fact and Law filed on her behalf but provided extensive and very helpful submissions both in writing and orally at the hearing of this matter under the headings "The appropriate test to apply in determining whether information is "about an identifiable individual" and "Balancing of interest inherent in [paragraph 8\(2\)\(m\)\(i\)](#) of the *Privacy Act*." Subheadings under the first heading include "The importance of privacy in Canadian society".

[17] Standard of review, as referred to in the Applicant's list of issues is, of course, fundamental to the determination of all applications such as this. There is a substantial overlap between the remaining issues proposed on behalf of the Applicant and those proposed on behalf of the Respondent.

ANALYSIS

1. Standard of Review

[18] In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*^[6], Justice Gonthier, for the Court, in the context of a brief pragmatic and functional analysis and after quoting subsection 2(1) of the *Act*, wrote:

In my opinion, this purpose [of the *Access to Information Act*] is advanced by adopting a less differential standard of review. Under the federal scheme, those responsible for answering access to information requests are agents of a government institution. This is unlike the situation under many provincial access to information statutes, where information requests are reviewed by an administrative tribunal independent from the executive... . A less differential standard of review thus advances the stated objective that decisions on the disclosure of government information be reviewed independently of government. Further, those charged with responding to requests under the federal *Access Act* might be inclined to interpret the exceptions to information disclosure in a liberal manner so as to favour their institution... . As such, the exercise of broad powers of review would also advance the stated purpose of providing a right of access to information in records under the control of a government institution in accordance with the principle that necessary exceptions to the right of access should be limited and specific.

[citations omitted]

He concluded that, on the facts of the matter before him, many of the critical features of which are similar to the factual background in this matter, the appropriate standard of review was “correctness”.

[19] Counsel for the Applicant urges that, in this case, the Respondent was required to interpret section 3 of the *Privacy Act*. Consequently, counsel urges, the fact that the head of a government institution is here to interpret legislation, as in the above authority, militates in favour of providing broad powers of review. Thus, counsel urges the appropriate standard of review to be applied on the facts of this matter is “correctness”.

[20] Counsel for the Respondent urges that the foregoing should be qualified in circumstances where the Information Commissioner of Canada, as here, has expressed a view supporting the withholding of information on the grounds of privacy concerns. In *Canada (Attorney General) v. Canada (Information Commissioner)*^[7], my colleague Justice Dawson wrote at paragraph 84 of her reasons:

...Disclosure can only be ordered by the Federal Court in the event that, after the Commissioner concludes his investigation, either the requester or the Commissioner

seeks, pursuant to s. 41 or 42 of the *Act*, judicial review of any subsequent refusal to disclose a record. In such case, the Court will have the benefit of the Commissioner's investigation and report. Both this Court and the Federal Court of Appeal have held that the considered opinion of the Commissioner is a factor to be considered on judicial review in this Court. ...

[citations omitted]

I am satisfied that the foregoing is not inconsistent with the guidance provided by Justice Gonthier of the Supreme Court of Canada. Indeed, I am satisfied that it is entirely consistent with that guidance, given the independence from government of the Information Commissioner.

[21] Further, counsel for the Respondent urges, once a decision was reached by the Respondent to refuse to disclose the field of "province" because it constitutes personal information as defined in section 3 of the *Privacy Act*, greater deference is owed to a decision by the Respondent not to disclose that information because the exception to the general rule reflected in subsection 19(1) of the *Act* is entirely discretionary. The determination to not exercise discretion is based, on the facts of this matter, on a conclusion that disclosure would not be in accordance with section 8 of the *Privacy Act*. Thus, the exercise of discretion not to disclose involves an interpretation of law.

[22] In *Dagg v. Canada (Minister of Finance)*^[8] ("Dagg"), Justice LaForest wrote at paragraph [110]:

In *Kelly v. Canada (Solicitor General)*...Strayer J. discussed the general approach to be taken with respect to discretionary exemptions under the *Privacy Act*. He stated at p. 149:

It will be seen that these exemptions required two decisions by the head of an institution: first a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.

The first type of factual decision is one which, I believe, the Court can review and in respect of which it can substitute its own conclusion. This is subject to the need, I believe, for a measure of deference to the decision of those whose institutional responsibilities put them in a better position to judge the matter....

The second type of decision is purely discretionary. In my view in reviewing such a decision the Court should not itself attempt to exercise the discretion *de novo* but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith

and for some reason which is rationally connected to the purpose for which the discretion was granted.

In my view, this is the correct approach to reviewing the exercise of discretion under s. 8(2)(m)(i) of the *Privacy Act*.

[23] I am satisfied that the exercise of discretion under subsection 19(2) of the *Act* falls within the “second type of decision”, that is to say, a purely discretionary decision, referred to in the foregoing quotation.

[24] In the result, I am satisfied that the appropriate standard of review on this application is correctness subject to the two foregoing qualifications as urged on behalf of the Respondent; that is to say, that the fact that the Commissioner was involved in this matter and supported the decision of the Respondent to maintain the exemption of the field of “province” is a factor that should be considered by this Court as a qualification of the correctness standard of review in respect of the claimed exemption under subsection 19(1) of the *Act*, and that the decision by the Respondent not to exercise his discretion under subsection 19(2) to nonetheless release the substance of the field of “province” should only be reviewed to determine whether the discretion was exercised in good faith and for a reason rationally connected to the purpose for which the discretion was granted.

2. The determination that the field of “province” falls within subsection 19(1) of the *Act*

a) Personal Information

[25] “Personal Information” is defined in section 3 of the *Privacy Act*, for the purposes of that *Act*, as “...information about an identifiable individual that is recorded in any form...”. That broad definition is elaborated with nine (9) classes of information that are listed and that are indicated not to restrict the generality of the foregoing. Exceptions from the broad definition are then listed for the purposes, among others, of section 19 of the *Access to Information Act* with the only one of those exceptions that might possibly be relevant for the purposes of this matter being “information about an individual who has been dead for more than twenty years”. Much turns for the purposes of this matter on the interpretation of the word “about” in the general definition of “personal information”.

[26] Subsection 19(1) of the *Act* provides that the head of a government institution shall refuse to disclose any record requested under the *Act* that contains personal information as defined in section 3 of the *Privacy Act*. Subsection 19(2) provides a discretion to the head of a government institution to disclose personal information in three (3) circumstances, with the only one of those circumstances that is relevant for the purposes of this matter being if the disclosure is in accordance with section 8 of the *Privacy Act*.

[27] Subsection 8(1) of the *Privacy Act* prohibits disclosure of personal information without the consent of the individual to whom it relates except in accordance with subsection (2) of the same section. Subsection 8(2) provides that personal information may be disclosed in thirteen (13) listed circumstances, with the only one of which that is relevant for the purposes of this matter being in the following terms:

- (m) for any purpose where, in the opinion of the head of the institution,
 - (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
 - ...

[28] In *Dagg*^[9], Justice Laforest described the interpretation of section 19 of the *Act* as involving “...a clash between two competing legislative policies – access to information and privacy”. In *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*^[10] Justice Deschamps, for the majority, wrote at paragraph 26 of her reasons:

The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*.

Justice Deschamps concluded on this issue at paragraph 29:

...Thus, it is clear from the legislative scheme established by the *Access Act* and the *Privacy Act* that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information.

[emphasis added]

[29] At paragraph 28 of *Heinz, supra*, Justice Deschamps noted:
 ...the importance of this legislation is such that the *Privacy Act* has been characterized by this Court as “quasi-constitutional” because of the role privacy plays in the preservation of a free and democratic society:....
 [citations omitted]

[30] It is against this background that the decision of the Respondent to withhold disclosure of the field of “province” in the CADRIS database maintained by the Respondent must be reviewed.

b) Is the Substance of the field of “province” personal information?

[31] As earlier noted, the field of “province” does not necessarily identify the province of residence of the individual who suffered or would appear to have suffered an adverse drug reaction. Rather, that field discloses the location by province, and province includes Canada’s three (3) northern territories in this context, of the person, in the broadest sense of that term, filing the report. The issue thus becomes, is the substance of the field of “province” information about an identifiable individual?

[32] In *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*^[11], Madame Justice Desjardins, for the Court, wrote at paragraph [43]:

These two words, “about” and “concernant” [the French language equivalent of “about” in [section 3](#) of the *Privacy Act*], shed little light on the precise nature of the information which relates to the individual, except to say that information recorded in any form is relevant if it is “about” an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an “identifiable” individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available....

[citations omitted, emphasis added]

[33] Thus, information recorded in any form is information “about” a particular individual if it “permits” or “leads” to the possible identification of the individual, whether alone or when combined with information from sources “otherwise available” including sources publicly available.

[34] Counsel for the Privacy Commissioner, the Intervener, urged the adoption of the following test in determining when information is about an identifiable individual:

Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

I am satisfied that the foregoing is an appropriate statement of the applicable text.

[35] As previously noted, the burden of establishing that the Respondent was authorized to refuse to disclose the field of “province” in CADRIS is on the Respondent. Also as previously noted, in an effort to discharge this burden, the Respondent filed three (3) affidavits, those being of Bill Wilson, Head of the Database and Terminology Unit in the Marketed Health Products Directorate of Health Canada, of Ross Hodgins, Director, Access to Information and Privacy, Health Canada and of Ann Brown, a Senior Statistical Consultant in the Statistical Consultation Group of the Social Survey Methods division of Statistics Canada.

[36] None of the Respondent’s affiants were sought to be qualified as experts. All three (3) were cross-examined on their affidavits. Reasonably extensive answers to undertakings were provided.

[37] Under the heading “The Risk of Identification of Personal Information if the Province Field is Disclosed”, Mr. Wilson attested :

22. A first indication of such risk is the size of the pool of information in the database for the smaller provinces and territories. Statistics Canada preliminary post-censal estimates for January 1, 2006, indicates the population of Prince Edward Island, for example is 138,157 (compared to Ottawa at 865,500). In addition, there are only nine hospitals in the province. The territories also send Adverse Reaction reports and these have considerably smaller populations: Yukon 31,150, Northwest Territories 42,526 and Nunavut 30,245. The number of reports from these smaller provinces and territories is relatively small (in 2005, Prince Edward Island had 13 reports, Yukon had 5 reports, Northwest Territories had 3 reports and Nunavut had no reports). In conjunction with other information released, i.e. height, weight, age, reaction description and notifier type, links can be made to particular individuals.^[12]

[38] At paragraph 27 of his affidavit, Mr. Wilson attests:

As a further test of the ability of an outsider to obtain personal information, I examined publicly available information from the database in conjunction with

obituary information available on the internet. The combination of this information made it relatively easy to identify personal information if the province field was known. ...

He concluded at paragraph 28 of his affidavit:

...the identification of personal information is much more difficult without knowledge of the province field, because the number of AR [Adverse Reaction] reports and corresponding publicly available secondary information without knowledge of the province of origin can be very large. However, with the province field, identification of personal information matched with publicly available information such as obituary data or other information known to someone such as a neighbour or hospital worker, makes the identification of the individual extremely easy.

[39] Finally, in paragraphs 29 and 30 of his affidavit, Mr. Wilson attested as to an actual use of CADRIS database information already disclosed as follows:

The potential for the identification of personal information as described above is not merely theoretical. Even in the absence of province information, in 2003, the CBC used information from the CADRIS database, combined with obituary information, to identify and approach the family of a student aged 26 named Kathrina Agelidis about the possible connection between her medication and her death. The details of that report drawn from the CBC website are attached hereto... The table and other information provided...are among the other publicly available information provided on the CBC website in respect of this report.

The CBC report reflects some uncertainty as to whether or not the individual in question is the same person as disclosed in the CADRIS database line entry. Such uncertainty would be reduced substantially, or eliminated entirely, if the province field was provided as the Applicant has requested.

[40] Mr. Hodgins attested in response to the affidavit of David MacKie filed on behalf of the Applicant and relating to the process leading up to this matter and as to the basis for the exemption of the “province” field and to the considerations leading to the failure on the part of the respondent to exercise the discretion provided to the respondent under [subsection 19\(2\)](#) of the *Act*. With respect to the basis for exemption of the “province” field, he attested at paragraph 9 of his affidavit:

Health Canada determined that disclosure of the “province” field of the CADRIS database would result in disclosure of information about an identifiable individual, whether the reporter of information or the patients themselves. As set out in more detail in the Affidavit of Bill Wilson, this conclusion was based upon the fact that the number of entries in the database becomes extremely small if the province field is provided in conjunction with the other information publicly available, making the risk of disclosure of personal information very high... ^[13]

[41] In the affidavit of Ann Brown, she attests at paragraph 4:

In April, 2006 I was requested by Health Canada to prepare an assessment of the impact of disclosure of the “province” field on the ability of outsiders to identify unique or near-unique individual reports from the other publicly-available CADRIS database fields. Bill Wilson at Health Canada provided the CADRIS raw data to me in electronic form. I initially familiarized myself with the content and operation of the CADRIS data. This included identification of fields which could be used by someone attempting to link publicly available information in the database with a known individual or information about a known individual. The fields chosen were the following:

- (a) “year received at MHPD” (Marketed Health Products Directorate):
This corresponds to the year from the field “date received at MHPD” in the CADRIS database;
- (b) “outcome”: the “outcome” field;
- (c) “gender”: the “gender” field;
- (d) “age at reaction”: this corresponds to the field “age” in the CADRIS database.^[14]

[42] Ms. Brown concluded at paragraph 9 of her affidavit:

The columns [in Exhibit “A” to Ms. Brown’s affidavit] under the heading “After Adding Province” indicate how the number of reports in question changes if the “province” field is added. In the case of unique reports involving all five fields, for example, the number of unique reports increases by more than 16,000 when the “province” field is included.

“Unique reports” in the foregoing quotation represent situations in which there is only one (1) report for a particular combination of fields. For example, the four (4) fields involving a unique report might be: “year sent to MHPD = 2002; Outcome = Died Due to Adverse Reaction; Gender = Female: Age at Reaction = 26” the relevant combination of fields for the late Ms. Agelidis referred to in the quotation in paragraph [39] of these reasons.

[43] I am satisfied that the evidence of the Respondent’s three affiants, quoted in part above, when taken together, represents substantial evidence that disclosure of the province field would substantially increase the possibility that information about an identifiable individual that is recorded in any form would fall into the hands of persons seeking to use the totality of information disclosed from the CADRIS database, in conjunction with other publicly available information, to identify “particular” individuals.

[44] In written submissions contained in the Applicant's Memorandum of Fact and Law and in oral submissions on behalf of the Applicant at the hearing of this matter, the Applicant was substantially critical of the foregoing evidence. It was noted that all three (3) affiants, as previously noted in these reasons, stated that they were not being put forward as experts. In the result, counsel noted there was no "expert" evidence put forward on behalf of the Respondent concerning the likelihood that disclosing the field of "province" would allow the identification of particular individuals. Counsel noted that the following issues were not addressed in the Respondent's evidence: first, the fact that drug reactions are underreported; secondly, that the CADRIS database contains suspected drug reactions, which indicates that there may have been no drug reaction in specific cases; thirdly, the identity of the drug at issue; fourthly, the number of people in the province who might be taking a particular drug; fifthly, the fact that there is a potential six-month lag time after a report is received before the report would be included in the CADRIS database; and finally, the fact that the name of an individual allegedly experiencing a negative reaction is not in the CADRIS database and is not otherwise available publicly.

[45] Finally, it is worthy of note that no rebuttal evidence was put forward on behalf of the Applicant and that the concerns expressed in the Applicant's Memorandum of Fact and Law and put forward on the Applicant's behalf at hearing would appear to be those of a person or persons certainly no more "expert" than each of the Respondent's witnesses and certainly less expert and less familiar with the CADRIS database than the Respondent's affiants taken together.

[46] Counsel for the Applicant urges in conclusion on the evaluation of the evidence before the Court, at paragraph 80 of the Applicant's Memorandum of Fact and Law that:

The Respondents have completely failed to show that the addition of the field of "province" to other publicly released data would serve to increase or significantly increase the prospect of identifying an individual sufferer of a drug reaction.

[47] I disagree. I am satisfied that the Respondent has provided evidence to the Court sufficient to meet the burden placed on him by [section 48](#) of the *Act* to establish that he was authorized to refuse to disclose a record requested under the *Act* or a part thereof. Put another way, I am satisfied that the Respondent, on the evidence before the Court, was required to refuse to disclose

the content of the field of “province” pursuant to [subsection 19\(1\)](#) of the *Act*. The content of that field, in all of the circumstances of this matter, constitutes “personal information” as defined in [section 3](#) of the *Privacy Act*.

c) Failure of the Respondent to disclose the field of “province” in the CADRIS database pursuant to [subsection 19\(2\)](#) of the *Act*

[48] The issue before the Court with regard to the Respondent’s failure to exercise his discretion to disclose under [subsection 19\(2\)](#) of the *Act* is whether or not the requested information, that is the substance in the field of “province”, is such that its disclosure would have been in accordance with [section 8](#) of the *Privacy Act*.

[49] As earlier noted in these reasons, the only authority for disclosure under [section 8](#) of the *Privacy Act* on which it was urged the Respondent should rely is “...for any purpose where, in the opinion of the head of the institution, [here the Respondent], the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure...”. Further, also as previously noted, the Respondent, in considering whether or not he should exercise his discretion to disclose based upon a weighing of the public interest in disclosure against any invasion of privacy that could result, was required to bear in mind that the *Privacy Act* has been characterized as “quasi constitutional” because of the role privacy plays in the preservation of a free and democratic society.

[15]

[50] Counsel for the Applicant urges that access to the field of “province” is for more than mere curiosity, it is for the legitimate aim of informing the public regarding their health and safety without affecting Canadians’ privacy rights. She urges that the only evidence put forward on behalf of the Respondent is “...arbitrary, unscientific and purely anecdotal and...[is] riddled with assumptions and assertions that the risk of identification would significantly increase without a credible [evidentiary base] that this is the case.”

[51] The foregoing being said, the Applicant put forward no evidence contrary to that of the Respondent and in particular, no evidence how public health and safety would be enhanced if the

field of province were disclosed, without at the same time impinging on privacy rights.

[52] In *Dagg*^[16], Justice Laforest wrote at paragraph 113:

There is no evidence, as was the case in *Rubin, supra*, that the Minister failed to examine the evidence properly. It is apparent that he considered the appellant's request for public interest waiver in the light of the objects of the legislation and came to a determination that the public interest did not "clearly outweigh" the violation of privacy that could result from disclosure. This was a conclusion that he was entitled to make. For this Court to overturn this decision would amount to a substitution of its view of the matter for his. Such a result would do considerable violence to the purpose of the legislation and would amount to an unjustified usurpation of the Minister's statutory role.

[emphasis added]

I am satisfied that precisely the same might be said here, particularly in light of the support for the Respondent's determination not to exercise his discretion to disclose that was provided by the Access to Information Commissioner after lengthy involvement in the dispute between the Applicant and the Respondent over this request for access.

CONCLUSION

[53] For the foregoing reasons, this application will be dismissed.

COSTS

[54] The Respondent seeks his costs of this application. In the normal course of events, costs follow the outcome. I find no basis on the facts of this matter to vary from the normal course of events. The Respondent will have his costs as against the Applicant.

[55] There will be no costs in favour of or against the Intervener.

"Frederick E. Gibson"

JUDGE

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-347-06

STYLE OF CAUSE: MIKE GORDON AND THE MINISTER OF HEALTH
AND THE PRIVACY COMMISSIONER OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 4, 2008

REASONS FOR ORDER: GIBSON J.

DATED: FEBRUARY 27, 2008

APPEARANCES:

Ms. Julie Thibault	FOR THE APPLICANT
Mr. John Tyhurst and Mr. Kris Klein	FOR THE RESPONDENT
Mr. Steven Welchner and Ms. Nathalie Daigle	FOR THE INTERVENER

SOLICITORS OF RECORD:

Legal Services Canadian Broadcasting Corporation Ottawa	FOR THE APPLICANT
Heenan Blaikie LLP Ottawa	FOR THE RESPONDENT
Welchner Law Office Professional Corporation Ottawa	FOR THE INTERVENER

SCHEDULE

2. (1) The purpose of this [Act](#) is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

(2) This [Act](#) is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

3. In this [Act](#),

...

"Court" means the Federal Court;

...

"government institution" means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

...

"record" means any documentary material, regardless of medium or form;

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.

3. Les définitions qui suivent s'appliquent à la présente loi.

...

«Cour» La Cour fédérale.

...

«institution fédérale»

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la *Loi sur la gestion des finances publiques*.

...

«document» Éléments d'information, quel qu'en soit le support.

...

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this [Act](#) that contains personal information as defined in [section 3](#) of the *Privacy Act*.

2) The head of a government institution may disclose any record requested under this [Act](#) that contains personal information if

...

(c) the disclosure is in accordance with [section 8](#) of the *Privacy Act*.

...

41. Any person who has been refused access to a record requested under this [Act](#) or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

...

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this [Act](#) or a part thereof shall be on the government institution concerned.

49. Where the head of a government institution refuses to disclose a record requested under this [Act](#) or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the r

...

19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'[article 3](#) de la *Loi sur la protection des renseignements personnels*.

(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

...

c) la communication est conforme à l'[article 8](#) de la *Loi sur la protection des renseignements personnels*.

...

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

...

48. Dans les procédures découlant des recours prévus aux [articles 41](#) ou [42](#), la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi

record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate

autres que celles mentionnées à l'article 50, or donne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

...

SCHEDULE I
(Section 3)

GOVERNMENT INSTITUTIONS

DEPARTMENTS AND MINISTRIES OF
STATE

...

Department of Health

...

...

ANNEXE I
(article 3)

INSTITUTIONS FÉDÉRALES

MINISTÈRES ET DÉPARTMENTS D'ÉTAT
E

...

Ministère de la Santé

...

Privacy Act

Hghgh...

2. The purpose of this [Act](#) is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

3. In this [Act](#),

.....

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

.....

...

2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

3. Les définitions qui suivent s'appliquent à la présente loi.

...

« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

...

but, for the purposes of [sections 7, 8 and 26](#) and [section 19](#) of the *Access to Information Act*, does not include

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'[article 19](#) de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :

.....X.....

(m) information about an individual who has been dead for more than twenty years;

...

m) un individu décédé depuis plus de vingt ans.

XXXXXX.....

Xxxxx88(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

...

8(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

XXXXXX.....

(m) for any purpose where, in the opinion of the head of the institution,

...

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(i) des raisons d'intérêt public justifient nettement une éventuelle violation de la vie privée,

XXXXXX.....

...

[1] The brief description of the CADRIS system contained in this paragraph is extracted from paragraphs one to ten of the affidavit of Bill Wilson filed in this matter and sworn the 5th of July, 2006.

[2] Paragraph 7 of the affidavit of Bill Wilson referenced in footnote 1.

[3] Respondent's Application Record pages 15-18, Exhibit C to the affidavit of Bill Wilson referenced in footnote 1.

[4] R.S., 1985, c. A-1.

[5] R.S.C. 1985, c. P-21.

[6] 2003 SCC 8 (CanLII), [2003] 1 S.C.R. 66.

[7] (2004), 2004 FC 431 (CanLII), 32 C.P.R. (4th) 464 (F.C.).

[8] 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403 (Justice LaForest in dissent but concurring with the Majority on this point).

[9] *Supra*, footnote 8.

- [10] 2006 SCC 13 ([CanLII](#)), [2006] 1 S.C.R. 441.
- [11] 2006 FCA 157 ([CanLII](#)), [2007] 1 F.C.R. 203 (F.C.A.).
- [12] Respondent's Application Record, volume 1, page 0008.
- [13] Respondent's application Record, volume 1, pages 0067 and 0068.
- [14] Respondent's Application Record, volume 1, page 0062.
- [15] See the brief quotation in paragraph [29] of these reasons.
- [16] *Supra*, footnote 8.

TAB 37

Morgan v. Alta Flights (Charters) Inc., 2006 FCA 121 (CanLII)

Date:	2006-03-21
File number:	A-184-05
Other citation:	350 NR 93
Citation:	Morgan v. Alta Flights (Charters) Inc., 2006 FCA 121 (CanLII), < https://canlii.ca/t/1mx16 >, retrieved on 2025-10-28

Date: 20060321

Docket: A-184-05

Citation: 2006 FCA 121

CORAM: SEXTON J.A.
 EVANS J.A.
 MALONE J.A.

BETWEEN:

JANICE MORGAN

Appellant

and

ALTA FLIGHTS (CHARTERS) INC.

Respondent

and

THE PRIVACY COMMISSIONER OF CANADA

Added Respondent

Heard at Edmonton, Alberta, on March 21, 2006.

Judgment delivered at Edmonton, Alberta, on March 21, 2006.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

SEXTON J.A.

MALONE J.A.

Date: 20060321

Docket: A-184-05

Citation: 2006 FCA 121

CORAM: SEXTON J.A.

EVANS J.A.

MALONE J.A.

BETWEEN:

JANICE MORGAN

Appellant

and

ALTA FLIGHTS (CHARTERS) INC.

Respondent

and

THE PRIVACY COMMISSIONER OF CANADA

Added Respondent

REASONS FOR JUDGMENT

(Delivered from the Bench at Edmonton, Alberta, March 21, 2006)

EVANS J.A.

[1] This is an appeal from a decision of Simon Noël J. of the Federal Court dismissing a complaint by Janice Morgan under section 14 of the *Personal Information Protection and Electronic Documents Act*, S.C. 200, c. 5 ("*PIPEDA*"), alleging that her employer, Alta Flights (Charters) Inc., had collected personal information without her consent or knowledge in breach of her rights under *PIPEDA*. The decision is reported as *Morgan v. Alta Flights (Charters) Inc.*, 2005 FC 421.

[2] We are not persuaded that, in concluding that no conversations were ever in fact recorded on the recording device hidden in the employees' smoke room, the Judge committed an error of law, or that his finding of fact was vitiated by palpable and overriding error based on the evidence before him.

[3] Counsel for Ms. Morgan also argued that even if, contrary to his submission, the Judge's finding of fact stands, he erred in law by failing to conclude that the employer was

nonetheless engaged in the act of collecting information and that this activity constituted "collects" for the purpose of paragraph 4(1)(a) of *PIPEDA*.

[4] We do not agree. In our view, since it was not proved that any conversations had been recorded when the device was discovered, the activities in question constituted merely an unsuccessful attempt to collect personal information. *PIPEDA* does not expressly prohibit attempts to collect personal information and the word "collects" cannot be interpreted to include them.

[5] For these reasons, and despite the able arguments of counsel, the appeal will be dismissed without costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-184-05

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE NOËL DATED MARCH 29, 2005, DOCKET NO. T-1066-04)

STYLE OF CAUSE: JANICE MORGAN v. ALTA
FLIGHTS (CHARTERS) INC. AND THE PRIVACY COMMISSIONER OF CANADA

PLACE OF HEARING: EDMONTON

DATE OF HEARING: MARCH 21, 2006

REASONS FOR JUDGMENT OF THE COURT BY: SEXTON, EVANS, MALONE J.J.A.

DELIVERED FROM THE BENCH BY: EVANS, J.A.

APPEARANCES:

MR. BOB BLAIR FOR THE APPELLANT

MR. GREG J. LINTZ FOR THE RESPONDENT - ALTA FLI
GHTS (CHARTERS) INC.

MR. STEVEN WELCHNER FOR THE RESPONDENT - PRIVACY
COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

BLAIR CHAHLEY SEVENY FOR THE APPELLANT

Edmonton, Alberta

TARRABAIN & COMPANY

Edmonton, Alberta

WELCHNER LAW OFFICE

Ottawa, Ontario

FOR THE RESPONDENT - ALTA FLI
GHTS (CHARTERS) INC.

FOR THE RESPONDENT - PRIVACY
COMMISSIONER OF CANADA

TAB 38

Ontario (Attorney General) v. Pascoe, 2002 CanLII 30891 (ON CA)

Date: 2002-11-08
File number: C38093
Other citations: 118 ACWS (3d) 1 — 166 OAC 88 — 22 CPR (4th) 447 —
[2002] OJ No 4300 (QL)
Citation: Ontario (Attorney General) v. Pascoe, 2002 CanLII 30891
(ON CA), <<https://canlii.ca/t/1chz2>>, retrieved on 2025-10-28

DATE: 20021108
DOCKET: C38093

COURT OF APPEAL FOR ONTARIO

**RE: ATTORNEY GENERAL FOR ONTARIO (Applicant/
Appellant) – and – IRENA PASCOE, ADJUDICATOR, JOHN
DOE, REQUESTER and JOHN Q. DOE, AFFECTED PERSON
(Respondents/Respondents in appeal)**

BEFORE: MORDEN, DOHERTY and FELDMAN JJ.A.

COUNSEL: Elaine Atkinson for the appellant

Peter M. Jacobsen for the respondent/requester

**Christopher D. Bredt and Rema J. Imseis for the respondent
Information and Privacy Commissioner**

HEARD: November 5, 2002

On appeal from the decision of the Divisional Court dated December 17, 2001.

ENDORSEMENT

[1] The appellant's basic submission is that the Divisional Court erred in its review of the Commissioner's decision that the record in question did not contain "personal information" within the meaning of this term in s. 2(1) and s. 21 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. Specifically, the appellant submits that the Divisional Court erred in holding that "detailed and convincing evidence" was required to establish that the affected person was identifiable within the meaning of the term "personal information" in s. 2(1) of the Act.

[1] There are two relevant and important matters that are not in dispute. The first relates to the substantive test which should be applied, which the Commissioner set forth in her reasons. It is:

If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

[2] The second relates to the applicable standard of review to be applied by the Divisional Court. It is that of reasonableness. This was accepted by the Divisional Court.

[3] Further, it is agreed that the onus is on the Ministry on the question of whether the information was "personal information". The appellant submits that the "detailed and convincing" test applied by the Divisional Court in its review of the Commissioner's decision is unreasonably high. At this point, we observe that the Commissioner herself did not use the "detailed and convincing" expression. She merely said that, on the material before her, she was "not persuaded" or "not satisfied" that the information in question was personal information.

[4] We note that the impugned formulation of the test has been used to express the onus to bring a case within one of the exemptions in the Act (see ss. 12-23), and that in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)*, (1998) 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464 at 476 (C.A.) it was held that these words have been used by the Supreme Court of Canada "to describe the quality of evidence required to satisfy the burden of proof in civil cases."

[5] Notwithstanding this latter point, having regard to the substantive test of what is "personal information", referred to in paragraph 2 above, we think that reference to an evidentiary standard of "detailed and convincing evidence" is too demanding to be realistically appropriate. What is required to satisfy or persuade the Commissioner, on the balance of probabilities, will depend on the circumstances of a case and the issues arising in it.

[6] Having regard for the record before the Commissioner, we do not think that in the present case the formula used in the Divisional Court's reasons resulted in any material error. There was a distinct paucity of evidence before the Commissioner on which she could be satisfied or persuaded that the substantive test had been met. Accepting that the proper standard of review on application for judicial review is that of reasonableness, we

are satisfied that her decision that the information in question was not personal information could not be said to be unreasonable.

[7] The appeal is dismissed. Neither the appellant nor the respondent Commissioner seeks costs. The respondent requester is entitled to his costs of the appeal payable by the appellant. Submissions on his behalf respecting quantum should be delivered within seven days and the appellant should deliver its response to them within five days of their receipt.

“J.W. Morden J.A.”

“D. Doherty J.A.”

“K. Feldman J.A.”

TAB 39

Ontario (Labour) (Re), 2011 CanLII 63499 (ON IPC)

Date: 2011-10-04
File number: PO-3000; PA11-431
Citation: Ontario (Labour) (Re), 2011 CanLII 63499 (ON IPC),
<<https://canlii.ca/t/fndx2>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3000

Appeal PA11-431

Ministry of Labour

October 4, 2011

Summary: On August 12, 2011, the Ministry of Labour (the ministry) issued an interim decision and fee estimate to the requester, more than 30 days after receiving the request. The ministry is of the view the interim decision and fee estimate was issued within the 30 day timeframe imposed by the *Freedom of Information and Protection of Privacy Act* (the *Act*), as it had to clarify the request prior to issuing the decision. The order states that the request was clear and the efforts of the ministry are not consistent with the clarification envisioned by [section 24\(2\)](#) of the *Act*. As such, the ministry is found to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act*, and is ordered to issue a final access decision within one week of the date of this order, without any further time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as am., ss. 24, 26, and 29.

Orders and Investigation Reports Considered: Orders PO-2634, P-81.

BACKGROUND:

[1] On June 20, 2011, the Ministry of Labour (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act*, (the Act) dated June 17, 2011.

[2] The request was for access to the following information:

Our firm is requesting information relating to the amendments made to the *Regulation respecting Asbestos on Construction Projects and in Buildings and Repair Operations* – made under the *Occupational Health and Safety Act*, which took effect in November 2005.

Specifically, we request the following information:

1. Any discussion papers, consultation papers, or policy papers prepared by the Ministry of Labour, in relation to amendments to this Regulation.
2. Any and all stakeholder or other party submissions and responses to any such discussion papers, consultation papers, policy option papers, or draft proposed amendments to the Regulation, received by the Ministry in relation to the amendments to this Regulation.
3. Any and all copies of empirical data or factual information used by the Ministry of Labour, in the Ministry's formulation of the amendments to the Regulation, including, but not limited to,
 - a) information on the incidence or prevalence of asbestos-related disease in Ontario;
 - b) information on exposures to asbestos in Ontario workplaces;
 - c) information on exposure risk associated with non-friable asbestos containing materials;
 - d) information on costs associated with compliance with the Regulation respecting Asbestos on Construction Projects and in Buildings and Repair Operations, from the period 1985 to 2004;
 - e) projections or estimates relating to expected reductions in asbestos exposure or asbestos disease risk resulting from the amendments to the Regulation that took effect in November 2005.

4. Any analysis of the potential costs and benefits that might be associated with the amendments to the Regulation, including but not limited to, potential compliance-related costs for municipal governments, hospitals, educational institutions, and the Government of Ontario.

[3] On August 12, 2011, the ministry wrote to the requester to provide him with a fee estimate and interim decision for processing the request. This decision also indicated that if the requester pays the deposit, it will be necessary for the ministry to extend the time for issuing a final access decision, pursuant to [section 27\(1\)](#) of the *Act*. The ministry did not specify how long the time extension would be.

[4] On August 23, 2011, the ministry received the requester's fee deposit, indicating he wished to proceed with the request.

[5] On the same day, the ministry wrote to the requester indicating that, under [section 27\(1\)](#) of the *Act*, it was extending the time for issuing a final access decision by an additional 60 days to October 21, 2011. The reason given for doing so was that the request would necessitate a search through a large number of records and the ministry currently has a number of other requests it is processing that also involved a large number of records.

[6] On September 8, 2011, the requester (now the appellant) appealed the ministry's time extension decision. Appeal PA11-431 was opened.

[7] This appeal was assigned to me to determine if the time extension decision was issued within the timeframe mandated under the *Act*.

[8] I spoke with an analyst at the ministry on September 15, 2011, and indicated that it appeared as though the ministry was in a deemed refusal situation as it had not issued its fee estimate and interim decision within the 30 days mandated under [section 26](#) of the *Act*.

[9] The analyst submitted that the ministry had attempted to clarify the request with the appellant on July 13, 2011. After speaking with the appellant, the ministry indicated that it was in a position to proceed with the request as it was originally submitted. From the information provided to me by the parties to this appeal, it appears that this was the only time the ministry spoke to the appellant regarding a clarification of the request.

[10] In the ministry's view the issuance of the August 12, 2011 fee estimate and interim decision, "stopped the clock" on the 30th day of the timeline contemplated in [section 26](#) of the *Act*. It is the ministry's position therefore that the time extension decision was issued within the 30 day timeframe imposed by the *Act*.

[11] The appellant submits that his request was clear, and that no changes were made to it when the ministry contacted him on July 13th, 2011.

[12] During the time period of September 16 to the 20th, 2011, I attempted to assist the parties in reaching a mutually agreeable date for the issuance of a final access decision. It was not possible to informally resolve this matter and as a result, on

September 22, 2011, this office sent a notice of inquiry to both the appellant and the ministry stating that the ministry is in a deemed refusal position. The notice also advised that if a decision was not issued by September 29, 2011, I would be in a position to issue an order requiring the ministry to provide a decision letter to the appellant.

[13] On September 27, 2011, the Freedom of Information Coordinator (FOIC) for the ministry contacted me to communicate that she felt the ministry's analyst in charge of the request had not been given an opportunity to provide all the relevant documents that show the ministry's efforts to understand the request in order to adequately identify the responsive records.

[14] In order to ensure that I had a full understanding of the sequence of events leading up to the appellant's filing of this appeal, I allowed the FOIC an opportunity to provide me with information that would show that a clarification was sought pursuant to [section 24\(2\)](#) of the [Act](#). The FOIC was given until September 30, 2011 to provide the additional information.

[15] On September 30, 2011, the FOIC sent an email to me that reiterated the ministry's view that the request of June 20, 2011, did not provide sufficient detail to enable an experienced employee of the ministry, upon a reasonable effort, to identify the records. The ministry submits it was only in a position to move forward with the request on July 13, 2011. The ministry also provided numerous attachments of internal emails that show that the analyst was in discussion with the program area responsible for the responsive records. These discussions focused on determining what records were responsive and vacation and staffing issues that appeared would impede a timely response to the appellant's request.

[16] The threshold issue raised by this appeal therefore is whether the request required clarification and if so, was the request properly clarified? If the answer is negative, then the institution may be in a deemed refusal situation.

DISCUSSION:

[17] The issues raised by this appeal relate to [sections 24, 26](#) and [29](#) of the [Act](#).

[18] Section 24 states, in part:

24(1) A person seeking access to a record shall,
 (a) make a request in writing to the institution that the person believes has custody or control of the record;
 (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
 (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[19] Section 26 sets out the time for responding to the request as follows:

26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[20] Section 29(4) sets out the parameters for a deemed refusal situation as follows:

29(4) A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[21] The first issue before me is whether the request required clarification and if it was properly clarified?

[22] Section 24(1)(b) requires that the request "provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record." Section 24(2) states:

If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[23] The mandatory section 24(2) requires the institution to undertake the process of clarifying a request that is not sufficiently detailed, and until the request is "clarified", the 30-day time limit for responding does not begin (see Order 81).

[24] Senior Adjudicator John Higgins stated in Order PO-2634 that,

... the character of any discussions that take place concerning the scope of a previously-submitted request is crucial for determining the date it is considered to have been submitted. I agree with former Commissioner Wright that unilateral narrowing by a requester, subsequent to filing an initial request, is not "clarification" for the purposes of section 24(2), and in such a case, the 30-day time limit begins to run on the date the request was first received by the institution.

[25] I adopt this approach for the purpose of this matter. The ministry has communicated that it made considerable efforts at the outset of receiving the appellant's request to understand what records would be responsive. The program area of the ministry responsible for the records was understaffed and the ministry had difficulty initially determining which records would be responsive to his request. The ministry states that clarification of the request was attempted with the appellant on July 13, 2011; 24 days after receiving the request and consulting with its program area. As a result of this

contact with the appellant, the ministry proceeded with processing the request in its original form. The request was not changed or clarified.

[26] While I appreciate the efforts taken by the ministry to respond to the request in a timely manner given its staffing issues, I do not agree that these efforts constituted a "clarification" of the request pursuant to [section 24\(2\)](#) of the *Act*. I am not satisfied that anyone at the ministry took any steps to clarify the request itself, but rather the ministry had difficulty determining what records were responsive due to the lack of knowledgeable staff available to assist with processing the request.

[27] Based on the information received from the ministry and my review of the request, as it stands, reproduced in the first part of this order, I find it to be clear and not in need of clarification. The clarity of the request is supported by the fact the ministry produced an index of responsive records that it attached to its fee estimate and interim decision based on the request as it was submitted, with no clarification.

[28] Accordingly, the fee estimate and interim decision and time extension decision claimed by the ministry were issued more than 30 days after receiving the request, which I have found not to have required clarification. I find that the ministry is therefore in a deemed refusal position pursuant to [section 29\(4\)](#) of the *Act*.

ORDER:

1. I order the ministry to issue a final access decision to the appellant regarding access to the records in accordance with the *Act* without recourse to any further time extensions, no later than Tuesday, **October 11, 2011**.
2. In order to verify compliance with Provision 1 of this order, I order the ministry to provide me with a copy of the decision letter referred to in Provision 1 no later than Tuesday, October 11, 2011. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8.

Original Signed By: _____

October 4, 2011 _____

Suzanne Brocklehurst

TAB 40

University of Ottawa (Re), 2012 CanLII 2818 (ON IPC)

Date: 2012-01-25
File number: PO-3043; PA11-501
Citation: University of Ottawa (Re), 2012 CanLII 2818 (ON IPC),
<<https://canlii.ca/t/fpsg7>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3043

Appeal PA11-501

University of Ottawa

January 25, 2012

Summary: An individual submitted a request for records related to communications between the president of the university and the individual who was hired as the president's Chief of Staff. The university declined to process the request as submitted, taking the position that it required clarification. Having concluded that the appellant was refusing to clarify the request, the university closed the request file and refunded the fee. Upon appeal to this office, and an unsuccessful effort to reach a mediated resolution, the adjudicator found that in closing the request file, the university failed to meet its statutory obligations under [sections 26](#) and [29](#) of the [Act](#). The university is ordered to issue an access decision in response to the request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 24(1)(b), 24(2), 26-29.

Orders and Investigation Reports Considered: Orders P-260, and MO-2116.

BACKGROUND:

[1] On September 19, 2011, the appellant submitted an access request to the University of Ottawa (the university) that stated:

By virtue of the *Freedom of Information and Protection of Privacy Act* of Ontario, I hereby request the following records:

All records:

- 1) Sent by [the university President] and received by [an identified individual]
- 2) Sent by [the identified individual] and received by the [university President]

The respondent period is from six months prior to [the identified individual's] hiring as [the university President's] Chief of Staff to present.

Please contact me if you need any clarifications about my request. As always for my requests, please provide the respondent records on CD to avoid paper cost.

[2] On September 22, 2011, the university wrote to the appellant, stating that the request was too broad to permit the identification of responsive records. The university asked the appellant to specify the subject matter and key words so that the request could be processed. The university also advised the appellant that:

Depending on the clarification you give us, we may be obliged to extend the 30-day response period provided by the [*Act*].

We would be pleased to answer any questions or assist you in clarifying or reformulating your request. ... If we do not hear from you within 30 days of this letter's date, we will close your file.

[3] On September 29, 2011, the appellant sent an email to the university, stating that he considered his request to be "clear and unambiguous." The appellant requested that the university:

... process my clear and unambiguous request immediately, otherwise I will file you in deemed refusal on October 19, 2011. October 19 is your thirty day deadline from the date of my request.

[4] The university subsequently sent the appellant a letter on October 17, 2011 advising him that it could not process his request as submitted. The university indicated

that as a consequence of his "refusal to provide clarification", it was closing the file and returning the request fee.

[5] Upon receipt of the university's October 17, 2011 letter, the appellant sent another email to the university on October 20 regarding the decision to close his request file. In the email, the appellant referred to sections 24(1)(b) and 24(2) of the *Act* and maintained that he had already provided sufficient detail to process the request. The appellant also wrote:

I ask that you reconsider your position and provide me with the requested email records.

As I stated in response to your September 22 letter ... my request was clear and unambiguous. The search would require only retrieving all records sent from [the university's President] to [his Chief of Staff] and vice-versa. Identifying the responsive email records would be a quick and simple task given the efficiency of e-mail search tools. In fact, were I to provide "a specific subject matter and ... key-words" as you requested in your September 22 letter, that would only lengthen the search time for responsive records in this case.

Whether or not you will have a large number of records to review for disclosure following the search for all e-mail records sent between [the two identified individuals] is a separate matter and is not the question at issue in your refusal of my request.

[6] On October 26, 2011, the appellant sent an email asking whether the university would be responding to his email of October 20. The university responded by advising the appellant that he could appeal its decision of October 17, 2011 (to close the appeal file) by contacting the Commissioner's office. On November 2, this office received the appellant's appeal.

[7] The mediator appointed to explore resolution of the appeal confirmed with the appellant that he seeks email records relating to "all matters" passing between the two identified individuals, where one of the identified individuals was the author and the other was either the primary recipient or had been copied on the email. The mediator conveyed this information to the university, but the university declined to change its position. Accordingly, the appeal was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

[8] I sent a Notice of Inquiry to the university, initially, to outline the issue and to seek representations. I received a brief response to the Notice of Inquiry in which the university stated only that it "does not have additional factors to raise." I am therefore issuing this order, without seeking representations from the appellant, to deal with the completion of the appellant's request by the university.

DISCUSSION:

WAS THE UNIVERSITY'S RESPONSE TO THIS REQUEST ADEQUATE?

[9] As stated, the correspondence from the university that I received on January 23, 2012 was provided in response to the December 30, 2011 Notice of Inquiry. In that document, I stated:

Based on my review of the file, I have formed the preliminary opinion that the request submitted by the appellant known as A11-44 is sufficiently detailed for the purpose of [section 24\(1\)](#) of the *Act*, and that the university ought to have processed it accordingly, rather than closing the file and returning the request fee.

Specifically, in my view, it appears that the requester is seeking access to all emails exchanged between [the two identified individuals] for the period starting six months prior to the latter individual's hiring as [the university President's] Chief of Staff up to, and including, September 19, 2011.

I am offering the university an opportunity to provide representations in response to my preliminary opinion, set out above, and with reference to the relevant portions of the following issue outline.

[10] Next, I set out the provisions of [section 24](#) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) and associated principles developed in past orders of this office. Specifically, I noted that section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section of the Notice of Inquiry stated:

24(1) A person seeking access to a record shall,

- (a) make a request in writing to the institution that the person believes has custody or control of the record;
- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, any ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Orders P-880 and PO-2661].

Did the request provide sufficient detail to identify the records responsive to the request?

What is the scope of the request and what records or portions of records may be responsive to the request?

Please explain the university's decision, based on its view that the request did not sufficiently describe the records sought, to close the request file [emphasis in original].

[11] As indicated previously, the university advised that it has nothing further to add in response to the outline of the issue, and questions posed, in the Notice of Inquiry.

Analysis and findings

[12] In the December 30, 2011 Notice of Inquiry sent to the university, I stated that I had formed the preliminary opinion that the appellant's request is sufficiently detailed for the purpose of [section 24\(1\)](#) of the *Act*. I also expressed the view that the university ought to have processed the request, rather than closing the file and returning the fee paid by the appellant.

[13] The university did not provide any explanation in response to the Notice of Inquiry that would assist me in understanding why it chose to respond to the appellant's request in the manner it did.

[14] Moreover, based on my consideration of the appellant's request, I am satisfied that it concisely and clearly conveys the subject matter of his interest. I note that the appellant stated (in an October 20, 2011 email), and the mediator clarified, that the appellant sought access only to *email* records.

[15] With reference to [section 24\(1\)\(b\)](#) of the *Act*, I find that no further information or clarification ought to have been required to enable an experienced employee of the university to identify the records, even though the request may be broad in scope. Additionally, even if the request is broad in scope, I conclude that the request did not require reformulation in order to comply with section 24(1) (Order P-260).

[16] In fact, I tend to agree with the appellant that "... Identifying the responsive email records would be a [relatively] quick and simple task given the efficiency of e-mail search tools." I also agree that the volume of records the university might identify and be required to review for disclosure following the search for responsive records is a separate matter that could be addressed by [section 27\(1\)\(a\)](#) of the *Act*.

[17] I appreciate that the university may initially have approached the issue of clarification with the appellant in an attempt to provide him with an indication of the anticipated breadth of the request's scope. Indeed, clarification of the scope of a request and a requester's specific areas of interest are key aspects of the access procedure outlined in [sections 24 to 30](#) of the *Act*. In Order P-260, former Assistant Commissioner Tom Mitchinson concluded that the institution in that appeal was not obliged under [section 24\(2\)](#) of the *Act* to contact that particular requester for clarification. The former Assistant Commissioner cautioned that his comments ought not:

... to be interpreted as discouraging institutions from contacting requesters during the course of responding to a request, if it is felt that the requester may not be aware of the scope of the request and the corresponding fee implications. On the contrary, co-operation and dialogue between the

institution and the requester at this stage can only assist in ensuring that the requirements of the requester are being addressed.^[1]

[18] In this appeal, however, it is clear that from the very beginning, the university had obligations with respect to responding to the appellant's request that it did not meet. The process for responding to access requests is set out in considerable detail in the *Act*, as well as in various guidelines established and circulated to institutions, including the university, by this office.

[19] More specifically, the time limits and the procedures prescribed by the *Act* for providing access decisions to requesters, and notifying affected parties, are set out in sections 26, 27 and 28. Once an institution has received a request, and clarified it as required, section 26 of the *Act* prescribes a 30-day time limit in which the institution must respond to the request. Section 26 states:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, **shall**, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and

(b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced [emphasis added].

[20] Section 27(1) of the *Act* allows an institution to extend the 30-day time limit for responding to a request in certain circumstances, including ones that may have been anticipated in this matter. Above, I referred to section 27(1)(a), which states:

A head may extend the time limit set out in section 19 for a period of time that is reasonable in the circumstances, if,

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; ...

[21] Section 27(2) addresses notice requirements for extensions. Indeed, from the university's first letter to the appellant, dated September 22, 2011, it is clear that the university was aware of the time extension provisions in section 27.

[22] Section 28 describes in detail the process to be followed by an institution in circumstances where disclosure may engage the interests of affected persons. Finally, where an institution refuses access to a record under section 26, section 29 outlines the contents of a notice of refusal. Finally, section 57(3) requires an institution to give the requester a "reasonable estimate" of the fee that will have to be paid (if it is over \$25) before giving access to the record(s).^[2]

[23] As described, there were a number of options available to the university in responding to the appellant's request. However, simply closing his file - based on the seemingly erroneous belief that it required clarification and that the appellant would not provide it - was not one of them. In the circumstances, I find that the actions taken in response to the appellant's request were not in accordance with the university's statutory obligations under [sections 26 and 29](#) of the *Act*.

[24] Accordingly, I will be ordering the university to issue an access decision to the appellant in response to his request. This order is to be taken to confirm the interpretation of the appellant's request, which will serve to guide the university in processing the request in accordance with the *Act*.

[25] I find that the appellant's request clearly contemplates the identification of **all email records exchanged between the two identified individuals** – the university President and his current Chief of Staff - in the role of sender and recipient (either in the "To" or "CC" lines) **for the time period represented by six months prior to the specified individual's hiring as the university President's Chief of Staff to the date the request was originally received (September 19, 2011).**

[26] In determining the appropriate remedy in this appeal, I am mindful that the individuals identified in this request may have an interest in its outcome, and that their interests may, therefore, be engaged under [section 28](#) of the *Act*. While I acknowledge that the timing specified below essentially returns the parties to the starting point of the process, which may be frustrating for the appellant, it offers the most appropriate remedy in the circumstances.

ORDER:

1. I order the university to process the request and issue a proper decision letter in compliance with its statutory obligations under [section 26, 28 and 29](#) of the *Act*, treating the date of this order as the date the request was received.
2. In order to verify compliance with this order, I order the university to provide me with a copy of the decision letter issued pursuant to provision 1.

Original Signed By: _____

January 25, 2012

Daphne Loukidelis
Adjudicator

[1] At page 18 of Order P-260 (Ministry of Treasury and Economics).

[2] For an in-depth discussion of this office's approach to the issue of time extensions and interim access decisions, see Order PO-2634 (Ministry of Natural Resources).

TAB 41

Ontario (Community Safety and Correctional Services) (Re), 2013 CanLII 10443 (ON IPC)

Date: 2013-02-22
File number: PO-3166; PA12-388
Citation: Ontario (Community Safety and Correctional Services)
(Re), 2013 CanLII 10443 (ON IPC),
<<https://canlii.ca/t/fwdv>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3166

Appeal PA12-388

Ministry of Community Safety and Correctional Services

February 22, 2013

Summary: A 49-part request was submitted to the Ministry of Community Safety and Correctional Services for records relating to the actions of the Ontario Provincial Police in relation to specific Mohawk protests that occurred in June 2007 and April 2008. The ministry denied access to the records pursuant to [section 65\(5.2\)](#) of the *Freedom of Information and Protection of Privacy Act* (the Act). The decisions were appealed and put on hold pending the completion of the

related prosecutions. Once the prosecutions had been completed, the adjudicator directed the ministry to issue new decision letters. The ministry failed to issue new decision letters as directed. This order relates to 13 of the requests for which the ministry failed to issue new decision letters as directed. The ministry is in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act* with respect to 13 of the original 49 requests. In this decision, the ministry is ordered to issue final decision letters regarding the 13 outstanding requests without recourse to further time extensions.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 26, 29 and [65\(5.2\)](#).

BACKGROUND:

[1] The appeal before me has a long and complex history involving three previous appeal files. It is therefore necessary for me to provide a more detailed account of the history of this matter than would otherwise be included.

[2] This is a deemed refusal appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with regard to 13 requests out of an original 49-part request made to the Ministry of Community Safety and Correctional Services (the ministry) on December 19, 2008 for records relating to the actions of the Ontario Provincial Police in relation to specific Mohawk protests that occurred in June 2007 and April 2008.

[3] On March 18, 2009, the ministry issued several decisions letters to the requester, constituting a partial response to the 49-part request. Citing section 65(5.2) of the *Act*, the ministry advised that “the records you have requested are not accessible under the *Act* at this time. You may wish to reapply once all proceedings in relation to the prosecutions have been completed.” [Section 65\(5.2\)](#) of the *Act* states:

This [Act](#) does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[4] The requester (now the appellant) appealed the ministry’s decisions, and lack thereof, to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[5] On April 22, 2009, the IPC opened appeal files PA09-124 and PA09-125 with respect to 17 of the requests. Appeal PA09-203 was opened on June 11, 2009 to address another 10 requests.

[6] The appeals were not resolved during mediation and moved to the adjudication stage of the appeals process in August and September of 2009. The appeals were placed “on hold” until the completion of the prosecutions.

[7] On January 4, 2011, the ministry’s legal counsel advised that the final prosecution was complete. The ministry’s letter stated that:

... the criminal trial of [the accused] has concluded. Accordingly, the Ministry of Community Safety and Correctional Services is withdrawing its claim that the records that are in dispute ... are excluded from the jurisdiction of the *Freedom of Information and Protection of Privacy Act* pursuant to subsection 65(5.2) of that Act.

[8] On January 20, 2011, the adjudicator wrote to the ministry and required it to issue access decisions with respect to the original 49-part request. The adjudicator further required the ministry to treat the date of January 20, 2011 as the date of the request for the purpose of calculating the 30-day period for responding with decision letters.

[9] In February and March of 2011, the ministry and the appellant exchanged correspondence regarding the outstanding decision letters. The ministry advised that it was placing the requests on hold pending receipt of clarification of the scope and specification of the requested records from the appellant. The appellant objected to the requests being placed on hold. The ministry then advised that it would be extending the time to issue decision letters to March 25, 2011. On March 30, 2011, the ministry advised that it would be giving notice to affected third parties regarding one of the requests.

[10] In the fall of 2011, the appellant contacted the ministry regarding the status of the outstanding decision letters. The ministry did not reply. The appellant contacted the ministry again in January and February of 2012, but decision letters were not issued. The appellant wrote to the ministry for the final time on June 10, 2012 to follow up regarding the outstanding decision letters. The appellant did not receive a reply.

[11] As no decisions had been issued by the ministry, an appeal was filed with the IPC on July 31, 2012.

[12] The IPC opened appeal file PA12-388 to address 17 of the original 49 requests. The other outstanding requests raised additional substantive issues or had been withdrawn. The IPC sent a Notice of Inquiry (notice) to the appellant and the ministry advising that the ministry was in a deemed refusal situation with respect to the 17 requests and stating that the ministry should immediately issue final decision letters to the appellant. The notice further advised that if final decision letters were not issued by September 4, 2012, I would be in a position to issue an order requiring the ministry to provide the appellant with final decision letters.

[13] The ministry responded to appeal file PA12-388 on August 30, 2012 by writing to the appellant and enclosing what it identified as the outstanding decision letters.

[14] Shortly thereafter, the appellant wrote to the IPC to advise that the decision letters that had been produced by the ministry pre-dated and were therefore not responsive to the adjudicator's directive of January 20, 2011.

[15] In an effort to clarify the issues surrounding the outstanding decisions, the IPC's Registrar and I arranged a conference call on October 25, 2012 with the ministry's Freedom of Information Co-ordinator and the ministry's Analyst assigned to this appeal. The ministry advised that it would need to verify whether it had in fact issued decision letters that were responsive to the adjudicator's directive of January 20, 2011.

[16] On November 5, 2012, the IPC and the ministry participated in a second conference call. The ministry confirmed that it had not issued decision letters that were

responsive to the adjudicator's directive of January 20, 2011. It was agreed that the ministry would propose a timetable for issuing final decision letters regarding the 13 requests for which the ministry remained in a deemed refusal situation. Two of the 17 requests had been withdrawn and two had been streamed to mediation, leaving 13 requests for which decisions were outstanding.

[17] On November 16, 2012, the ministry wrote to the appellant and proposed a timetable providing that the 13 outstanding decision letters would be issued in batches by December 31, 2012, January 15, 2013, and February 15, 2013. The appellant and the IPC accepted the timetable as proposed by the ministry.

[18] Between December 20, 2012 and January 20, 2013, I made several unsuccessful attempts to speak with the ministry regarding this appeal and the missed deadlines for issuance of the first six of 13 outstanding decision letters. When I did speak with the ministry on January 21, 2013 I was advised that a revised timetable was being sent by mail.

[19] By letter to the appellant dated January 25, 2013, the ministry proposed a revised timetable for issuing the 13 outstanding decision letters due to the fact that some of the files are voluminous and require time consuming reviews for consistency. The timetable was changed to February 8, 2013, February 15, 2013 and February 22, 2013. The appellant and the IPC accepted the timetable as proposed by the ministry.

[20] On February 8, 2013, the first revised deadline that had been proposed by the ministry for the issuance of three decision letters was missed with no notice to the IPC or to the appellant. A call from the ministry reiterated that while the ministry was doing its best to issue decision letters, the reason for the delay included that some files are voluminous and require time consuming reviews for consistency. However, the ministry did not provide firm dates for when final access decisions will be issued.

DISCUSSION:

[21] [Section 26](#) of the [Act](#) requires the ministry to issue a decision within 30 days of receipt of a request. If a decision is not issued within that time period, the ministry is in a "deemed refusal" situation pursuant to [section 29\(4\)](#) of the *Act*. That provision states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[22] I find that the ministry was in a deemed refusal situation pursuant to [section 29\(4\)](#) of the [Act](#) on February 20, 2011, as it has failed to issue final decisions letters as directed by the adjudicator on January 20, 2011.

[23] Even after being provided with a significant amount of additional time and two opportunities to propose its own timetables for issuing the 13 outstanding decision letters, the ministry has failed to do so. The ministry continues to be in a deemed refusal situation and has not provided firm dates when final access decisions will be issued.

ORDER:

1. I order the ministry to issue final decision letters with respect to the 13 outstanding requests to the appellant in accordance with the *Act* and without recourse to any further time extensions, as follows:
 - a. Not before **April 1, 2013** and no later than **April 8, 2013** regarding requests: CSCS-2008-03762, CSCS-2008-03765, CSCS-2008-03766;
 - b. Not before **April 8, 2013** and no later than **April 15, 2013** regarding requests: CSCS-2008-03768, CSCS-2008-03769, CSCS-2008-0377, CSCS-2008-0378, CSCS-2008-0379, CSCS-2008-0380, CSCS-2008-0381, CSCS-2008-0387, CSCS-2008-0388; and
 - c. Not before **April 15, 2013** and no later than **April 22, 2013** regarding request: CSCS-2008-0386.
2. In order to verify compliance with provision 1 of this order, I order the ministry to provide me with copies of the final decision letters referred to in provision 1 as follows:
 - a. Not before **April 1, 2013** and no later than **April 8, 2013** regarding requests: CSCS-2008-03762, CSCS-2008-03765, CSCS-2008-03766;
 - b. Not before **April 8, 2013** and no later than **April 15, 2013** regarding requests: CSCS-2008-03768, CSCS-2008-03769, CSCS-2008-0377, CSCS-2008-0378, CSCS-2008-0379, CSCS-2008-0380, CSCS-2008-0381, CSCS-2008-0387, CSCS-2008-0388; and
 - c. Not before **April 15, 2013** and no later than **April 22, 2013** regarding request: CSCS-2008-0386.

Original signed by: _____

February 22, 2013 _____

Jessica Leinwand
Analyst

TAB 42

Ontario (Environment and Climate Change) (Re), 2015 CanLII 76939 (ON IPC)

Date: 2015-11-17
File number: PO-3545
Citation: Ontario (Environment and Climate Change) (Re), 2015 CanLII 76939 (ON IPC), <<https://canlii.ca/t/gm7tt>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3545

Appeals PA13-437 & PA13-295-2

Ministry of the Environment and Climate Change

November 17, 2015

Summary: The Ministry of the Environment and Climate Change (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a third party's named wind energy project proposal. The ministry decided to grant access to some records or parts of records, and denied access to others based on the discretionary exemption in section 19(a) (solicitor-client privilege) of the *Act*. The ministry also withheld portions of some records based on sections 21(1)(f) (personal privacy) and 22(a)

(available to the public). Both the requester and the third party appealed the ministry's decision on numerous grounds.

In this order, which addresses both appeals, the adjudicator upholds the ministry's application of section 19(a), and partially upholds the ministry's fee decision pursuant to section 57(1). The adjudicator also upholds the ministry's decision not to notify the third party under section 28(1) (a) in relation to certain records. The adjudicator orders the ministry to disclose certain records for which it issued an access decision, and to issue an access decision in relation to certain records for which it has not yet issued a decision. The adjudicator finds that one record is exempt under section 17(1) (third party information), and that the public interest override has not been established for that record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 19, 21(1), 23, 26, 28(1), 29(4) and 57(1); and *R.R.O. 1990, Regulation 460, section 6*.

Orders and Investigation Reports Considered: PO-1694-I.

Cases Considered: *Merck Frosst Canada Ltd. V Canada (Health)*, 2012 SCC 3.

BACKGROUND:

[1] In Ontario, certain types of renewable energy projects (such as most solar, wind or bio-energy projects) require a Renewable Energy Approval (REA). The Ministry of the Environment and Climate Change (the ministry) issues REAs pursuant to *Ontario Regulation 359/09*, Renewable Energy Approvals under part V.0.1 of the *Environmental Protection Act*.^[1]

[2] Applicants are generally required to:

- conduct site assessments and related studies;
- prepare detailed plans and reports; and
- consult with municipalities, Aboriginal communities and the public.^[2]

[3] While renewable energy project developers must meet specific notification and consultation requirements, the ministry encourages applicants to work with local communities as much as possible. Community consultation often takes the form of public meetings.

[4] Renewable energy project developers are required to publically post a number of reports and other documentation prior to a project proponent's final public meeting, depending on the type of technology proposed and the class of facility. Class 4 wind turbine project developers must submit the following reports and documents:

- Project Description Report,
- Construction Plan Report,
- Design and Operations Report,
- Decommissioning Plan Report,
- Notice of Proposal,
- Meeting Notices,

- Consultation Report,
- Specifications Report, and
- Wind Farm Noise Report.^[3]

[5] Upon receipt of a complete REA application, the ministry posts a proposal notice on the Environmental Registry indicating the application is under technical review. As noted by the ministry,

This is an opportunity for community members to submit comments on the proposal directly to the ministry. The ministry takes all comments received during this period under consideration when making decisions on project applications.

[6] Following the public consultation period, the Director of the ministry may, if in his or her opinion it is in the public interest to do so, issue an REA, or refuse to issue an REA.^[4]

OVERVIEW:

[7] These appeals concern a request made to the ministry – then called the Ministry of the Environment – under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a named Class 4 wind energy project (the wind farm) for the time period January 2009 to the date of the request (April 1, 2013).

[8] On July 26, 2013, the ministry issued a decision letter to the requester. In its letter the ministry advised that it would provide partial access to the requested records, with severances of some information pursuant to the exemptions at sections 19(a) (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*, and of other information as being non-responsive or duplicate material, or falling outside the requested time frame. The ministry also advised that as disclosure of some records may affect the interests of third parties, it would be providing notice to those parties in accordance with *section 28(1)(a)* of the *Act*. As a result, the ministry advised that its decision on access to those records would not be made before August 28, 2013.

[9] In addition, the ministry provided the following information regarding the fee for access:

In accordance with Section 57 of the [*Act*], detailed below are our charges:

Search Time 2 hours @ \$30/hour	\$ 60.00
Copying 706 pages @ \$0.20/page	\$ 141.20
Preparation Time 0.25 hour @ \$30/hour	\$ 7.50
Delivery	<u>\$ 3.00</u>
Total	\$ 211.70

[10] On August 7, 2013, the ministry wrote to 11 third parties. In each of those letters, the ministry notified a third party of the requester's request and sought the third party's views on disclosure of records identified by the ministry as involving the interests of that third party. In response, ten third parties provided submissions to the ministry on disclosure of records identified in the ministry's notices to them.

[11] On September 9, 2013, the ministry issued a final decision to the requester, advising that it would provide partial access to the records, with severances of some names and personal telephone numbers pursuant to the exemption at [section 21\(1\)](#) of the [Act](#), and of publicly-available information pursuant to the exemption at section 22(a). The ministry also claimed solicitor-client privilege to withhold some records pursuant to the exemption at section 19(a).

[12] In its decision letter, the ministry also explained that while various third parties had consented to the disclosure of records relating to them, one third party had not consented to disclosure of information sent in confidence. The ministry noted, however, that after considering whether the mandatory exemption at [section 17\(1\)](#) of the [Act](#) (third party information) applies to the records of the non-consenting third party, the ministry had determined that the test for application of the exemption had not been met. The ministry's decision, therefore, was to disclose these records to the requester. The ministry also advised the requester that the non-consenting third party could itself appeal the ministry's decision to this office, and, as a result, the records would not be disclosed to the requester until October 9, 2013.

[13] At the same time, the ministry communicated its decision on the application of section 17 in a separate letter to the non-consenting third party, which had consented to the disclosure of some, but not all, of the records on which it had been consulted.

[14] The non-consenting third party filed an appeal of the ministry's decision to this office, becoming the appellant (herein referred to as the third party) in Appeal PA13-437 (the third party appeal). In its appeal letter, the third party took the position that the section 17 exemption applies to information it seeks to have withheld from the requester. In addition, the requester filed his own appeal of the ministry's decision to withhold some records, becoming the appellant in the related Appeal PA13-295-2 (the requester appeal).

[15] Despite the ministry's decision to disclose some records, and the third party's consent to disclosure of certain of these, the ministry did not at this point release any records to the requester. In response to a query from this office, the ministry wrote:

This letter is further to your request that a partial disclosure package be forwarded to the requester

As you know, the [ministry] has reviewed the representations of the various third parties and specifically [the third party], the developer of the wind project. [The third party] objects to the disclosure of most of the records that were supplied to the [ministry] in accordance with the provisions of Section 17 of the [\[Act\]](#). The [ministry] issued its final decision on September 9, 2013 and a letter was sent to both the requester and the third party. The [ministry] received notice of [the third party's] appeal on October 10, 2013. Unfortunately, [the third party's] representations indicate that information that the [ministry] incorporated into its records should also be excluded from disclosure. Notice was not provided for these records.

In order to protect the integrity of third party information and consistent with Order PO-1694-I, the [ministry] cannot provide partial release to the requester at this time without disclosing information that involves the

interests of [the third party]. Once the [third party] appeal has concluded, the [ministry] will be in a position to release all non-exempt records to the requester.

[16] During the mediation stage of the appeal process, a mediator from this office had discussions with the requester, the third party, and the ministry, with a view to attempting resolution of the issues raised in both appeals.

[17] The requester advised the mediator that despite having paid the fee, the ministry had not released any of the following responsive records to him: 1) those records that had not been subject to third party notice, and to which the ministry had decided to grant access; and 2) those records that had been subject to third party notice, and for which the third party had consented to disclosure.

[18] In response, the ministry took the position that it could not release any records to the requester until the resolution of both appeals. The ministry elaborated on its position in a December 20, 2013 email to the mediator:

The [ministry's] priority is to ensure utmost accuracy, thoroughness and consistency in decisions affecting access and protection of proprietary information. The ongoing FOI requests regarding [the wind farm] comprise a complex and sensitive collection of nearly 10,000 pages of records requiring thorough review and processing. Any partial disclosure will detract from the completeness and coherence of these FOI request files and increase the risk of error in our administration of the [Act]. An incomplete release may also inadvertently jeopardize the interests of affected parties. The [ministry's] position is, therefore, to maintain the practice of disclosing all relevant records as a single release package.

The FOI Office will give notice for any remaining records for which [the third party] is entitled to receive notice ... However, sending all records in the request file may affect the interests of other parties, including the requester, whose correspondence was not intended to be received by [the third party]. There is a danger that risking the interests of these other parties is comparable to risking the interests of [the third party], and thus contrary to the purpose of the [Act] and the FOI process.

[19] The requester did not accept the ministry's position and this office opened Appeal PA13-295-3 to address the ministry's failure to disclose records. Only those records that had been subject to third party notice and for which the third party had consented to disclosure were at issue in Appeal PA13-295-3. The ministry subsequently disclosed those records to the requester, and, as a result, Appeal PA13-295-3 was closed.

[20] During mediation, the ministry also reviewed those records for which third party notice had not been given and that the ministry had decided to disclose to the requester. The ministry determined that third party notice should be given for certain additional records. By letter dated January 22, 2014, the ministry notified the third party of these additional records and sought its views on disclosure. The third party consented to partial disclosure of those records.

[21] On February 24, 2014, the ministry issued letters to the requester and to the third party, advising of its decision to disclose to the requester all the additional records for which third party notice was given on January 22, 2014. During subsequent discussions with the mediator, the ministry confirmed that it would release to the requester those additional records for which notice had been given and for which the third party had provided consent – namely, pages 72-73, 196, 208, 646-650, 885, 910 and 918-923. As of the close of the mediation stage, these pages had not yet been disclosed to the requester. Accordingly, disclosure of these pages is an issue in the requester's appeal, PA13-295-2.

[22] With its consent, the mediator shared the ministry's index of records with the requester and the third party.

[23] After reviewing the index, the third party advised the mediator that it may have an interest in records on which it had not been consulted and that the ministry has decided to disclose to the requester. The third party takes the position that the ministry should have notified it of these records and sought its position prior to issuing a decision to disclose the records. Therefore, the issue of notice arises in the third party appeal, PA13-437. The third party claims the exemption at section 17(1) (third party information) in relation to those records for which third party notice was given. It also claims the exemption at section 21 (personal privacy) in relation to a specific portion of information.

[24] After reviewing the index, the requester narrowed the records to which he continues to seek access. In particular, the requester no longer takes issue with the ministry's reliance on section 22 (publicly available) and its claim of non-responsiveness to withhold certain pages. As a result, those pages are no longer at issue.

[25] The requester continues to seek access to pages to which the ministry has denied access on the basis of the exemption at section 19(a) (solicitor-client privilege). The requester also takes issue with the ministry's failure to disclose pages to which it has granted access, and to issue a decision on access on other pages for which the ministry has withdrawn its claim of non-responsiveness. He also appeals the reasonableness of the fee issued by the ministry, and seeks confirmation regarding the applicability of the ministry and third party's claims under section 21 (personal privacy) in relation to two specific portions of information.

[26] As a number of issues remained outstanding at the close of mediation, the appeals were transferred to the adjudication stage, where an adjudicator conducts an inquiry under the [Act](#). I am the adjudicator in these appeals.

[27] In regard to the requester appeal, I sought and received representations from the ministry and the requester. The ministry also provided supplementary representations on the issue of failure to disclose.

[28] Regarding the third party appeal, I sought and received representations from the third party, the requester and the ministry. In its representations, the ministry notes that it has decided to provide the third party with notice for the records at pages 197, 670, 688^[5] and 691-692. The ministry provided the third party with notice of these records on May 4, 2015. Although the third party referenced having received notice of these records in its reply representations, and has provided this office with proposed redactions for portions of pages 197 and 688 under sections 17 and 21, the ministry has not yet

provided the requester with an access decision. Additionally, the third party consented to the disclosure of pages 516-517, 651, 687 and 154.

[29] Although the requester appeal and the third party appeal arise out of the same request and involve the same parties, I initially decided to deal with the two appeals separately for the purpose of seeking and exchanging representations, as each appeal contains distinct issues. However, I address all of the outstanding issues in both appeals in this single order.

[30] As of the date of this order, the third party's REA application for the wind farm is still under "technical review" by the ministry.

RECORDS:

[31] The records at issue in the requester and third party appeals consist of correspondence, emails, email attachments, reports and a power point presentation slide deck.

ISSUES:

PA13-295-2 – Requester appeal

- A. Was the ministry justified in not disclosing the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923 for which it issued a decision to grant access?
- B. Has the ministry failed to issue a decision on access within the legislated time frame regarding the records at pages 197, 670, 688-690 and 691-692?
- C. Does the discretionary exemption at section 19 apply to the records at pages 95-104, 710-717, 796, 860 and 871?
- D. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?
- E. Does the mandatory exemption at section 21(1) apply to a portion of the information at page 860?
- F. Should the fee be upheld?

PA13-437 – Third party appeal

- G. Does the mandatory exemption at section 17(1) apply to portions of pages 194-195, 303-304, 452-467, and all of pages 155-157, 217-244, 688 and 701-706?
- H. Did the ministry adhere to the notice requirements in [section 28\(1\)](#) of the *Act* regarding the records at pages 3-59, 88-94, 146-153, 198-207, 209-216, 263, 446-451, 685-686, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926 and 928-930?
- I. Is there a compelling public interest in the disclosure of the record at pages 194-195 that clearly outweighs the purpose of the section 17 exemption?
- J. Is the information claimed as exempt under section 21(1) at page 195 "personal information" within the meaning of the *Act*?

DISCUSSION:

PA13-295-2 – Requester appeal

FAILURE TO DISCLOSE

A. Was the ministry justified in not disclosing the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923 for which it issued a decision to grant access?

[32] Section 26 of the *Act* sets out the obligations of an institution in responding to requests under the *Act*. It reads, in part:

Where a person requests access to a record, the head of the institution to which the request is made ... shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[33] The ministry has not disclosed to the requester the above-noted records to which it decided to grant access in a February 24, 2014 letter. The ministry provided the third party with notice pursuant to section 28 in regard to those records on January 22, 2014, and the third party consented to disclosure. During mediation, the ministry confirmed its intention to provide the requester with these records.

Representations

[34] The ministry submits that the requester and third party appeals, alongside a number of related appeals, "comprise a complex and sensitive collection of nearly 10,000 pages of records requiring thorough review and processing." The ministry claims that "any partial disclosure would detract from the completeness and coherence of these FOI request files and increase the risk of error in [the ministry's] administration of the *Act*." The ministry also states that "incomplete release could inadvertently jeopardize the interests of affected parties."

[35] The ministry submits that the case management system used to process access requests can only release records to a requester in a single package, and that once a record is entered into the system as "withheld", it is not possible to change the record's status within the system. The ministry's explanation is as follows:

This system is able to record the Ministry's decision on individual pages of records complete with the relevant sections of the *Act*, and to release those records as a single package at the time of disclosure based on those

recorded dispositions (i.e. only pages marked as full or partial release are exported from the system, while withheld pages are not).

[....]

When the Ministry receives third party submissions in response to a consultation, the third party's views are filed and recorded manually. As the status of each record in our system must accurately record the Ministry's (or IPC's) final disposition on disclosure, there is no electronic mechanism for recording views submitted by third parties that are independent of Ministry decisions. While the Ministry considers third party views carefully under Section 17, it remains important for the Ministry's application of the Act not to be confused with proposed redactions submitted by third parties, and for this information to remain protected until the resolution of the third party appeal.

Given the constraints of our case management system, the high number of pages in these requests, the complexity of the records, and the Ministry's overall request volume, the degree of manual intervention required for a single partial release process poses considerable risk to third party interests.... As this issue of partial and final disclosure is relevant to several of the [wind farm] files, the resources required to comply with multiple 'Failure to Disclose' appeals will once again introduce potential for error with respect to the protection of proprietary information. We therefore respectfully request that, with respect to the files at issue, the Ministry be permitted to disclose the records as a single release package pending the outcome of your disposition in the third party appeals.

[36] The requester submits that the ministry's rationale for withholding records for which the affected party has consented to disclosure is not in accordance with the *Act*. Specifically, the requester states, "[t]he purposes and related provisions of the Act make no provision for the circumstance that the [ministry] has used to withhold the release of documents to me, which release [sic] is in accordance with the Act." The requester submits that there is no basis in the *Act* for the ministry to rely on issues of record management to justify delay in disclosure. Lastly, he states that the delay in disclosure will result in "irreparable harm" to him and his family.

Analysis

[37] Section 26 requires the issuance of a decision *and* the disclosure of records to which access is to be given, subject to the provisions listed, including sections 27 (time extension) and 28 (third party notice). In regard to the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923, the ministry consulted with the third party, and confirmed that the third party provided its consent to disclose these records in its decision letter of February 24, 2014.

[38] The request giving rise to these appeals is one of many the requester has made to the ministry, covering the same types of records for successive time periods. These requests have in turn given rise to a number of appeals. The ministry's representations suggest that it seeks to defer the release of any additional records to the requester until all of these appeals have been resolved.

[39] If this is indeed the ministry's position, I do not accept it. I recognize the request covers a large number of records and, as well, that the requester has made other requests that relate to a similar volume of records. [Section 27](#) of the [Act](#) permits reasonable time extensions for responding to requests that: cover large numbers of records; necessitate searches through a large number of records; or where meeting the statutory time limit would unreasonably interfere with the operations of institutions. It also permits such extensions when consultations with a person outside the institution necessitate more time to respond.

[40] Further, section 28 of the [Act](#) requires a head to give written notice to affected third parties in the circumstances described, and establishes time limits for that process. Sections 28(7) to (9), in particular, address the requirement to issue a decision within a specified time after giving notice to a third party. Unlike the circumstance where no third party is involved, and disclosure of the records accompanies the decision, section 28(9) allows for disclosure to be delayed so that the third party may invoke its right to appeal a decision to disclose records in which it has an interest.

[41] In this case, the request was made on April 1, 2013, and the ministry issued its final decision on access on September 9, 2013. The ministry thus issued its decision within an extended time limit. The ministry's position is, in effect, that it requires a second time extension, following its decision, to effect disclosure of the records. The second time extension is in addition to the delayed disclosure provided for in section 28(9), described above. Further, the ministry wishes to apply this additional time extension to all of the requester's related requests.

[42] I do not find this second extension to be justified. First, it is not clear to me that the [Act](#) contemplates such an extension, following the issuance of a decision under section 28(7). The section 28 process for responding to an access decision that involves the interests of a third party incorporates the possibility of a time extension, but only up to the time of giving notice: section 28(3). The rest of its provisions, setting time limits for making the access decision and giving access, do not suggest the possibility of further extensions.

[43] On a plain reading of those provisions, I find that they do not allow for two types of time extensions in the same matter, one before the decision and the other after. I also doubt that the Legislature could have intended to allow for these two types of extensions, both giving rise to a right to appeal to this office, and thus leading to a more cumbersome and prolonged process. It took great care in providing a detailed road-map for responding to requests, both with and without interested third parties. If it had wished to allow for an additional time extension for disclosure following a decision, it could have included such a provision.

[44] The ministry has identified some practical and logistical issues in giving timely access following its decision. While I appreciate that voluminous records present legitimate obstacles, the ministry had the opportunity to take this into account, and did, in the time before making its decision. Once it has decided to grant access, and subject to any third party appeal, it is obliged to provide the records to the requester. It may be that this requires it to manually review the records in order to assemble those the third party gave consent to disclose, and those not covered by any third party appeal. But it is

reasonable to assume at least some of this work was required in order to arrive at its access decision in any event.

[45] While I appreciate the shortcomings in the ministry's case management system in facilitating disclosure of records following confirmation of a third party's consent, I do not find that this is a valid reason to delay the requester's access under the [Act](#). Having paid the fee and received a decision on access, he was entitled to receive the records not subject to these appeals.

[46] As noted above in the "Background" section of this Order, the requester filed Appeal PA13-295-3 in response to the ministry's refusal to release certain records to the requester following receipt of third party consent. However, the ministry subsequently disclosed the records at issue to the requester during mediation, and the appeal was closed. The ministry's disclosure of the records at issue in PA13-295-3 to the requester demonstrates that the ministry is not incapable of effecting partial disclosure.

[47] I do not put much weight on the ministry's submission about the "considerable risk" associated with partial disclosure. It demonstrates that the ministry needs to take care in preparing its disclosure; it does not suggest that the answer lies in delaying disclosure to the requester. The requester should not have to bear the burden created by the ministry's current case management system.

[48] Accordingly, I find that the ministry is required to provide the requester with partial disclosure of the records at pages 72-73, 196, 208, 646-650, 885, 910 and 918-923, for which the affected party has provided consent.

DEEMED REFUSAL

B. Has the ministry failed to issue a decision on access within the legislated time frame regarding the records at pages 197, 670, 688-690 and 691-692?

[49] [Section 26](#) of the [Act](#) states that the head of an institution shall, subject to sections 27 (time extension), 28 (third party notice) and 57 (payment of fees), give written notice of its decision on an access request within 30 days after the request is received.

[50] Where a head fails to issue a decision on access within the legislated time frame, [section 29\(4\)](#) of the [Act](#) applies. This section states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[51] During the mediation stage of the requester appeal, the ministry withdrew its claim that certain records are non-responsive to the request, and indicated its intention to issue a decision on pages 689 and 690 after notifying the affected party. The ministry has not yet completed this process.

[52] During the adjudication stage of the requester appeal, the ministry provided the third party with notice for the records at pages 197, 670, 688 and 691-692. Although the

third party has provided the ministry with proposed redactions for portions of those records pursuant to section 17(1), the ministry has not yet issued an access decision to the requester.

Representations

[53] The ministry acknowledges that the records at pages 689-690 are covered by the request, and therefore would require notice to the affected party under [section 28\(1\)](#) of the *Act*. In its representations, the ministry stated that it would issue an updated decision to the requester in regard to these records.

[54] In its representations for the third party appeal, the ministry notes that it has decided to provide the third party with notice regarding the records at pages 197, 670, 688 and 691-692. The ministry subsequently provided this office with a copy of the notification letter sent to the third party, and the third party has provided this office with a copy of its response to the ministry.

[55] The requester did not make representations on the deemed refusal issue. However, the requester generally submits that the ministry's delay in disclosing responsive records is not in accordance with the *Act*.

Analysis

[56] As the ministry acknowledged that the records at pages 197, 670, 688-690 and 691-692 are responsive to the request, and the ministry did not issue a decision to the requester within the 30 day statutory requirement pursuant to [section 26](#) of the *Act*, I find the ministry to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act*. I also find that there have been no exceptional circumstances present to justify the delay.

[57] Accordingly, I will order the ministry to issue a final access decision to the requester in relation to those pages.

SOLICITOR-CLIENT PRIVILEGE

C. Does the discretionary exemption at section 19 apply to the records at pages 95-104, 710-717, 796, 860 and 871?

[58] Section 19 states as follows, in part:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) That was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation [...]

[59] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. The

statutory exemption and common law privileges, although not identical, exist for similar reasons.

[60] The ministry relies on both the common law privilege at Branch 1 and on the Branch 2 statutory privilege to exempt the records at pages 95-104, 710-717, 796, 860 and 871. First, I will consider whether these records are subject to the common law privilege at Branch 1.

Branch 1: common law privilege

[61] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[62] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.^[6] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.^[7] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.^[8]

[63] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.^[9]

[64] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.^[10] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.^[11]

Litigation privilege

[65] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.^[12] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.^[13] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.^[14] The litigation must be ongoing or reasonably contemplated.^[15]

Loss of privilege

Waiver

[66] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.^[16]

[67] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.^[17]

[68] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.^[18] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.^[19]

Termination of litigation

[69] Common law litigation privilege generally comes to an end with the termination of litigation.^[20]

Representations

[70] In the non-confidential portions of its representations, the ministry notes that solicitor-client privilege “has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.”^[21] The ministry submits that a client’s ability to confide in his or her lawyer on a legal matter, without reservation, has been maintained in several orders of this office, and on judicial review.

[71] The ministry states that,

When one Ministry staff person substantively refers to or passes on the legal advice received by another staff member of the Environmental Approvals Access and Service Integration Branch or another program area within the Ministry, the “continuum of communications” between a solicitor and client is maintained (please refer to IPC Order PO-3150).

[72] The ministry references the records at pages 717 and 796 as examples of this type of communication.

[73] The ministry submits that its legal counsel are “in a position to provide legal advice to all branches and offices in the Ministry.” Consequently, the ministry claims that,

... all Ministry staff members are the expressed clients of Ministry legal counsel, and the communications exchanged to and from these parties,

including all legal analysis, advice and information must be considered in the context of a solicitor-client relationship... so long as the communication was made for the dominant purpose of obtaining legal advice (please refer to IPC Order PO-1663).

[74] In regard to facts and status updates that have been sent to ministry counsel in which no advice or review has been explicitly requested, the ministry submits that "this information has been provided as required background to assist ongoing and future legal review related to the project as a continuum of communication."

[75] The ministry provided the following non-confidential representations regarding the records for which it has claimed solicitor-client privilege:

- Pages 710-716 contain a legal opinion to the Director of the Environmental Approvals Access and Service Integration Branch of the ministry, and reference ongoing litigation;
- Page 717 is an email sent to ministry legal counsel, and the attachment reveals the legal analysis contained in pages 710-716;
- Page 796 is an email sent to ministry legal counsel from the Director of the Environmental Approvals Access and Service Integration Branch, and references the ongoing litigation mentioned above;
- Page 860 is an email exchanged between staff of the Environmental Approvals Access and Service Integration Branch, which was copied to ministry legal counsel; and,
- Page 871 is a request for legal review sent from the ministry's Environmental Approvals Access and Service Integration Branch to ministry legal counsel and another ministry staff member.

[76] The ministry also made confidential representations in relation to a number of records, including the records at pages 95-104.

[77] Although he made no submissions on the specific issue of solicitor-client privilege, the requester generally submits that the subject matter of the records at issue, as outlined in the Index,

... does not suggest any extraordinary reasons for confidentiality. The Ministry is the **approval agency** not the legal advisor or confidant to [the third party]. The [third party is] well supported by the professions – legal, planning engineering etc., who prepare the documentation in accordance with the regulations, that are posted on the Government of Ontario website.

[\[22\]](#)

Analysis

[78] The records at pages 95-104 and 710-716 convey legal advice from a ministry lawyer to the Director of the Environmental Approvals Access and Service Integration Branch. These records would reveal the substance of communications between a solicitor and an individual comprising "the client", made for the purpose of giving legal advice. Accordingly, I have no difficulty finding that these records qualify for exemption under section 19(a).

[79] The record at page 717 consists of an email sent from ministry staff to a ministry lawyer. While the body of the email contains no text, I find that the subject line of the email and the name of the attachment (which is a copy of the record at pages 95-104) would reveal the substance of communications between a solicitor and client, made for the purpose of obtaining legal advice. Consequently, this record qualifies for exemption under section 19(a).

[80] The records at pages 796 and 871 consist of an email sent from the Director of the Environmental Approvals Access and Service Integration Branch to a ministry lawyer, in addition to other ministry staff. I find that these records contain communications between a solicitor and client, made for the purpose of obtaining legal advice. Therefore, these records qualify for exemption under section 19(a).

[81] The record at page 860 consists of an email sent from a ministry staff member to a ministry lawyer and another ministry staff member. As this record contains communications between a solicitor and a client, made for the purpose of obtaining legal advice, it also qualifies for exemption under section 19(a).

[82] I considered the requester's submissions and do not find them persuasive. The ministry's claim of privilege is not based on its relationship with the third party but, rather, on the solicitor-client relationship between ministry staff and ministry lawyers, about which there is no doubt.

[83] There is no evidence that solicitor-client privilege in relation to the records at issue has been waived.

[84] As I find the records at pages 95-104, 710-716, 717, 796, 860 and 871 qualify for exemption under the common law privilege at Branch 1, I need not consider the application of the Branch 2 statutory privilege.

EXERCISE OF DISCRETION

D. Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[85] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to exercise its discretion.

[86] In addition, this office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[87] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.^[23] This office may not, however,

substitute its own discretion for that of the institution.^[24]

Relevant considerations

[88] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:^[25]

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

[89] Regarding the records at pages 95-104, 710-716, 717 and 871, the ministry submits that the Environmental Approvals Access and Service Integration Branch is currently reviewing the affected party's completed application for the wind farm project.^[26]

[90] The ministry makes the following submissions in regard to the above-noted records:

The Ministry has chosen to exercise its discretion to respect the confidentiality of the solicitor-client privilege while the REA review and decision-making process is ongoing.

The Ministry notes that the concerns discussed in these records are current and under debate within the Ministry, and remain at issue between the [third party] and concerned stakeholders...

To disclose these records presently would compromise the integrity of the solicitor-client relationship and its role informing the discretion of the REA decision-making process with advice and analysis.

[91] The ministry also submits that it has exercised its discretion to apply section 19 to the record at page 796 "[d]ue to the ongoing sensitivity of these communications in relation to the litigation described above." This litigation was outlined in more detail in confidential portions of the ministry's representations.

[92] The ministry made confidential submissions regarding its exercise of discretion to apply section 19 to the record at page 860.

[93] The requester did not provide representations on this issue.

Analysis

[94] Having regard to the submissions before me, I am satisfied that the ministry has not erred in the exercise of its discretion. I find that the ministry did not act in bad faith or for an improper purpose. I am also satisfied that the ministry did not take into account irrelevant considerations or failed to take into account relevant considerations.

[95] Accordingly, I find that the ministry properly exercised its discretion in applying the section 19 exemption, and I uphold its decision to withhold the records at issue pursuant to this section.

PERSONAL PRIVACY

E. Does the mandatory exemption at section 21(1) apply to a portion of the information at page 860?

[96] At mediation, the requester agreed to the ministry's redactions of personal information. However, in his representations, the requester requests confirmation from this office that certain information at page 860 is exempt under section 21(1).

[97] As I uphold the ministry's decision to exempt the record at page 860 from disclosure under section 19, and uphold the ministry's exercise of discretion under section 19, I need not consider whether the personal privacy exemption applies to this information.

FEE**F. Should the fee be upheld?**

[98] The requester advised the mediator that he takes issue with the ministry's fee, which he believes is excessive for various reasons including the fact that he will be paying for and receiving the same records in more than one request, and that he wishes to receive the records electronically and not pay the photocopying fee.

[99] Section 57(1) requires an institution to charge fees for requests under the [Act](#). That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[100] More specific provisions regarding fees are found in section 6 of Regulation 460. That section reads:

6. The following are the fees that shall be charged for the purposes of [subsection 57\(1\)](#) of the [Act](#) for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if

those costs are specified in an invoice that the institution has received.

Representations and analysis

[101] As noted above, the requester believes the ministry's fee is excessive, as he will be paying for and receiving the same records in more than one request, and he wishes to receive the records electronically and not pay the photocopying fee.

Search fee

[102] The ministry makes the following submissions in relation to the \$60.00 fee charged:

[It] was calculated cumulatively based on the individual search times recorded from four branches of the Ministry: the Environmental Approvals Branch, Environmental Approvals Access and Service Integration Branch, the Environmental Programs Division, and the Deputy Minister's Office. In accordance with section 6 of Regulation 460, the search times recorded were based on the number of hours spent manually locating responsive records in file folders related to the [wind farm], taking into account how these records were stored and maintained.

[103] The ministry submits that the Environmental Approvals Branch and the Environmental Approvals Access and Service Integration Branch spent a total of five hours conducting a manual search of their records. This included selecting soft copies of emails and "pulling hard copy reports, letters and other documentation from files to be scanned for FOI review."

[104] The ministry also states that the Environmental Programs Division spent approximately two hours conducting an electronic search of its records, using various key word searches to locate responsive records in soft copy file folders.

[105] The ministry notes that it reduced the amount of chargeable search time from 7 hours to two hours to reduce the margin of error and "ensure that the records remained accessible" for the requester.

[106] I find that the \$60.00 fee charged for the time spent searching the above-noted ministry branches is reasonable. While portions of the request may overlap with other requests made by the requester, this circumstance alone does not warrant a reduction of the search fees in the present appeal. As the requester did not reduce the scope of his request to account for time periods that are the subject of another access request, I find that the ministry reasonably conducted a search for records responsive to the whole time period stated in the request.

[107] In the circumstances, I am satisfied that the search time has been calculated in accordance with the requirements of the [Act](#). Accordingly, I find that this aspect of the ministry's search fee is reasonable, and uphold the ministry's fee of \$60.00 for the search time associated with responding to this request.

Copying

[108] The ministry submits that its copying fee of \$141.20 was “based on the number of releasable pages identified in full or in part after a review of the total number of records retrieved from each responsive program area.”

[109] Of the 939 pages of responsive records, the ministry withheld 136 pages in full under sections 19(1), 21(1) and 22(a). The ministry also identified 42 pages as duplicates and 57 pages as not relevant to the scope of the request. The ministry acknowledges having identified 706 pages in its decision letter to the requester, rather than the actual 704 pages that were “releasable”. However, the ministry notes that the significant reduction in the cost of the preparation fees compensates for the discrepancy in the page numbers.

[110] Although the requester’s preference for electronic access to the records on CD-ROM was noted in the Mediator’s Report and the Notice of Inquiry sent to the ministry by this office, the ministry does not make any submissions on this issue. As noted above in section 6.1 part 2 of Regulation 460, an institution may charge a fee of \$10.00 for records provided electronically on CD-ROM. Accordingly, I do not uphold the ministry’s photocopying fee of \$141.20, and find that the ministry is entitled to charge the requester \$10.00 for providing an electronic copy of the records on a CD-ROM.

Preparation

[111] The ministry submits that IPC Orders MO-1169, PO-1721 and PO-1834 established a permitted preparation time of two minutes per page. As the ministry identified 87 pages of records that required “partial severing”, the ministry notes that it could have charged for 174 minutes of preparation at a cost of \$87.00. However, the ministry charged for 15 minutes of preparation at a cost of \$7.50.

[112] I find that the \$7.50 fee charged for the time spent preparing the 87 pages of records that required partial severing is reasonable and was calculated in accordance with the requirements of the [Act](#). Therefore, I hold up the ministry’s fee of \$7.50 for the time spent preparing the records for disclosure. _

Shipping

[113] The ministry submits that the \$3.00 fee charged to the requester for the delivery of “final release package” is based on a \$4.35 quote from the ministry’s shipping vendor, Purolator. The ministry provided this office with a copy of the \$4.35 shipping quote. The ministry states that, “[t]he remainder of releasable records will be shipping at a cost consistent with this estimate subsequent to the resolution of appeals PA13-295-2 and PA13-437.”

[114] I find that the \$3.00 fee charged for shipping is in accordance with the [Act](#), and I uphold this shipping fee.

Fee decision summary

[115] In summary, I find that the ministry is entitled to charge the requester:

- \$60.00 for searching for responsive records,

- \$10.00 for providing an electronic copy of the records on a CD-ROM,
- \$7.50 for preparation time, and
- \$3.00 for delivery.

PA13-437 – Third party appeal

THIRD PARTY INFORMATION

G. Does the mandatory exemption at section 17(1) apply to portions of pages 194-195, 303-304, 452-467, and all of pages 155-157, 217-244 and 701-706?

[116] As the third party consented to disclosure of the records at pages 154, 516-517, 651 and 687 in its reply representations, it is not necessary to discuss them here, and I will order their disclosure.

[117] Section 17(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[118] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.

[27] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. [28]

[119] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

Representations

[120] The third party provided confidential and non-confidential representations on the application of section 17(1).

[121] The third party submits that it only generates and supplies information to institutions, such as the ministry, to facilitate its ultimate objective of selling energy from its wind projects. It states that since the records at issue bear upon the commercial viability of the wind farm, the records constitute commercial information. The third party submits that the redacted information is not publically available.

[122] The third party also submits that the records constitute technical information, as the records were prepared by an aviation expert, and contain "operational information" pertaining to the project and a nearby airport, "making specific findings with respect to lighting and zoning requirements, limitations on the height of structures, and the takeoff and landing of planes, among other things."

[123] In its representations, the ministry notes that it agreed with the third party that the information sent to the third party for notification was the result of technical or scientific study.

[124] The requester generally questions whether the records constitute commercial or technical information. He also makes a number of other comments which do not directly relate to the type of information, such as the validity of the opinion expressed in reports of the third party's consultant.

Analysis

[125] This office has defined scientific, technical and commercial information as follows:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.^[29]

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.^[30]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.^[31] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.^[32]

[126] I adopt these definitions for the purpose of these appeals.

[127] I find that the records at issue on pages 155-157, 194-195, 217-244, 303-304, 452-467, and 701-706 consist of, or refer to, either technical information prepared by an expert retained by the third party relating to the potential operation of the proposed wind farm alongside a nearby airport, or commercial information relating to the third party's proposal to build the wind farm. Therefore, part 1 of the test under section 17(1) has been met for these records.

Part 2: supplied in confidence

[128] I will first consider whether the records at issue at pages 155-157, 194-195, 217-244, 303-304, 452-467 and 701-706 were supplied by the third party to the ministry. If so, I will then consider whether they were supplied in confidence.

Supplied

[129] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.^[33]

[130] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.^[34]

Representations

[131] The third party submits that the information at issue was supplied to the ministry by the third party "in the course of ongoing correspondence, mainly in the form of in-person meetings, private letters and emails."

[132] In its representations, the ministry notes that it agrees with the third party that the information at issue was supplied to the ministry in confidence either implicitly or explicitly.

[133] The requester's representations do not address whether the information was supplied to the ministry.

Analysis

[134] The records consist of email chains, letters, reports and slides from a presentation. Based on my review of the information at issue in the records, I find that it was all either

supplied directly by the third party to the ministry, or that disclosure would reveal information supplied by the third party to the ministry.

[135] I will now consider whether the information at issue in the records has been supplied to the ministry in confidence.

In confidence

[136] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis. ^[35]

[137] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure. ^[36]

Representations

[138] The third party submits that it had a reasonable expectation that the records, “which were supplied to the ministry in response to aviation issues outside of the established REA application process, would remain confidential.” The third party relies on an Alberta Court of Appeal decision, *Imperial Oil Ltd. v Calgary (City)*, ^[37] discussing the importance of a party’s subjective expectation of confidentiality under the Alberta legislation.

[139] The third party also notes that its expectation that the records were supplied in confidence was subjectively held and objectively reasonable as numerous documents were marked as “confidential” and the records were supplied to the ministry “pursuant to a working relationship in which the correspondence was expected to remain confidential.”

[140] The third party distinguishes between the public documentation required under the legislation to have a complete REA application, and those “supplementary documents” supplied to the ministry during an ongoing dialogue to “address other matters.” It claims that the records at issue constitute the latter type of document. In light of the media attention and public opposition garnered by the wind farm, the third party submits that it reasonably expected that the documents submitted would be kept confidential.

[141] As noted above, the ministry agrees with the third party that the information at issue was supplied to the ministry in confidence.

[142] The requester submits that the third party should have expected that all emails and letters to the ministry are subject to the [Act](#), and disclosure should be expected. The requester also notes that Ontarians have the right of “vocal resistance” in relation to projects that are provincially regulated.

Analysis

[143] I adopt the reasoning applied by this office in previous orders, which have determined that the party resisting disclosure must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. I agree with the principle expressed in those orders that this expectation must have an objective basis.^[38]

[144] While a portion of the record at pages 452-467 is marked “confidential”, the remaining records at issue are not similarly marked. I also note that the record at pages 155-157 is an attachment to a letter (the record at page 154) which was copied to a Member of Parliament, a Member of Provincial Parliament and two provincial Ministers. Furthermore, the record at pages 155-157 is substantially similar to the record at pages 516-517, for which the third party has agreed to disclosure.

[145] As the third party shared the record at pages 155-157 with numerous parties outside of the ministry’s REA process, I find that the third party did not have a reasonable expectation of confidence at the time the information was provided to the ministry. Accordingly, I find that this record does not meet part 2 of the test.

[146] As the record at pages 194-195 is the third party’s preliminary view on certain aspects of the regulatory requirements applicable to the proposal, I find that there is a sufficient objective basis on which to conclude that the third party had a reasonable expectation of confidentiality at the time the information was provided.

[147] Although the third party claims that the remaining information at issue was submitted to the ministry confidentially, it is not clear to me, in light of other information the third party has agreed to disclose to the requester, and publically available information on the third party’s website, whether the remaining records at issue constitute the type of information for which it would be reasonable to assume the third party had an implicit expectation of confidentiality. However, due to my determination on part 3 of the section 17(1) test, I find that it is not necessary for me to make a finding with respect to whether the remaining information at issue in these records was supplied “in confidence” by the third party.

Part 3: harms

[148] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such

harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.^[39]

[149] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.^[40]

Representations

[150] The third party submits that “[t]here has been vocal resistance from anti-wind coalitions against wind energy projects in Ontario, as well as against the [third party’s] projects in particular.” The third party references lawsuits filed against it and landowners who have entered into commercial agreements with it, in addition to numerous freedom of information requests, as examples of anti-wind activists’ attempts to “thwart wind energy projects.”

[151] The third party claims that disclosure of the remaining information at issue, such as the third party’s rebuttal to allegations in the media, could be exploited by anti-wind activists and would present a legitimate risk to the advancement of the wind farm. The third party references previous litigation and appeals to the Environmental Review Tribunal (ERT) as support for its argument that disclosure of the information at issue could prejudice the third party in future proceedings that are likely to arise as the development of the wind farm progresses.

[152] In response to the third party’s representations, the ministry submits that the third party has not provided sufficiently detailed and convincing evidence that demonstrates a reasonable link between the release of the information at issue and the reasonable expectation of harm in the form of litigation, project delays, or any other harm referenced by the third party. The ministry also notes that “stakeholders and members of the public are entitled to express concern about REA projects”, and that “[i]t has not been demonstrated that these communications are prejudicial to the [third] party under the *Act*.”

[153] The requester generally submits that the third party’s arguments are “without merit”.

Analysis

[154] Based on my review of the records and the representations, including the third party’s confidential representations, I find that, with one exception, the third party has failed to provide evidence establishing a reasonable expectation of harm from disclosure of the information at issue.

[155] As noted above, the record at pages 194-195 is a letter from the third party to the ministry outlining the third party’s preliminary views on certain aspects of the regulatory requirements applicable to its wind farm project proposal. This letter was sent to the ministry in the early stage of the REA process, before more public positions were taken by the third party. I find that disclosure of this record could reasonably be expected to

prejudice the third party's competitive position as a wind farm project proponent, both in relation to the third party's ongoing REA with the ministry, and in any future applications. As all three elements of the section 17(1) exemption have been met, I do not uphold the ministry's decision to disclose this record.

[156] I find that the third party has failed to meet the harms portion of the test in relation to the remaining records at pages 217-244, 303-304, 452-467 and 701-706. These records consist of correspondence between the third party and the ministry and the slides from a power point presentation given by the third party to the ministry. The records discuss general details of the third party's proposal and outline stakeholders' and community members' objections to the third party's wind farm proposal. Substantially similar information is publically available on the third party's website and elsewhere, including in the third party's "Consultation Report" and its consultant's assessments.

[157] The third party's assertion that, in light of previous litigation, access to information requests and ERT appeals, the information at issue "could be exploited by anti-wind activists", does not establish a reasonable expectation of harm. The fact that stakeholders and members of the public have expressed concern over the third party's wind farm projects does not in and of itself establish a reasonable expectation of harm. I fail to see how the specific information in these records could reasonably be expected to be used in a manner leading to the harms described in section 17(1). The public availability of substantially similar information leads me to doubt the assertion of harm, in relation to the disclosure of these records.

[158] I find, therefore, that part 3 of the test for exemption has not been met for the records at pages 217-244, 303-304, 452-467 and 701-706. Accordingly, I will order disclosure of these records, in addition to the record at pages 155-157.

NOTICE

H. Did the ministry adhere to the notice requirements in [section 28\(1\)](#) of the [Act](#) regarding the records at pages 3-59, 88-94, 146-153, 198-207, 209-216, 263, 446-451, 685-686, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926, 928-930?

[159] Section 28(1) sets out an institution's obligation under the [Act](#) to provide notice of an access request, in the following circumstances:

Before a head grants a request for access to a record,

(a) that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the

interest of a person other than the person requesting information; or

(b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21 (1) (f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[160] In order to discharge his or her responsibilities under section 28(1)(a), a head must provide notice with respect to any responsive records that he or she has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information, in this case, the third party.

Representations

[161] The third party submits that the [Act](#) imposes a duty on the head to provide notice of a request to the person to whom the information relates. Further, the third party states that since the request is for records relating to the wind farm from January 2009 to April 1, 2013, including records that may have been submitted or produced on behalf of the third party, such as consultant's reports, it is evident that such records relate to the third party as it is the proponent of the project.

[162] The third party states that if the ministry had any doubt as to whether the above-noted records relate to the third party, the ministry should have acted out of an abundance of caution and provided notice so the third party could have the opportunity to review the records and determine whether they are confidential.

[163] The third party notes that,

Considering that the purpose of the [Act](#) is to balance the interest of the public to have access to information held by institutions and the interests of third parties to protect certain information from disclosure, it is important [that] the notice requirements in the *Act* [are] strictly adhered to by institutions. Those affected third parties must be given prompt notice by institutions. Accordingly, it is important for the Commissioner to issue an order to clarify and reinforce the notice requirements established in [section 28\(1\)](#) of the *Act*.

[164] The third party asks this office to order the ministry to provide it with notice for the above-noted records before any order is made on the disclosure of the records.

[165] The requester submits that the third party's claims are broad, and that the extent of notice provided to the third party prior to the issuance of an order should be limited to avoid further prejudicing the outcome of the appeals.

[166] The ministry submits that,

... the above-noted records consist of emails and other documents authored by, and exchanged between, Ministry staff for briefing and other

informational purposes that are internal to the Ministry's review process. The Ministry notes that there is no substantive information included in these records related to [the third party's wind farm] that is otherwise unavailable in the proponent's publicly posted documentation.

[167] The ministry also states that as the above-noted records do not contain trade secrets or substantive technical, scientific, commercial, financial or labour relations information, there was no reason to believe the disclosure of those records might affect the third party's interests.

[168] In regard to the third party's assertion that it should have received notice for the above-noted records, the ministry submits that the records for which the ministry did not provide notice were either created internally and/or submitted to the ministry by external stakeholders or members of the public. As the records were not "supplied" by the third party, the ministry submits that the third party is not in a position to claim or confirm the confidentiality of these records.

[169] The ministry describes one group of the records as "status notes and informational correspondence related to internal meetings and briefings." Another group of the records is described as "letters of concern from stakeholders and members of the public about the [wind farm] and Ministry communications and responses, that were not addressed to [the third party] and were exchanged in confidence with the ministry."

[170] The ministry submits that the notification threshold applied was both reasonable and equitable. The ministry states that sending the records to the third party would "reflect a misappropriation of subsection 28(1) and be contrary to the Ministry's commitment to disclose the majority of Ministry records to the requester."

[171] Lastly, the ministry notes that it has made the decision to notify the third party for the records at pages 197, 670, 688 and 691-692, as those records appear to have been submitted to, or received on behalf of, the third party.

Analysis

[172] As this office has stated elsewhere, the responsibility to fulfill the notification requirements in section 28 rests with institutions, and not this office;^[41] in the normal course this office does not play a role in reviewing that decision. In this case, however, the issue has been placed before this office as part of the third party appeal and I have therefore reviewed the above-noted records at issue.

[173] This office considered the threshold for notification under section 28(1) in Interim Order PO-1694-I. In that order, the adjudicator stated:

In my view, use of the word might in section 28(1)(a) creates a low threshold in determining whether notification is required.

In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If

it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.

If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1) (a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.^[42]

[174] The Supreme Court of Canada, in *Merck Frosst Canada Ltd. v Canada (Health)*, also considered the proper threshold for notification of a third party, stating that disclosure without notice is only justified in clear cases where the institution concludes that there is “no reason to believe that the record might contain exempted material.”^[43] In that case, the court also noted that section 27(1) of the *Access to Information Act* [which is similar to the equivalent notification provision in the *Act*] “does not refer to particular categories of documents but rather to particular types of information that are or may be contained in records otherwise subject to disclosure.”^[44]

[175] I agree with the approach taken in Order PO-1694-I, and by the Supreme Court in *Merck Frosst*, and adopt the principles expressed there for the purposes of these appeals.

[176] As indicated above, the third party submits that the threshold for notification under section 28 is whether the information “relates” to a third party. I do not find this standard to be mandated by the principles expressed in Order PO-1694-I and the *Merck Frosst* decision. To begin with, notification must be based on an assessment that the records might contain or lead to inferences revealing certain *types* of information about a third party. Second, the threshold for notification must be guided by the provisions of section 17(1).

[177] In this case, the part of section 17(1) that is most relevant to the issue of notification is the protection accorded to information “supplied in confidence” by a third party. The ministry has described the types of records for which it did not seek the third party’s submissions through notification under section 28. They include internal ministry documents in which any reference to the third party is consistent with publicly available information. I accept the ministry’s assessment that notification was not required for these. Adopting the formulation in the *Merck Frosst* decision, there is “no reason” to believe that these records might contain or reveal information supplied in confidence by

the third party. Likewise, I accept the ministry's assessment that communications submitted to the ministry by external stakeholders or members of the public, and that refer to the third party, do not give rise to a duty to notify under section 28. Again, there is no reason to believe that these records might contain or reveal information supplied in confidence by the third party. I accept the ministry's submission that "there is no substantive information included in these records related to [the third party's wind farm] that is otherwise unavailable in the proponent's publicly posted documentation."

[178] In arriving at my conclusion, I have specifically considered the possibility that a record that was not submitted by the third party to the ministry (such as a record created by a ministry employee) may nevertheless contain the type of information protected by section 17(1), for instance, by incorporating or describing confidential business information originally supplied by the third party. On my review of the evidence and records, I am satisfied that none of these records fall into this category.

[179] Accordingly, I find that the above-noted records did not require notification to the third party pursuant to section 28, and, in accordance with the ministry's decision, may be disclosed to the requester with the exception of any severances of personal information the requester has already agreed to.

PUBLIC INTEREST OVERRIDE

I. Is there a compelling public interest in the disclosure of the record at pages 194-195 that clearly outweighs the purpose of the section 17 exemption?

[180] The requester takes the position that there is a compelling public interest in the disclosure of any withheld information. As I have found that the record at pages 194-195 qualifies for exemption under section 17(1), I will consider the possible application of [section 23](#) of the [Act](#) to that information.

General Principles

[181] Section 23 reads:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.
[Emphasis added]

[182] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.^[45]

[183] The [Act](#) is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the record

with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.^[46]

Compelling public interest

[184] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.^[47] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.^[48]

[185] A public interest does not exist where the interests being advanced are essentially private in nature.^[49] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.^[50]

[186] A public interest is not automatically established where the requester is a member of the media.^[51]

[187] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.^[52]

[188] Any public interest in *non*-disclosure that may exist also must be considered.^[53] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.^[54]

Purpose of the exemption

[189] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[190] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.^[55]

Representations

[191] The third party cites Order PO-2478, in which the adjudicator determined that there was “no sufficient compelling interest warranting disclosure of commercial information relating to agreements entered into between a developer and landowners to facilitate a wind energy project since there are established processes by which the public

can comment and provide input on wind energy projects.” The third party notes that its proposal for the wind farm was posted on the Environmental Registry for a 60-day public review and comment period. Accordingly, the third party submits that the established public participation process supports the conclusion that there is no compelling public interest in disclosure that would outweigh the exemptions in section 17(1).

[192] The third party also states that there is an interest in non-disclosure of the records at issue. It submits that protection of the withheld information is necessary to promote wind energy investment as a component of the government’s renewable energy initiatives under the *Green Energy Act*.

[193] The requester’s arguments on the application of the public interest override generally relate to aviation safety concerns he asserts arise from the proposed wind farm project.

[194] The ministry did not make any representations on this issue.

Analysis

[195] As noted above, two requirements must be met to establish that the public interest override in [section 23](#) of the [Act](#) applies to the record to which section 17(1) has been found to apply:

- There must be a compelling public interest in the disclosure of the information; and
- This interest must clearly outweigh the purpose of the exemption.

[196] In determining whether a compelling public interest in the disclosure of the exempted information exists, I must first consider whether the interest being advanced is a public or private interest. As mentioned above, a public interest does not exist where the interests being advanced are essentially private in nature.

[197] The interests advanced by the requester relate to aviation safety concerns. The record at issue does not relate to aviation safety. Rather, as noted above, the record relates to the third party’s preliminary views on certain non-aviation aspects of the regulatory requirements applicable to its REA proposal. Nonetheless, I accept that there exists a public interest in information about legislated regulatory requirements for wind farm projects, and in discussions about the proper interpretation of those requirements.

[198] I must consider whether this public interest is “compelling” in nature. As determined by previous decisions of this office, in order for a public interest to be “compelling”, it must arouse “strong interest or attention.”^[56] A compelling public interest has been found *not* to exist where another public process or forum has been established to address public interest considerations.^[57] In this appeal, the third party submits that the public consultation portion of the REA process provides the appropriate forum for the public interest to be addressed. I have reviewed various documents the third party has publically posted pursuant to the REA process, and, in particular, note the availability of information regarding the third party’s position on the regulatory requirement discussed in the record. I find that the record at issue does not add to the information the public requires to make effective use of the REA public consultation

process (which has already occurred), or any potential future proceeding at the ERT. Therefore, I find that any public interest in the disclosure of the record is not compelling within the meaning of section 23.

[199] Accordingly, section 23 does not apply in the circumstances of this appeal.

PERSONAL PRIVACY

J. Is the information claimed as exempt under section 21(1) at page 195 "personal information" within the meaning of the *Act*?

[200] As I have found that the public interest override is not applicable to the record at pages 194-195, I need not consider the requester's request that this office verify that the information the third party seeks to have withheld on page 195 "is as represented".

[201] However, in my review of the records, I find that certain information at the following pages is the same as information withheld by the ministry under section 21(1) in other records, and should be redacted for consistency: 708, 834, 836, 868 and 870.

ORDER:

1. I order the ministry to issue a final access decision to the requester regarding access to the records at pages 197, 670, 688-690 and 691-692 in accordance with the *Act* without recourse to any further time extension, and treating the date of this decision as the date of the request. In order to verify compliance with this order provision, I order the ministry to provide me with a copy of the access decision.
2. I order the ministry to disclose the records at pages 72-73, 154, 196, 208, 516-517, 646-650, 651, 687, 885, 910 and 918-923, with the exception of any severances of personal information the requester has already agreed to, no later than **December 22, 2015**.
3. I uphold the ministry's decision to disclose the records at pages 3-59, 88-94, 146-153, 155-157, 198-207, 209-216, 217-244, 263, 303-304, 446-451, 452-467, 685-686, 688, 701-706, 707-709, 718-722, 755-773, 778-780, 784-786, 788, 790, 793, 797-798, 802, 806, 810, 814, 818-820, 824, 828-829, 833-836, 838, 840-842, 868-870, 878-879, 886, 889, 890-891, 894-906, 911-914, 925-926 and 928-930 and order the ministry to disclose those records to the requester, with the exception of any severances of personal information the requester has already agreed to and those I have identified in the last paragraph of my decision above, no later than **December 22, 2015** but not earlier than **December 17, 2015**. For the assistance of the ministry, I am providing it with a highlighted copy of the records discussed in the last paragraph of my order indicating the information to be withheld.
4. I order the ministry to withhold the record at pages 194-195 from disclosure.
5. I uphold the ministry's decision to deny access to the records at pages 95-104, 710-717, 796, 860 and 871.

6. I uphold the ministry's fee, in part. The fee is to be reduced to \$80.50.
7. In order to verify compliance with order provisions **2, 3 and 5**, I reserve the right to require the ministry to provide me with proof of disclosure to the requester in accordance with order provisions **2, 3 and 5**.

Final Signed By: _____

November 17, 2015 _____

 rry Liang
 stant Commissioner

[1] R.S.O. 1990, c. E 19.

[2] See <http://www.ontario.ca/page/renewable-energy-approvals>.

[3] See <https://dr6j45jk9xcmk.cloudfront.net/documents/915/3-3-1-guide-to-renewal-energy-approvals-en-pdf.pdf> at page 213.

[4] *Environmental Protection Act* at section 47.5(1).

[5] Since receiving these representations, the IPC was advised by the requester that he has obtained court records that overlap with some of the records at issue in his appeals. One of the records in his possession is page 688. I bring this to the third party and the ministry's attention as it will have a bearing on the ministry's access decision.

[6] *Descôteaux v. Mierzwinski* (1982), 1982 CanLII 22 (SCC), 141 D.L.R. (3d) 590 (S.C.C.).

[7] Orders PO-2441, MO-2166 and MO-1925.

[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, 1969 CanLII 1540 (CA EXC), [1969] 2 Ex. C.R. 27.

[10] *General Accident Assurance Co. v. Chrusz* (1999), 1999 CanLII 7320 (ON CA), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

[11] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[12] *Blank v. Canada (Minister of Justice)* (2006), 2006 SCC 39 (CanLII), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

[13] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 2002 CanLII 18055 (ON CA), 62 O.R. (3d) 167 (C.A.).

[14] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[15] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz*, cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

[16] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.).

[17] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

[18] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

[19] *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

[20] *Blank v. Canada (Minister of Justice)*, cited above.

[21] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at 53.

[22] Emphasis in original.

- [23] Order MO-1573.
- [24] Section 54(2).
- [25] Orders P-344 and MO-1573.
- [26] The ministry's representations indicate that the deadline to issue an approval decision is October 2014. However, this deadline has lapsed, and the ministry's Renewable Energy Projects Listing indicates that the project is still under "technical review": <http://www.ontario.ca/environment-and-energy/renewable-energy-projects-listing?drpType=0&drpStatus=0&drpLocation=0>.
- [27] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) [*Boeing Co.*].
- [28] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
- [29] Order PO-2010.
- [30] Order PO-2010.
- [31] Order PO-2010.
- [32] Order P-1621.
- [33] Order MO-1706.
- [34] Orders PO-2020 and PO-2043.
- [35] Order PO-2020.
- [36] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
- [37] 2014 ABCA 231 [*Imperial Oil*].
- [38] See Orders PO-2020, PO-2043, PO-2371 and PO-2497.
- [39] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
- [40] Order PO-2435.
- [41] Order PO-1694-I.
- [42] PO-1694-I at page 6, emphasis in original.
- [43] 2012 SCC 3 [*Merck Frosst*] at para 72.
- [44] *Merck Frosst* at para 64.
- [45] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).
- [46] Order P-244.
- [47] Orders P-984 and PO-2607.
- [48] Orders P-984 and PO-2556.
- [49] Orders P-12, P-347 and P-1439.
- [50] Order MO-1564.
- [51] Orders M-773 and M-1074.
- [52] Order P-984.
- [53] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
- [54] Orders PO-2072-F, PO-2098-R and PO-3197.
- [55] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.
- [56] Order P-984 and Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.
- [57] Orders P-123/124, P-391 and M-539.

TAB 43

Ontario (Public Guardian and Trustee) (Re), 2017 CanLII 6298 (ON IPC)

Date: 2017-01-27
File number: PO-3691; PA15-212
Citation: Ontario (Public Guardian and Trustee) (Re), 2017 CanLII 6298 (ON IPC), <<https://canlii.ca/t/gxgzn>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3691

Appeal PA15-212

Office of the Public Guardian and Trustee

January 27, 2017

Summary: The appellant made a request to the Office of the Public Guardian and Trustee (the OPGT) relating to a deceased person's estate. This was one of many similar requests. In responding to the appellant's numerous requests, the OPGT indicated that it was limiting the number of requests from the appellant that it would process at any given time. The appellant appealed to this office, stating that he had not received a proper decision letter. During the

processing of this appeal, the OPGT confirmed that it was taking the position that the appellant's requests were "frivolous and vexatious" under [section 10\(1\)\(b\)](#) of the [Act](#).

In this order, the adjudicator finds that the number of requests submitted by the appellant amounts to a pattern of conduct that interferes with the operations of the institution, and accordingly the requests are "frivolous and vexatious" for the purpose of [section 10\(1\)\(b\)](#) of the [Act](#) and [section 5.1\(a\)](#) of Regulation 460. The appellant is restricted to five active requests at any given time. The adjudicator also finds that the institution did not issue an access decision that complied with the requirements set out in the [Act](#). However, he finds that there would be no useful purpose in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

Statutes Considered: [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, as amended, [10\(1\)\(b\)](#), 26, 27.1, and 29; Regulation 460, [section 5.1](#).

Orders and Investigation Reports Considered: Orders 28, M-618, M-697, MO-1921, MO-2201, MO-2436, and PO-2151.

OVERVIEW:

[1] The Office of the Public Guardian and Trustee (OPGT or the institution) received a request under the [Freedom of Information and Protection of Privacy Act](#) (the [Act](#)) from a lawyer at an identified law firm (the appellant) for information relating to a deceased person's estate. The request stated that it was made "for the purposes of advancing and administering the Estate of [the deceased person]" and specifically sought the following information:

- Marital status of the deceased;
- The name of the deceased's spouse;
- The names of the deceased's parents;
- Occupation of the deceased;
- Date of birth of the deceased;
- Place of birth of the deceased;
- Age of the deceased at the date of death; and
- Last known address of the deceased.

[2] The request was made in January of 2015 and was one of many requests submitted by the appellant to the OPGT.

[3] In March of 2015 the appellant filed an appeal with this office on the basis that he had not received a response from the OPGT.

[4] During the processing of this file, the Freedom of Information Coordinator (FOIC) for the Ministry of the Attorney General (the ministry), which processes requests and appeals on behalf of the OPGT, advised this office that it had previously confirmed for the appellant that, due to the number of requests the appellant had made to the OPGT, the OPGT was prioritizing his requests. The OPGT provided copies of correspondence it had earlier sent to the appellant which confirmed that the OPGT would be prioritizing the appellant's requests and dealing with five requests at a time "... in order to ensure that

[the appellant's] numerous requests do not interfere with the operations of the office" The institution therefore took the position that it had responded to the request and was not in a "deemed refusal" position.

[5] The appellant asserted that he had never agreed to prioritizing his requests, and that he is entitled to receive "fully compliant written responses within 30 days" in accordance with the requirements of the *Act*.

[6] This appeal was then transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the institution, initially. I asked the institution to address a number of issues including:

- whether the OPGT is in a "deemed refusal" position;
- whether the access decision issued by the OPGT constituted an adequate decision letter in accordance with [section 29](#) of the *Act*;
- whether the OPGT is taking the position that the request for access resulting in this appeal is frivolous or vexatious and, if so, whether the request is frivolous or vexatious.

[7] The OPGT provided representations in response. In its representations the OPGT confirms that it takes the position that the large number of requests made by the appellant is vexatious and an abuse of process. It states:

It is the position of [the OPGT] that responding to the over 100 requests made by the appellant within 30 days would significantly interfere with the operations of the Ministry.

As stated above, the Ministry has not issued a decision letter as it has yet to open the request in the order described to the Appellant. However, it is the position of the Ministry that the request is frivolous and vexatious within the meaning of Section 5.1 of Regulation 460 and [section 10\(1\)](#) of the *Act*.

[8] I then sent a Notice of Inquiry to the appellant, along with a complete copy of the institution's representations, and the appellant also provided representations to me.

[9] I note that, concurrent with or during the processing of this appeal, the appellant filed numerous additional "deemed refusal" appeals^[1] with this office pertaining to his many requests to the OPGT. Due to the identical issues involved, this office put those additional appeals on hold pending the determination of this appeal.

[10] In this order I deal first with the issue of whether the appellant's request is frivolous or vexatious. I then address some of the other issues raised by the parties.

[11] In this order, I find that the number of requests submitted by the appellant amounts to a pattern of conduct that interferes with the operations of the institution, and accordingly the requests are "frivolous and vexatious" for the purpose of section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460. The appellant is restricted to five active requests at any given time.

[12] I also find that the institution did not issue an access decision that complied with the requirements set out in the [Act](#). However, I determine that there would be no useful purpose served in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

RECORDS:

[13] The appellant seeks access to the following information in relation to a named deceased person: the name of the deceased's spouse; the names of the deceased's parents; and the deceased's occupation, date of birth, place of birth, age at the date of death, marital status and last known address.

[14] The appellant's other requests appealed to this office are similar in nature to the above-noted request.

DISCUSSION:

Additional background information

Duties and Practices of the OPGT in Estate Administration

[15] As background, the OPGT provided the following summary of its duties and practices in estate administration:

The PGT has the authority under the *Crown Administration of Estates Act* to administer certain estates in Ontario. The PGT is appointed Estate Trustee in approximately 225 new estates every year and has approximately 1,400 estates under administration at any given time. The legislation imposes on the PGT a duty to identify, locate and distribute the estate to the rightful beneficiaries. The majority of estates are intestacies where there is no will, so it is necessary to determine who inherits under the *Succession Law Reform Act*. The Office of the Public Guardian and Trustee (the "OPGT") is actively involved in attempting to locate the next-of-kin, first to verify if the next-of-kin wish to administer the estate themselves, and if not, to obtain their agreement to the PGT's appointment as estate trustee.

The OPGT continues to search for heirs after the PGT is appointed Estate Trustee, consistent with its duty as estate trustee. With often very little information, the Estate Analysts in the Heirship and Research Unit of the OPGT, a small unit of eight people, must build a family tree for the deceased. In many cases there is limited or conflicting information about the deceased's family and it is necessary to retain the professional services of genealogists to conduct searches for next-of-kin in countries all over the world. This process can sometimes be lengthy, and the family tree must be updated and sometimes corrected as additional information is received and verified.

The OPGT ensures that the heirs are provided with complete information about the estate, including its value, the OPGT's fees, and the documentation which is required to distribute the estate. Upon locating an

heir, the Office assists the heir with the paperwork and research that must be completed to prove the heir's rightful claim to the inheritance. The Office regularly corresponds directly with heirs in Poland, Croatia, Hungary, Ukraine, the Czech and Slovak Republics, Germany, and other countries, in their language, to respond to their questions about the status of administration and of their documentation, to send them an accounting of the estate and release form, and ensure that the funds are forwarded to them in a timely manner.

Preliminary Issue – effect of the adequacy of the decision letter

[16] One of the issues raised in this appeal is whether the institution's decision letter was adequate and conformed with the requirements of the *Act*. I find under my discussion of "additional issues" below that the decision issued by the institution did not conform to the requirements of the *Act*. In particular, although correspondence from the institution to the appellant referred to the restrictions it was placing on the number of requests it would process at a time, and stated that the appellant's actions resulted in "interference with the operations of the institution" and referred to previous orders of this office which found appellants to be frivolous and vexatious,^[2] I find below that the institution at no time identified specifically to the appellant that it was taking the position that his requests were frivolous and vexatious, nor that this decision could be appealed to this office.

[17] This office may in certain circumstances order an institution to issue a decision letter in compliance with the *Act*; however, some previous IPC orders have not required an institution to do so if there would be "no useful purpose" in requiring an institution to issue a new or revised decision letter where the original decision letter was found to be inadequate. For example, in Order M-913,^[3] the adjudicator found that there would be "no useful purpose" in requiring a new decision to be issued, notwithstanding the inadequacy of the original decision letter, where "the appellant has exercised his right of appeal and provided extensive representations."^[4]

[18] In this appeal, although I find that the institution's decision was inadequate, the appellant appealed the decision, and the institution's representations identified its position that the appellant's request (in conjunction with his other requests) was frivolous and vexatious. Both parties have made representations on this issue, and I address this issue below. In these circumstances, I find that there would be no useful purpose served in requiring the institution to issue a new or revised decision letter.

Issue A: Is the request for access frivolous or vexatious?

General principles

Section 10(1)(b) reads:

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 head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 460 reads:

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

- (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
- (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[19] Section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly. ^[5]

[20] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious. ^[6]

[21] The institution takes the position that the request is frivolous and vexatious because of the application of the grounds in section 5.1(a) of Regulation 460. These grounds are:

- The appellant's conduct amounts to an abuse of the right of access;
- The appellant's conduct interferes with the institution's operations;

[22] The institution indicates that section 5.1(b) does not apply in the circumstances of this appeal.

[23] The institution submits that the number of requests made by the appellant is excessive and responding to such a number within 30 days would interfere with its operations. The institution described its process for limiting the appellant to five active requests at one time.

Grounds for a frivolous or vexatious claim

Pattern of conduct that amounts to an abuse of the right of access

[24] The institution takes the position that the appellant's requests form a "pattern of conduct that amounts to an abuse of the right of access."

[25] In determining whether the appellant's conduct amounts to an abuse of the right of access, the following factors may be relevant in determining whether a pattern of conduct

amounts to an “abuse of the right of access”:

- The number of requests and whether it is excessive by reasonable standards.
- The nature and scope of the requests. Whether they are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.
- The purpose of the requests and whether they are intended to accomplish an objective other than gaining access. Whether they are made for “nuisance” value or for the purpose of harassing the institution or burdening its system.
- The timing of the requests connected to the occurrence of some other related event, such as court proceedings.^[7]

[26] The institution’s conduct may also be a relevant consideration weighing against a “frivolous or vexatious” finding. However, misconduct on the part of the institution does not necessarily negate a “frivolous or vexatious” finding.^[8]

Representations

[27] In support of its position that the request is part of a pattern of conduct that amounts to an abuse of the right of access, the institution refers to the volume of requests made by the appellant. It states:

... the number of requests made by the Appellant is excessive by reasonable standards. The Appellant made 37 requests for access between October 8, 2014 and December 2, 2014, a period of six weeks. He was advised at that time that responding to the requests within 30 days would interfere with the operations of the institution and as a result that only 5 requests would be processed at a time. He subsequently made further access requests and [to the date of the filing of the representations] has made 116 requests ...: 59 requests have been dealt with and the files closed; 57 requests have not yet been opened and are inactive; 5 active requests. In addition to the requests from the Appellant, the OPGT, which is part of the Ministry, also receives numerous requests from other requesters with regard to estates which must be processed, in addition to meeting its statutory duties to administer estates and search for heirs.

[28] The appellant’s position is that his request(s)^[9] are not frivolous or vexatious. He states:

... numerous [IPC] Orders establish that the *Act* clearly “requires that *each request* be treated separately, and that *each request* must be considered on its own merits to determine whether a search for responsive records would unreasonably interfere with its operations.”^[10]

... there is nothing in the submission of the Ministry to indicate, or in the requests or conduct of the Appellant, that amount even in the slightest to reasonable grounds of bad faith by the Appellant or for a purpose other than to obtain access as lawfully permitted under the *Act*.

The Appellant states that in the overwhelmingly majority of all of the requests that have been submitted by the Appellant, the response by the Ministry amounts to photocopying approximately 3 – 4 pages of existing documents on their existing file. Despite the Ministry's submission that the number of requests made by the Appellant is "excessive by reasonable standards" they then go on in their own submission to confirm that many of the requests have already been complied with. Further in support of its position, the Ministry states that it "also receives numerous requests from other requestors with regard to estates which must be processed...". [T]he Ministry has not substantiated its decision, and it has not met the overwhelming burden of proof to substantiate its arbitrary decision. ... [The IPC] should not allow the Ministry to exercise any discretion in these circumstances as it would not be within the spirit and intent of the *Act* (and which discretion it is submitted does not exist in any event and would only amount to an *ultra vires act* and an abuse of power by the Ministry).

[29] The appellant then provides a copy of a short response received from the institution in response to one of his requests, as an example of "the brevity of its FOI requests". He then states:

There is nothing in the nature and scope, purpose of the request, or timing of the request that would indicate any abuse of process or frivolous or vexatious conduct by the Appellant.

The Appellant submits that the purpose of each request is in accordance with the *Act*, and previous Orders of the Information Privacy Commissioner. In regard to timing the requests, the Appellant submits that prior to this Appeal being submitted, it was receiving responses to requests for information at a rate of an average of less than 1 response per week from the Ministry, and that if the Ministry's submission is that it processes 6,000 requests per year, then it is the submission of the Appellant that the Ministry's arbitrary decision to limit the number of the Appellant's requests that it will process is in itself, in the absence of any further evidence of any other administrative processing limitations imposed, on its face, *prima facie*, of bad faith on the part of Ministry.

[30] The appellant refers to the actions of the institution and states that it there has been bad faith on the part of the FOI office and OPGT in not complying with the 30-day time limit imposed by the *Act*. He also provides lengthy representations on his concerns regarding how the institution responded to his requests, which I address below.

Analysis and Findings

[31] I will now review the four factors set out above to determine whether there is a pattern of conduct that amounts to an abuse of the right of access.

The number of requests and whether it is excessive by reasonable standards

[32] Regarding the quantity of requests, the institution states that the appellant made 37 requests for access between October 8, 2014 and December 2, 2014. The appellant indicates in a letter to the institution that:

... between September 29th and December 2nd, 2014 ... we have made 40 access to information requests regarding deceased individuals, in addition to 2 requests regarding lists of Deceased Estates funds escheated to the Crown that have been transferred to the Consolidated Revenue Fund. We have already voluntarily limited ourselves so that the requests may be reasonably responded to.

[33] Based on the above, both the institution and the appellant note approximately 40 requests being made in an approximately 9-week period. Projecting that quantity over an entire year would result in over 230 requests.

[34] The institution has also stated that:

[The appellant] subsequently made further access requests and to date has made 116 requests since October 2014.

[35] It is notable that, for the period of time which would result in a calculation of 230 requests a year, the appellant indicates that he has voluntarily limited the number of requests he has made.

[36] I consider the number of requests to be equal to 230/year and find that this number of requests is excessive by reasonable standards.

The nature and scope of the requests.

[37] In considering this factor, I must consider whether the requests are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.

[38] On my review of the request resulting in this appeal, and the other requests made by the appellant, I find that the nature and scope of the requests are not excessively broad and varied in scope or unusually detailed. The appellant clearly identifies the specific information from the various files that he is interested in, and restricts the requests to that information. Although the requests are similar in nature (that is – they are for the same type of information from various files), they are not for the same information from the same files, nor do they appear to be repetitive or overlapping with other files.

The purpose of the requests

[39] In reviewing the purpose of the request, I must determine whether they are intended to accomplish an objective other than gaining access. Whether they are made

for “nuisance” value or for the purpose of harassing the institution or burdening its system.

[40] The parties have provided little information about the purpose of the appellant’s requests, although the appellant confirmed that he is involved in “international heir locate and estate work”. I note that the request at issue in this appeal, which is for specific historic information about the deceased individual whose estate is being administered, is similar to previous requests made by “heir tracers” (organizations that are in the business of identifying and locating heirs of estates that have not been claimed or have escheated to the Crown) and addressed in previous orders issue by this office.^[11] Given the nature of the request, it appears the appellant is making the request(s) to access information to assist him in his business ventures. Based on the appellant’s own statement, it appears that the number of requests he could make is constrained only by his “voluntary limit” on that number, and that he intends to continue to seek access to records of the nature requested indefinitely.

[41] In the circumstances, I find that the purpose of the appellant’s request is to obtain access to the requested information, and is not intended to accomplish an objective other than gaining access.

The timing of the requests

[42] In reviewing the timing of the requests, one factor to consider is whether they are connected to the occurrence of some other related event, such as court proceedings.^[12]

[43] I note that the requests are not specific to or restricted by a limited time period – for example, these requests are not specific to identified litigation or particular matters that will end.

[44] However, with respect to the timing of the requests, I note that the appellant has indicated that he has voluntarily limited the number of requests he made during the identified time period.

Finding

[45] In considering the factors set out above, I am not satisfied that the appellant’s conduct amounts to an abuse of the right of access. Although the number of requests made by the appellant is excessive by reasonable standards, given the limited nature and scope of the requests, my finding that the purpose of the requests is to obtain access to the requested information, and the fact that the timing of the requests is not connected to other related events, I find that the institution has not established that the requests are frivolous and vexatious on the basis that the appellant’s conduct amounts to an abuse of the right of access.

Pattern of conduct that would interfere with the operations of the institution

[46] A pattern of conduct that would “interfere with the operations of an institution” is one that would obstruct or hinder the range of effectiveness of the institution’s activities.

[13]

[47] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government institution, and the evidentiary onus on the institution would vary accordingly.^[14]

What is the pattern of conduct?

Quantity of requests

[48] I reviewed this issue above and found the number of requests to be equal to 230/year. I also found that this number of requests is excessive by reasonable standards.

[49] In addition, I note that there is no suggestion that this number will decrease over time. In fact, the appellant has confirmed that this number of requests represents his own voluntary restriction on the number of requests he makes.

The nature and scope of the requests

[50] I found above that the nature and scope of the requests are not excessively broad and varied in scope or unusually detailed. The appellant clearly identifies the specific information from the various files that he is interested in accessing, and restricts the requests to that information. Although the requests are similar in nature (that is – they are for the same type of information from various files), they are not for the same information from the same files, nor do they appear to be repetitive or overlapping with other files.

[51] However, I must also consider the impact of the nature and scope of the requests on the institution.

[52] With respect to the nature of his requests, I accept the appellant's submission that many of his requests may result in 3 - 4 pages of documents. However, the number of responsive pages does not necessarily reflect the amount of work required to respond to his requests.

[53] The institution describes its process of responding to each of the appellant's requests as follows:

It takes the Ministry a significant amount of time to respond to FOI requests. Once a request is received, it is actioned to the appropriate program area, in this case the OPGT. When the OPGT receives a request, it is necessary to determine whether it has an estate file. At that time, counsel is assigned and contacts the Estate Analyst and Team Leader to determine the status of the estate (e.g. has the PGT been appointed estate trustee, have the heirs been located, has the estate been administered, etc.). For older estates the file must be requested from storage. The file is reviewed for responsive records, copies of responsive records are made and analysed to determine whether any exemptions apply and information severed where

appropriate. In reviewing the records, the Estate Analyst and Counsel must verify whether the records contain the most current information as in some cases the information regarding the deceased's family was incorrect when the file was first opened. This may involve reviewing numerous reports and correspondence from genealogists and family members, vital statistic documents, court records, etc.

[54] The appellant has provided evidence that the results of one request did not require significant effort on the part of the institution; however, based on the nature of the requests and the representations of the institution, I find that responding to each request takes a significant amount of time on the part of the institution – as the institution must consider where records are located, and:

- Locate the files (from various places);
- Review the files (which may include voluminous estate files)
- Locate the requested information in the files (which may be fairly straightforward in some files, but may involve significant review of individual pages in other files);^[15]
- Review the responsive information to determine whether exemptions apply, and issue access decisions in accordance with the requirements of the [Act](#).

Would the pattern of conduct interfere with the operations of the institution?

Representations

[55] In this appeal, the request was made to the OPGT. The OPGT is an institution listed on the schedule of institutions in Regulation 460. The OPGT's duties and practices in estate administration are set out by the institution above.

[56] Also of note is the fact that the OPGT is part of the Ministry of the Attorney General, and that requests for access are initially processed by the FOIC for the ministry. In the material provided by the ministry, the ministry states that the appellant's pattern of conduct is interfering with the operation of the institution. It states:

To provide some background, the Justice Cluster ministries (the Ministry of the Attorney General and the Ministry of Community Safety and Correctional Services) employ 11 FOI analysts who deal with numerous requests from various individuals (over 6000 requests were received in 2014), which makes it impossible to assign two or more analysts to deal with one requester."

[57] The ministry has also confirmed that, although the ministry's FOI office processes the request, it is actioned to the OPGT which then receives the request and must:

- determine whether it has an estate file;
- if so, assign counsel and contact the Estate Analyst and Team Leader to determine the status of the estate;
- for older estates, request the file from storage;
- review the file for responsive records;

- copy and analyse responsive records to determine whether any exemptions apply, and sever information where appropriate;
- verify the currency of the information in the files, which may involve reviewing numerous reports and correspondence from other parties.

[58] The appellant argues that the institution has shown that it can process a significant number of requests, as evidenced by their confirmation that many of the appellant's requests have already been complied with. The appellant also points to the institution's statement that it "also receives numerous requests from other requestors with regard to estates which must be processed...", presumably in support of his position that his requests are not interfering with the operations of the institution. The appellant also states that, prior to this appeal being submitted, he was receiving responses to requests for information at a rate of an average of less than 1 response per week from the institution, which in his view is unsupportable given the ministry's statement that it processes 6,000 requests per year.

[59] In addition, in response to the institution's position that the Justice Cluster ministries pool their resources to respond to FOI requests, the appellant states:

... this confirms that the Ministry of the Attorney General "Clusters" with other Ministries in regard to resources in regard to Freedom of Information Requests. The Appellant submits therefore that, the resources of the entire Government of Ontario and all 28 Ministries are to be considered ... as resources available to the Ministry of the Attorney General to assist when required by the number of requests received. It is submitted ... that in a democratic, open, and transparent society it should not be possible for an institution of government to constrain properly submitted freedom of information requests by reducing the number of employees allocated to processing requests for information. Where the *Act* requires a complete written response within 30 days, the institution must comply.

The Appellant submits the aforementioned statistics to show that the Ministry has the resources, or is able to obtain the resources, necessary to comply with the prescriptive 30 day time limit established in the [Act](#).

Analysis and findings

[60] As noted above, a pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.^[16] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces.

[61] Furthermore, Order PO-2151 identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

Previous orders of this office have considered the meaning of the term "unreasonable interference with the operations of an institution" in the context of claims that a request is frivolous or vexatious. Although made in a different context, they provide some guidance in assessing this issue.

Applying the findings in these previous orders, it appears that in order to establish “interference”, an institution must, at a minimum, provide evidence that responding to a request would “obstruct or hinder the range of effectiveness of the institution’s activities” (Order M-850). ...

... [W]here an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488).

In Order M-583, former Commissioner Tom Wright noted that, “government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed.”

Similarly, government organizations are not obligated to retain more staff than is required to meet its operational requirements. I qualify this point, however, by adding, as I noted above, that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).

In my view, a determination that producing a record would unreasonably interfere with the operations of an institution is dependent on the facts of each case. ^[17]

[62] I have found above that 230 requests in one year is an excessive number of requests, however, it is not only the number of requests that determines whether they would interfere with the operations of an institution. ^[18] In making my determination, I must consider all of the circumstances.

[63] In the circumstances of this appeal, I find that the appellant’s requests amount to a pattern of conduct that would interfere with the institution’s operations. I make this finding based on the number of requests made by the appellant and the amount of work required by the institution to respond to each of the requests, including who within the institution is available to process the requests. In particular, I note that although the institution’s FOI office initially processes the request, the requirements to review specific estate files are actioned to those within the office of the PGT familiar with the nature and content of the files. ^[19]

[64] I have also considered whether the relief provided by the *Act* would be sufficient to address the institution’s concerns that responding to the request would interfere with its operations. This relief includes the cost recovery mechanisms provided by the *Act* which may permit the institution to mitigate or avoid any such interference. ^[20] In my view, and particularly based on the institution’s evidence regarding the expertise required to locate and review the information contained in the estate files, I am not satisfied that the cost recovery mechanisms provided by the *Act* would permit the institution to mitigate or avoid any such interference.

[65] In addition, I note that previous orders of this office have encouraged institutions to allocate resources to deal with an unexpected influx of requests;^[21] however, such allocations are intended as an “emergency” solution to what is seen as a temporary situation. In this case, there is no indication that the appellant intends to cease making numerous requests to the institution. In the circumstances, I am satisfied that this “emergency” solution is not appropriate in the context of these requests.

[66] Lastly, I have considered the appellant’s suggestion that there has been bad faith on the part of the institution in responding to his requests, and that this should be a factor in determining whether the request is frivolous and vexatious. In the circumstances, I find that there has not been bad faith on the part of the institution, and do not find this to affect my decision in this appeal.

[67] Accordingly, I find that the institution has established that the requests submitted by the appellant amount to a pattern of conduct that would “interfere with the operations of the institution.” As a result, I find that the requests are “frivolous or vexatious” for the purpose of [section 10\(1\)\(b\)](#) of the [Act](#), with reference to section 5.1(a) of Regulation 460.

Remedy

[68] Where a request is found to be frivolous or vexatious, this office will uphold the institution’s decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution.^[22]

[69] I invited representations from the parties on the possible remedy that may be appropriate in the circumstances of this appeal. The institution responded by stating:

The IPC has the authority to impose conditions on processing FOI requests. The Ministry has limited the Appellant to five active requests at one time, which is quite generous, given that several IPC orders limit frivolous and vexatious requesters to one request at a time (e.g. MO-2436, MO-1921 and M-618). The Ministry submits the current process of limiting the Appellant to five active requests at one time is reasonable in the circumstances and should be upheld by the IPC and should also include appeals submitted by the Appellant.

[70] The appellant takes the position that, given the actions of the institution, the only appropriate remedy is for the institution to respond to his requests in accordance with the [Act](#).

[71] In the circumstances, and based on the evidence provided by the parties and the nature of the request(s) being made by the appellant, I find that an appropriate remedy is to restrict the appellant to five active requests at any given time. Assuming most requests are processed within 30 days, this number allows the appellant to have upwards of 60 requests processed per year.

[72] I have also considered the institution’s request that, if the appellant is restricted to five active requests at any given time, this should also include appeals. Previous orders issued by this office finding that requests are frivolous and vexatious frequently restrict

the total number of transactions (requests and appeals) which may proceed at a given time under the [Act](#). I have considered whether the restrictions should include a restriction on the number of appeals; however, I have decided not to restrict the number of appeals because: (1) based on the information provided by the parties, there is no suggestion that denial of access to information on the basis of identified exemptions or exclusions occurs regularly with the appellant's requests; and (2) I have no evidence regarding who in the institution would be processing the appeals if they are filed with this office. As a result, I will not restrict the number of appeals which may be processed by this office in this order.

Additional issues – adequacy of the institution's decision

[73] As noted above, when this file was transferred to the inquiry stage of the process, I invited representations on a number of issues in addition to whether the OPGT was taking the position that the requests were frivolous and vexatious. These issues included whether the OPGT was in a deemed refusal position and whether the access decision issued by the OPGT constituted an adequate decision letter in accordance with the requirements of the [Act](#).

Background

[74] In response to an earlier Notice of Inquiry sent to the parties at the intake stage of the appeal process, the institution provided this office with copies of three letters (dated December 2, 2014, December 29, 2014 and February 3, 2015) that had been sent to the appellant in relation to previous access requests made by the appellant.

[75] In the institution's December 2, 2014 letter to the appellant, with the subject line "Notice of Request for Prioritization", the institution notes that the appellant had filed 37 access requests between October 8, 2014 and December 2, 2014. At that time, 15 requests had been processed, the institution was working on 8 of the requests, and the remaining 14 requests had not yet been assigned. The letter then stated:

On November 24, 2014, [an assigned representative] contacted you to let you know that we could not deal with all of your requests, as this would interfere with the operations of this office.

At that time, you indicated that you would be making many more requests, and refused to prioritize them.

In order to ensure that your numerous requests do not interfere with the operations of the office, we will be dealing with five requests at a time and are asking you to prioritize them accordingly by December 16, 2014.

If you do not prioritize the request by the above-noted date, we will deal with them five at a time in the order listed below.

[76] The letter then set out a table listing the appellant's remaining 14 requests. It then reads:

Any requests coming in after the date of this letter will be added, in order of arrival, to the bottom of this list.

[77] The letter concludes by inviting the appellant to send his prioritization in writing.

[78] In a responding letter dated December 10, 2014, the appellant indicated that he had “already voluntarily limited [himself] so that the requests may be reasonably responded to”, noted various errors in the institution’s response, and stated:

It is our position... that we are entitled to, pursuant to [section 26](#) of the *Act*, an accurate response within 30 days of our requests being received.

[79] In its letter of December 29, 2014, the institution stated as follows regarding the processing of the appellant’s requests:

This letter is in response to concerns you outlined in your correspondence of December 10, 2014, around the processing of your Freedom of Information requests. ...

Although there is a 30-day timeline set out for responding to requests under the *Act*, there may be extenuating circumstances, which on occasion could result in a further delay... In addition, there are times where the records may be voluminous and additional time is required to extract the relevant information in responding to the inquiry. [Section 27\(1\)](#) of the *Act* sets out these parameters. Nevertheless, in this case, the analyst dealing with the file called you to inform you that extra time was needed due to the records being in a different location. ...

Lastly, in our letter dated December 2, 2014, we noted you had made 37 requests to date and you have since made further requests. In order to ensure there is no interference with the operation of the institution, you were asked to prioritize your requests and that we would deal with five active requests at one time. Please review IPC orders: M-618, M-697, MO-1921 and MO-2436, which support our decision to limit the number of requests.

[80] The appellant’s responding letter dated January 27, 2015 noted that he had not received a notice of extension under [section 27](#) of the *Act* for any of his requests, and that he did not agree to the chronological processing of its requests. He stated:

It is our position that we are entitled to received fully compliant written responses within 30 days, and that your office is legally bound by the legislation to this time period.

[81] The institution’s letter of February 3, 2015 reaffirms that “[p]rioritization of [the appellant’s] numerous requests will continue, in order to avoid interference with the operation of the institution, which must prioritize many work related demands with finite resources.” The letter also directs the appellant to appeal any dissatisfactory decisions to this office.

[82] In May of 2015 the institution provided this office with the following explanation of its position:

The Ministry's position is that these [appeals] are not deemed refusals. In fact, these requests have yet to be opened, because we are currently prioritizing the numerous requests received [from the appellant] and only dealing with five active requests at one time.

Initially, we attempted to arrive at a solution which would be amenable to both the requester and the Ministry and we attempted to work with the requester by asking him to prioritize his numerous requests according to his needs. At that time, the individual did not contact us.

In light of this, in addition to the fact that the requester continued to make numerous requests, the Ministry was placed in the position of limiting the number of active requests at one time by this individual, because his requests were interfering with the operations of the institution. ...

[83] This appeal was then transferred to me to continue the inquiry stage of the process. In response to the Notice of Inquiry I sent to the appellant, the appellant provided extensive representations setting out a chronology of his responses to the institution's position. This included his correspondence with the institution between December of 2014 and April of 2015, his contacts with his MPP and representatives of OPGT to "discuss ongoing issues." The appellant summarizes his view of these attempts and states:

... we unequivocally reject, in every sense, the Ministry's representation that the Ministry's letters of December 2, 2014, December 29, 2014, and February 3, 2015 [footnotes omitted] were parts of attempted negotiations with the Appellant, to process requests for information.

The fact is that the Ministry arbitrarily imposed a limit on the Appellant's requests, and then attempted to negotiate the Appellant's acquiescence of the arbitrarily imposed limit. At no point in time did the Ministry come to the table to discuss processing and number of requests.

In fact, it is the Appellant who made sincere attempts, which were always undertaken in a professional and courteous manner, to attempt to negotiate a reasonable resolution. ...

Adequacy of the institution's decision

[84] The above events raise the issue of whether the institution's response to the appellant's request was in accordance with the requirements of the [Act](#). Sections 26, 27.1 and 29 are relevant to this issue. The relevant portions read:

26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a

part of it will be given; and

- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

27.1 (1) A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,

- (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
- (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
- (c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision.

(2) Sections 28 and 29 do not apply to a head who gives a notice for the purpose of subsection (1).

29. (1) Notice of refusal to give access to a record or part under section 26 shall set out,

- (a) where there is no such record,
 - (i) that there is no such record, and
 - (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
- (b) where there is such a record,
 - (i) the specific provision of this *Act* under which access is refused,
 - (ii) the reason the provision applies to the record,
 - (iii) the name and position of the person responsible for making the decision, and
 - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Representations and findings

[85] The institution takes the position that its letters sent to the appellant setting out the approach it was taking to his requests were appropriate. The institution submits that sections 26 and 29 are not applicable because of the manner in which the institution had responded to the appellant's earlier requests. It states:

Due to the large number of requests submitted by the Appellant, the [ministry] limited the number of requests from the Appellant to five open requests at any given time in order to process his requests in a timely manner without interfering with the operations of the Ministry. This request was received by [the ministry] on January 29, 2015, however, as there were already five open requests the request was not opened.

[86] The appellant takes the position that the institution's decision does not conform with the requirements of the *Act*. He states:

Pursuant to section 29(4) of the *Act* the Ministry has failed to provide written notice as required by section 26 of the *Act* on numerous occasions to requests by the Appellant. It is submitted that, the Ministry cannot circumvent the *Act* by its effort to constrain access to information. ...

It is a fact that each request submitted by the Appellant has been properly submitted in accordance with the *Act*, including all requirements and fees. Moreover, it is a fact that at no time has the Ministry contested this. It is also a fact that the Ministry did not respond in writing within 30 days as required by the *Act* – which is also not denied and is, in fact, admitted by the Ministry. Yet, despite the overwhelming evidence to the contrary, the Ministry continues to assert in its written submission that it is “not in a deemed refusal position”

The Appellant submits that there are no Orders at present by the Information and Privacy Commissioner restricting the numbers of requests the Appellant may submit to the Ministry, or under the *Act*; and further that the Municipal Orders referred to by the Ministry in this case are under a different *Act*, and have no application to the Ministries of the Government of Ontario.

[87] The institution refers to its three letters to the appellant (dated December 2, 2014, December 29, 2014 and February 3, 2015) in support of its position that it properly responded to the appellant's requests. I note that two of these letters pre-date the particular request at issue in this appeal, but were provided to this office by the institution to support its position that it appropriately responded to the request, and to demonstrate the institution's process of limiting the appellant to five active requests and inviting him to prioritize his requests.

[88] The letters each state in varying ways that the institution seeks to “avoid interference with the operations of the institution” by limiting the appellant to five active requests and by the prioritizing of those requests. An “interference with the operation of the institution” could serve as a basis for a time extension under section 27(1) of the *Act* or as a basis for claiming a request is “frivolous or vexatious” under section 27.1(1) of the *Act* in conjunction with section 5.1(a) of Regulation 460. However, the institution did not explicitly identify that it was taking the position that the appellant's request was frivolous

and vexatious until making that specific argument in its representations. Neither party takes the position that the institution issued a time extension decision.

[89] Neither of the December letters indicate any right to appeal to the IPC. While the February 3 letter does state “if you are dissatisfied with decisions being issued by our office, you have the right to appeal, within 30 days of the receipt of any decision letter to the IPC”, the institution has not claimed that this letter is a “decision”. In the circumstances, I find that the institution’s indication of a “right to appeal” in its February letter refers generally to the decisions which the institution had been or would be issuing in response to the appellant’s requests while dealing with them five at a time.

[90] I do not agree with the institution’s submission that “sections 26 and 29 are not applicable”. Section 26 requires that a request receive a response “within thirty days after the request is received”, and section 29 sets out the necessary contents of a decision denying access, as well as what constitutes a “deemed refusal”. Accordingly, I find that there has not been a proper decision letter in response to the request at issue in this appeal.

[91] I have also considered the institution’s position that it sought to enter an agreement with the appellant regarding the processing of his requests – that is – prioritizing them and processing five requests at a time. I note that the appellant “unequivocally rejects” the institution’s position that its response letters constituted attempted negotiations with the appellant to process requests for information. ^[23]

[92] Previous orders of this office have accepted that an institution and requester may come to a mutual agreement regarding the processing of requests outside the timelines stipulated by the *Act*. In Order 28, former Commissioner Linden identified the following as a legitimate course of action that an institution might consider when compliance with the time limits set out in the *Act* places an inordinate strain on resources:

Negotiate with the individual requester who sends in numerous requests as to whether the requester would consent to waive the 30 day limit for each of the requests in favour of a response within 30 days in respect of certain “priority” requests and a longer time for response in respect of others.

[93] Previous orders have also confirmed that there is nothing to prevent an institution and requester from negotiating a mutually agreeable schedule for the processing of a requester’s multiple or numerous access requests. However, where any such negotiations fail to achieve a mutually agreeable result, it is incumbent on the institution to proceed according to the timelines specified in the *Act*. In Order M-697, the adjudicator dealt with several appeals in which the institution and appellant had initially attempted negotiations, but ultimately ended up with appeals to the IPC. The adjudicator stated:

While I commend both parties for their earlier attempts to work together in achieving their objectives, my findings must be based on the wording of [the applicable sections of the *Act*].

[94] More recently, Commissioner Beamish confirmed the supervisory role of this office over the processes of institutions under the *Act*:

...[W]here an institution's processes for access to information are not specifically established in the *Act* or by regulation, this office has the authority to review, comment on and establish processes for institutions. In its oversight role under the *Act*, this office has the authority to control its own processes and to supervise the processes of institutions under the *Act* in a manner that is consistent with the purposes of the *Act* and with a view to minimizing or eliminating the potential for abuse. ^[24]

[95] Similarly, while I agree that institutions and requesters may attempt to work together in resolving access requests, if those efforts do not succeed and the matter goes to appeal, my findings must be based on the wording of the *Act*.

[96] The institution and the appellant both comment on their efforts to "work with" the other party and/or "negotiate a reasonable resolution." The institution asserts that it was attempting to negotiate, and the appellant asserts that it is he who made "sincere attempts ... to attempt to negotiate a reasonable resolution." Although I will not comment on the sincerity of either side's efforts to negotiate with the other, it is evident that there was no mutual agreement regarding the processing of the appellant's numerous requests (including the one specifically at issue here). The institution took the position that the numerous requests were interfering with its operations and accordingly imposed a limit, and the appellant expected a response to each of his requests within 30 days as required by the *Act*.

[97] The institution's correspondence confirms its position that responding to the appellant's numerous requests would interfere with its operations, yet it did not explicitly claim that any of the requests were "frivolous or vexatious" until doing so in its representations on this appeal. Under section 27.1(1) of the *Act* (in conjunction with section 5.1 of the Regulation), when the head of an institution concludes that a request is "frivolous or vexatious", the *Act* allows the institution to take the position that the "request is refused". Section 27.1(1) does not provide the institution with other options.

[98] The IPC decisions relied on by the institution (M-618, M-697, MO-1921, MO-2436) do not support the institution's decision to unilaterally impose a limit on the appellant's number of active requests. In all of these decisions, the institutions issued formal decisions which either denied access, claimed a lengthy time extension, or refused to process the requests on the basis that they were frivolous or vexatious. ^[25]

[99] In my view, absent an agreement between an institution and a requester, the *Act* does not allow an institution to unilaterally impose a limit on the number of active requests allotted to a requester, and certainly not without first issuing a formal decision claiming section 27.1. Given what appears to be obvious dissatisfaction on the appellant's part with the institution's collective response to his numerous requests, the institution's proper course of action would have been to issue a formal decision claiming *section 27.1* of the *Act*. The institution did not do so, and therefore it did not issue a decision that complied with the requirements set out in the *Act*. However, as set out above, I will not review this issue further as there would be no useful purpose in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

ORDER:

1. I find that the request which resulted in this appeal (in conjunction with the other requests made by the appellant) is frivolous or vexatious under [section 10\(1\)\(b\)](#) of the [Act](#). As a result, this appeal is dismissed, without prejudice to the appellant's right to submit a new request for information in accordance with the processes set out below.
2. I impose the following conditions on the processing of any requests from the appellant with respect to the OPGT now and for a specified time in the future:
 - a. For a period of one year following the date of this order, I am imposing a five-request limit on the number of requests under the [Act](#) that may proceed at any given point in time, including any requests that are outstanding as of the date of this order.
 - b. Subject to the five-request limit described in provision 2(a) above, if the appellant wishes any of his requests that now exist with the OPGT, including the request that gave rise to this appeal, to proceed to completion, the appellant shall notify both this office and the OPGT and advise as to which matter(s) he wishes to proceed.
 - c. Pending this notification, current appeals with this office shall be placed on hold and any outstanding requests stayed.
3. The terms of this order shall apply to any requests made by the appellant or by any individual, organization or entity found to be acting on his behalf or under his direction.
4. At the conclusion of one year from the date of this order, the parties may apply to this office to seek to vary the terms of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.
5. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with, the terms of this order.

Original Signed By:

January 27, 2017

Frank DeVries
Senior Adjudicator

- [1] Approximately 65 deemed refusal appeals.
- [2] Citing Orders M-618, M-697, MO-1921 and MO-2436 to support its decision to limit the number of requests.
- [3] Upheld on judicial review, *Duncanson v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 18726 (ON SCDC), [1999] O.J. No. 2464, 175 D.L.R. (4th) 340 (Div. Ct.)
- [4] See also PO-2913.
- [5] Order M-850.
- [6] Order M-850.
- [7] Orders M-618, M-850 and MO-1782.
- [8] Order MO-1782.
- [9] Although this order only specifically addresses the appellant's appeal of the institution's response to one particular request, the analysis that follows considers the request in conjunction with the appellant's other requests to the OPGT.
- [10] Order M-697.
- [11] See for example Orders PO-1736 and PO-1790-R (upheld on judicial review, *Public Guardian and Trustee v. David Goodis, Senior Adjudicator and John Doe, Requester*, Tor. Doc. 490/00 (Div. Ct.)), and PO-2877.
- [12] Orders M-618, M-850 and MO-1782.
- [13] Order M-850.
- [14] Order M-850.
- [15] I accept that time spent searching for records can be charged back to the requester under the fee structure established in the [Act](#); however, this does not necessarily speak to the issue of whether the pattern of conduct interferes with the operations of the institution.
- [16] Order M-850.
- [17] See also Order PO-2752.
- [18] For example, in Order MO-2289, Adjudicator Corban found that 600 requests to the City of Toronto would not interfere with the operations of the institution.
- [19] Although the institution references the possibility of having one or two of the 11 FOI analysts "dedicated to deal with one requester," the other information provided by the institution confirms how requests are processed, and by whom.
- [20] I considered, in particular, the fee provisions in the [Act](#).
- [21] Orders PO-2168 and MO-3230.
- [22] Order MO-1782.
- [23] I note, however, that the appellant does states that he made sincere attempts to attempt to negotiate a reasonable resolution.
- [24] MO-2201. See also MO-2063.
- [25] I do not accept the appellant's submission that the municipal *Act* and IPC orders issued under it "have no application to the Ministries of the Government of Ontario." The principles enunciated in a municipal order may be relevant in the provincial context, given that the municipal and provincial statutes are "clearly parallel" (See, for examples, Orders P-537, M-700 and P-1311).

TAB 44

University Health Network (Re), 2017 CanLII 62935 (ON IPC)

Date: 2017-09-12
File number: PO-3769; PA17-246
Citation: University Health Network (Re), 2017 CanLII 62935 (ON IPC), <<https://canlii.ca/t/h6b1t>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3769

Appeal PA17-246

University Health Network

September 12, 2017

Summary: A request was submitted to the University Health Network (UHN) on September 22, 2016. The UHN issued an interim decision with a fee estimate of \$4400 on November 16, 2016. The requester then narrowed the scope of his request resulting in a revised fee estimate that was issued by the UHN on December 20, 2016. On January 26, 2017, the requester paid a 50% deposit of the \$2,430 estimated fee. Since that date, a final decision regarding access to the requested records has not been issued by UHN.

On May 11, 2017, the requester submitted an appeal to the Office of the Information and Privacy Commissioner/Ontario (IPC) indicating that the UHN was in a “deemed refusal” situation. This order finds the UHN to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the [Act](#), and is ordered to provide an access decision without recourse to a time extension.

Statutes Considered: [Freedom of Information and Protection of Privacy Act](#), R.S.O. 1990, c. F.31, as amended, sections 10, 24, 26, 27, 28 and 29. Regulation 460/823 s. 7.

BACKGROUND:

[1] On September 22, 2016, a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was made to the University Health Network (UHN) for access to the following records:

1. Copies of all records, documents, notes, information, communications (paper or electronic), including deleted electronic correspondence, relating to [a named individual and/or [a named individual], from September 1, 2001 until the present, involving any of the following individuals [13 named individuals]”.
2. Copies of all records, documents, notes, information, communications (paper or electronic), including deleted electronic correspondence, relating to [a named individual] and/or [a named individual] from September 1, 2012 until present between any employees, staff, agents or representatives of the University Health Network and any employees, staff, agents or representatives of the following entities [12 named entities].
3. A copy of the 2016 External Departmental Review Report of the University Health Network Lab Medicine Program, including any drafts or correspondence relating to drafts, amendment or changes to the 2016 External Departmental Review Report of the University Health Network Lab Medicine Program.

[2] On October 21, 2016, the UHN sent a letter to the requester to acknowledge that during a conversation on October 19, 2016, the requester confirmed he wished to proceed with the access request.

[3] On November 16, 2016, the UHN issued an interim decision to the requester advising that after an initial review of the records the estimated cost of processing the request was \$4,400 based on an estimated 146 hours of search time. The UHN also advised that [sections 19, 21, 65\(6\)](#) and [65\(8.1\)](#) of the *Act* would likely apply to many of the responsive records.

[4] On December 20, 2016, the UHN issued a revised interim decision, following a narrowing of the request. The fee estimate was revised to \$2,430. The UHN maintained that the following exemptions and exclusions would likely be applied: section 21 (personal privacy); section 19 (solicitor-client privilege); section 65(6) (employer and employee relations); and [section 65\(8.1\)](#) of the *Act*.

[5] On May 11, 2017, the requester (now the appellant) filed an appeal with the IPC, indicating that despite paying the requested fee estimate, he had not received a final decision and stated that: “The institution should provide immediate, unredacted access to the responsive records”.

[6] This appeal was originally assigned to former analyst Rita Najm to address the deemed refusal issue.

[7] On June 5, 2017, the Manager, Privacy Operations/FIPPA Coordinator (FOIC) at the UHN informed Ms. Najm that the UHN was struggling to answer the request due to its complexity. The FOIC indicated that he would need until August, 2017 to respond. The appellant did not agree with the August timeframe to issue a final access decision. In a later conversation with Ms. Najm on July 6, 2017, the FOIC indicated that the UHN was on target to issue a decision before August.

[8] The appeal was transferred to me for follow-up on July 13, 2017. On July 31, 2017, I spoke with the FOIC who reported that the UHN had not yet completed the request. The FOIC reported that the appellant may no longer be interested in pursuing his request, as the records requested, appeared to have been solicited for a legal matter that was not successful. The FOIC indicated that he would call the appellant and report back by August 2, 2017. The FOIC did not call by the end of the day on August 2, 2017. On August 4, 2017, I attempted to obtain an update from the FOIC without success.

[9] I then directed the UHN to provide a decision on or before August 11, 2017. On August 11, 2017, the FOIC e-mailed me indicating that he was waiting for the appellant to return his call to discuss the request. I indicated to the FOIC that the appellant remained interested in the request and that a decision should be issued immediately.

[10] On August 14, 2017, this office sent a Notice of Inquiry to the UHN stating that the UHN was in a deemed refusal situation for failing to issue an access decision within the 30 days mandated by [section 26](#) of the *Act*. The Notice advised the UHN that if a final decision was not issued by August 28, 2017, I would be in a position to issue an order requiring the UHN to provide a decision regarding access to the requested records to the appellant.

[11] Despite following up with the UHN on September 6, 2017, and the FOIC's promise that a decision would be issued on Friday, September 8, 2017, as of September 11, 2017, a decision regarding access has not been issued.

DISCUSSION:

[12] The issues raised by this appeal relate to [sections 10, 24, 26, 27, 28](#), and [29](#) of the *Act*.

[13] I find that the UHN is in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act* as it has failed to issue an access decision pursuant to the statutory timelines set out in [section 26](#) of the *Act*.

[14] [Section 10 \(1\)](#) of the *Act* states that:

Subject to subsection 69(2), every person has a right of access to a record or part of a record in the custody or control of an institution unless,

- (a) The record or part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) The head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[15] When an institution makes a decision to disclose records, or parts of records, in response to a request under the *Act*, [section 26](#) sets out the time frames within which this disclosure is to take place. This section reads:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under [section 25](#), the head of the institution to which it is forwarded or transferred, shall, subject to [sections 27, 28](#), and [57](#), within thirty days after the request is received,

- (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and

- (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.

[16] In order MO-2275, former Registrar, Robert Binstock stated:

"In my view, section 19 [equivalent to section 26 in the *Freedom of Information and Protection of Privacy Act*] of the *Act* requires the ministry to issue a decision and to disclose those records for which access is to be given within 30 days of receipt of the request."

[17] I agree with the former Registrar's approach and adopt his reasoning for the purposes of this appeal.

[18] In this appeal, a request was made to the UHN for documents on September 22, 2016 as per [section 24\(1\)](#) of the *Act*. The request was further narrowed on December 20, 2016. The revised fee estimate was paid by the appellant on January 26, 2017.

[19] The UHN has committed to issuing a decision on four separate occasions (early August, August 11, August 28 and finally September 8, 2017). The UHN has continuously failed to adhere to its oral commitments to provide a decision.

[20] The appellant has expressed concern that UHN's refusal to issue a decision letter seven months after it paid the requested fee deposit is an act of flagrant non-compliance which renders the *Act* meaningless. I concur that the UHN's behaviour in failing to communicate with the IPC and the appellant in a diligent manner regarding the status of the appeal; its disregard for his own deadlines; and its failure to adhere to its commitment to issue a decision by September 8, 2017, undermines the spirit and intent of FIPPA outlined in [section 1](#) of the *Act*.

[21] Based on the foregoing, I find the UHN to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act*.

ORDER:

1. I order the University Health Network to issue a final decision to the appellant regarding access to the records in accordance with the *Act* without recourse to a time extension, no later than **September 22, 2017**.

2. In order to verify compliance with provision 1 of the Order, I order the University Health Network to provide me with a copy of the decision letter referred to in Provision 1 no later than **September 22, 2017**.

Original signed by _____
Daniel McSweeney
Analyst

September 12, 2017 _____

TAB 45

Ontario Agency for Health Protection and Promotion, 2021 CanLII 63767 (ON IPC)

Date: 2021-07-15
File number: PA21-00092; PA21-0093
Citation: Ontario Agency for Health Protection and Promotion,
2021 CanLII 63767 (ON IPC), <<https://canlii.ca/t/jh3n4>>,
retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4165

Appeals PA21-00092 and PA21-0093

Ontario Agency for Health Protection and Promotion

July 15, 2021

Summary: Public Health Ontario (PHO) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) on April 30, 2020 for emails relating to lab testing capacity and the coronavirus. On May 28, 2020, PHO applied extensions of time to both requests, without specifying the length of time extension it required. It cited the impact of the COVID-19 pandemic on its operations as one of the reasons for the extension. After receiving multiple status updates from PHO without any final decisions, the requester filed these appeals with this office. This order finds that PHO is deemed to have refused access under *section 29(4)* of the *Act*. The adjudicator takes into account the extraordinary circumstances of the pandemic in deciding on the appropriate remedy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31, as amended, sections 26, 27 and 29.

Orders and Investigation Reports Considered: Order PO-2634.

OVERVIEW:

[1] On April 23, 2020, the requester (a member of the media) sent the following two access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) to Public Health Ontario (PHO):

A digital machine-readable copy of all emails related to lab testing capacity sent or received by [the Chief Executive Officer and President of PHO] between February 1, 2020 and the date of receipt of this request. [Request 2020-01]

A digital, machine-readable copy of all novel coronavirus related emails sent or received by [the Chief Executive Officer and President of PHO] from December 1, 2019 through January 31, 2020. For the scope of the search please include all emails that include at least one of the following keywords: Coronavirus, China, Wuhan or Pandemic. [Request 2020-02]

[2] PHO received the requests on April 30, 2021. On May 28, 2020, PHO responded to the requester, acknowledging receipt of the requests. PHO applied extensions of time to both requests pursuant to section 27 of the *Act* and noted that the reasons for the extensions fell under subsections (a) (large number of records that would unreasonably interfere with the operations of the institution) and (b) (consultation with a person outside the institution are necessary). PHO noted that the request also requires consultations with other organizations. It also referred to their focus on COVID-19 response and stated that they would update the requester every 30 days or less. PHO did not specify the length of the time extension.

[3] On numerous occasions[1], the requester followed up with PHO and was advised that it was unable to specify the length of the extension. On February 1, 2021, the requester (now the appellant) filed appeals with this office. PA21-00093 was opened to address Request 2020-01 and PA21-00092 was opened to address Request 2020-02.

[4] The IPC has established special procedures for processing deemed refusal appeals, under which an Acting Adjudicator seeks to help the parties achieve a mediated resolution. These appeals were thus assigned to an Acting Adjudicator initially to explore potential resolution of the appeals.

[5] During the discussions with the Acting Adjudicator, PHO provided the following information:

These requests are in progress at Public Health Ontario (PHO). A preliminary record search has been conducted, resulting in more than 6,000 pages of records. A review of a sample of the records reveals that some exemptions will likely apply, particularly with respect to advice or recommendations (FIPPA s. 13), records that contain third party information (FIPPA s. 17), and records that would reveal information received in confidence from another government (FIPPA s. 15).

As we have indicated in our correspondence with the requester:

- PHO's ability to process FOI requests is directly impacted by the pandemic, as we are prioritizing critical COVID-19 response activities.
- The request is for a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution (PHO).
- Consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

For clarity, Public Health Ontario provides scientific and technical advice and support to clients working in government, public health, health care and related sectors, and the PHO Laboratory provides laboratory testing services to health care providers. During the pandemic, PHO works with the Ministry of Health, local public health units and other health system partners to provide evidence and expertise that will support COVID-19 efforts. In these exceptional circumstances, large requests are taking considerably longer than usual to process due to prioritization of COVID-19 response activities.

Given these circumstances, PHO would welcome the opportunity to work with you and the requester to clarify the request to enable a more timely response satisfactory to the requester. Alternatively, PHO would be pleased to work with you in determining an acceptable decision date for the request.

[6] The appellant responded by clarifying Request 2020-02/PA21-00092 as follows:

A digital, machine-readable copy of all novel coronavirus related emails sent or received by [the Chief Executive Officer and President of PHO] from December 1, 2019 through January 31, 2020. For the scope of the search please include all emails that include a combination of the following keywords: "Coronavirus" and "China", "Coronavirus" and "Wuhan", "Pneumonia" and "China", and "Pneumonia" and "Wuhan"

[7] The appellant also asked how many responsive records were located in response to Request 2020-01/PA21-00093. In response, PHO advised that 4900 pages of records had been located in the search for Request 2020-01/PA21-00093 and 1600 pages of records had been located in the search for Request 2020-02/PA21-00092.

[8] The appellant subsequently narrowed Request 2020-01/PA21-00093 to the following:

A digital, machine-readable copy of all emails related to lab testing capacity sent directly by [the Chief Executive Officer and President of PHO] and received directly by [the Chief Executive Officer and President of PHO] (please exclude all emails Donnelly was cc'ed on) between February 1, 2020 and April 9, 2020. I am also happy to eliminate any duplicates of the same email thread that might appear in the records.

[9] Following this, PHO advised that the number of responsive pages in the clarified request for Request 2020-02/PA21-00092 was approximately 600 pages, not including surrounding pages, which may be part of an email message or thread in which a responsive page is contained.

[10] On April 21, 2021, PHO provided the following timelines for issuing its decisions:

With respect to your request to provide timelines for the decisions, we have estimated decision dates to the best of our ability during the exceptional circumstances of the COVID-19 pandemic. During the pandemic, PHO has been prioritizing critical COVID-19 response activities, and the demand for this continues to be very high during the current third wave. In this context, we estimate the following decision dates for these requests:

Request 2020-01/PA21-00093 (Lab testing capacity email) *Requester has indicated this is first priority. Decision date: July 16, 2021

Request 2020-02/PA21-00092 (Coronavirus related email) Decision date: August 13, 2021

These dates have been determined taking into account what is realistic in the circumstances given the large number of records and the prioritization of critical COVID-19 response activities, and are based on the likelihood that consultations with persons outside PHO will be necessary to comply with the requests.

For clarity, Public Health Ontario provides scientific and technical advice and support to clients working in government, public health, health care and related sectors, and the PHO Laboratory provides laboratory testing services to health care providers. During the pandemic, PHO works with the Ministry of Health, local public health units and other health system partners to provide evidence and expertise that will support COVID-19 efforts. In these exceptional circumstances, large requests are taking considerably longer than usual to process due to prioritization of COVID-19 response activities.

[11] The appellant was not satisfied with this response and requested that the appeals proceed to adjudication.

[12] The IPC transferred these appeals to the adjudication stage and, as the adjudicator assigned to these appeals, I began my inquiry by issuing a Notice of Inquiry. I received representations from PHO, which I provided to the appellant, inviting her to submit representations. I received representations from the appellant, which I shared with PHO, which subsequently provided reply representations.

[13] During the inquiry process, PHO confirmed the approximate number of responsive records:

- 2860 pages (of the original approximately 4900 pages from the preliminary review) responsive to the revised search parameters for Request 2020-01/PA21-00093 (Lab testing capacity email); and
- 600 pages (of the original approximately 1600 pages from the preliminary search) responsive to the revised search parameters for

[14] In this order, I find that PHO is deemed to have refused access under section 29(4) of the *Act*, given its failure to specify the length of extension of time to issue decisions as required by section 27. I order PHO to issue a final decision for Request 2020-01/PA21-00093 by no later than August 15, 2021 and a final access decision for Request 2020-02/PA21-00092 by no later than August 31, 2021, without recourse to any further time extensions but subject to any required notices to affected third parties.

ISSUES:

Issue A: Did PHO respond to the request for access in accordance with section 26 of the *Act*? Is PHO deemed to have refused access pursuant to section 29(4) of the *Act*?

Issue B: What is the appropriate remedy in the circumstances?

DISCUSSION:

Issue A: Did PHO respond to the request for access in accordance with section 26 of the *Act*? Is PHO deemed to have refused access pursuant to section 29(4) of the *Act*?

The legal framework

[15] The primary issue for me to determine in these appeals is whether the extension of time claimed by PHO to respond to the appellant's requests was made in accordance with sections 26 and 27 of the *Act*.

[16] Section 26 of the *Act* states that the head of an institution shall, subject to sections 27 (time extension), 28 (third party notice) and 57 (payment of fees), give written notice of its decision on an access request within 30 days after the request is received.

[17] The ability to extend the timeline for issuing a decision is addressed in section 27 of the *Act*, which states:

- (1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,
 - (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
 - (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit
- (2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) *the length of the extension;*
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

[*emphasis added*]

[18] Section 28 of the *Act* sets out obligations to give notice to affected third parties, as well as time limits for giving notice and responding to the requester after such notice.

[19] Where a head fails to issue a decision on access within the legislated framework, [section 29\(4\)](#) of the *Act* applies. This section states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[20] Previous orders have applied the above provisions in finding that a decision to extend the time for responding to a request must be issued within the initial 30 day time limit for responding to a request.[\[2\]](#) Failure to issue a time extension decision within thirty days may result in a deemed refusal.[\[3\]](#) While institutions are discouraged from issuing a second time extension, a second time extension may be acceptable if it is given in a timely manner and meets the conditions in section 27.[\[4\]](#)

[21] Prior to the expiry of a valid extension, and subject to sections 28 and 57 (fees) of the *Act*, an institution must issue a “final decision”, consisting of a written notice stating whether or not access to the record or a part thereof will be given. If access is to be given, the institution must provide the record to the requester. If a final access decision is not issued prior to the expiry of the extension, the institution may be in a “deemed refusal” pursuant to section 29(4) of the *Act*.

[22] Other IPC orders have found that an interim decision/fee estimate must also be issued within the initial 30-day time limit for responding to a request[\[5\]](#), otherwise, the institution would be in a “deemed refusal” pursuant to section 29(4) of the *Act*.

[23] In Order PO-2634, the IPC commented on the “time-driven approach” to responding to access requests under the *Act*:

Although it may seem inappropriate, and possibly even harsh, to state that barring exceptional circumstances, the consequence of being one day late is that a section 27 time extension may not be claimed, it is entirely consistent with the time-driven approach to responding to access requests established in sections 24 through 29 of the *Act*. In order to have meaningful time limits for taking steps in an access request, it is sometimes necessary to take a “bright line” approach to the establishment of such limits, as the legislature itself has done. In my view, the requirement that a decision to claim a time extension be communicated to the requester within the original time frame for responding to a request (30 days) is consistent with sections 26 and 27, and with the legislative scheme in sections 24 through 29. In order to be effective, the expiry of a time limit must have consequences.

[24] Against this legal framework, these appeals raise the issue of how this “time-driven approach” applies in the extraordinary circumstances of the COVID-19 pandemic.

Representations

Representations of PHO

[25] PHO submits that it played a central role in the COVID-19 pandemic response. It provides extensive representations explaining its mandate and role, and the impact of the COVID-19 pandemic on its operations. Specifically, it advises that:

In the face of COVID-19, PHO has responded to an extraordinary and exponential demand for scientific and technical advice and support from its clients as they worked to respond to the pandemic. PHO has been able to meet these demands through an extensive redeployment of staff into COVID-19 response roles and recruitment of additional staff. However... routine day-to-day operational work within many of PHO’s program areas has had to be delayed or deferred as a result of the shifting focus and capacity constraints of PHO’s clients.

[26] It provides several examples of PHO’s COVID-19 role and activities, including laboratory response, public health response, scientific guidance, test methodologies and vaccine safety surveillance. In addition, PHO advises that it hired approximately 700 mostly temporary staff to support pandemic response activities and continuation of other mandated responsibilities.

[27] PHO submits that it responded to the requests for access in accordance with section 26 of the *Act*. It advises that it received the appellant’s two requests on April 30, 2020 and that it gave written notice to the requester within 30 days of receiving the requests that an extension of time pursuant to section 27 was necessary and outlining why it was necessary. In addition, PHO advises that it did not specify the length of the extension because, due to the demands of COVID-19, it was unable to estimate when it would be in a position to issue decisions.

[28] It specifically advises that the requests were received within weeks of a declaration of emergency by the Ontario government and when employees who would otherwise be involved in responding to the requests were shifting to working from home. It also advises that the demands on PHO and its staff increased dramatically and from all its clients, in particular the Ministry of Health and the Ontario government, all of whom were working 12 hours or more, seven days a week.

[29] PHO submits that the requests were challenging as they sought emails sent to or from PHO’s CEO, who deals in highly sensitive information and at times, confidential information. In addition, PHO advises that its CEO was absent due to illness and resigned several months later. Accordingly, he was unable to assist with the identification of records. In addition, it submits that there was no one readily available to categorize the identified records.

[30] PHO submits that individual employees were redeployed as needed to meet the new demands and specifically, its privacy office faced increased demands for privacy advice, input on privacy impact assessments, review of research, data transfer, collaboration and other agreements to enable the new initiatives. It explains that there

has been an exponential increase in work related to both *FIPPA* and the *Personal Health Information Protection Act*, including a demand for general privacy consultations due to the ever-changing nature of the pandemic and the need to put out as much information (and data) as possible for PHO's stakeholders and the public.

[31] In support of this, PHO submits that it received and responded to:

- more than 4800 requests for support from key stakeholders relating to COVID-19 during the fiscal year compared to 2418 in 2019/20 and 1740 in 2018/19;
- over 13,100 inquiries to its general mailbox, compared to approximately 500 such inquiries per year; and
- over 1800 media requests compared to 344 in 2019 and 311 in 2018.

[32] PHO submits that "[t]his is why PHO was unable to estimate decision dates in the first instance and through waves of COVID-19 each of which was more intense and consequently more demanding on PHO, than the previous one." It explains that it continues to process the requests with its limited capacity.

[33] PHO provided the following timelines for issuing decisions for the requests:

Timeline	Request 2020-01/ PA21-00093	Request 2020-0 2/ PA21-00092
Verify integrity of records, recover misprinted documents	29-Apr to 07-May-2021	29-Apr to 07-May-2021
Privacy Office review of records; prepare for program area review	10-May to 25-May-2021	25-May to 16-Jun-2021
Program area review of records	26-May to 02-Jun-2021	17-Jun to 24-Jun-2021
Prepare records for disclosure	03-Jun to 09-Jun-2021	25-Jun to 05-Jul-2021
Prepare index of records	10-Jun to 14-Jun-2021	06-Jul to 09-Jul-2021
Conduct external consultation – prepare and send records	15-Jun to 21-Jun-2021	12-Jul to 16-Jul-2021
Review feedback from external consultation s; consult PHO programs respecting consultations; draft decision letter; obtain approvals	12-Jul to 15-Jul-2021	09-Aug to 12-Aug-2021
Finalize decision letter; send to requester	16-Jul-2021	13-Aug-2021

[34] PHO submits that key members of the PHO leadership will review the requests, which may also require consultation with others and issuing notices under section 28 of the *Act*. It also provides information on the roles engaged in by PHO leadership in connection with the response to COVID-19.

[35] PHO further submits that the COVID-19 pandemic has seen requests trending upwards. It explains that it has responded to the increase in requests by increasing the availability of information outside of the *FIPPA* request process, by co-opting individuals from other areas of PHO to assist in searching and preparing records, and hiring an additional access and privacy analyst.

[36] PHO makes reference to public notices of this office related to the COVID-19 pandemic.^[6]

[37] In response to the question of whether PHO is in a deemed refusal position pursuant to section 29(4) of the *Act*, PHO made reference to the exceptional and extenuating circumstances under which it is operating. It submits that its inability to respond more promptly was directly related to a need to avoid unreasonable interference with the operations of PHO. Despite these circumstances, PHO further submits that it has continued to work, as it can, on the requests. Because of this, PHO submits that this is not an instance of a deemed refusal and that it will issue notices as required by the *Act* in due course.

[38] PHO submits that it was not and is not possible for PHO to respond to the requests any faster than it is doing, and that it is responding in good faith and in as timely a manner as possible given the extraordinary circumstances.

Representations of appellant

[39] The appellant submits that PHO has failed to issue decisions to her requests within the legislated timeframe, and has failed to communicate in writing the length of the extension needed, as required by section 27(2) of the *Act*.^[7] She also submits that these failures mean that section 29(4) of the *Act* applies to the requests. In addition, she submits that PHO should be considered to be in a deemed refusal position and this office should order PHO to issue decisions for both appeals. The appellant notes PHO's own admission that it did not specify the length of the time extension it needed to respond to the request.

[40] The appellant refers to the notice on the IPC's website, which states "the expectation to comply with Ontario's access laws remains in effect" during the COVID-19 pandemic. She also points to the "readily available mechanisms" in sections 27(1) and (2) of the *Act*, which allow institutions to seek time extensions required to respond to access requests. She submits that PHO could have utilized the mechanisms available within the *Act* to request a proper time extension with a deadline, given the "exceptional and extenuating circumstances" PHO was facing but it did not.

[41] The appellant confirms that she mailed the requests to PHO on April 23, 2020 and that PHO confirmed in its May 28, 2020 letter that it received the requests on April 30, 2020. Her position is that the 30-day timeline under the *Act* began on April 30, 2020 and that PHO chose not to follow the requirements set out in section 27(2) of the *Act* for time extensions by failing to provide the length of the time extension in its letter.

[42] Despite this, the appellant points out that she did not immediately file deemed refusal appeals with this office given the COVID-19 pandemic, and instead allowed months to go by between her check-ins with PHO. She further notes that she did not file such appeals until approximately ten months after PHO received her request and after PHO continued to send the same form response to her status requests rather than tangible information on the status of the requests.

[43] The appellant submits that PHO did not do everything it could to limit interference with its operations by working with her to expedite the requests or limit the amount of work/hours needed for these requests. In addition, she submits that PHO's inability to

respond faster does not give it the authority to operate outside the parameters of what is required by the *Act*.

[44] The appellant believes that it was only after the acting adjudicator got involved that she started to receive information about the work PHO had completed on the requests, including the number of preliminary records its search yielded.

[45] She submits that at no time in the first ten months during which PHO had her requests did it contact her about whether she would be open to narrowing the scope of the requests. She states that she would have narrowed the scope of her requests sooner without involving this office had PHO informed her of the volume of responsive records.

[46] In addition, the appellant submits that while responding to the COVID-19 pandemic is the priority for PHO, that role does not give PHO the license to defy its legislative requirements under the *Act* and to respond to requests in whatever manner it likes, especially given that the requests relate to matters of high public interest – what and when PHO knew about the coronavirus, and how prepared it was to meet the needs of a pandemic.

[47] She submits that the *Act* addresses the importance of access to this kind of information through its legislated deadlines and criteria for requesting time extensions, to ensure that institutions do not withhold information in perpetuity.

[48] She notes that PHO's statement that "the notices required by the *Act* will be issued in due course" does not negate the fact that it's been more than a year since PHO received the requests and the decision have yet to be issued. As PHO never sought a proper time extension under the *Act*, she submits that it is in a deemed refusal situation.

PHO's reply representations

[49] In response to the appellant's assertion that PHO "chose not to follow the requirements set out in section 27(2) for the time extensions by failing to provide the length of the time extension", PHO replies that it did not choose to do this. PHO states that it was unable to provide the length of a required extension because PHO had no means of reasonably assessing how long, under the circumstances then in effect, it would take to process the requests. It claims that responding in a way that suggested it did would have been misleading.

[50] PHO submits that it gave notice to the appellant, indicating that an "as yet undetermined" extension would be required. It also submits that it periodically updated the appellant about the circumstances so she would be aware of when PHO might determine what period of time would be reasonable in the circumstances. It further submits that it was unable to estimate a timeline that it might be able to meet without unduly interfering with the provincial response to COVID-19 until April 21, 2021, acknowledging that these timelines are subject to provincial demands on PHO and the availability of other organizations with which PHO needs to consult prior to reaching decisions on individual records.

[51] PHO submits that contrary to the appellant's representations, it has worked very hard to be in a position to issue decisions. According to PHO:

if a genuine inability to respond with information required by the *Act*, while continuing to work towards a position in which the information could be

given, must be treated as a deemed refusal, then PHO will respect the IPC's decision and will look to the IPC for guidance on how to respond should PHO ever find itself in a similar unforgiving circumstances.

[52] In response to the appellant's assertion that she would have narrowed the scope of the requests sooner, PHO submits that it repeatedly invited the appellant to reach out to PHO if she had any questions and notes that her first attempt to narrow the requests was through an appeal to the IPC. PHO further submits that the appellant's representations do not take into account the challenges that PHO identified in its initial representations.

[53] The PHO also submits that, based on the work it has done to date on the two requests, it understands that the organizations with which it needs to consult are simply not in a position to do so in a timely manner. While PHO did provide an estimated timeline within which it expected be able to issue decisions, it now states that it will need additional time.

Analysis and Finding

[54] The IPC has recognized that the COVID-19 pandemic has resulted in challenges for institutions in responding to access to information requests. The IPC's website states:

Will institutions be required to respond to requests for access to or correction of information during this time?

The expectation to comply with Ontario's access laws remains in effect, and institutions should continue to process access requests. However, if you've made a request for general or personal information from a public-sector organization, you should expect delays. Because of the COVID-19 outbreak, many public sector staff are working remotely and may not be in a position to search for the records you are asking for as quickly as they might otherwise do.

Given that these are exceptional circumstances, we understand that some organizations will be unable to meet the 30-day response requirement. As such, we will consider these circumstances when processing appeals relating to deemed refusals.

[55] The expectation that institutions must continue to respect their transparency obligations even during the pandemic was further emphasized in a public Joint Statement of the Federal, Provincial and Territorial Access and Privacy Commissioners issued June 2, 2021:

"[...] Federal, provincial and territorial institutions must recognize the importance of transparency, and uphold the right of access to information during an emergency by ensuring business continuity plans include measures for processing requests for access.

Institutional leaders must provide clear guidance and direction on the ongoing importance of information management in this new operating environment, which may include working remotely. Properly documenting institutional decisions and any resulting actions, and organizing and storing such documentation in a manner

that enables timely access to such documentation are central to principles of open, transparent and responsible government. [...]”[8]

[56] I acknowledge the exceptional and extenuating circumstances under which PHO was operating during the COVID-19 pandemic. This is not in dispute. What is less clear is the extent to which these circumstances can operate to relieve institutions such as PHO from complying with the requirements of the Act.

[57] On a plain reading of sections 26 and 27, and consistent with prior IPC orders, the requirement to provide a response within 30 days can only be lifted in very specific circumstances. One of those is where an institution has issued a time extension under section 27. However, section 27 has its own mandatory requirements, one of which is that a decision to extend time must state the length of the intended time extension. It is not hard to imagine the policy purpose for such a requirement, as it enables requesters to make an assessment on whether the time extension is “reasonable”, as required by section 27, and to make an informed decision on whether to appeal the decision to extend time. In the circumstances here, had such a decision been made and appealed, the IPC would have determined whether the time extension was reasonable.

[58] In this case, PHO gave notice to the appellant of an extension of time, within the required 30-day time period. However, it did not specify the length of the extension.

[59] While PHO described its inability, in the face of the extraordinary circumstances, in estimating the length of a time extension, it has not argued that this is not a mandatory condition of a valid time extension decision, or given me any basis on which I could waive this statutory requirement. In this sense, PHO is transparent about its failure to comply with the requirements of section 27. I have sympathy for the position in which PHO found itself in April 2020 and the ensuing months and, indeed, so does the appellant, who did not file these appeals until ten months had elapsed from the submission of her requests. However, given the failure to issue a valid time extension decision, PHO was not relieved of the obligation to provide a decision pursuant to section 26, and section 29(4) applies.

[60] I therefore find that PHO is in a deemed refusal position because its written notice of extension did not set out the length of the extension.

Issue B: What is the appropriate remedy in the circumstances?

[61] In light of my finding above, it is now necessary for me to determine the appropriate remedy in the circumstances of these appeals.

[62] Once an institution is found to be in a deemed refusal, it is the IPC’s usual practice to direct the institution to issue a final decision to the appellant, if it has not already done so. In some cases, the IPC has issued orders directing the institution to provide a decision within ten days of the date of the order, subject to notification of affected parties.[9] In one case, the IPC ordered the institution to issue a decision approximately one month after its order, while in another, it gave the institution a timetable of steps culminating in a decision approximately three months after its order.[10]

[63] The IPC’s orders in deemed refusals are generally crafted to take into account the circumstances of the appeals, such as ordering the institution to provide the appellant with an index of records as an initial step, outlining timelines that permit the institution to notify affected third parties, deciding to impose a lengthier deadline for issuing a

decision, barring the institution from charging fees, and relying on the deemed refusal as a factor in favour of fee waiver.^[11]

[64] From these orders, it is clear that I have discretion to fashion an appropriate remedy taking into account all the circumstances before me.

Representations

Representations of PHO

[65] PHO submits that any decision by this office other than the one that enables PHO to make a decision on the requests as required by the *Act* and, at a minimum, in accordance with the timelines proposed by PHO, would be inconsistent with the very purpose of the *Act* and cause unreasonable interference to PHO's and the province's pandemic response. In addition, it submits that a decision that provides additional time beyond the minimum estimated by PHO would cause less interference to PHO's operations and would accommodate the fact that the PHO executive team and the organizations that may need to be consulted are leading the pandemic response in Ontario and Canada.

[66] PHO provides estimated minimum timelines for completion of each request based on the assumptions that PHO can rely on program area resources to take time from their regular duties for request processing and that organizations with whom PHO must consult prior to making a decision are available to review the records.

[67] According to PHO, while PHO may be able to meet these timelines without unreasonable interference with its operations, a shorter response time would not be reasonable.

Representations of the appellant

[68] The appellant submits that PHO should be ordered to issue its decisions on the standard ten-day timeline used in other deemed refusal orders issued by this office. With reference to the detailed timeliness provided by PHO, the appellant submits that it is unclear why it took PHO a year to gather the responsive records and begin reviewing the records. She further submits that PHO:

could have picked away at [these] request[s] week by week, over the last 14 months and would have been able to issue a decision by now, with no major burden to its resources but instead a detailed plan on completing this request was not established until after [she] filed deemed refusal appeals with the IPC.

[69] In addition, the appellant submits that PHO is not the only institution subject to the *Act* that has been actively engaged in Ontario's COVID-19 pandemic response, and that other institutions have faced similar challenges and have still managed to fulfill their statutory obligations under the *Act*.

[70] In the alternative, the appellant requests that, if I decide to issue an order to give PHO more time to issue its decisions than is standard, PHO should not be given any additional time beyond its proposed dates to issue the decisions.

[71] PHO submits that if it is not allowed the necessary time to make decisions, without proper consultations, it may result in more appeals. It states that despite its best efforts, it continues to work in circumstances that remain relentlessly challenging and that the organizations with which it needs to consult are simply not in a position to respond in a timely manner. As I indicate above, it also submits that while it did provide an estimated timeline within which it expected to be able to issue decisions, it now appears that PHO it will need additional time.

Analysis and Finding

[72] The evidence submitted by the PHO to describe the “exceptional and extenuating circumstances” under which it has been operating are compelling. The impact of the pandemic on its operations is undeniable. While from one month to another, the intensity of the pandemic may vary, I have no reason to think that the operations of PHO do not continue to be challenged. This is a factor in favour of not imposing a short deadline within which to issue its decisions.

[73] Other factors are the number of records at issue – approximately 2860 pages for one request and 600 for the other. While these numbers are not of the same volume as some of the orders cited in my discussion, it is still a considerable number of records to review. Further, I accept that the nature of the records will require PHO to consult with external parties, as well as PHO leadership, who are the very people at the heart of the PHO’s pandemic responsibilities.

[74] Also relevant is PHO’s submission that it has received an increased number of requests during the pandemic, and its description of the measures it has taken to respond to this increase. As described above, federal, provincial and territorial information and privacy commissioners and ombudsman, including this office’s Information and Privacy Commissioner, have called on public institutions to recognize the importance of transparency, and uphold the right of access to information during an emergency by ensuring business continuity plans include measures for processing requests for access. It appears that PHO has taken steps to try to maintain its ability to respond to requests for access to information, but still faces challenges in meeting the demand.

[75] Weighing in favour of issuing an order with a short deadline to respond, I take into account the fact that the appellant’s requests were received by PHO on April 30, 2020, which is over 14 months ago. Presumably, over these 14 months, PHO has been making progress in preparing its response to these requests.

[76] Moreover, while it was evidently difficult for PHO to meet its statutory timelines in this case for valid reasons, particularly given its central role in managing the pandemic, other health organizations were able to rise to similar challenges. As documented in the most recent annual report of the IPC, hospitals covered by the *Act* averaged 92.8% compliance in responding to access to information requests within statutory timelines, during 2020.^[12]

[77] Finally, I take into account the fact that these requests cover matters of significant public interest, concerning the preparedness of the central provincial agency responsible for supporting the province through the pandemic.

[78] In considering the appropriate order, I am mindful of the comments made by Senior Adjudicator Higgins in PO-2634, with respect to making “a sound remedy”:

This raises the question of what remedy to impose as it is clearly impractical to order that a final access decision be produced instantly in respect of what the Ministry claims to be 42,000 pages of responsive records. Even if this estimate is high, as the appellant contends, it is still apparent that it will take more than a few days to formulate a final access decision.

...

Therefore, in my view, it would be unfair to the Ministry to require an immediate final access decision on all the records. If the Ministry is correct that there are 42,000 pages, it would also be impossible to comply with such an order. This would not be a sound remedy.

[79] In arriving at my order, I consider the most compelling factor to be the critical role of PHO in supporting the province’s response to the pandemic and the evidence as to the impact of this on its operations. I find it would not be a “sound remedy” to impose a short deadline on PHO’s response to these requests that it cannot meet, in view of its persuasive submissions describing its ongoing challenges, as well as its submission on the need to consult with others whose ability to respond is also affected by the pandemic.

[80] Considering all these circumstances, I will direct PHO to issue a final decision by August 15, 2021 for Request 2020-01/PA21-00093 and by August 31, 2021 for Request 2020-02/PA21-00092, subject to any requirement to give notice under section 28 of the Act.

ORDER:

I order PHO to issue final access decisions and send the decisions to the appellant and myself no later than **August 15, 2021** for Request 2020-01/PA21-00093 and no later than **August 31, 2021** for Request 2020-02/PA21-00092, subject to the provisions of sections 28 and 29, and without recourse to a time extension under section 27.

Original signed by: _____

Sherry Liang
Assistant Commissioner

July 15, 2021 _____

[1] In response to the appellant’s status update requests, PHO’s responded with correspondence dated May 28, 2020, June 30, 2020, July 30, 2020, August 31, 2020, and September 30, 2020.

[2] Orders P-234, M-439 M-581, MO-1748, PO-2634.

[3] Orders MO-1777, PO-2634.

[4] Orders PO-2514, PO-3849.

[5] Orders MO-1520-I, PO-2634.

[6] <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/> as updated May 7, 2021 and <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/> as updated May 7, 2021

[7] The appellant refers to Orders PO-2595 and PO-2634.

[8] <https://www.ipc.on.ca/wp-content/uploads/2021/06/2021-06-02-fpt-news-release-on-joint-resolution-final.pdf>

[9] Orders PO-3794, PO-3769, PO-3747.

[10] Orders PO-3849, PO-2634.

[11] See Orders PO-2634, MO-2475, MO-3807, PO-1998 and 193.

[12] <https://www.ipc.on.ca/wp-content/uploads/2021/06/ar-2020-stats-e.pdf>

TAB 46

Ontario (Environment, Conservation and Parks) (Re), 2023 CanLII 12585 (ON IPC)

Date: 2023-02-10
File number: 22-00334
Citation: Ontario (Environment, Conservation and Parks) (Re), 2023
CanLII 12585 (ON IPC), <<https://canlii.ca/t/jvqsn>>, retrieved
on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4353

Appeal PA22-00334

Ministry of the Environment, Conservation and Parks

February 10, 2023

Summary: On May 4, 2022, the requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Environment, Conservation and Parks (the ministry) for access to records. The requester appealed to this office on the basis that the ministry failed to provide an access decision within the prescribed time limit under the *Act*. This order finds the ministry to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act*. The ministry is ordered to issue a final decision regarding access by February 27, 2023, without any recourse to a time extension.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. sections 26, 27, 28 and 29.

BACKGROUND:

[1] On May 4, 2022, the requester submitted a request to the ministry for the following records:

1. The Ministry of Environment Conservation and Parks 2020 full study "Updated fish contaminant levels and consumption advisories for Porcupine Lake".
2. The Ministry of Environment Conservation and Parks 2022 full study "Update on fish contaminant levels for Porcupine Lake".
3. All records dating between 2019 and 2022 which relate to sampling methodology, collection of samples, lab processes, results methodology and the results for fish sampling in Porcupine Lake and any changes to methodology or fish sampling in Porcupine Lake as it relates to the (1) Ministry of Environment Conservation and Parks 2020 full study "Updated fish contaminant levels and consumption advisories for Porcupine Lake", and (2) the Ministry of Environment Conservation and Parks 2022 full study "Update on fish contaminant levels for Porcupine Lake".

[2] On May 5, 2022, the requester received an autoreply email from noreply@ontario.ca acknowledging receipt of the request and payment of the application fee and advised that a representative from the ministry may be in contact for additional information.

[3] On August 2, 2022, the Information and Privacy Commissioner/Ontario (this office) received a deemed refusal appeal from the requester (now the appellant) indicating that since May 5, 2022, there has been no response from the ministry.

[4] As a result, file PA22-00334 was opened.

[5] On September 22, 2022, this office sent a Notice of Inquiry (the Notice) to the appellant and the ministry stating that the appellant had filed an appeal, which claimed the ministry was in a deemed refusal because the ministry had not issued a decision letter within the time period set out in [section 26](#) of the *Act*. The Notice indicated that the ministry should issue a final access decision letter to the appellant as soon as possible. The Notice also indicated that should a resolution not be reached by October 13, 2022, an order requiring the ministry to issue a decision letter to the appellant could be issued.

[6] On October 11, 2022, this office contacted the ministry and requested an update with respect to the issuance of a final decision. The ministry advised that they were hoping to "send a fee estimate decision by the end of this week or early next week". This office explained that since this matter is a "deemed refusal", the ministry must issue a final access decision letter, and not an interim decision.

[7] On October 31, 2022, the ministry provided an update and stated the following:

We will be providing some of the records that have been requested (i.e. two studies), while we continue to conduct our full records search.

[8] On November 7, 2022, the ministry advised this office that it had contacted the appellant who agreed to the issuance of the decision in two stages. The ministry also explained that the first stage of the decision would respond to the first two parts of the

request, and that the second stage of the decision would respond to the third part of the request. Lastly, the ministry advised this office that they had not yet received the records for the first two parts of the request.

[9] On December 5, 2022, the ministry advised that it had received records responsive to the first two parts of the request and agreed to issue the first stage of the decision by December 9, 2022.

[10] On December 14, 2022, this matter was transferred to me and I contacted the ministry to provide me with an update. However, I did not receive a response.

[11] On December 29, 2022, I contacted the ministry again regarding the status of the decision letter.

[12] On January 3, 2023, the ministry stated the following:

We are still in the process of finalizing our review and compiling records for release. This continues to be a priority and we are doing our best to have a decision made as soon as possible.

[13] To date, the ministry has not issued its final access decision.

DISCUSSION:

[14] [Section 26](#) of the [Act](#) states that the head of an institution shall, subject to sections 27 (time extension), 28 (third party notice) and 57 (payment of fees), give written notice of its decision on an access request within 30 days after the request is received.

[15] Where a head fails to issue a decision on access within the legislated framework, [section 29\(4\)](#) of the [Act](#) applies. This section states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[16] The ministry received the appellant's request on or about May 5, 2022, and did not issue an access decision or extend the time for its decision pursuant to [section 27](#) of the [Act](#), within the 30-day statutory requirement.

[17] Therefore, I find the ministry to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the [Act](#).

[18] To ensure that there are no further delays I will order the ministry to issue a final access decision to the appellant no later than February 27, 2023, without recourse to any further time extensions under [section 27](#) of the [Act](#).

ORDER:

1. I order the ministry to issue a **final** access decision to the appellant regarding access to the records in accordance with the [Act](#) without recourse to any further time extensions, no later than **February 27, 2023**.
2. In order to verify compliance, the ministry shall provide me with a copy of the response referred to in provision 1 by **February 27, 2023**. This copy should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario M4W 1A8.

Original signed by:

February 10, 2023

Soha Khan
Acting Adjudicator

TAB 47

Ontario (Municipal Affairs and Housing) (Re), 2023 CanLII 95949 (ON IPC)

Date: 2023-10-13
File number: PA23-00098
Citation: Ontario (Municipal Affairs and Housing) (Re), 2023 CanLII 95949 (ON IPC), <<https://canlii.ca/t/k0phv>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

INTERIM ORDER PO-4449-I

Appeal PA23-00098

Ministry of Municipal Affairs and Housing

October 13, 2023

Summary: The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the withdrawals of land from the Greenbelt Plan. To date, the ministry has not issued a final access decision in response to the request. An appeal was made to the IPC and Appeal file PA23-00098 was opened to determine the issue of the ministry's deemed refusal under [section 29\(4\)](#) of the *Act*.

In light of the Auditor General's observations in her *Special Report on Changes to the Greenbelt*, the appeal file was moved to the adjudication stage. In this interim order, the adjudicator finds

that the Auditor General's observations regarding the use of personal email accounts by political staff and their record retention practices, provide reasonable grounds for the belief that records responsive to the appellant's request may be irretrievably lost or destroyed. Accordingly, the adjudicator orders the ministry to take steps to secure the preservation and recovery of responsive records within its custody or control, in accordance with its duties set out in section 10.1 of the *Act* and the *Archives and Recordkeeping Act*, 2006.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990., c. F31, as amended, sections 10.1, 26, 29 and 54; *Archives and Recordkeeping Act*, 2006, S.O. 2006, c. 34, Sched. A., Parts I and III.

Investigation Reports Considered: *Deleting Accountability: Records Management Practices of Political Staff*, A Special Investigation Report, IPC, June 5, 2013.

Decisions and Orders Considered: PHIPA Decisions 23 and 221, Order M-1053 and Order MO-3281.

Cases Considered: *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1 SCR 311, 1994 Can LII 117 (SCC), *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306.

OVERVIEW:

[1] The Ministry of Municipal Affairs and Housing (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. Records in relation to withdrawals of land from the Greenbelt Plan, including:

- All draft/redlined greenbelt plan policies;
- All draft/redlined greenbelt plan mapping;
- All staff reports providing risks/analysis and justifications for modifications or changes to the greenbelt;
- All decision packages, including modification analysis;
- All analysis of the statement of environmental values, all decision summaries;
- All memoranda, emails or minute notes from Premier's Office, Minister's Office and Ministry officials regarding modifications and changes; and
- Information and data on the quantum of expansion lands and employment conversions.

2. This request includes documentation of any kind in all formats including emails, USB drives and SharePoint or another file sharing service.

3. This request does not include information submitted to the ministry by Niagara, Hamilton, Halton, Waterloo, Peel, York or Durham Regions, communications materials, publicly available documentation or purely scheduling correspondence.

For the time period from September 1, 2022 to November 18, 2022.

[2] The ministry received the request on November 18, 2022 and on December 19, 2022 issued a time extension under [section 27](#) of the [Act](#). As a result of the time extension, the deadline for the ministry to issue a final access decision was January 18, 2023.

[3] On January 26, 2023, the ministry issued an interim decision, which included a fee estimate and indicated that partial access may be granted to records.

[4] The requester, now appellant, appealed to the Information and Privacy Commissioner of Ontario (IPC) on the basis that the ministry had failed to issue a final access decision and was in a position of deemed refusal.

[5] Appeal file PA23-00098 was opened and assigned to the acting adjudicator. The acting adjudicator decided to conduct an inquiry and sought and received representations from the ministry.

[6] As a result of the ministry's representations in relation to its time estimate for issuing a final decision and in order to ensure no further delays in processing the appellant's request, the acting adjudicator ordered the ministry to issue a final access decision to the appellant by September 15, 2023. Accordingly, the acting adjudicator issued Order PO-4434 on August 28, 2023.

[7] The ministry advises that it has received an unprecedented number of access requests in relation to the Greenbelt Plan amendment.

[8] In August 2023, the Auditor General published her *Special Report on the Changes to the Greenbelt*. This report reviewed the process used to select land for withdrawal from the Greenbelt Plan. The withdrawal of lands from the Greenbelt Plan is the subject matter of the appellant's request. The Auditor General reported observing during the audit that personal email accounts were used by political staff for communicating with lobbyists and external parties and that emails were regularly being deleted.

[9] The Auditor General made several recommendations at the conclusion of her report, including the following:

Records Retention (with a Focus on Emails)

6. Non-elected political public service staff receive formal training on records retention policy as per the [Archives and Recordkeeping Act, 2006](#), clarifying which types of emails and other documents are required to be retained and what information needs to be included on meeting calendars.

Restriction on the Use of Personal Email Accounts for Government Business

7. Non-elected political public service staff receive reinforced communications on the inappropriate use of personal email accounts for

government business with annual, formal documented attestation that this policy is being followed.[1]

[10] In a published response to the Auditor General's report, the Premier's Office accepted the recommendations that record retention policies for political staff communications need reinforcing and that attestation processes be used to confirm the exclusive use of government email platforms.[2]

[11] The observations in the Auditor General's report raise concerns regarding the preservation of records within the ministry's custody or control that are responsive to the appellant's request pending the processing of the request and the determination of any issues in proceedings that may result from the ministry's access decision.

[12] In light of these concerns, appeal file PA23-00098 has been moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry and exercise associated powers of inquiry.

[13] For the reasons set out below, I am making this order on an urgent basis to secure the preservation of records relating to the amendment of the Greenbelt Plan within the ministry's custody or under its control pending the processing of the appellant's request. More specifically, I am ordering the ministry to take all reasonable measures to preserve records responsive to the appellant's request, including any responsive emails or other communications held in the personal accounts of political staff, pending the processing of the request and determination of any further proceedings that may result from its access decision.

DISCUSSION:

The Governing Law

[14] The preservation of records is fundamental to the access regime of the [Act](#). The IPC has held that the destruction of records after receipt of a request compromises the integrity of the access system.[3]

[15] Record deletion by political staff was the subject of a special investigation by the IPC in 2013, where the Former Commissioner, Ann Cavoukian, concluded:

[T]he practice of indiscriminate deletion of all emails sent and received by the former Chief of Staff was in violation of the [Archives and Recordkeeping Act, 2006](#) (ARA) and the records retention schedule developed by Archives of Ontario for ministers' offices. In my view, this practice also undermined the purposes of the [Freedom of Information and Protection of Privacy Act](#) (FIPPA), and the transparency and accountability principles that form the foundation of both Acts.

[16] The [Archives and Recordkeeping Act, 2006](#) [4] (ARA) is a cornerstone of the right of access enshrined in the [Act](#). This is reflected in Part I of the ARA, which sets out its purposes, interpretation and application. The ministry is a public body within the meaning of the ARA and the public records it creates or receives are subject to the ARA duties relating to recordkeeping and record management practices.[5]

[17] Part III of the *ARA* contains provisions authorizing the Archivist of Ontario to prepare a records schedule that sets out, for a class of public records that a public body creates or receives, the length of time the records will be retained and the disposition of the records at the end of the retention period. Where the Archivist has not prepared a records schedule, the public body is required to prepare its own records schedule that is subject to the approval of the Archivist. Each public body is required to comply with the applicable record schedule. Further, public records may not be transferred, destroyed or otherwise disposed of except in accordance with the records schedules or the written consent of the Archivist.^[6] Section 15 of the *ARA* states that a public record may not be,

- (a) destroyed or damaged;
- (b) altered so as to delete information from it;
- (c) made illegible;
- (d) removed from the custody or control of a public body or the Archives of Ontario; or
- (e) concealed from a public body or the Archivist.

[18] In 2014, an institution's duties to ensure the preservation of records within its custody or control were reinforced by the enactment of section 10.1 of the *Act*, which states:

Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an *Act* or otherwise, that apply to the institution.

[19] The Supreme Court of Canada has adopted a two-part test on the question of whether a government institution has control of records that are not in its physical possession.^[7] Where the content of a record relates to a departmental matter and the institution could reasonably expect to obtain a copy of the record upon request, the Court has stated that the record will be found to be within the control of the institution.^[8]

[20] In the Auditor General's *Special Report on the Changes to the Greenbelt*, the process used to select lands for the provincial government's amendment to the Greenbelt Plan, was the subject of a value-for-money audit and an assessment. As noted above, the Auditor General reported observing during the audit that personal email accounts were used by political staff and that emails were regularly being deleted. For the reasons set out below, I am satisfied that these observations are reasonable grounds for believing that records under the custody or control of the ministry and responsive to the appellant's request may be irretrievably lost or destroyed pending the processing of the request and the determination of any issues resulting from the ministry's access decision.

[21] The Auditor General reported observing that political staff used their personal email accounts as a conduit for government email correspondence with lobbyists and other external parties.^[9] The Auditor General noted that this use of personal emails is contrary to Ontario Public Service cybersecurity guidelines. Section 4.14 of the report states:

It is important to note that any communication between lobbyists and political staff about government business is still subject to the [\[Act\]](#), and is not excluded from this act even if communication occurred on a personal email account.

[22] The ministry's obligation to take reasonable measures to preserve records under [section 10.1](#) of the [Act](#), includes all records within its custody or under its control. The appellant's request includes a request for access to records in email form regarding modifications or changes to the Greenbelt Plan. In light of the Auditor General's observation regarding the use of personal email by political staff, there are reasonable grounds for believing that records within the ministry's control and responsive to the appellant's request may include emails or other communications in the form of texts or other direct messaging held in the personal email accounts of political staff.

Deletion of emails by political staff

[23] The Auditor General also reported the need for reinforcement in the record retention policies for political staff communications. Section 4.15 of the report states:

During the course of our audit, we observed that emails were regularly being deleted by political staff. However, email correspondence relating to the undertaking to make changes to the Greenbelt was not exempt from the [Archives and Recordkeeping Act, 2006](#), (Recordkeeping Act) and should not have been deleted ...

The [Recordkeeping Act](#) governs the management, destruction and preservation of the electronic and paper records of public bodies. This ensures that records related to the activities of all public bodies are available and foster government accountability and transparency. The records schedule outlined in the Recordkeeping Act dictates how and when relevant public records are to be maintained, transferred, altered or destroyed.

The obligations around retaining and destroying public records apply to ministers, their political and office staff as well as ministry program area staff. Excluded records include ministers' personal, political caucus and constituency records. Exemptions to the records schedule are possible for: an access request made under the [\[Act\]](#); requests by the Legislative Assembly; legal discovery or other proceedings; or public inquiries through [Public Inquiries Act, 2009](#).^[10]

[24] The appellant's request is for records relating to the withdrawal of land from the Greenbelt Plan. The Auditor General's audit of the process of selection of lands for withdrawal from the Greenbelt Plan is therefore related to the subject matter of the appellant's request. In my view, the Auditor General's observations about the record

retention practices of political staff, specifically that emails were regularly being deleted by political staff, provides reasonable grounds for believing that records responsive to the appellant's request may be irretrievably lost or destroyed pending the processing of the request and determination of issues arising from the ministry's access decision.

Preservation and recovery of records

[25] The IPC has previously ordered, on an urgent basis, that steps be taken to ensure the security of records of personal health information under the *Protection of Personal Health Information Act (PHIPA)*.^[11] Although not directly applicable to the preservation of general records under the *Act*, I am assisted by the principles referenced in these orders in my analysis of the issue of preservation and recovery of records in this appeal.

[26] In PHIPA Decision 23, the former Assistant Commissioner, Sherry Liang, issued an interim order to preserve records after considering the test for interlocutory injunctive relief set out in *RJR-MacDonald Inc. v Canada (A.G.)*.^[12] This test is as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[27] The preservation of records, including the recovery of deleted emails, pending the processing of the appellant's request under the *Act* is a serious issue. The ministry has indicated in its interim access decision to the appellant that, from its preliminary review of the records, it may decide to grant partial access to records. The preservation of records is fundamental to an institution's response to a requester's exercise of access rights under the *Act*. By the same analysis, the irretrievable loss or destruction of records undermines the purposes of the *Act* and its foundations of transparency and accountability.^[13]

[28] In my view, the burden placed upon the ministry to take reasonable steps to preserve records pending the processing of the appellant's request is insignificant compared to the harm the appellant would suffer in the event that responsive records are irretrievably lost. The loss or destruction of responsive records would deny the appellant the opportunity to effectively exercise its right of access under the *Act*. In the case of records that are destroyed, this harm cannot be cured.

[29] In contrast, requiring the ministry to take steps to preserve responsive records that are within its custody or under its control, including measures to recover records, affirms the ministry's existing obligations under section 10.1 of the *Act* and under the *ARA*.

[30] For the reasons set out above, pursuant to [section 54\(3\)](#) of the *Act*, I order the ministry to take all reasonable measures to preserve records relating to the withdrawals of land from the Greenbelt Plan responsive to the appellant's request, pending the ministry's processing of the request and the determination of any proceedings that may result from the ministry's access decision. Where records responsive to the appellant's request and within the ministry's custody or control have been deleted, the measures to be taken by the ministry include taking reasonable steps to recover deleted records so that they are not irretrievably lost.

ORDER:

1. I order the Ministry of Municipal Affairs and Housing to take steps to preserve records within its custody or under its control relating to the withdrawal of lands from the Greenbelt Plan (for the period from September 1, 2022 to November 18, 2022) pending the ministry's processing of the request and the determination of any proceedings that may result from the ministry's access decision. Such steps must include the ministry taking all reasonable measures to comply with its obligations set out in section 10.1 of the *Act* and the *Archives and Recordkeeping Act, 2006* in relation to these records.
2. In the event that the Ministry identifies records relating to the withdrawal of lands from the Greenbelt Plan (for the period from September 1, 2022 to November 18, 2022) within its custody or under its control that have been deleted or destroyed, I order the Ministry to take reasonable steps to recover such records pending its processing of the appellant's request and the determination of any proceedings that may result from the ministry's access decision.
3. In order to verify compliance with provisions 1 and 2 above, the ministry shall provide me with affidavits setting out the steps taken to preserve records, including the measures in place to ensure preservation and recovery of records in accordance with any recordkeeping or record retention requirements, rules or policies that apply to the ministry, pursuant to section 10.1 of the *Act* and the *Archives and Recordkeeping Act, 2006*.
4. The affidavits required under provision 3 above, shall be provided to me by **November 3, 2023**.

Original Signed by: _____

Katherine Ball
Adjudicator

October 13, 2023 _____

APPENDIX**Archives and Recordkeeping Act, 2006****PART I****PURPOSES, INTERPRETATION AND APPLICATION****Purposes of the Act**

1 The purposes of this *Act* are,

- (a) to ensure that the public records of Ontario are managed, kept and preserved in a useable form for the benefit of present and future generations;

- (b) to foster government accountability and transparency and to support effective government administration by promoting and facilitating good recordkeeping by public bodies; and
- (c) to encourage the public use of Ontario's archival records as a vital resource for studying and interpreting the history of the province.

Interpretation

2 (1) In this [Act](#),

"Archivist" means the Archivist of Ontario appointed under section 8; ("archiviste")

"Deputy Minister" means the deputy minister to the Minister; ("sous-ministre")

"legislative body" means,

- (a) the Legislative Assembly or a committee of the Legislative Assembly,
- (b) an officer of the Legislative Assembly or of the Legislature, or
- (c) an officer or servant of the House; ("organisme législatif")

"Minister" means the member of the Executive Council who is assigned the administration of this [Act](#) under the *Executive Council Act*; ("ministre")

"prescribed" means prescribed by regulation; ("prescrit")

"private record" means a record that is not a public record; ("document privé")

"public body" means,

- (a) the Executive Council or a committee of the Executive Council,
- (b) a minister of the Crown,
- (c) a ministry of the Government of Ontario,
- (d) a commission under the *Public Inquiries Act, 2009*, or
- (e) an agency, board, commission, corporation or other entity designated as a public body by regulation; ("organisme public")

"public record" means a record made or received by a public body in carrying out the public body's activities, but does not include constituency records of a minister of the Crown or published works; ("document public")

"record" means a record of information, including data, in any form, including a record made, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic, optical or any other means, but does not include a mechanism or system for making, sending, receiving, storing or otherwise processing information; ("document")

"regulation" means a regulation made under this [Act](#). ("règlement")

Record of archival value

(2) For the purposes of this [Act](#), a record is a record of archival value if,

- (a) it relates to,
 - (i) the origin, development, organization or activities of a public body, a legislative body, a court or any other person or entity,

(ii) the development or implementation of a law or of a policy or decision of a public body, a legislative body or any other person or entity, or

(iii) the history of Ontario or of any part of Ontario;

(b) it has the characteristics of a record of archival value that are prescribed;

(c) it is designated as a record of archival value by regulation; or

(d) it belongs to a class of records prescribed as being a class of records of archival value.

Laws re privacy and access, privileges

3 (1) Nothing in this [Act](#) limits the operation of any law or privilege governing the protection of privacy or access to information in respect of records held by public bodies and legislative bodies.

Same

(2) Nothing in this [Act](#) limits the operation of any other privilege that may exist in respect of a record transferred to the Archivist or to another person or entity under this Act.

Orders of Assembly and courts, statutory provisions

4 Nothing in this [Act](#) shall be taken or deemed to authorize the retention, transfer, destruction or other disposition of any public record in contravention of an order of a court or of the Legislative Assembly or in contravention of an express provision in any other Act.

Crown bound

5 This [Act](#) binds the Crown.

[1] *Special Report on Changes to the Greenbelt*, Appendix 8: Recommendations for the Secretary of the Cabinet and Chief of Staff in the Office of the Premier, at page 92.

[2] *Special Report on Changes to the Greenbelt*, Response from the Government (Chief of Staff, Office of the Premier), at page 16-17.

[3] Order M-1053.

[4] [S.O. 2006, c. 34, Sched. A](#).

[5] Part I of the [ARA](#) is reproduced as an Appendix to this Order.

[6] [ARA](#), at ss 11-14.

[7] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 ([CanLII](#)), [2011] 2 SCR 306.

[8] See Order MO-3281, decided under the municipal version of the [Act](#).

[9] *Special Report on Changes to the Greenbelt*, Section 4.14 Use of Personal Email Accounts Contrary to Public Service Cybersecurity Guidelines, at page 67.

[10] *Special Report on Changes to the Greenbelt*, Section 4.15 Record-Retention Policies for Political Staff Communications Needs Reinforcing, at pages 67-8. The exemptions to which the Auditor General refers require the public body to retain records for longer periods of time until the need to use them for other specified purposes has lapsed.

[11] PHIPA Decisions 23 and 221.

[12] [1994] 1 S.C.R. 311, 1994 Can LII 117 (SCC), at para 43. Irreparable harm at Part 2 of the three-part test includes harm that cannot be compensated for in damages.

[13] *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, IPC, June 5, 2013.

TAB 48

Ontario (Solicitor General) (Re), 2025 CanLII 62410 (ON IPC)

Date: 2025-06-24
File number: PA25-00015
Citation: Ontario (Solicitor General) (Re), 2025 CanLII 62410 (ON IPC), <<https://canlii.ca/t/kczlm>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4670

Appeal PA25-00015

Ministry of the Solicitor General

June 24, 2025

Summary: On November 28, 2024, an individual asked the Ministry of the Solicitor General for records about the prohibition of licence plate obstructions. They appealed because the ministry did not issue a decision within the prescribed time limit. The decision-maker finds that the ministry has not issued a decision, and the request is deemed to have been refused. The ministry is ordered to issue a decision by July 8, 2025.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 26 and 29.

BACKGROUND:

[1] On November 28, 2024, the appellant asked the Ministry of the Solicitor General (the ministry) for access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to records about the prohibition of licence plate obstructions under the *Highway Traffic Act*[1].

[2] On January 2, 2025, the appellant asked the ministry for a status update, but the ministry did not respond.

[3] On January 7, 2025, the appellant appealed to the Information and Privacy Commissioner of Ontario (the IPC) because the ministry failed to issue a decision within 30 days of the access request. File PA25-00015 was opened.

[4] On April 14, 2025, I asked the ministry whether a decision had been issued in response to the access request. I did not receive a response.

[5] On April 25, 2025, I again asked the ministry for an update by May 1, 2025, or I would issue a Notice of Expedited Inquiry. I did not receive a response.

[6] On May 14, 2025, I decided to conduct an expedited inquiry and issued a Notice of Expedited Inquiry, encouraging the ministry to issue a final decision by May 28, 2025. A final decision was not issued by this date.

[7] While the ministry contacted me and indicated that it would facilitate a meeting with the appellant, the appellant or I never heard back from the ministry.

[8] Considering the above, and to ensure there are no further delays in processing this access request, I will order the ministry to issue a final decision to the appellant.

DISCUSSION:

[9] Section 26 of the *Act* states:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

[10] The circumstances giving rise to a deemed refusal are set out in section 29(4) of the *Act*. This section states:

A head who fails to give notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[11] Where a time extension is not issued, it is expected that, prior to the expiry of the 30-day time limit in [section 26](#) of the *Act*, subject to [sections 28](#) and [57](#) of the *Act*, written notice will be given to the requester as to whether access to the record or a part thereof will be given and for access to the record to then be given to the requester. This is referred to as a final access decision. If a final access decision is not issued prior to the expiry of the 30-day time limit, the institution would be in a “deemed refusal” pursuant to [section 29\(4\)](#) of the *Act*.

[12] The appellant requested records on November 28, 2024. The ministry did not request an extension of time to respond to the access request. As of today, the ministry has not issued its final access decision despite the appellant filing this appeal with the IPC and me issuing a Notice of Expedited Inquiry, encouraging it to do so by May 28, 2025. As a final decision was not issued to the appellant within 30 days of the access request, the ministry is deemed to have refused the access request.

[13] Therefore, I find the ministry to be in a deemed refusal situation pursuant to [section 29\(4\)](#) of the *Act*.

[14] To ensure that there are no further delays, I will order the ministry to issue a final access decision to the appellant.

ORDER:

1. I order the ministry to issue a **final** access decision to the appellant regarding access to the records in accordance with the *Act* and without recourse to a time extension, by **July 8, 2025**.
2. To verify compliance, the ministry shall provide me with a copy by email of the decision referred to in provision 1 by **July 8, 2025**.

Original Signed By:
Kelley Sherwood

June 24, 2025

Case Lead

[1] R.S.O. 1990, c. H.8.

TAB 49

Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII)

Date: 2018-06-20
 File number: 334/17
 Other citation: [2018] OJ No 3294 (QL)
 Citation: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII), <<https://canlii.ca/t/hsm3q>>, retrieved on 2025-10-28

CITATION: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790
DIVISIONAL COURT FILE NO.: 334/17
DATE: 20180620

ONTARIO

SUPERIOR COURT OF JUSTICE DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:	)	
	)	
MARY SHUTTLEWORTH	)	<i>Gary Mazin and Paulina Munroe, for the Ap</i>
Applicant	)	plicant, Mary Shuttleworth
	)	
– and –	)	
	)	
SAFETY, LICENSING APPEALS	)	
AND STANDARDS TRIBUNAL O	)	<i>Trevor Guy and Kathryn Chung, for the Res</i>
NTARIO and LICENCE APPEAL T	)	pondent Licence Appeal Tribunal
RIBUNAL	)	
	)	
and	)	
	)	<i>Cynthia Verconich, for the Respondent Peel</i>
PEEL MUTUAL INSURANCE CO	)	Mutual insurance Company
MPANY	)	
	)	
Respondents	)	
	)	

THORBURN J.

AMENDED REASONS FOR DECISION

OVERVIEW

[1] On September 28, 2012, the Applicant, Mary Shuttleworth, was sitting in the front passenger seat of a motor vehicle when it was hit head-on by another vehicle. She suffered physical and psychological injuries as a result of the accident.

[2] The Licence Appeal Tribunal (“LAT”) adjudicator decided that the Applicant was not sufficiently badly injured to be entitled to benefits for catastrophic impairment under the applicable *Statutory Accident Benefits Schedule*.

[3] Several months after the adjudicator rendered her decision, the Applicant’s legal counsel received an anonymous note. The author of the note said that after the adjudicator wrote her decision, the decision was reviewed by the executive chair of the umbrella organization, the Safety, Licensing Appeals and Standards Ontario (“SLASTO”) who “changed the decision to make the applicant not catastrophically impaired.” The note contains *indicia* including the file number and the name of counsel that would suggest the author was familiar with some of the circumstances of this case.

[4] The Applicant then sought further information from the LAT about how the adjudicator arrived at her decision. She discovered that, pursuant to an unwritten review process imposed by the executive chair, the legal department sent the adjudicator’s draft decision to the executive chair for her review and comments. The executive chair provided comments to the adjudicator. The adjudicator thanked the executive chair for her helpful review of the decision and advised that she was working on revising it. Further revisions were made and the decision was released.

[5] The Applicant claims the process followed does not meet the requirements established by the Supreme Court of Canada to allow for consultation in the decision-making process while protecting the independence of the decision-maker. In particular, the Applicant says that the process followed by the LAT was deficient in the following ways:

- a. Consultation was imposed on the adjudicator by the executive chair, a “superior level of authority within the administrative hierarchy”; and
- b. There is reason to believe the executive chair changed the adjudicator’s decision. The Respondents have refused to provide evidence to confirm the nature of the revisions made by the executive chair so there is no way of knowing whether the executive chair changed the decision as suggested in the anonymous note.

(*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001 SCC 4 \(CanLII\)](#), [2001] 1 SCR 221.)

[6] The Applicant claims there is reason to believe the adjudicator’s decision was influenced by the executive chair and does not represent the adjudicator’s independent decision. She seeks to quash the decision and order a rehearing or reconsideration without input from the executive chair. Alternatively, she seeks an adjournment of this proceeding to allow her to examine the adjudicator and executive chair for discovery, and/or obtain further documentation and an extension of time to file such evidence.

[7] The Respondents submit that the anonymous letter is not admissible as it is double hearsay. In any event, decision-making is a consultative process. This was the first decision to determine whether someone suffered a catastrophic impairment under the recently implemented administrative structure at the LAT. Counsel for the LAT advised that where an LAT decision involves a novel, contentious, precedent-setting or high-profile issue, the executive chair reviews the decision as a second peer reviewer. The review is not intended to question the facts and evidence or to comment on the ultimate result. It is intended to offer suggestions to improve clarity, reasoning, readability, and ensure the correct legal test has been applied. Counsel for the LAT submits that adjudicators cannot be compelled to participate in the review process. The Respondents submit there is no credible evidence to challenge the adjudicator's independence and the Application for judicial review must therefore fail.

[8] For the reasons that follow, I allow the application and set aside the adjudicator's decision. As discussed below, I make no finding of any actual impropriety having occurred on the facts of this case. The applicant did not prove that the executive chair did anything to force the adjudicator to change her decision. Rather, the consultative decision-making process followed by the LAT in this case did not meet the minimum standards required to ensure both the existence and the appearance of adjudicative independence of the adjudicator's decision. Justice must not only be done; it must be seen to be done. In the absence of a properly limited, voluntary consultative process, an informed, cautious observer would have a reasonable basis to believe that the decision did not reflect the independent decision of the adjudicator. It must therefore be set aside.

BACKGROUND

The Role of SLASTO and LAT

[9] Before 1990, compensation for those who were injured in a motor vehicle accident was left largely to the tort system.

[10] On June 1, 1990, Ontario enacted the *Insurance Statute Law Amendment Act, 1990*. S.O. 1990, c. 2. This new regime for motor vehicle accident compensation in Ontario is premised on an "exchange of rights" principle under that the legislature restricted the rights of innocent accident victims to maintain a tort actions against the wrongdoers in exchange for payment of enhanced no-fault accident benefits from their own insurers under the *Statutory Accident Benefits Schedule* (the "SABS"). (*Meyer v. Bright* (1993), 1993 CanLII 3389 (ONCA), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354 (C.A.) and *Sullivan Estate v. Bond* (2001), 2001 CanLII 8584 (ON CA), 55 O.R. (3d) 97, 202 D.L.R. (4th) 193 (C.A.)).

[11] Section 268(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 provides that,

268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[12] Pursuant to this system, every automobile insurance policy in Ontario provides its own insured with access to prescribed benefits in the event of a motor vehicle accident regardless of fault.

[13] Section 280 of the *Insurance Act* grants the LAT the jurisdiction to resolve disputes "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled."

[14] This is new jurisdiction for the LAT. Under the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, 2009, SO 2009, c 33, Sch 5, (the “ATAGAA”) the LAT has been designated as part of the SLASTO cluster of tribunals. The executive chair of SLASTO is a member of the LAT and has the powers and authority as its chair under s. 17 (1) of ATAGAA. Section 14 (4) of ATAGAA provides as follows:

Chair to recommend appointments, reappointments

(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person’s qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member’s performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

[15] In so doing, the executive chair of SLASTO exercises a “superior level of authority within the administrative hierarchy.”

Accident Benefits and Catastrophic Impairment Regime

[16] The Applicant applied for and received statutory accident benefits from her insurer, the Respondent Peel, payable under the *SABS*.

[17] There is a \$50,000 limit on the amount of medical and rehabilitation benefits, and a \$36,000 limit on the amount of attendant care benefits an insured person is to be paid, under the *SABS Schedule*. These limits are increased to one million dollars if the insured is found to have suffered a “catastrophic impairment” as a result of a motor vehicle accident. (*Statutory Accident Benefits Schedule – Effective September 1, 2010*, Ont. Reg. 34/10 of the *Insurance Act*, RSO 1990, c I.8.)

[18] In December 2014, the Applicant submitted that her injuries resulted in “catastrophic impairment”.

[19] As outlined in the *SABS*, “catastrophic impairment” is a 55% impairment of the whole person. There are several factors used to calculate whole person impairment. Physical and neurological impairments are rated under the appropriate chapter and are each assigned a percentage impairment rating. Individual percentages are then combined according to a formula in the *Guides to the Evaluation of Permanent Impairment*, arriving at a total whole person impairment (“WPI”). Psychological and mental impairments are assigned a class of impairment based on how seriously they affect a person’s useful functioning in four domains of daily life, according to the *Guides*. To arrive at a total WPI, the psychological impairments must be converted to percentage values and then combined with the other ratings. (American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago: American Medical Association, 1993.).

[20] The *Guides* allow for the final estimated WPI to be rounded to the nearest values ending in 0 or 5, meaning a WPI of 53% will be rounded up to 55%.

[21] The Applicant and the Respondent Peel both commissioned assessments to determine whether she met the catastrophic impairment threshold.

[22] The Applicant’s assessors found her catastrophically impaired, as her physical and neurological impairments, when combined with her mental or psychological impairments met or exceeded the 55% WPI threshold. The Respondent Peel’s assessors found the Applicant to have a 40% WPI, falling short of the 55% threshold. The following chart shows the respective positions of the parties and where the parties differed in their assessments:

IMPAIRMENT	GUIDE CHAPTER	OMEGA's WPI	DIRECT IME's WPI
Cervico-thoracic	3	5%	5%
Medication side-effects	2	3%	3%
Sleep and arousal disorder	4	1-9%	0%
Mental status impairment	4	1-14%	7-8% (<u>not</u> included in the physical & neurological WPI subtotal)
Vertigo	4	1-9%	10%
Headaches		0%	0%
Lower back pain		0%	0%
WPI physical/neurological subtotal		11-35%	17%
WPI mental/behavioral (psychological) subtotal	14	27-34% (revised to at least 29%)	26% (18% psychological impairment including sleep and + 7-8% mental status above)
TOTAL COMBINED WPI		35 - 57% (later revised to 54, round up to 55%)	39% (round up to 40%)

[23] The parties were unable to resolve their dispute and the matter was brought to a hearing before the LAT to resolve the issue.

The Decision Review Process

[24] In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT. The stated reason was to maximize the quality of the tribunal's decisions. The peer review process has not been adopted formally. No written policy was provided but counsel swore that, "generally, the LAT decision review process for final decisions is, and at all material times in this case was" as follows:

First, there is peer review: After drafting a decision, an adjudicator ***is expected to send the decision for peer review by the Duty Vice-Chair***. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.

Second, there is legal review: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.

Third, there is a second peer review by the executive chair: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – ***the Legal Services Unit will send the decision to the Executive chair for her review***. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."

Fourth, there is a review by the file's case management officer: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct. [Emphasis added.]

[25] The absence of a written policy is significant. The ATAGAA contains a very formal process to ensure the accountability of tribunal members and officers both internally and to the public. Sections 7 and 8 of ATAGAA read as follows:

Member accountability framework

7 (1) Every adjudicative tribunal shall develop a member accountability framework.

Contents

(2) The member accountability framework must contain,

(a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;

(b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;

(c) a code of conduct for the members of the tribunal; and

(d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 7 (2).

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister.

Publication, Amendment and Review of Public Accountability Documents

Publication of public accountability documents

8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[26] No documents were provided to outline LAT's review process nor were we advised that the process had been adopted and published in accordance with the statutory process designed to protect and enhance accountability as provided by the statute.

[27] According to counsel for the LAT,

... those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. To the extent that a reviewer's comments might relate to the facts or evidence, they are simply intended to clarify the author's findings. The reviewer functions simply as an editor. Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result. In this sense, the LAT's decision review process recognizes that an adjudicator assigned to hear and determine a matter is completely independent to render whatever determination he or she sees fit.

Again, the reviewer functions simply as an editor. The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it. If an adjudicator declined to participate in process, there is no means to prevent him or her from releasing the decisions without further comment or discussion.

[28] By contrast, the graphic presentation of the peer review algorithm disclosed to the court makes no reference to the voluntariness of the peer review process. Moreover, according to counsel, adjudicators “are expected” to subject their decisions for review and decisions get sent to the executive chair by the legal department without any assent or input from adjudicators. When comments come back to adjudicators from the executive chair, they are being made by a person with authority over the adjudicator’s reappointment.

The Tribunal Hearing

[29] The adjudicator heard the catastrophic impairment issue on September 7 and 8, 2016.

[30] The adjudicator submitted her decision for peer review by the Duty Vice-Chair, after which she sent her decision for legal review. After legal review was completed, the SLASTO’s Head of Legal Services provided a copy of the decision to the executive chair as the decision was the first of its kind for the LAT and, as such, was viewed as highly significant. The executive chair then offered her comments to the adjudicator.

[31] On April 11, 2017, the adjudicator thanked the executive chair for her comments and indicated that she would further revise her draft. The adjudicator rendered her decision on April 21, 2017. She held that the Applicant had a WPI of 51% and that, accordingly, the Applicant was not catastrophically impaired.

[32] The Applicant did not request reconsideration of the decision nor did she appeal the decision. It is agreed that if she had received a WPI of 53% (rather than the 51% she received), this would have been rounded up to 55% and she would have been entitled to benefits for catastrophic injury. That is, a small change of any one finding on any single input into the WPI calculation would have changed the outcome of the decision.

The Anonymous Letter

[33] Almost two months after she received the Tribunal’s decision, the Applicant’s lawyer received an anonymous letter with no return address dated June 16, 2017. The note reads as follows:

I have heard from [sic] reliable source that the [adjudicator] Sapin’s initial decision was that this was a catastrophic impairment. This decision then went up for review and the [executive chair] Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.

Thought you should know that the decision was not made by an independent decision maker who heard the evidence.

I was also told that [the adjudicator] Sapin hesitated to sign this order.

The Results of the FOI request made by the Applicant

[34] After receiving the anonymous letter and being denied further information by the LAT, the Applicant's counsel made an access to information request to the LAT for "any/or all documents, notes and records relating to" the applicant and/or the adjudicator's decision, along with a second request for any "documents, emails, notes, letters, and all communications" between the executive chair and the adjudicator from September 7, 2016 to April 21, 2017.

[35] In response, the LAT disclosed, among other things, two emails. The first, dated April 11, 2017, was from the adjudicator to the executive chair. The email reads as follows:

I just wanted to thank you for your helpful review of this decision and to let you know that I have met with [legal counsel] and am working on revising it (for the umpteenth time, this was *not* a *first* draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.

I also wanted to point out that this will take more time, and although I will do my best to meet recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.

I look forward to discussing this decision with you.

[36] The executive chair responded as follows:

Susan thank you for your note. This is a complex case. I had the benefit of reading it after a great deal of work on your part and after legal review. I recall stopping by your desk on a few occasions where you indicated you were struggling with a CAT [catastrophic injury] case – no wonder given the issues at play. I do appreciate your understanding and willingness to work with legal and myself to ensure the best possible decision. You must be a fan of Justice Laskin's as he takes a similar approach. This is an important decision, one that will be referenced. I suspect it will receive a great deal of attention.

Although I am concerned about the delay already experienced by the applicant and the further delay that will ensue because of my comments, I do appreciate your understanding of the importance of ensuring quality decision writing, and your willingness to accept constructive feedback. At the end of the day, the people we serve benefit.

[37] The Applicant filed her application for judicial review on June 21, 2017.

STANDARD OF REVIEW

[38] The Court is "required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly." (*London (City) v. Ayerswood Development Corp* (2005), [2002 CanLII 3225 \(ON CA\)](#), 167 O.A.C. 120 at para 10.)

[39] This involves a review of the nature of the decision, the process followed; the statutory scheme pursuant to which the body operates; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and the choice of

procedure selected by the agency. (See *Baker v Canada* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.)

THE ISSUES

[40] The issues are as follows:

1. May the Applicant seek judicial review prior to reconsideration and/or appeal of the decision?
2. Should the anonymous letter be admitted and if so, for what purpose?
3. Is there a reasonable apprehension that the decision was not made by an independent decision-maker and if so, what is the appropriate remedy?

1. MAY THE APPLICANT SEEK JUDICIAL REVIEW PRIOR TO RECONSIDERATION OR APPEAL?

[41] The Applicant has not sought reconsideration nor has she appealed the Adjudicator's decision.

[42] Section 18.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure* permits reconsideration by the executive chair of the SLASTO within 21 days of the date of the decision. Section 11(1) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G ("the Act") provides that the Divisional Court may hear appeals from decisions relating to matters under the *Insurance Act* on questions of law that are brought within 30 days of the order appealed from.

[43] Reconsideration is not an absolute prerequisite to judicial review. (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 (CanLII), [2001] 1 SCR 221, 52 OR (3d) 160; 194 DLR (4th) 385.)

[44] The Applicant claims it would not have been appropriate to proceed by way of reconsideration or appeal because:

- a. the deadline to apply for an internal review of the decision and appeal had passed by the time she received the anonymous letter which forms the basis for application for judicial review;
- b. the whistleblower alleges that the executive chair changed the decision to deny her benefits for catastrophic injury; and
- c. the executive chair is in charge of the reconsideration process.

[45] The Respondents do not object to the Applicant's filing outside the usual timeframe.

[46] This Application for judicial review may proceed notwithstanding that there has been no reconsideration or appeal of the decision because:

- a. There is no prerequisite that a party must seek reconsideration before an application for judicial review;
- b. The Applicant did not receive the new information upon which this review is based until after the timeframe for reconsideration or appeal had expired; and

- c. Reconsideration is effected by the executive chair who is also the person who edited the draft decision.

2.

[47] The anonymous letter should be admitted into evidence.

[48] It is not admitted for the truth of its contents (that the executive chair changed the outcome) but for the purpose of narrative: to explain why the Applicant became concerned about the decision after the time for reconsideration and appeal had expired, and why she sought further information from the respondents regarding the decision and the process of decision-making.

3. **WAS THERE A REASONABLE APPREHENSION THAT THE ADJUDICATOR DID NOT ARRIVE AT HER DECISION INDEPENDENTLY?**

Is there a reasonable apprehension that the decision was not made independently by the adjudicator?

[49] The Applicant claims there is reason to believe the adjudicator's decision was not decided by an impartial decision-maker. The Applicant relies on the information obtained from the Tribunal.

[50] It is important to the administration of justice that *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 and *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20.)

[51] An administrative decision-maker's discussion of a draft decision with colleagues does not, in and of itself, breach the rules of natural justice. (*IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 SCR 282 and *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952.)

[52] "Contemporary reason-writing is very much a consultative process during which the writer of the reasons resorts to many sources" and "[t]o hold that any 'outside' influence vitiates the validity of ... the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing." (*Khan v. College of Physicians & Surgeons of Ontario*, 1992 CanLII 2784 (ON CA))

[53] The implementation of an institutional consultation procedure does not create an apprehension of bias or lack of independence provided the system is designed to safeguard the ability of the decision-maker to decide the facts and the law to be applied, independently. The basic principles that must be followed to ensure compliance with the rules of natural justice are as follows:

First, the consultation proceeding cannot be imposed by a superior level of authority within the administrative hierarchy, but can be requested only by the adjudicators themselves.

Second, the consultation must be limited to questions of policy and law. Members of the organization who have not heard the evidence cannot be allowed to re-assess it. The consultation must proceed on the basis of the facts as stated by the members who heard the evidence.

Finally, even on questions of law and policy, decision-makers must remain free to take whatever decision they deem right in their conscience and

understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal.

(*Ellis-Don Ltd. (supra)* at para 29 per Lebel J. for the majority, citing *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282 per Gonthier J.; and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC) 2 S.C.R. 756. at p. 798.)

[54] As long as these rules are followed, decision-makers may change their minds as a result of discussions with colleagues or because they have further reflected on the matter. (*IWA v. Consolidated-Bathurst (supra)*)

[55] The information provided by the Respondent Tribunal in this case must be considered to determine whether there is a reasonable apprehension that the adjudicator's decision was not made independently.

[56] We recognize that there is a presumption of regularity of the administrative process and that establishing some form of decision review process to ensure consistency in style and form is accepted practice. (*Ellis-Don* at para 55.)

[57] The legal department sent the draft decision to the executive chair because the decision was the first of its kind for the Tribunal and thus significant. The draft was reviewed by the executive chair, the executive chair offered her comments and further changes were made by the adjudicator. There is no evidence as to the nature of those changes.

[58] It would appear from the email exchange between the adjudicator and the executive chair that the adjudicator was informed of the review after it had taken place.

[59] The Applicant did not cross-examine the affiant for the Respondent Tribunal. There is therefore no evidence to refute the affiant's assertion that,

... those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. ... Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result.

... The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it.

[60] Therefore, on the evidence before us and given the presumption of regularity of an administrative process, we are unable to conclude that the adjudicator did not make her decision independently.

[61] However, an important rule of consultation set out in *Ellis-Don* was contravened. Review was imposed by the executive chair; a person at a supervisory level of authority within the administrative hierarchy. Consultation was not requested by the Adjudicator. There was no formal or written policy protecting the adjudicator's right to decline to participate in review by the executive chair or to decline to make changes proposed by the executive chair. In their emails, the adjudicator and executive chair discussed the fact that the changes proposed would take time to draft but the executive chair indicated that the changes were important enough to justify further delay in the finalization of the decision.

[62] This failure to comply with the rules for consultation laid out in *Consolidated Bathurst* and applied in *Ellis-Don*, creates a reasonable apprehension of lack of independence.

CONCLUSION AND REMEDY

[63] The Applicant had a legitimate concern about the basis for the decision that she was not catastrophically injured. She therefore sought further information and was provided an affidavit from Board counsel that set out the process for editing decisions.

[65] consultation cannot be imposed by a superior level of authority within the administrative hierarchy, but can only be requested by the adjudicator herself. This breach creates a reasonable apprehension of lack of independence.

[66] Deliberative privilege is meant to ensure that any peer review or consultative process has robust protections to safeguard adjudicative independence. Absent bad faith, the formality and express limits set out in a formal peer review process will usually be the last and best protection that the parties and the public have against improper interference and to safeguard the appearance of propriety of the decision-making process.

[67] There is no formal and voluntary process, despite the statutory accountability process that calls for one. As the decision in this case was subjected to a peer review process that did not contain the required safeguards of adjudicative independence, decision of the adjudicator is set aside and referred back to the LAT for a new hearing.

[68] On the agreement of the parties as to the quantum, costs of this Application are awarded to the Applicant in the amount of \$12,000 inclusive of HST and disbursements.

Thorburn J.

McKelvey J.

Myers J.

Date of Release: June 20, 2018

CORRECTION NOTICE

Corrected decision: the text of the original judgment was corrected on June 25, 2018, and the description of the correction is appended.

In the style of proceedings counsel for the applicant has been corrected as Gary Mazin.

Corrected decision: the text of the original judgment was corrected on July 12, 2018, and the description of the correction is appended.

Paulina Munroe has been added as counsel for the applicant in the style of proceedings.

CITATION: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790
DIVISIONAL COURT FILE NO.: 334/17
DATE: 20180620

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:

MARY SHUTTLEWORTH

Applicant

– and –

SAFETY, LICENSING APPEALS AND S
TANDARDS TRIBUNAL ONTARIO and
LICENCE APPEAL TRIBUNAL

and

PEEL MUTUAL INSURANCE COMPAN
Y

Respondents

REASONS FOR DECISION

THORBURN J.

Date of Release: June 20, 2018

TAB 50

Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518 (CanLII)

Date: 2019-06-21

File number: C65995; C65981

Other citations: 146 OR (3d) 369 — 90 CCLI (5th) 179 —
52 Admin LR (6th) 332 — [2019] OJ No 3278 (QL)

Citation: Shuttleworth v. Ontario (Safety, Licensing Appeals and
Standards Tribunals), 2019 ONCA 518 (CanLII),
<<https://canlii.ca/t/j140m>>, retrieved on 2025-10-28

Shuttleworth v. Safety, Licensing Appeals and Standards Tribunals Ontario et al.

[Indexed as: Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)]

Ontario Reports

Court of Appeal for Ontario

Tulloch, Hourigan and Fairburn JJ.A.

June 21, 2019

146 O.R. (3d) 369 | 2019 ONCA 518

Case Summary

Administrative law — Bias — Reasonable apprehension of bias — Executive chair of Safety, Licensing Appeals and Standards Tribunals Ontario reviewing draft decision of Licence Appeal Tribunal adjudicator — Adjudicator making significant changes to draft decision as result — Adjudicator not requesting review — Adjudicator's right to decline to participate in review or make proposed changes not being protected by any formal or written policy — Executive chair having power over reappointment of adjudicators — Divisional Court not erring in finding that circumstances gave rise to reasonable apprehension of lack of adjudicative independence.

The applicant sought a hearing before the Licence Appeal Tribunal ("LAT") on whether she met the statutory threshold for a "catastrophic impairment" as defined in the [Statutory Accident Benefits Schedule](#), O. Reg. 34/10. At the time, the LAT was a part of a cluster of tribunals known as the

Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO"). The adjudicator released a decision determining that the threshold was not met. The applicant's counsel later received an anonymous letter stating that, before the decision was released, it was reviewed by the executive chair of SLASTO, who reversed the adjudicator's determination that the applicant's injuries qualified as a catastrophic impairment. As a result, the applicant brought an application for judicial review of the adjudicator's decision. The Divisional Court found that: the SLASTO Legal Services Unit generally sent decisions to the executive chair without assent or input from the adjudicator; the adjudicator in this case did not request the review and was unaware of it until it had taken place; there was no formal or written policy protecting the adjudicator's right to decline to participate in the review or to decline to make changes proposed by the executive chair; a manual describing the tribunal's procedure made no reference to the voluntariness of peer review; and the executive chair had power over the reappointment of adjudicators. The Divisional Court concluded that the circumstances gave rise to a reasonable apprehension of a lack of adjudicative independence. The application was allowed. The respondents appealed.

Held, the appeal should be dismissed.

A superior level of authority imposed consultation on the adjudicator. Evidence that the LAT lacked the legal power to force an adjudicator to participate in the peer review process did not mean that consultation was not imposed. The adjudicator was never given the opportunity to decline the review and was instead presented with the executive chair's review as a *fait accompli*. The Lieutenant Governor in Council could not reappoint the adjudicator without the executive chair's recommendation. The review process lacked the appropriate procedural safeguards. As the Divisional Court noted, the procedural manual made no reference to the voluntariness of the peer review process. There was no evidence that adjudicators were ever told that they were free to decline to participate in a review by [page370] the executive chair, and considerable evidence tending to show that adjudicators were expected to participate in such a review. The adjudicator in this case made significant changes following the executive chair's comments. The Divisional Court did not err in its conclusion that there was a reasonable apprehension of a lack of independence on the facts of this case.

Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5, [2001 SCC 4](#), 194 D.L.R. (4th) 385, 66 C.L.R.B.R. (2d) 216, 265 N.R. 2, J.E. 2001-315, 140 O.A.C. 201, 26 Admin. L.R. (3d) 171, [2001] CLLC Â220-028, [2001] OLRB Rep. January/February 236, 102 A.C.W.S. (3d) 733, REJB 2001-22165, D.T.E. 2001T-138; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990 CanLII 132 \(SCC\)](#), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, 68 D.L.R. (4th) 524, 105 N.R. 161, J.E. 90-472, 38 O.A.C. 321, 42 Admin. L.R. 1, 90 CLLC Â14,007, [1990] OLRB Rep. March 369, EYB 1990-67694, D.T.E. 90T-444; *Khan v. College of Physicians & Surgeons Ontario* (1992), [1992 CanLII 2784 \(ON CA\)](#), 9 O.R. (3d) 641, [1992] O.J. No. 1725, 94 D.L.R. (4th) 193, 57 O.A.C. 115, 11 Admin. L.R. (2d) 147, 76 C.C.C. (3d) 10, 35 A.C.W.S. (3d) 322 (C.A.), **consd**

Other cases referred to

Baker v. Canada (Minister of Citizenship and Immigration), [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777, REJB 1999-13279; *Bovbel v. Canada (Minister of Employment and Immigration)*, [1994 CanLII 3465 \(FCA\)](#), [1994] F.C.J. No. 190, [1994] 2 F.C. 563, 113 D.L.R. (4th) 415, 167 N.R. 10, 18 Admin. L.R. (2d) 169, 46 A.C.W.S. (3d) 1122 (C.A.); *Chipman Wood Products (1973) Ltd. v. Thompson*, [1996 CanLII 12488 \(NB CA\)](#), [1996] N.B.J. No. 395, 138 D.L.R. (4th) 761, 181 N.B.R. (2d) 386, 42 Admin. L.R. (2d) 259, 65 A.C.W.S. (3d) 102 (C.A.); *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation*

Commission), [2009] N.B.J. No. 41, 2009 NBCA 13, 90 Admin. L.R. (4th) 243, 308 D.L.R. (4th) 53, 341 N.B.R. (2d) 286; *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77, 24 D.L.R. (4th) 161, 64 N.R. 1, 14 O.A.C. 79, 23 C.C.C. (3d) 193, 49 C.R. (3d) 97, 19 C.R.R. 354, 37 M.V.R. 9, 15 W.C.B. 326, 1985 CCAN Å10,032; *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952, [1992] S.C.J. No. 20, 90 D.L.R. (4th) 609, 136 N.R. 5, J.E. 92-679, 47 Q.A.C. 169, 3 Admin. L.R. (2d) 173, 32 A.C.W.S. (3d) 864; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, [2015] S.C.J. No. 25, 2015 SCC 25, 383 D.L.R. (4th) 579, 471 N.R. 206, [2015] 11 W.W.R. 217, J.E. 2015-825, 370 B.C.A.C. 1, 75 B.C.L.R. (5th) 1, 336 C.R.R. (2d) 137, 252 A.C.W.S. (3d) 247, EYB 2015-252077, 2015EXP-1501, 84 Admin. L.R. (5th) 185

Statutes referred to

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sch. 5, ss. 7, (2), 8, 14(4), 15, 16, 20(1)

Insurance Act, R.S.O. 1990, c. I.8, s. 280 [as am.]

Rules and regulations referred to

Adjudicative Tribunals and Clusters, O. Reg. 126/10

Statutory Accident Benefits Schedule, O. Reg. 34/10

Authorities referred to

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Mullan, David, *Administrative Law* (Toronto: Irwin Law, 2001)

Van Harten, Gus, et al., *Administrative Law: Cases, Text, and Materials*, 7th ed. (Toronto: Emond Publishing, 2015) [page371]

APPEAL from the order of the Divisional Court (Thorburn, McKelvey and F.L. Myers JJ.), [2018] O.J. No. 3294, 2018 ONSC 3790 (Div. Ct.) allowing an application for judicial review of a decision of the Licence Appeal Tribunal.

Sunil Mathai and *Domenico Polla*, for Safety, Licensing Appeals and Standards Tribunals Ontario and Licence Appeal Tribunal.

Cynthia Verconich, for Peel Mutual Insurance Company.

Gary Mazin and *Vasiola Bibolli*, for Mary Shuttleworth.

The judgment of the court was delivered by
HOIRIGAN J.A.: --

Introduction

[1] Mary Shuttleworth was injured in a car accident on September 28, 2012. In December 2014, she applied to her insurer, Peel Mutual Insurance Company ("Peel"), for a determination that her accident injuries resulted in impairments that met the statutory threshold for a "catastrophic

impairment" as defined in the [Statutory Accident Benefits Schedule](#), O. Reg. 34/10 (the "SABS"). When the parties were unable to agree whether the threshold was met, she sought a hearing before the Licence Appeal Tribunal (the "LAT"). At the time, the LAT was a part of a cluster of tribunals known as the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO"). On April 21, 2017, LAT vice-chair Susan Sapin released a decision determining that the threshold was not met.

[2] Approximately two months later, Ms. Shuttleworth's counsel received an anonymous letter stating that, before the decision was released, it was reviewed and changed by Linda Lamoureux, the executive chair of SLASTO. The letter claimed that in Ms. Sapin's initial decision, Ms. Shuttleworth's injuries qualified as a catastrophic impairment, but when Ms. Lamoureux reviewed the decision, she altered it and determined that Ms. Shuttleworth did not meet the threshold. The letter also indicated that Ms. Sapin was reluctant to sign the decision.

[3] Ms. Shuttleworth attempted to obtain information about the process followed in her case. This was met by a broad claim of adjudicative privilege asserted by the LAT. However, the LAT did produce some e-mails without attachments, which it relied on in support of its position that there was no interference with Ms. Sapin's decision. Having obtained no meaningful information regarding the serious charges in the anonymous letter, Ms. Shuttleworth brought an application for judicial review. [page372]

[4] The Divisional Court granted Ms. Shuttleworth's application for judicial review and set aside the LAT's decision. While it made no finding of any actual impropriety, the court held that the LAT's decision-making process did not meet the minimum standards required to ensure both the existence and appearance of adjudicative independence.

[5] The LAT and SLASTO appeal the order of the Divisional Court, as does Peel (the "appellants"). They assert that the court erred in law in finding that there was a reasonable apprehension of lack of independence in relation to Ms. Sapin. As I will explain below, I do not accept this submission and would dismiss the appeal.

Facts

[6] Ms. Shuttleworth suffered physical and psychological injuries as a result of her motor vehicle accident. A finding that she was catastrophically impaired would entitle her to enhanced benefits. Peel's assessments determined that Ms. Shuttleworth's impairment of the whole person ("WPI") fell below the 55 per cent threshold for catastrophic impairment provided in the [SABS](#), while an assessment that Ms. Shuttleworth commissioned confirmed that she met the threshold. She applied to the LAT under [s. 280](#) of the [Insurance Act](#), R.S.O. 1990, c. I.8 to resolve the dispute.

[7] To promote efficiency, the [Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009](#), S.O. 2009, c. 33, Sch. 5, s. 15 ("ATAGAA") allows two or more adjudicative tribunals to be designated as a "cluster" by regulation. Until January 1, 2019, the LAT was part of SLASTO.¹ Ms. Lamoureux was appointed as executive chair of SLASTO, pursuant to s. 16 of ATAGAA. The LAT acquired jurisdiction over disputes in respect of the [SABS](#) on April 1, 2016. Ms. Shuttleworth's case was the first catastrophic impairment decision that the LAT was to release.

[8] On April 21, 2017, Ms. Sapin ruled that Ms. Shuttleworth's WPI was 51 per cent and that Ms. Shuttleworth was, therefore, not catastrophically impaired. If Ms. Shuttleworth's WPI was assessed at 53 per cent, it would have been rounded up to 55 per cent and she would have been found catastrophically impaired. Ms. Shuttleworth did not request a reconsideration of the decision and did not appeal.

[9] Approximately two months after the decision was released, Ms. Shuttleworth's counsel received an anonymous letter advising [page373] that the decision was reviewed and changed by Ms. Lamoureux before its release. The letter stated:

I have heard from reliable source that Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the ED Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.

Thought you should know that the decision was not made by an independent decision maker who heard the evidence.

I was also told that Sapin hesitated to sign this order.

[10] After receiving the anonymous letter and being denied further information by the LAT, Ms. Shuttleworth's counsel made an access to information request. In response to that request, the LAT refused to produce the drafts of the decision, which could have resolved the issue. Instead, it made limited disclosure, including of internal e-mails. The respondent did not pursue further disclosure. In one e-mail of particular note, dated April 11, 2017, Ms. Sapin wrote to Ms. Lamoureux as follows:

I just wanted to thank you for your helpful review of this decision and to let you know that I have met with Liz and am working on revising it (for the umpteenth time, this was *not* a *first* draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.

I also wanted to point out that this will take more time, and although I will do my best to meet Karen's recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.

[11] Ms. Lamoureux responded the same day, she wrote:

Susan thank you for your note. This is a complex case. I had the benefit of reading it after a great deal of work on your part and after legal review. I recall stopping by your desk on a few occasions where you indicated you were struggling with a CAT case -- no wonder given the issues at play. I do appreciate your understanding and willingness to work with legal and myself to ensure the best possible decision. You must be a fan of Justice Laskin's as he takes a similar approach. This is an important decision, one that will be referenced. I suspect it will receive a great deal of attention.

Although I am concerned about the delay already experienced by the applicant and the further delay that will ensue because of my comments, I do appreciate your understanding of the importance of ensuring quality decision writing, and your willingness to accept constructive feedback. At the end of the day, the people we serve benefit.

[12] On June 21, 2017, Ms. Shuttleworth filed an application for judicial review. She argued that the LAT had failed to remain neutral in its decision-making process and sought an order reversing the decision or referring the matter back to the LAT for a rehearing. [page374]

[13] On the application for judicial review, Benson Cowan, head of legal services for SLASTO, affirmed an affidavit explaining the LAT's decision review process. His uncontested evidence was that an adjudicator "is expected to send the decision for peer review" upon completing the draft. However, there was "no means to compel adjudicators to participate" and no means to prevent an adjudicator who declined to participate from releasing the decision. According to Mr. Cowan, in some situations, the review proceeds through a total of four phases: (1) peer review by the duty vice-chair; (2) legal review by the SLASTO Legal Services Unit; (3) a second peer review by the executive chair; and (4) a review by the file's case management officer. The Legal Services Unit would only send the decision to the executive chair in "rare instances" such as when a decision involved a "novel, contentious, precedent-setting, or high profile issue".

[14] Finally, Mr. Cowan provided some evidence about the operation of the peer review process in the case at bar. He stated that the adjudicator submitted her decision for peer review by the duty vice-chair and then to the Legal Services Unit for legal review. Mr. Cowan sent the decision to the executive chair for review because it was the first catastrophic impairment decision that the LAT was going to release.

Decision of the Divisional Court

[15] The Divisional Court accepted that an adjudicator's discussion of a draft decision with colleagues does not in and of itself breach the rules of natural justice. It relied on *Khan v. College of Physicians & Surgeons of Ontario* (1992), 1992 CanLII 2784 (ON CA), 9 O.R. (3d) 641, [1992] O.J. No. 1725 (C.A.), for the principle that some "outside" influence on reason writing is permissible and accepted. However, the court emphasized that the institutional consultation procedure must be designed to safeguard a decision-maker's ability to independently decide the facts and the law. It relied on *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5, 2001 SCC 4, at para. 29, for the propositions that the consultation procedure cannot be imposed by a superior level of authority, consultation must be limited to questions of policy and law, and decision-makers must remain free to decide independently even on questions of policy and law.

[16] The Divisional Court was unable to find that the adjudicator lacked actual independence. It held that, as Ms. Shuttleworth elected not to cross-examine Mr. Cowan, there was no evidence to refute his evidence that the reviewers do not question the facts and evidence and do not comment on the policy choices or outcome, that there is no means to compel adjudicators to participate [page375] in peer review, or that the adjudicator has complete discretion to accept or reject any suggested revisions. This evidence, coupled with the presumption of regularity that applies to administrative proceedings, meant that Ms. Shuttleworth failed to prove a lack of actual independence.

[17] Notwithstanding the foregoing, the Divisional Court concluded that there was a reasonable apprehension of a lack of independence. The LAT breached the rule of consultation from *Ellis-Don* because the executive chair imposed a review that was not requested by the adjudicator. The court emphasized that peer review or other consultative processes must be accompanied by robust protections to safeguard adjudicative independence. It stressed that there was no formal or written policy protecting the adjudicator's right to decline to participate in a review by the executive chair or make changes proposed by the executive chair. The court found the absence of this policy "significant" because ss. 7-8 of ATAGAA required it and because its existence would safeguard the appearance of propriety. Accordingly, it concluded that the LAT subjected the decision to a peer review process that lacked the required safeguards of adjudicative independence.

[18] It is important to note that, in reaching its conclusion, the Divisional Court made a number of factual findings about the review process, none of which are challenged on appeal:

- (1) the SLASTO Legal Services Unit generally sent decisions to the executive chair without assent or input from the adjudicators;
- (2) in this particular case, the adjudicator did not request the consultation with the executive chair and the executive chair only informed the adjudicator of her review after it had already taken place;
- (3) there was no formal or written policy protecting the adjudicator's right to decline to participate in the review by the executive chair or to decline to make changes proposed by the executive chair;
- (4) a manual describing the tribunal's procedure made no reference to the voluntariness of the peer review process; and
- (5) by virtue of reappointment powers granted to the executive chair under s. 14(4) of ATAGAA, she exercised a superior level of authority within the administrative hierarchy.

[19] In the result, the Divisional Court granted Ms. Shuttleworth's application, set aside the adjudicator's decision and referred the matter back to the LAT for a new hearing. [page376]

Analysis

[20] The appellants submit that the Divisional Court erred by (a) incorrectly articulating and applying the test for reasonable apprehension of bias; (b) wrongly applying the trilogy of Supreme Court of Canada cases involving the preparation of reasons by administrative tribunals; (c) mistakenly finding that ss. 7 and 8 of the *ATAGAA* required SLATSO to have written consultation procedures; (d) failing to conduct a holistic analysis as mandated by *Khan*; and (e) conducting an incorrect analysis regarding reasonable apprehension of lack of adjudicative independence in relation to Ms. Sapin. These issues will be considered below.

(a) Test for a reasonable apprehension of bias

[21] In the overview section of its reasons, the Divisional Court stated [at para. 8], "Justice must not only be done; it must be seen to be done. In the absence of a properly limited, voluntary consultative process, an informed, cautious observer would have a reasonable basis to believe that the decision did not reflect the independent decision of the adjudicator."

[22] The appellants submit that the Divisional Court misapplied the test for reasonable apprehension of bias by introducing the concept of a "cautious observer". This, they argue, is novel and inconsistent with the test for reasonable apprehension of bias articulated in *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77, which *Ellis-Don* confirms applies to the tribunal context.

[23] The test for a reasonable apprehension of bias or lack of independence in respect of an administrative tribunal is whether the apprehension is "a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information": *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, at p. 334 S.C.R. The question is thus whether "an informed person, viewing the matter realistically and practically -- and having thought the matter through" would think that it is more likely than not that the decision-maker would decide fairly: *Consolidated-Bathurst*, at p. 334 S.C.R. The Supreme Court recently confirmed this test in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, [2015] S.C.J. No. 25, 2015 SCC 25.

[24] I would not give effect to the appellants' submission that the Divisional Court applied the incorrect test. The appellants seize on the Divisional Court's passing reference to a "cautious [page377] observer". It is unfortunate that the term was used, as it may appear to introduce an unknown element to the test. However, on a review of the court's reasons as a whole, it is plain that it correctly articulated the test for a reasonable apprehension of a lack of independence, at para. 50 of its reasons, and cited the relevant authorities on the issue. At paras. 62 and 65, the court applied that test and found a reasonable apprehension of a lack of independence without making reference to a "cautious observer".

[25] In my view, the Divisional Court did not apply a novel test for reasonable apprehension of a lack of independence. Accordingly, this ground of appeal should fail.

(b) Application of the trilogy

[26] The Supreme Court's trilogy of cases on consultations in the course of preparing reasons for a decision -- *Consolidated-Bathurst, Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952, [1992] S.C.J. No. 20 and *Ellis-Don* -- sets out a framework of considerations for assessing whether there is a reasonable apprehension of bias or lack of independence.

[27] The guiding principle from the trilogy is that the decision-maker must be free to decide cases "in accordance with his own conscience and opinions": *Consolidated-Bathurst*, at p. 332 S.C.R. *Consolidated-Bathurst* establishes that discussions with colleagues are permissible even

though they raise the possibility of "moral suasion", and that adjudicators are entitled to consider the opinion of their colleagues in the interest of adjudicative coherence: at pp. 331-33 S.C.R. The court also recognized that consultation could allow the adjudicator to benefit from the acquired experience of the entire board and foster coherence in the board's jurisprudence: at pp. 326-28 S.C.R. At the same time, the court concluded that any procedure or practice that unduly restricted independence would be contrary to the rules of natural justice: at p. 323 S.C.R. Accordingly, procedures that "effectively compel or induce" decision-makers to decide against their own conscience and opinions are impermissible: at p. 333 S.C.R.

[28] To reconcile the demands of decision-making by administrative tribunals with procedural fairness, the court held that full-board consultation was permissible if accompanied by appropriate safeguards. As Gonthier J. stated, the question is whether the "safeguards attached to this consultation process are . . . sufficient to allay any fear of violations of the rules of natural justice": *Consolidated-Bathurst*, at para. 96. *Consolidated-Bathurst* establishes that the fact that the board's chair or other board members lack any *de jure* power to impose their opinion on other [page378] board members is not a sufficient safeguard, as procedures may still "effectively compel or induce" members to decide against their conscience and opinions: at p. 333 S.C.R. Accordingly, the court must examine the "actual structure of the machinery created to promote collegiality" and "determine the *actual situation* prevailing in the body in question": *Tremblay*, at pp. 968 and 973 S.C.R. (emphasis in original).

[29] The Supreme Court also outlined specific rules that govern the practice of full-board consultation. In *Consolidated-Bathurst*, the court found it "obvious" that "no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision": at p. 332 S.C.R. Likewise, in *Tremblay*, the court found that the tribunal president's ability to refer a matter for plenary discussion without the permission of the adjudicator was a sufficient basis to find an appearance of a lack of independence: at p. 974 S.C.R. As a result, *Ellis-Don* held that it was a basic principle that only the adjudicators could request consultation and that their superiors in the administrative hierarchy could not impose it on them: at para. 29. This conclusion is consistent with leading treatises. As Sara Blake states in *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017), at pp. 116-17:

A process for compulsory consultation . . . is not acceptable. The decision to consult must be up to the decision makers. It should not be imposed on them. If they do not wish to consult, they must be truly free to choose not to do so. Compulsory consultation creates an appearance [of] constraint on their freedom to decide the case.

[30] The appellants attempt to distinguish the LAT's review process from the full-board meetings the trilogy considered on two bases. First, they submit that the review process was purely focused on the quality of the written decision, unlike the full-board meetings that involved reviewing policy choices and the ultimate result. Second, they submit that the same moral suasion concerns are not present in the review process because only a maximum of four reviewers are involved and it is a simple editorial exercise. I would reject these submissions for the following reasons.

[31] First, it is inaccurate to characterize the review process as a purely qualitative or editorial exercise. Mr. Cowan's evidence was that reviewers did comment on whether the correct legal test and jurisprudence has been identified and applied. *Ellis-Don* emphasized that the procedural safeguards were required to protect a decision-maker's ability to decide questions of law independently from compulsion by other members of the tribunal: at para. 29. [page379]

[32] Second, the fact that fewer people were involved in the review than in the full-board consultations the trilogy considered does not assist the appellants. The fact remains that the executive chair occupies the most superior level of authority within the LAT and SLATSO. It should be recalled that the executive chair undertakes any reconsideration of the LAT adjudicators'

decisions and holds power over the reappointment of individual adjudicators under s. 14(4) of ATAGAA. That subsection provides:

Chair to recommend appointments, reappointments

14(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

[33] The appellants submit that the moral suasion concern related to the executive chair's power over reappointment would be equally strong even if the adjudicator requested review by the executive chair. This submission should be rejected. As *Tremblay* and *Consolidated-Bathurst* recognize, adjudicators are more likely to feel free to decide according to their own conscience and opinions if the consultation occurs at their own request: *Consolidated-Bathurst*, at pp. 334-35 S.C.R.; and *Tremblay*, at p. 974 S.C.R.

[34] Third, it is also important to note that this court and other courts have found the principles from the trilogy on full-board consultation relevant to cases dealing with other review processes for draft decisions. In the context of review of draft reasons by counsel to a disciplinary committee, this court in *Khan* relied on *Tremblay* for the principle that compulsion to consult with others may cause the appearance of independence to be lost: *Khan*, at pp. 673-74 O.R. Similarly, in *Bovbel v. Canada (Minister of Employment and Immigration)*, 1994 CanLII 3465 (FCA), [1994] F.C.J. No. 190, [1994] 2 F.C. 563 (C.A.), the Federal Court of Appeal relied on *Consolidated-Bathurst* and *Tremblay* to evaluate whether the Immigration and Refugee Board's practice of encouraging board members to submit their reasons for review by staff lawyers gave rise to a reasonable apprehension of bias.

[35] I would therefore reject the submission that the Divisional Court erred in its application of the trilogy.

(c) *Written procedures*

[36] The appellants submit that the Divisional Court erred in holding that the absence of a written peer-review policy was [page380] "significant" on the basis that ss. 7-8 of ATAGAA required such a policy. These sections provide as follows:

Member accountability framework

7(1) Every adjudicative tribunal shall develop a member accountability framework.

Contents

(2) The member accountability framework must contain,

(a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;

(b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;

(c) a code of conduct for the members of the tribunal; and

(d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet.

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister.

Publication of public accountability documents

8. Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[37] The appellants argue that the text of s. 7 of ATAGAA does not include a requirement for a written peer-review policy and that SLASTO has adopted all the required documents. Their position is that the documents codify the principle of adjudicative independence and address the roles of members and vice-chairs in the peer-review process. Nor, they argue, does the case law demand a written peer-review policy. They note that in *Consolidated-Bathurst* and *Ellis-Don*, the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultation even though the board lacked a written policy codifying the procedural safeguards in that process.

[38] I accept that ss. 7-8 of ATAGAA do not require SLASTO to publish a written peer review policy. Section 7(2) of ATAGAA only requires a tribunal to describe the functions of the members, the skills and qualifications required to be appointed a member, and a member code of conduct. SLASTO did publish a code of conduct, as well as descriptions of the vice-chair and member positions. [page381] The appellants are also correct that the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* despite the board's lack of a written policy governing those consultations, and that the Supreme Court found a reasonable apprehension of bias in *Tremblay* even though there was a written policy that protected adjudicative independence.

[39] Despite the foregoing, the Divisional Court was still entitled to find the absence of such a policy significant when it considered the adequacy of LAT's procedural safeguards. The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and Mr. Cowan's own evidence was that adjudicators were expected to participate in the review process. While Mr. Cowan's evidence was that there was no means to compel adjudicators to participate, he did not give evidence that SLASTO communicated to adjudicators that they were free not to have their drafts reviewed by the executive chair. The principal safeguard the appellants point to is the executive chair's inability to lawfully compel the adjudicator to change her mind. However, *Consolidated-Bathurst* establishes that this is not a sufficient safeguard: at p. 333 S.C.R.

[40] Further, the absence of a written policy on full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* and its presence of such a policy in *Tremblay* do not assist the appellants. The Ontario Labour Relations Board's practice of full-board consultations was well-known to board members and litigants before the board, as it was described in a 1971 government report and in legal treatises: *Consolidated-Bathurst*, Sopinka J., dissenting (but not on this point), at pp. 290-91 S.C.R. In particular, both board members and litigants knew that only the hearing panel could request a full-board meeting and it could not be centrally imposed: Gonthier J., writing for the majority, at pp. 316-17 S.C.R.

[41] In contrast, in this case, the Divisional Court found there was no evidence that adjudicators were aware that they had the right to refuse a review by the executive chair and that the process gave them no opportunity to refuse: at para. 28. The absence of a written policy was thus significant because it confirmed that the LAT had not communicated to adjudicators that they had the right to refuse. As for *Tremblay*, all it establishes is that a formal policy that protects adjudicative independence will not be an adequate safeguard if it is disregarded in practice: at pp. 972-73 S.C.R. The presence of the formal policy likely would have been [page382] a relevant consideration in *Tremblay* but for the evidence that the tribunal was disregarding it in practice.

[42] The SLASTO code of conduct and the position descriptions for the member and vice-chair positions undermine the appellants' position. The appellants point to the guarantee of adjudicative independence in these documents. However, the code of conduct simply states that "[m]embers

should be independent in decision-making" and makes no mention of a member's right to refuse a review by the executive chair. This provides no evidence to undermine the Divisional Court's finding that members were not advised of their right to refuse. Moreover, the member position description confirms the Divisional Court's finding that members were expected to submit their decisions for peer review and were not advised of their right to refuse. Under the heading "Key Duties," the description states "A Member, where appropriate . . . submits draft decisions for, and participates in, peer and other decision reviews before they are issued in accordance with SLASTO policy."

(d) *Holistic analysis*

[43] The appellants' submission that the Divisional Court failed to apply the holistic approach from *Khan* is unfounded. It is important to recognize that the court in *Khan* did not purport to undermine the holding in *Tremblay* that imposed consultation is generally inappropriate and did not suggest that it is merely one factor among others. To the contrary, Doherty J.A. found *Tremblay* "an appropriate starting place", quoted from it, and relied on it for the proposition that the result of compulsory consultation is that "the appearance of independence may be lost": *Khan*, at pp. 673-74 O.R.

[44] In *Khan* the court considered all of the factual circumstances of the case. Similarly, the Divisional Court recognized the need to look at all the circumstances. At paras. 38-39, it stated it was necessary to assess the "specific circumstances" and review the five factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, to determine the level of procedural fairness required.

[45] In addition, the review process in this case lacked the guarantees that led Doherty J.A. to find in *Khan* that the discipline committee's use of counsel in the drafting process did not give rise to a reasonable apprehension of lack of independence. Doherty J.A. stressed that counsel's involvement "could not have had any coercive effect" because counsel was the "servant of the Committee" and his involvement "was not mandatory, and was entirely under the control of the Committee": *Khan*, at [page383] p. 674 O.R. In contrast, the executive chair was the superior of the adjudicator with power over her reappointment, not the adjudicator's servant.

[46] In summary, I would reject this ground of appeal on the basis that the Divisional Court conducted an analysis of all of the circumstances of the case. I will consider in the next section of my reasons the adequacy of that analysis.

(e) *Overall analysis*

[47] The appellants' position is that the case before the LAT was an important, precedent-setting matter, and that it was thus an appropriate case for the executive chair's limited decision review role, which is consistent with her statutory responsibility in s. 20(1) of *ATAGAA* to ensure the LAT performs its duties and functions. The appellants submit that the Divisional Court's finding that there was no evidence that the adjudicator did not make her decision independently should have led the court to conclude that the executive chair's review of the draft decision did not raise a reasonable apprehension of a lack of independence. They argue that the uncontested evidence was that peer reviewers do not question the facts, evidence, policy choices, or result in a decision, and that adjudicators have complete discretion to accept or reject any suggested revisions. As a result, there is no danger of moral suasion of the kind discussed in *Ellis-Don*. Had the Divisional Court properly examined the facts of this case, the appellants submit, it would have found that a reasonable observer would conclude that the peer review adequately safeguards adjudicative independence.

[48] I am not persuaded that the Divisional Court erred in its conclusion that there was a reasonable apprehension of a lack of independence on the facts of this case. I reach this conclusion for the following reasons.

[49] First, the Divisional Court correctly found that the executive chair's imposition of the review on the adjudicator breached the rules set out in the trilogy. The Divisional Court found as a fact that the adjudicator was expected to send the decision for peer review: at para. 28. It also found that, as was the general practice, the legal department sent the decision to the executive chair without the adjudicator's prior knowledge or assent. The adjudicator was only informed of the review after it had taken place: at paras. 28, 57-58. The Divisional Court thus correctly concluded that the tribunal violated the rule from the trilogy because a superior level of authority imposed consultation on the adjudicator. [page384]

[50] I do not agree with the appellants' arguments that the Divisional Court erred in fact by finding that consultation was imposed. The appellants submit that the executive chair did not impose the review on the adjudicator because it was staff counsel that forwarded the decision to the executive chair. The fact remains that, by deciding to provide comments on the decision without seeking the adjudicator's permission, the executive chair imposed the review on the adjudicator. I likewise disagree with the argument that Mr. Cowan's evidence that the LAT lacked the legal power to force an adjudicator to participate in the peer review process meant that consultation was not imposed. Mr. Cowan forwarded the decision to the executive chair and the executive chair provided comments without seeking the adjudicator's consent. As Ms. Shuttleworth submits, the adjudicator's freedom to decline the review does not assist her because she was never given the opportunity to decline and was instead presented with the executive chair's review as a *fait accompli*.

[51] Second, the Divisional Court found that the breach was significant because of the power of the SLATSO executive chair. *Consolidated-Bathurst* recognized the possibility that a tribunal chair could exert moral suasion over tribunal members: at p. 333 S.C.R. Similarly, *Tremblay* stressed the control the tribunal president exercised over the consultation process in finding a reasonable apprehension of bias: at p. 973-74 S.C.R.; see, also, David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 344.

[52] The Lieutenant Governor in Council could not reappoint the adjudicator without the executive chair's recommendation: *ATAGAA*, s. 14(4). This power over reappointment is significant, as the Divisional Court found: at paras. 14-15, 28. The New Brunswick Court of Appeal has twice held that Ministers or Members of the Legislative Assembly should not be permitted to represent a claimant before a tribunal because the tribunal's members owe their re-appointment to the provincial cabinet: *Chipman Wood Products (1973) Ltd. v. Thompson*, 1996 CanLII 12488 (NB CA), [1996] N.B.J. No. 395, 181 N.B.R. (2d) 386 (C.A.); *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2009] N.B.J. No. 41, 2009 NBCA 13, 341 N.B.R. (2d) 286. Legal commentators have also recognized the power of the executive chair and the potential danger the chair's control over reappointments poses to the independence of individual adjudicators: Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials*, 7th ed. (Toronto: Emond Publishing, 2015), at p. 529; Mullan, at pp. 343-44.

[53] Third, the Divisional Court correctly concluded that the review process lacked the appropriate procedural safeguards. The [page385] court stated that peer review processes must be accompanied by "robust protections to safeguard adjudicative independence": at para. 66. This is consistent with the trilogy: see *Consolidated-Bathurst*, at p. 341 S.C.R. One of the factors the court considered in this regard was the lack of a written policy protecting the adjudicator's right to decline a review. However, the Divisional Court considered other relevant factors in drawing its conclusion. At para. 28, it stressed that the procedure manual made no reference to the voluntariness of the peer review process and that there was an expectation that adjudicators subject their decisions to review. There was thus no evidence that the Tribunal had ever communicated to adjudicators that they were free to decline to participate in a review by the executive chair and considerable evidence tending to show that adjudicators were expected to participate in such a review.

[54] The Divisional Court's finding of a reasonable apprehension of a lack of independence was supported by the facts of this case. The Divisional Court found, based on the e-mails, that the adjudicator did make changes following the executive chair's comments: at para. 57. The Divisional Court further found that those changes were significant, as the executive chair believed they were important enough to justify further delay: at para. 61.

[55] In addition, the executive chair became involved without the adjudicator's consent. The Divisional Court appropriately gave weight to the fact that the executive chair imposed the review and the adjudicator was only informed of it after it took place. It considered this evidence cumulatively with the lack of a formal written policy to protect the adjudicator's right to decline to participate and the lack of evidence as to the nature of the changes stemming from the review.

[56] In summary, there is no basis for appellate interference with the Divisional Court's analysis of the issue of a reasonable apprehension of a lack of independence. In my view, that analysis is correct.

Disposition

[57] For the foregoing reasons, I would dismiss the appeal. On a new hearing before the LAT, Ms. Shuttleworth and Peel have agreed to rely only on evidence available at the time of the original hearing so no party would be in a better position.

[58] The parties have agreed on costs in the event Ms. Shuttleworth is successful. Those costs are fixed in the all-inclusive total sums of \$2,500 against the LAT and SLASTO, and \$6,250 against Peel.

Appeal dismissed.

Notes

¹ All the tribunals formerly in SLASTO now belong to a larger cluster entitled "Tribunals Ontario": [Adjudicative Tribunals and Clusters](#), O. Reg. 126/10.

TAB 51

Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761 (CanLII)

Date: 2025-05-05
File number: CV-19-00004487-0000
Citation: Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761 (CanLII), <<https://canlii.ca/t/kbzwrc>>, retrieved on 2025-10-28

CITATION: Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761
COURT FILE NO.: CV-19-00004487-0000
DATE: 2025 05 05

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: DERENZIS, Lucia
DA SILVA, Joshua, **plaintiffs**

AND:

HIS Majesty THE KING in Right of Ontario,
GORE MUTUAL INSURANCE COMPANY,
SEVCIK, Heidi,
FERRITO, Joseph,
BEECRAFT, Sarah,
BETHUNE, Jennifer,
JONES, Ken, BY HIS LITIGATION ADMINISTRATOR
CHRISTOPHER RAYMOND JONES
WHITEHALL BUREAU OF CANADA LIMITED,
WRIGHT, Michael,
MASCARENHAS, David,
AMBLESIDE INVESTIGATION MANAGEMENT INC.,
RAPID INTERACTIVE DISABILITY MANAGEMENT INC.,
HEERAMAN Singh, Ranu,
PEEL REGION POLICE SERVICE BOARD,

PERONE, Andrea,
MULLINGS, Carl, **defendants**

AND:

TRIBUNALS ONTARIO, **third-party records holder**

BEFORE: Justice MANDHANE

COUNSEL: ISMAIL, Ashu, for the **plaintiffs**
Email: ashu@campisilaw.ca

WAGNER, Eric, for the **third-party records holder**
Email: eric.wagner@ontario.ca

**REASONS ON RULE 30.10 MOTION FOR PRODUCTION OF RECORDS
HELD BY TRIBUNALS ONTARIO**

INTRODUCTION

[1] The Plaintiff, Lucia Derenzis, brings a motion pursuant to [Rule 30.10](#) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for production of records held by the License Appeal Tribunal (“LAT”). The records include adjudicators’ notes and draft decisions (the “notes and drafts”), and more than 400 emails between adjudicators, counsel and staff (the “emails”). The LAT created the records during its administration of Derenzis’ applications against her insurance company, Gore Mutual Insurance Company (“the Insurer”).

[2] Because the records contain her personal information, Derenzis first requested them from the LAT directly. The LAT refused to provide them, asserting deliberative secrecy and solicitor-client privilege. Derenzis appealed the LAT’s refusal to the Information and Privacy Commissioner for Ontario (“IPCO”). The LAT would not disclose the records to the IPCO for their review. While the IPCO refused to order release of the notes and drafts, it found that there was “insufficient evidence” to determine whether the emails were also subject to deliberative secrecy. The IPCO ordered the LAT “to issue an access decision” with respect to the emails. In its access decision, the LAT again refused to release the records to Derenzis. The IPCO’s decision is now under review by the Divisional Court.

[3] Derenzis now appears before this court. She asks me to order Tribunals Ontario (“the Tribunal”) to produce the records because they are relevant and necessary to her constitutional challenge to Ontario’s no-fault auto insurance scheme, and because there are valid reasons for believing that the LAT did not comply with the rules of natural justice when administering her applications.

[4] The Tribunal opposes any production order: it says that the records are irrelevant to the claim and, in the alternative, that they are protected by deliberative secrecy and/or solicitor-client privilege. It says that I should not lift the veil of secrecy because the LAT complied with natural justice in administering her claim.

[5] Having carefully reviewed the records, I order the Tribunal to produce them to Derenzis, save and except those that I have determined are protected by solicitor-client privilege. The records are relevant to the constitutional challenge, and they are necessary because whether the LAT is sufficiently independent is a central issue in the litigation.

[6] While some records are protected by deliberative secrecy, the secrecy must give way on these facts because Derenzis has demonstrated concerns about a breach of natural justice. It is uncontroversial that two successive executive chairs of the Tribunal have directly intervened three times in Derenzis’ applications to the LAT: first, to recuse a three-person panel for the appearance of bias; then, to recuse a panel member because she had been on the first three-person panel; and, most recently, to personally complain about plaintiff’s counsel to the Law Society of Ontario.

OVERVIEW

[7] It is undisputed that Derenzis suffered catastrophic injuries after a truck ran her down on November 24, 2015. Pursuant to the Statutory Accident Benefits Schedule (“the Schedule”), Derenzis claimed statutory accident benefits from the Insurer (“the benefits”), while also suing the driver of the truck for damages (CV-16-00001766-0000).

[8] Derenzis’ applied to the LAT three times for relief against her Insurer about her benefits eligibility and coverage. Derenzis was roundly unsuccessful at the LAT and her applications are now mired in multiple appeals to the Divisional Court.

[9] In this action (CV-19-00004487-0000), Derenzis seeks general and punitive damages totaling over ten million dollars against the Insurer amongst others. She alleges that the Insurer and its sub-contractors intentionally caused her emotional distress by requiring her to attend repeated medical examinations and through aggressive public surveillance of her and her family.

[10] The Insurer says that this Court does not have jurisdiction over the substance of the claim: *Yang v. Co-operators General Insurance Company*, 2022 ONCA 178, at para. 7. Indeed, it is well-established that the LAT has exclusive jurisdiction over all matters related to the nature and extent of the insurer’s obligations under the Schedule, including any alleged efforts to circumvent them: *Yang*, at paras. 4-7, referring to *Stegenga v. Economical Mutual Insurance Co.*, 2019 ONCA 615. At the same time, the LAT has interpreted its own enabling legislation to find that it does not have jurisdiction to award damages for torts or breach of contract: *Gilani v. Travelers Insurance Company of Canada*, 2022 ONLAT 19-009248/AABS.

[11] To get around these jurisdictional hurdles, as part of her civil claim, Derenzis asks me to declare sections 280 and 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8 unconstitutional (“the impugned provisions”). The impugned provisions form the backbone of Ontario’s no-fault auto insurance scheme. They give the LAT exclusive jurisdiction over all aspects of disputes about how an insurer handles claims made pursuant to the Schedule. Derenzis says that the impugned provisions are invalid because they create a statutory bar on damage claims related to the administration of the benefits, and delegate adjudication of insurance contracts to an inferior tribunal that lacks independence (*i.e.*, the LAT). Ontario is named as

a defendant to respond to the constitutional issues but does not take a position on this motion.

[12] Derenzis now asks me to order the Tribunal to produce all the records in its possession that are relevant and necessary to her constitutional challenge.

[13] The Tribunal opposes the motion on behalf of the LAT. The Tribunal claims deliberative secrecy over all the records because they “may enclose a draft decision or direction, may reveal the adjudicator’s procedural or substantive decisions or directions, and may reveal how adjudicators are assigned to files.” The Tribunal claims solicitor-client privilege over the records where the adjudicator seeks advice from counsel or where counsel provides advice to the adjudicator, as well as staff communications that reveal legal advice sought or received.

[14] The parties agree that the law on a Rule 30.10 motion is set out in *Ontario (Attorney General) v. Stavro* (1995), 26 O.R. (3d) 39, [1995 CanLII 3509 \(C.A.\)](#), and that I could review the records for the purposes of determining the motion.

[15] To decide this motion, I must answer the following questions:

- Are the records relevant to the constitutional challenge?
- Are the records necessary for a fair hearing of the constitutional application?
- Are the records protected by deliberative secrecy? If so, should the secrecy be lifted because Derenzis has demonstrated concerns about a breach of natural justice?
- Are any of the records protected by solicitor-client privilege?

ANALYSIS

[16] The LAT is a provincial administrative tribunal whose decision-makers have adjudicative independence but whose associate chair is accountable for the LAT's administration to the executive chair of the Tribunal. The executive chair is responsible for ensuring that all provincial administrative tribunals—including the LAT—are accountable, transparent, and efficient, while maintaining the independence of their decision-making: *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, s. 1 & 16(1).

[17] The Tribunal says that the records were all produced as part of the LAT's day-to-day administration of Derenzis' applications. The Tribunal provided an affidavit outlining the steps in the LAT application process:

- Step 1: Upon receipt, the application is uploaded to the case management portal by staff.
- Step 2: The staff team lead assigns a case management officer to assess the file and take the administrative steps necessary to implement the procedural directions given by the adjudicator.
- Step 3: The associate chair (or their delegate vice-chair) assigns an adjudicator to conduct a case conference; assignments are based on the nature of the proceedings, the legal issues involved, the size and composition of the hearing panel, adjudicator expertise, and adjudicator availability.
- Step 4: If settlement is not achieved at the case conference, the case management adjudicator, with assistance of staff, manages the next procedural steps in the application, including scheduling motions.
- Step 5: The associate chair (or their delegate vice-chair) assigns an adjudicator or panel of adjudicators to conduct the merits hearing

(“merits adjudicator”).

- Step 6: The merits adjudicator may direct staff to release final or interim decisions.

[18] The LAT’s affiant did not provide details about how the associate chair is accountable to the executive chair of the Tribunal.

Are the records relevant to the constitutional application?

[19] It is uncontroversial that the constitutional application is a material issue in the trial. The only issue at this stage is whether the records are relevant to the constitutional challenge—meaning, do they make it more or less likely that a fact in issue is true.

[20] The pleadings in the action frame the relevance analysis. Derenzis pleads her constitutional claim in her Second As Amended Statement of Claim in two main ways. First, she alleges that the impugned provisions extinguish her common law rights to seek damages in tort, equity, and contract—without monetary limits—contrary to [s. 96](#) of the *Constitution Act, 1867*. Second, she pleads that the impugned provisions provide an inferior tribunal that lacks adjudicative independence (*i.e.* the LAT) with exclusive jurisdiction to decide disputes, and that this has a disproportionate negative impact on the disabled people, contrary to ss. 7 & 15 of the *Charter*. Ontario has not moved to strike the constitutional application and has agreed that it should be heard on its merits.

[21] Leaving aside the merits of the Plaintiff’s claim, it is clear from the pleadings that a key factual issue in dispute is whether the LAT lacks adjudicative independence. The records are relevant to that issue because they are directly related to the adjudicative and administrative processing of her claim by the LAT, including the interactions between adjudicators, counsel, staff, and associate, vice, and executive chairs. While the records may not be especially probative or even admissible at trial, that does not matter on a Rule 30.10 motion where the only question is relevance.

Are the records necessary for a fair hearing of the constitutional application?

[22] Having found that the records are relevant, I must go on to consider whether disclosure is necessary for a fair hearing of the constitutional application: *Ontario v. Stavro*.

[23] I find that it is. It is uncontroversial that *Charter* challenges cannot proceed in a factual vacuum and must be proven through evidence rather than speculation and conjecture. This is certainly the case here where Derenzis seeks to challenge legislation that creates Ontario's no fault auto insurance scheme: *Campisi v. Ontario (AG)*, 2017 ONSC 2884, at para. 15; aff'd 2018 ONCA 869.

[24] Meanwhile, the records cannot be obtained in any other way because the LAT has already refused Derenzis' freedom of information request. Suffice it to say, the Tribunal is not a typical third-party to this litigation: its actions lay at the heart of the constitutional challenge, its interests are the same as those of Ontario (they are accountable to the same Minister), and there is no contravening privacy interest in the documents.

Are the records protected by deliberative secrecy? If so, should the secrecy be lifted because Derenzis' has demonstrated concerns about a breach of natural justice?

[25] The LAT says that all the records are protected by deliberative secrecy. In addition to the adjudicator's draft and notes, the LAT says that the emails may reveal the adjudicator's

procedural or substantive decisions or directions, and may reveal how adjudicators are assigned to files.

[26] Justice Nishikawa succinctly set out the law in *Grogan v. Ontario College of Teachers*, 2023 ONSC 2980, paras. 16-18. Deliberative secrecy is a core component of administrative independence: it promotes the finality of decision by preventing disclosure of how and why decision-makers reached their decisions, while also creating a zone of secrecy in which decision-makers can engage in collegial debate and seek appropriate feedback with the goal of ensuring consistency.

[27] Deliberative secrecy is not watertight in the administrative context because there is an inherent tension between secrecy and the fundamental right to know that the decision was made in accordance with the principles of natural justice. That is why the secrecy is interpreted more narrowly to only attach to matters that lie at the heart of the exercise of judgement or the deliberative process: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, 1992 CanLII 1135.

[28] I start with the emails before turning to the notes and drafts. Based on my review, the emails fall into three broad categories. The first and largest category of emails are administrative communications about the management of Derenzis’ applications before the LAT (the “administrative emails”). The administrative emails deal with day-to-day case management like receipt and distribution of application materials, receipt and response to routine communications, confirmation of procedural steps, internal tracking, and scheduling. The administrative emails are not protected by deliberative secrecy because there is nothing deliberative about them—they do not relate to the decision-making process in any way.

[29] The second category of emails are communications about adjudicator assignments and schedules (“scheduling emails”). In *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796, 1989 CanLII 40, the Supreme Court reiterated the importance of courts having control over the

assignment of judges without interference from the legislature or executive. This reasoning applies with equal force to administrative tribunals as far as it would be unthinkable for Ontario's Attorney General to instruct the LAT's associate chair to assign a particular adjudicator to a particular application. However, deliberative secrecy does not extend to the scheduling emails because they relate to scheduling and not decision-making. They have little to do with the associate chair applying his discretion to determine which members to assign to which files. Again, the substance of the scheduling emails is administrative; they are not protected by deliberative secrecy.

[30] The third category of emails are those that relate to or otherwise might reveal deliberations by adjudicators or the substantive decision-making processes employed by the LAT ("deliberative emails"). The deliberative emails shed light on the nature and extent to which adjudicators engage with other adjudicators, counsel, and staff as part of their decision-making process on both procedural and substantive matters. The deliberative emails are *prima facie* protected by deliberative secrecy because they relate to the process by which adjudicators arrived at both procedural and substantive decisions.

[31] Beyond the emails, the Tribunal claims deliberative secrecy over the notes and drafts. Most the notes and drafts fall within the core of the type of communications that are meant to be protected by deliberative secrecy. They include communications that go to the substance of the decision-making process, including what material was considered or not considered by the adjudicator, the legal advice that was requested or received, and the extent to which the adjudicator was influenced by the views of others: *Agnew v. Ontario Association of Architects* (1987), 1987 CanLII 4030 (ON SC), 64 O.R. (2d) 8 (Ont. Div. Ct.), at pp. 16-17.

[32] That all being said, administrative tribunals cannot rely on deliberative secrecy to the same extent as courts. The secrecy may be lifted where the litigant can present "valid reasons for believing that the process followed did not comply with the rules of natural

justice”: *Commission scolaire de Laval v. Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8, at para. 58.

[33] Here, Derenzis says that I should order to lift the secrecy over the deliberative emails and the notes and drafts because she has presented valid reasons for believing that the process followed by the LAT did not comply with the rules of natural justice.

[34] I find that Derenzis has met her onus in this regard. To support my finding, I rely on three uncontroversial facts about Derenzis’ applications before the LAT, that:

- On May 18, 2018, the executive chair recused a LAT panel assigned to hear the Derenzis matter after one of the adjudicator’s told the parties that he had to take instructions from his “client.”
- On May 1, 2019, the executive chair recused a LAT adjudicator from hearing a Derenzis matter because she had been on the LAT panel that had been recused in 2018.
- On January 24, 2025, the executive chair filed a complaint to the Law Society of Ontario against one of the Derenzis’ lawyers based on materials that the lawyer filed at the LAT on her behalf.

[35] These facts alone raise concerns about the independence of LAT adjudicators, and whether their process complied with natural justice as it relates to Derenzis’ applications. My concerns are amplified by the Court of Appeal’s finding that the LAT’s internal review process lacked sufficient independence during the same time frame as Derenzis’ applications and under the same executive leadership: *Shuttleworth v. License Appeal Tribunal*, 2018 ONSC 3790, aff’d 2019 ONCA 518.

[36] I would order the LAT to produce the records save and except those protected by solicitor-client privilege. I turn to the privilege claim next.

Are any of the records protected by solicitor-client privilege?

[37] The LAT claims privilege over emails involving counsel who provide legal advice, provide comments on draft decisions when requested, and assist in the finalizing and publication of decisions.

[38] Because LAT counsel provides both legal and non-legal services, I must consider whether counsel's advice *in each communication* is such that it can be properly characterized as privileged: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at paras. 19-20.

[39] Solicitor-client privilege applies to communications between solicitor and client, which entails the giving of legal advice, and which are intended to be confidential by the parties. It is meant to create a zone of privacy where the client is able to speak freely with counsel to obtain their advice. In *Pritchard*, the Supreme Court found, for example, that staff counsel's legal opinion to the commission was protected by solicitor-client privilege, at para. 28. Once established, solicitor-client privilege is nearly absolute.

[40] The Tribunal claims solicitor-client privilege over nearly seventy emails, which include communications involving counsel, law clerks, staff, adjudicators, and larger staff teams. Having reviewed the emails, I find that some of them are properly considered privileged insofar as they relate to the request for and receipt of legal advice. However, many emails are not related to legal advice at all because they are administrative; they relate to the internal processing of Derenzis' application by the LAT and cannot be properly characterized as related to legal advice.

[41] Using the numbering found in the chart at Exhibit EE to the Tribunal's affidavit, I find that only the following emails are protected by solicitor-client privilege: 6, 7, 10, 17, 18, 20, 34, 36, 38, 43, 49, 52, 55, 56, 82, 85, 87, 148, 349-351, 353, 354.

[42] Using the LAT's document naming convention, I find that the following notes and drafts also protected by solicitor-client privilege because they involve legal advice:

- 4th Reconsideration Request Decision Derenzis 17-002762 - final version for release.msg
- FW_ Recon Legal Review - JB TO TG.msg
- 18-011978 - Response to July 30 2019 Letter_docx.msg
- Decision in mCL 18-011978.msg
- FW_ Decision in mCL 18-011978.msg
- July 18-19_In_18-011978 - Motion.msg
- RE_ Tipping v Coseco Tribunal No__ 18-004783_AABS.msg
- Response to Recusal Request 18-011978.msg

ORDER

[43] The Tribunal shall produce all the records in its possession that are relevant to the constitutional challenge, except those protected by solicitor-client privilege pursuant to paragraphs 41 and 42 of these reasons.

[44] Derenzis was successful on this motion. Based on the agreement of the parties, Tribunals Ontario shall pay costs in the amount of \$4,000.

Released: May 5, 2025

TAB 52

Smith v. Jones, 1999 CanLII 674 (SCC), [1999] 1 SCR 455

Date:	1999-03-25
File number:	26500
Other citations:	169 DLR (4th) 385 — 236 NR 201 — 86 ACWS (3d) 977 — 196 WAC 161 — [1999] 8 WWR 364 — 62 BCLR (3d) 209 — 132 CCC (3d) 225 — 22 CR (5th) 203 — 120 BCAC 161 — 41 WCB (2d) 319 — 60 CRR (2d) 46 — [1999] CarswellBC 590 — JE 99-723 — [1999] SCJ No 15 (QL)
Citation:	Smith v. Jones, 1999 CanLII 674 (SCC), [1999] 1 SCR 455, < https://canlii.ca/t/1fqp9 >, retrieved on 2025-10-28
Most recent unfavourable mention	Ontario (Attorney General) (Re) , 2015 CanLII 47555 (ON IPC) [...] [47] The appellant also submits that Smith v. Jones is not applicable . [...]

Smith v. Jones, [1999] 1 S.C.R. 455

James Jones

Appellant

v.

John Smith

Respondent

and

Southam Inc.

Intervener

Indexed as: Smith v. Jones

File No.: 26500.

1998: October 8; 1999: March 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Privilege -- Solicitor-client privilege -- Public safety exception -- Psychiatrist's report and opinion -- Psychiatrist retained by defence counsel to assist in preparing accused's defence -- Psychiatrist's report indicating that accused posed continuing danger to society -- Accused pleading guilty and defence counsel informing psychiatrist that sentencing judge would not be informed of his concerns about accused -- Circumstances and factors to be considered in determining whether solicitor-client privilege should be set aside in interest of protecting public safety.

Courts -- Proceedings -- Openness -- Action on exception to solicitor-client privilege -- Court file sealed -- Hearing in Supreme Court public but members of press and public subject to publication ban -- Supreme Court holding public safety exception to solicitor-client privilege applicable -- Publication ban lifted and file unsealed, except parts of affidavit subject to solicitor-client privilege which do not fall within public safety exception.

An accused was charged with aggravated sexual assault on a prostitute. His counsel referred him to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with submissions on sentencing in the event of a guilty plea. Counsel informed the accused that

the consultation was privileged in the same way as a consultation with him would be. During his interview with the psychiatrist, the accused described in considerable detail his plan to kidnap, rape and kill prostitutes. The psychiatrist informed defence counsel that in his opinion the accused was a dangerous individual who would, more likely than not, commit future offences unless he received sufficient treatment. The accused later pled guilty to the included offence of aggravated assault. The psychiatrist phoned defence counsel to inquire about the status of the proceedings and learned that his concerns about the accused would not be addressed in the sentencing hearing. The psychiatrist commenced this action for a declaration that he was entitled to disclose the information he had in his possession in the interests of public safety. He filed an affidavit describing his interview with the accused and his opinion based upon the interview. The trial judge ruled that the public safety exception to the solicitor-client privilege and doctor-patient confidentiality released the psychiatrist from his duties of confidentiality and concluded that he was under a duty to disclose to the police and the Crown both the statements made by the accused and his opinion based upon them. The Court of Appeal allowed the accused's appeal but only to the extent that the mandatory order was changed to one permitting the psychiatrist to disclose the information to the Crown and police. Since the beginning of these proceedings at first instance, the file has been sealed. This Court dismissed a motion for a hearing *in camera* but the members of the press and of the public present at the hearing were subject to a publication ban.

Held (Lamer C.J. and Major and Binnie JJ. dissenting): The appeal should be dismissed and the order of the Court of Appeal is affirmed subject to the following directive. The file will be unsealed and the ban on the publication of the contents of the file is removed, except for those parts of the psychiatrist's affidavit which do not fall within the public safety exception.

Per L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ.: Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor-client privilege, and it should be considered on that basis. The solicitor-client privilege is a principle of fundamental importance to the administration of justice. It is the highest privilege recognized by the courts. However, despite its importance, the privilege is not absolute and remains subject to limited exceptions, including the public safety exception. While only a

compelling public interest can justify setting aside solicitor-client privilege, danger to public safety can, in appropriate circumstances, provide such a justification.

Three factors should be taken into consideration in determining whether public safety outweighs solicitor-client privilege: (1) Is there a clear risk to an identifiable person or group of persons? (2) Is there a risk of serious bodily harm or death? (3) Is the danger imminent? These factors must be defined in the context of each situation and different weights will be given to each, and to the various aspects of each, in any particular case. Under the “clarity” factor, it is important, as a general rule, that a group or person must always be ascertainable. In some situations, great significance might be given to the clear identification of a particular individual or group of intended victims, even if the group of intended victims is large. At the same time, a general threat of death or violence directed to everyone in a city or community, or anyone with whom the person may come into contact, may be too vague to warrant setting aside the privilege. However, if the threatened harm to the members of the public was particularly compelling, extremely serious and imminent, it might well be appropriate to lift the privilege. All the surrounding circumstances will have to be taken into consideration in every case. The “seriousness” factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. With respect to the “imminence” factor, the nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor-client privilege, then the privilege must be set aside. When it is, the disclosure should be limited so that it includes only the information necessary to protect public safety.

In this case, the solicitor-client privilege must be set aside for the protection of members of the public. A reasonable observer, given all the facts for which solicitor-client privilege is sought, would consider the potential danger posed by the accused to be clear, serious, and imminent. According to the psychiatrist's affidavit, the accused suffered from a paraphiliac disorder with multiple paraphilias -- in particular sexual sadism -- and drug abuse difficulty. In his interview, the accused clearly identified the potential group of victims -- prostitutes in a specific area -- and described, in considerable detail, his plan and the method for effecting the attack. The evidence of planning and the prior attack on a prostitute similar to that which was planned emphasize the potential risk of serious bodily harm or death to prostitutes in that area. The combination of all these elements meets the factor of clarity, and the potential harm -- a sexually sadistic murder -- clearly meets the factor of seriousness. Lastly, although no evidence was adduced as to whether the psychiatrist considered that a future attack was imminent, two important elements indicate that the threat of serious bodily harm was imminent. First, the accused breached his bail conditions by continuing to visit the specific area where he knew prostitutes could be found. Second, after his arrest and while awaiting sentencing, he would have been acutely aware of the consequences of his actions.

The disclosure of the psychiatrist's affidavit was properly limited at first instance to those portions of it which indicated that there was an imminent risk of death or serious bodily harm to an identifiable group comprising prostitutes located in a specific area. To that extent, the solicitor-client privilege attaching to the psychiatrist's affidavit must be set aside. In the result, the file will be unsealed and the ban on the publication of its contents is removed, except for those parts of the psychiatrist's affidavit which do not fall within the public safety exception. The psychiatrist's affidavit as edited at first instance will be made public together with all the other material in the Court's file.

Per Lamer C.J. and Major and Binnie JJ. (dissenting): The confidentiality of the solicitor-client privilege, which extends to communications between clients and experts retained by their counsel for the purpose of preparing a defence, must, in exceptional circumstances, yield

to the interests of public safety. Since the entire factual basis from which the psychiatrist's knowledge and opinion of the accused stem is the oral history provided by the accused, the accused's communications, and the expert's opinion arising from them, are privileged subject to the public safety exception.

While the danger in this case is sufficiently clear, serious and imminent to justify some warning to the relevant authorities, two principles should guide the analysis of the scope of the disclosure: (1) the breach of privilege must be as narrow as possible; and (2) an accused's right to consult counsel without fear of having his words used against him at trial is vital to our conception of justice. In this case, the trial judge permitted disclosure of parts of the psychiatrist's affidavit beyond those portions which indicate an imminent risk of serious harm or death, and could result in conscriptive evidence, such as the accused's confession, being revealed unnecessarily. A limited exception which does not include conscriptive evidence against the accused would better address the immediate concern for public safety while respecting the importance of the privilege. The immediate concern for public safety is to ensure that the accused not harm anyone. This can be accomplished by permitting the psychiatrist to warn the relevant authorities that the accused poses a threat to prostitutes in a specific area. However, he should only disclose his opinion and the fact that it is based on a consultation with the accused. Specifically, he should not disclose any communication from the accused relating to the circumstances of the offence, nor should he be permitted to reveal any of the personal information which the trial judge excluded from his original order for disclosure.

This approach will foster a climate in which dangerous individuals are more likely to disclose their disorders, seek treatment and pose less danger to the public. As the facts of this case illustrate, the accused was only diagnosed and made aware of the possibility of treatment because he felt secure in confiding to the psychiatrist. If that confidence is undermined, then these individuals will not disclose the danger they pose, they will not be identified, and public safety will suffer.

Cases Cited

By Cory J.

Not followed: *R. v. Derby Magistrates' Court*, [1995] 4 All E.R. 526; **approved:** *R. v. Dunbar and Logan* (1982), [1982 CanLII 3324 \(ON CA\)](#), 68 C.C.C. (2d) 13; **considered:** *Solosky v. The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821; *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976); *Thompson v. County of Alameda*, 614 P.2d 728 (1980); *Brady v. Hopper*, 570 F.Supp. 1333 (1983); *W. v. Egdell*, [1990] 1 All E.R. 835; **referred to:** *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644; *R. v. Gruenke*, [1991 CanLII 40 \(SCC\)](#), [1991] 3 S.C.R. 263; *Descôteaux v. Mierzwinski*, [1982 CanLII 22 \(SCC\)](#), [1982] 1 S.C.R. 860; *R. v. Seaboyer*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 S.C.R. 577; *A. (L.L.) v. B. (A.)*, [1995 CanLII 52 \(SCC\)](#), [1995] 4 S.C.R. 536; *R. v. McCraw*, [1991 CanLII 29 \(SCC\)](#), [1991] 3 S.C.R. 72.

By Major J. (dissenting)

R. v. Perron (1990), [1990 CanLII 3396 \(QC CA\)](#), 54 C.C.C. (3d) 108, [1990] R.J.Q. 752; *In re Shell Canada Ltd.*, [1975 CanLII 2217 \(FCA\)](#), [1975] F.C. 184, 22 C.C.C. (2d) 70 (*sub nom. Re Director of Investigation and Research Shell and Canada Ltd.*); *Solosky v. The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821; *R. v. Hebert*, [1990 CanLII 118 \(SCC\)](#), [1990] 2 S.C.R. 151; *R. v. Jones*, [1994 CanLII 85 \(SCC\)](#), [1994] 2 S.C.R. 229; *R. v. L. (C.K.)* (1987), [1987 CanLII 9450 \(ON SC\)](#), 62 C.R. (3d) 131; *R. v. Poslowsky*, [1996] B.C.J. No. 2550 (QL); *R. v. King*, [1983] 1 All E.R. 929; *R. v. Ward* (1981), 3 A. Crim. R. 171; *City & County of San Francisco v. Superior Court*, 231 P.2d 26 (1951); *Calcraft v. Guest*, [1898] 1 Q.B. 759; *Descôteaux v. Mierzwinski*, [1982 CanLII 22 \(SCC\)](#), [1982] 1 S.C.R. 860; *Harmony Shipping Co. S.A. v. Davis*, [1979] 3 All E.R. 177; *Lyell v. Kennedy (No. 2)* (1883), 9 App. Cas. 81; *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969 CanLII 1540 \(CA EXC\)](#), [1969] 2 Ex. C.R. 27; *Thorson v. Jones* (1973), [1973 CanLII 1105 \(BC SC\)](#), 38 D.L.R. (3d) 312; *M. (A.) v. Ryan*, [1997 CanLII 403 \(SCC\)](#), [1997] 1

S.C.R. 157; *Thompson v. County of Alameda*, 614 P.2d 728 (1980); *R. v. P. (M.B.)*, 1994 CanLII 125 (SCC), [1994] 1 S.C.R. 555; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

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APPEAL from a judgment of the British Columbia Court of Appeal, 1998 CanLII 4689 (BC CA), [1998] B.C.J. No. 3182 (QL), allowing in part the accused’s appeal from a judgment of Henderson J. ordering a psychiatrist to disclose his report to the Crown. Appeal dismissed, Lamer C.J. and Major and Binnie JJ. dissenting.

Leslie J. Mackoff, for the appellant.

Christopher E. Hinkson, Q.C., and *Elizabeth A. Campbell*, for the respondent.

Paul B. Schabas and *Matthew J. Halpin*, for the intervener.

The reasons of Lamer C.J. and Major and Binnie JJ. were delivered by

MAJOR J. (dissenting) --

I. Introduction

1 I agree with Justice Cory's summation of the facts giving rise to this appeal and with his conclusion that the confidentiality of the solicitor-client privilege must, in exceptional circumstances of public safety, yield to the public good.

2 The point of departure arises in the restriction each of us places on the scope of disclosure.

3 In my opinion a limited exception which does not include conscriptive evidence against the accused would address the immediate concern for public safety in this appeal while respecting the importance of the privilege. I do not read Cory J.'s reasons as imposing that limitation.

4 This approach will in my view foster a climate in which dangerous individuals are more likely to disclose their disorders, seek treatment and pose less danger to the public.

II. The Principles Underlying Solicitor-Client Privilege

5 In Canada, everyone is entitled to retain legal counsel to defend and protect their interests. This right is particularly important in criminal proceedings. The rationale for protection of the solicitor-client relationship was clearly stated by Jackett C.J. in *Re Shell Canada Ltd.*, [1975](#)

[CanLII 2217 \(FCA\)](#), [1975] F.C. 184, 22 C.C.C. (2d) 70 (C.A.) (*sub nom. Re Director of Investigation and Research and Shell Canada Ltd.*), at p. 193 F.C., and adopted by Dickson J. (as he then was) for this Court in *Solosky v. The Queen*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821, at p. 834:

. . . the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal adviser might somehow become available to third persons so as to be used against him.

6 If the confidences clients share with counsel were not protected by privilege, it seems apparent that accused persons would hesitate to confide in their legal advisors, who in turn could not adequately represent them. The starting point of Canadian justice is that no one, no matter how horrible the alleged offence, be denied a full defence. Nor will they be prejudiced by retaining counsel and freely discussing the case with him or her.

7 In the criminal context principles embodied in the rules of privilege have gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence in [ss. 7, 10\(b\), 11\(c\) and 11\(d\)](#) of the *Canadian Charter of Rights and Freedoms*; *R. v. Hebert*, [1990 CanLII 118 \(SCC\)](#), [1990] 2 S.C.R. 151; *R. v. Jones*, [1994 CanLII 85 \(SCC\)](#), [1994] 2 S.C.R. 229, at pp. 246-55.

8 Each of these rights support the extension of privilege to communications between clients and experts retained by their counsel for the purpose of preparing a defence. Together, they

demonstrate the reasons for denying any use of solicitor-client communications against an accused in any legal proceeding. To deny the protection of solicitor-client privilege to the confidential communications of the accused to those intimately involved in the preparation of his defence would frustrate these rights. For these reasons, the communications between an accused and his counsel, made in furtherance of his or her defence, are accorded the highest level of protection and confidentiality.

III. Extension of Solicitor-Client Privilege to Experts

9 In this case the privilege is claimed not for the client's conversations with his lawyer, but those with the psychiatrist whom his lawyer retained as an expert. Tradition and case law support the extension of this privilege to include communications, by conversation or otherwise, between the accused and the expert in the same way as in the traditional solicitor-client relationship.

10 Courts in Canada, Australia, the United Kingdom and the United States have all concluded that client communications with third-party experts retained by counsel for the purpose of preparing their defence are protected by solicitor-client privilege: see *R. v. Perron* (1990), [1990 CanLII 3396 \(QC CA\)](#), 54 C.C.C. (3d) 108, [1990] R.J.Q. 752 (C.A.); *R. v. L. (C.K.)* (1987), [1987 CanLII 9450 \(ON SC\)](#), 62 C.R. (3d) 131 (Ont. Dist. Ct.); *R. v. Poslowsky*, [1996] B.C.J. No. 2550 (QL) (Prov. Ct.); *R. v. King*, [1983] 1 All E.R. 929 (C.A.); *R. v. Ward* (1981), 3 A. Crim. R. 171 (N.S.W. Ct. Cr. App.).

11 In *Perron, supra*, the Crown was permitted to call and examine a psychiatrist who was retained by the defence but not called as a witness. The Quebec Court of Appeal held that the substance of the accused's communications with the psychiatrist were privileged and therefore

inadmissible. The court adopted the opinion set out in *City & County of San Francisco v. Superior Court*, 231 P.2d 26 (1951), at p. 31, *per* Traynor J. of the Supreme Court of California, who held that:

The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.

. . .

Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed. [Emphasis in original.]

12 The court concluded that communications between an accused and psychiatrist come within the scope of the solicitor-client relationship and create the solicitor-client privilege. A privilege that goes to the heart of the ability of an accused to seek counsel and present a full answer and defence to the charges proffered against him.

13 The Quebec Court of Appeal concluded in *Perron, supra*, at p. 113 C.C.C.:

[TRANSLATION] When counsel requires the services of an expert in order to help him better prepare his defence, he acts within the scope of his mandate. It is the interest of his client which compels counsel to confer on a specialist the charge of evaluating the case and it follows that the accused must be able to undergo the evaluation in the same climate of confidence and in complete confidentiality as if he were communicating with counsel.

14 This reasoning is persuasive, and confirms that conversations with defence experts, such as psychiatrists, fall within the solicitor-client privilege and attract permanent and substantive privilege: see *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.), *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860.

IV. Is the Substance of the Psychiatrist's Opinion Privileged?

15 The respondent asserts that even if Mr. Jones's communications are privileged, Dr. Smith's opinion based on those communications is not privileged, on the basis of the long-established maxim that there is no property in a witness: see *Harmony Shipping Co. S.A. v. Davis*, [1979] 3 All E.R. 177 (C.A.), *per* Lord Denning, M.R., at pp. 180-81. In the present case the entire factual basis from which the witness's knowledge and opinion of the accused stem is the oral history provided by the accused. These communications and opinions arising from them are privileged subject to the public safety exception.

16 In *Ward, supra*, at p. 190, the New South Wales Court of Criminal Appeal held the psychiatrist's evidence to be beyond the reach of the Crown:

The first substantial question to be considered is whether Dr. Barclay was retained by the appellant for the purpose of forming an opinion, as a psychiatrist, as to the appellant's mental condition so that that opinion might, if the appellant desired, be used for the purpose of the forthcoming trial of the appellant. If he was so retained then what the appellant had said to him was the subject of legal professional privilege and unless the accused waived the privilege, Dr. Barclay's account of what he had been told by the appellant when interviewed and the opinion which he formed from that account, could not be put before the jury. [Emphasis added.]

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17 The judgment of Lord Blackburn in *Lyell v. Kennedy (No. 2)* (1883), 9 App. Cas. 81 (H.L.), at p. 87, cited with approval by Jactett P. in *Susan Hosiery Ltd. v. Minister of National*

Revenue, 1969 CanLII 1540 (CA EXC), [1969] 2 Ex. C.R. 27, at pp. 34-35, provides additional support for this conclusion:

. . . it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also. . . . when the interrogatory is simply “what is the belief which you have formed from reading that brief?” [i.e., the privileged information] it seems to me . . . to follow that you cannot ask that question.

18 In *Thorson v. Jones* (1973), 1973 CanLII 1105 (BC SC), 38 D.L.R. (3d) 312 (B.C.S.C.), the client identified himself, in strict confidence, to his solicitor as the driver responsible for an unsolved hit-and-run. The court held that the client’s identity constituted privileged information and was not to be revealed.

V. Purpose and Application of the Public Safety Exception

19 I agree with Cory J. that the standard of a “clear, serious and imminent” danger is the appropriate test for disclosure of privileged communications. There are compelling public policy reasons for limiting disclosure to cases of clear and imminent danger. The record confirms that Mr. Jones only disclosed his secret plans because his lawyer had properly advised him that anything he said to Dr. Smith would be confidential. If Cory J. is correct in holding that, in cases where the necessity test is met, the privilege is overridden to the extent of allowing disclosure of self-incriminating evidence, the result might endanger the public more than the public safety exception would protect them.

20 If defence counsel cannot freely refer clients, particularly dangerous ones, to medical or other experts without running a serious risk of the privilege being set aside, their response will be not to refer clients until after trial, if at all. This could result in dangerous people remaining free on bail for long periods of time, undiagnosed and untreated, presenting a danger to society.

21 The chilling effect of completely breaching the privilege would have the undesired effect of discouraging those individuals in need of treatment for serious and dangerous conditions from consulting professional help. In this case the interests of the appellant and more importantly the interests of society would be better served by his obtaining treatment. This Court has recognized that mental health, including those suffering from potentially dangerous illnesses, is an important public good: see *M. (A.) v. Ryan*, [1997 CanLII 403 \(SCC\)](#), [1997] 1 S.C.R. 157, at para. 27.

22 Although the appellant did not go to Dr. Smith to seek treatment, it is obvious that he is more likely to get treatment when his condition is diagnosed than someone who keeps the secret of their illness to themselves. It seems apparent that society will suffer by imposing a disincentive for patients and criminally accused persons to speak frankly with counsel and medical experts retained on their behalf.

23 As appealing as it may be to ensure that Mr. Jones does not slip back into the community without treatment for his condition, completely lifting the privilege and allowing his confidential communications to his legal advisor to be used against him in the most detrimental ways will not promote public safety, only silence. For this doubtful gain, the Court will have imposed a veil of secrecy between criminal accused and their counsel which the solicitor-client privilege was developed to prevent. Sanctioning a breach of privilege too hastily erodes the workings of the system of law in exchange for an illusory gain in public safety.

VI. Application to the Facts

24 While I agree with Cory J. that the danger in this case is sufficiently clear, serious and imminent to justify some warning to the relevant authorities, I find that the balance between the public interests in safety and the proper administration of justice is best struck by a more limited disclosure than the broader abrogation of privilege he proposes. In particular, Cory J. endorses the trial judge's limitation of Dr. Smith's affidavit to those portions which indicate an imminent risk of serious harm or death. In the result, conscriptive evidence such as the accused's confession can be disclosed. In my opinion, the danger posed by the accused can be adequately addressed by the expression of that opinion by Dr. Smith without disclosing the confession.

25 Two principles should guide the analysis of the scope of this disclosure. First, the breach of privilege must be as narrow as possible; *Descôteaux v. Mierzewski*, *supra*, at p. 875. Disclosure is justified only when it can actually accomplish something in the public interest, such as preventing injury or death. As the authors of "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 *Harv. L. Rev.* 730, at p. 732, observe, "the [American] Canons of Professional Ethics make it clear that the attorney is released from his duty to maintain confidence in order 'to prevent the act or protect those against whom it is threatened'". (Emphasis added.) See also *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980), at p. 736.

26 Second, an accused's right to consult counsel without fear of having his words used against him at trial is vital to our conception of justice. See *R. v. P. (M.B.)*, 1994 CanLII 125 (SCC), [1994] 1 S.C.R. 555, *per* the Chief Justice, at p. 577:

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution.

27 All of the information upon which the respondent formed his concern about future conduct of the accused, emanated from the accused himself, and would not generally have been available. Our jurisprudence does not allow the conscription of an accused's own words against him: see *R. v. Jones, supra*.

28 The immediate concern for public safety in this case is to ensure that the appellant not harm anyone. The solicitor-client privilege is a fundamental common law right of Canadians. That right must be interpreted in light of the *Charter* which provides for the right of an accused to counsel. Anytime such a fundamental right is eroded the principle of minimal impairment must be observed. See *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. This can be accomplished by a limited disclosure of the psychiatrist's opinion. Courts are obligated to craft the narrowest possible exception to privilege which accomplishes this purpose. Accordingly, Dr. Smith should be permitted to warn the relevant authorities (i.e., the Attorney General and sentencing judge) that Mr. Jones poses a threat to prostitutes in the Vancouver area. However, Dr. Smith should only disclose his opinion and the fact that it is based on a consultation with Mr. Jones. Specifically, he should not disclose any communication from the accused relating to the circumstances of the offence, nor should he be permitted to reveal any of the personal information which the trial judge excluded from his original order for disclosure.

29 I agree with Cory J. that in rare cases where an individual poses an instant risk such that even an *ex parte* application to the court is not possible, the person reviewing the otherwise privileged information may issue a timely warning to the police. Otherwise, the scope and timing of disclosures should be dealt with by the courts on a case-by-case basis.

30 The public interest in cases such as this is twofold, and requires not only that the dangerous individual is prevented from harming anyone, but that they obtain treatment if needed. Appealing as it might be to force individuals in Mr. Jones's position into treatment through the criminal process, it is unlikely to happen. If there is a risk that conscriptive evidence from the mouth of the accused can be used against him, the defence bar is going to be reluctant to refer dangerous clients to the care of experts. Disclosure will be discouraged and treatment will not occur.

31 As the facts of this case illustrate, Mr. Jones was only diagnosed and made aware of the possibility of treatment because he felt secure in confiding to Dr. Smith. If that confidence is undermined, then these individuals will not disclose the danger they pose, they will not be identified, and public safety will suffer.

VII. Scope of this Decision

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32 Cory J. relies on American jurisprudence regarding the private law duty of physicians to warn potential victims of their dangerous patients. With respect I think these cases are of limited usefulness, as they do not engage any of the legal and constitutional principles which underlie the solicitor-client privilege. In the absence of that issue in this case I will not comment on the existence or scope of the duty to warn in private doctor-client relationships.

33 This decision relates only to a limited exception to the solicitor-client privilege created by these facts, and does not extinguish that privilege. It pertains only to the prevention of imminent perils and the ability of legal and medical professionals to warn the police and potential victims of clear, serious and pressing dangers in the manner outlined. It follows that nothing in

this decision is intended to decide whether any of the privileged communications made between Mr. Jones and Dr. Smith are admissible at any judicial proceedings. Those are issues to be determined by the presiding judge as they arise.

VIII. Disposition

34 Accordingly, I would allow the appeal without costs, confirm the entirety of Mr. Jones's communications to Dr. Smith to be privileged, but permit Dr. Smith to give his opinion and diagnosis of the danger posed by Mr. Jones.

The judgment of L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Bastarache JJ. was delivered by

//Cory J.//

35 CORY J. -- The solicitor-client privilege permits a client to talk freely to his or her lawyer secure in the knowledge that the words and documents which fall within the scope of the privilege will not be disclosed. It has long been recognized that this principle is of fundamental importance to the administration of justice and to the extent it is feasible, it should be maintained. Yet when public safety is involved and death or serious bodily harm is imminent, the privilege should be set aside. This appeal must determine what circumstances and factors should be considered and weighed in determining whether solicitor-client privilege should be set aside in the interest of protecting the safety of the public.

I. Factual Background

36 Solicitor-client privilege is claimed for a doctor's report. Pending the resolution of that claim the names of the parties involved have been replaced by pseudonyms. The appellant, "James Jones", was charged with aggravated sexual assault of a prostitute. His counsel referred him to a psychiatrist, the respondent, "John Smith", for a forensic psychiatric assessment. It was hoped that it would be of assistance in the preparation of the defence or with submissions on sentencing in the event of a guilty plea. His counsel advised Mr. Jones that the consultation was privileged in the same way as a consultation with him would be. Dr. Smith interviewed Mr. Jones for 90 minutes on July 30, 1997. His findings are contained in an affidavit he submitted to the judge of first instance. They set out the basis for his belief that Mr. Jones poses a continuing danger to the public.

37 Dr. Smith reported that Mr. Jones described in considerable detail his plan for the crime to which he subsequently pled guilty. It involved deliberately choosing as a victim a small prostitute who could be readily overwhelmed. He planned to have sex with her and then to kidnap her. He took duct tape and rope with him, as well as a small blue ball that he tried to force into the woman's mouth. Because he planned to kill her after the sexual assault he made no attempt to hide his identity.

38 Mr. Jones planned to strangle the victim and to dispose of her body in the bush area near Hope, British Columbia. He was going to shoot the woman in the face before burying her to impede identification. He had arranged time off from his work and had carefully prepared his basement apartment to facilitate his planned sexual assault and murder. He had told people he would be going away on vacation so that no one would visit him and he had fixed dead bolts on all the doors so that a key alone would not open them.

39 Mr. Jones told Dr. Smith that his first victim would be a “trial run” to see if he could “live with” what he had done. If he could, he planned to seek out similar victims. He stated that, by the time he had kidnapped his first victim, he expected that he would be “in so deep” that he would have no choice but to carry out his plans.

40 On July 31, Dr. Smith telephoned Mr. Jones’s counsel and informed him that in his opinion Mr. Jones was a dangerous individual who would, more likely than not, commit future offences unless he received sufficient treatment.

41 On September 24, 1997, Mr. Jones pled guilty to aggravated assault and the matter was put over for sentencing. Sometime after November 19, Dr. Smith phoned Mr. Jones’s counsel to inquire about the proceedings. On learning that the judge would not be advised of his concerns, Dr. Smith indicated that he intended to seek legal advice and shortly thereafter commenced this action.

42 The *in camera* hearing took place in December 1997. Dr. Smith filed an affidavit describing his interview with Mr. Jones and his opinion based upon the interview. Mr. Jones filed an affidavit in response. On December 12, 1997, Henderson J. ruled that the public safety exception to the law of solicitor-client privilege and doctor-patient confidentiality released Dr. Smith from his duties of confidentiality. He went on to rule that Dr. Smith was under a duty to disclose to the police and the Crown both the statements made by Mr. Jones and his opinion based upon them. Henderson J. ordered a stay of his order to allow for an appeal and Mr. Jones promptly appealed the decision.

43 The Court of Appeal allowed the appeal but only to the extent that the mandatory order was changed to one permitting Dr. Smith to disclose the information to the Crown and police: [1998 CanLII 4689 \(BC CA\)](#), [1998] B.C.J. No. 3182 (QL). The order was stayed to permit Mr. Jones to consider a further appeal. It also directed that pseudonyms be used, that proceedings be heard *in camera* and that the file remain sealed pending further order. This order is discussed in greater detail below. The sentencing of Mr. Jones on the aggravated assault charge was adjourned pending the outcome of this appeal.

II. Analysis

A. *The Nature of the Solicitor-Client Privilege*

44 Both parties made their submissions on the basis that the psychiatrist's report was protected by solicitor-client privilege, and it should be considered on that basis. It is the highest privilege recognized by the courts. By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges and duties of confidentiality. It follows that, in these reasons, it is not necessary to consider any distinctions that may exist between a solicitor-client privilege and a litigation privilege.

45 The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649, the importance of the rule was recognized:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself

from an improper claim, should have recourse to the assistance of professional lawyers, . . . to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence . . . that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

46 Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

47 As Lamer C.J. stated in *R. v. Gruenke*, [1991 CanLII 40 \(SCC\)](#), [1991] 3 S.C.R. 263, at p. 289:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to

the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.

48 The solicitor-client privilege was originally simply a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify. Yet now it has evolved into a substantive rule. As Dickson J. (as he then was) wrote in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 836, “Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room.”

49 Lamer J. (as he then was) expanded on this statement in *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at p. 875, when he discussed the content of this substantive rule:

It is quite apparent that the Court in [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:

1. The confidentiality of the communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client’s consent.
2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person’s right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

50 As the British Columbia Court of Appeal observed, solicitor-client privilege is the privilege “which the law has been most zealous to protect and most reluctant to water down by exceptions”. Quite simply it is a principle of fundamental importance to the administration of justice.

B. Limitations on Solicitor-Client Privilege

51 Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.

(1) Innocence of the Accused

52 One exception to solicitor-client privilege was set out in *R. v. Dunbar and Logan* (1982), 1982 CanLII 3324 (ON CA), 68 C.C.C. (2d) 13 (Ont. C.A.). Martin J.A., speaking for the court, ruled that solicitor-client privilege must yield to the right of accused persons to fully defend themselves. At p. 44 he wrote:

No rule of policy requires the continued existence of the privilege in criminal cases when the person claiming the privilege no longer has any interest to protect, and when maintaining the privilege might screen from the jury information which would assist an accused.

53 The House of Lords recently considered this issue in *R. v. Derby Magistrates' Court*, [1995] 4 All E.R. 526. It held that solicitor-client privilege was absolute and permanent. It could not be set aside even when to do so would allow an accused to present a full answer and defence to a criminal charge. With great respect, I prefer the reasoning of Martin J.A. Despite the strength and importance of the privilege, it remains subject to certain well-defined and limited exceptions. These exceptions are not foreclosed and may be expanded in the future, for example, to protect national security. However, the question of further exceptions need not be considered in these reasons.

54 It is significant and worthy of observation that *Dunbar and Logan*, *supra*, was cited with approval by this Court in *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, at p. 607 (*per* McLachlin J.), and in *A. (L.L.) v. B. (A.)*, 1995 CanLII 52 (SCC), [1995] 4 S.C.R. 536 (*per* L'Heureux-Dubé J.). At para. 69 of *A. (L.L.) v. B. (A.)*:

When the enforcement of a privilege means that the accused will be limited as to his or her right to make full answer and defence to criminal accusations, this Court has strongly tended to favour disclosure. . . . Even the solicitor-client privilege, which has been elevated to a “fundamental civil and legal right” . . . will be overridden to allow the accused to make full answer and defence to criminal charges. . . . [Citations omitted.]

(2) Criminal Communications

55 A second exception to solicitor-client privilege was set out in *Descôteaux v. Mierzwinski*, *supra*. Lamer J. for the Court, held that communications that are criminal in

themselves (in this case, a fraudulent legal aid application) or that are intended to obtain legal advice to facilitate criminal activities are not privileged. At p. 893 this appears:

There are certain exceptions to the principle of the confidentiality of solicitor-client communications, however. Thus communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged, *inter alia*.

(3) The Public Safety Exception

56 In *Solosky, supra*, an inmate in a federal penitentiary asked this Court to make a declaration that all properly identified correspondence between solicitors and clients would be forwarded to their destinations without being opened. The inmates' privilege was in conflict with the *Penitentiary Act*, R.S.C. 1970, c. P-6, and with Regulation 2.18 of the *Penitentiary Service Regulations*, which allowed the institution's director to censor any correspondence to the extent the censor considered necessary.

57 In his decision, Dickson J. ruled that the inmates' privilege must yield when the safety of members of the institution is at risk. In his reasons at p. 840, he implicitly limited the solicitor-client privilege. He wrote:

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. [Emphasis added.]

In certain circumstances, therefore, when the safety of the public is at risk the solicitor-client privilege may be set aside.

58 Courts in other jurisdictions have considered the issue of public safety exceptions to privilege, particularly in doctor-patient relationships. Obviously these cases do not deal with solicitor-client privilege. However, they do support the position that other privileges are subject to the public interest. Moreover, they assist in determining the approach that should be taken to the consideration of the issue of privilege. Further these cases are useful in exploring certain issues that arise in this case, for example, how the victim class can be identified and how specific the potential victim or class of victims must be.

59 I would emphasize that these cases are not being examined with a view to establishing a tort duty on doctors to disclose confidential information when a public safety concern arises. That issue is not before the Court and must not be decided without a factual background and the benefit of argument.

(a) *American Decisions*

60 In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (1976), the Supreme Court of California considered whether psychologists and psychiatrists have a duty to warn a potential victim when they were or should have been aware that a patient presented a serious danger to an identifiable person.

61 In that case a patient under the care of the respondents, a psychologist and two psychiatrists employed by the University of California, confessed to his psychologist his intention

to kill a young girl, who was readily identifiable from his description. The psychologist contacted the police who questioned and briefly detained the patient but released him because he appeared rational. Two months later, the patient killed the girl. Her parents brought an action against the therapists for failure to warn them of the danger to their daughter.

62 Tobriner J. of the California Supreme Court at p. 340 wrote:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

63 He went on to observe that the public interest in maintaining access to mental health treatment had to be balanced against the public interest in safety. At p. 346:

We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy..., and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. [Citation omitted.]

At p. 347, he concluded:

We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins. [Emphasis added.]

64 In *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980), county officials were aware of the violent propensities of a juvenile delinquent in their care. These violent propensities were directed toward young children. The county released the juvenile delinquent from custody into the care of his mother. Within 24 hours, he had sexually assaulted and murdered the five-year-old who lived next door. The parents of the victim sued the county for, *inter alia*, failing to warn them. The Supreme Court dismissed their suit.

65 In reaching its decision, the majority of the court held that *Tarasoff, supra*, was distinguishable because the victim in *Tarasoff* “was the known and specifically foreseeable and identifiable victim of the patient’s threats” (p. 734). Richardson J. explained and distinguished the decision in *Tarasoff* in this way at p. 734:

[W]e made clear that the therapist has no *general* duty to warn of each threat. Only if he “does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, (does he bear) a duty to exercise reasonable care to protect the *foreseeable victim* of that danger.”

...

Unlike *Johnson* [*v. State of California*, 447 P.2d 352 (Cal. 1968)] and *Tarasoff*, plaintiffs here have alleged neither that a direct or continuing relationship between them and County existed through which County placed plaintiffs’ decedent in danger, nor that their decedent was a foreseeable or readily identifiable target of the juvenile offender’s threats. [Underlining added; italics added by Richardson J.]

The court thus explicitly limited the duty to warn to cases in which the danger to a particular victim was foreseeable. At p. 735, Richardson J. wrote:

Bearing in mind the ever present danger of parole violations, we nonetheless conclude that public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made *nonspecific threats of harm directed at nonspecific victims*. [Emphasis in original.]

In California, the duty to warn was thus restricted to cases in which specific threats of harm were directed against specific victims.

66 This position was reiterated in *Brady v. Hopper*, 570 F.Supp. 1333 (D. Colo. 1983). James Brady and two others were suing Dr. John Hopper, John Hinckley's psychiatrist, in tort for the injuries they suffered during Hinckley's attempt to assassinate President Reagan. The court dismissed their claim, finding that Hinckley had made no threats upon which a duty to warn could be based. Moore J. wrote at p. 1339, "Nowhere in the complaint are there allegations that Hinckley made any threats regarding President Reagan, or indeed that he ever threatened anyone." It was determined that the duty to warn did not arise until such time as both the threat and the possible victim could be identified. Something more than a merely speculative risk of harm to unidentifiable persons was necessary (at p. 1338):

[O]nce the patient verbalizes his intentions and directs his threats to identifiable victims, then the possibility of harm to third persons becomes foreseeable, and the therapist has a duty to protect those third persons from the threatened harm. [Emphasis added.]

67 The reasons in *Brady v. Hopper* made it clear that the duty to warn should not be interpreted in such a wide and encompassing manner that therapists would become responsible for all their patients' violent actions. Such a test would be unreasonable and upset the balance between public safety and the importance to society of cultivating confidential relationships. Moore J. wrote at p. 1339: "In my opinion, the 'specific threats to specific victims' rule states a workable, reasonable, and fair boundary upon the sphere of a therapist's liability to third persons for the acts of their patients." (Emphasis added.)

68 There is much to commend these well-reasoned American decisions. Yet they lead me to believe that two observations should be made. First, it will not always be necessary to identify a specific individual as the victim. Rather it may be sufficient to engage the duty to warn if a class of victims, such as little girls under five living in a specific area, is clearly identified. Second, although Moore J. speaks of the patient "verbaliz[ing] his intentions", I believe it is more appropriate to speak of a person making known his or her intentions. While speech is perhaps the most common means of making intentions known, it is certainly not the only manner of indicating a clear intention. It could be accomplished soundlessly yet with brutal clarity by thrusting a knife through a photograph of the intended victim.

(b) *United Kingdom Decisions*

69 The leading case in the United Kingdom on balancing the duty of confidentiality and the duty to disclose is *W. v. Egdell*, [1990] 1 All E.R. 835 (C.A.). Although the facts differ somewhat from this case, enough similarities exist to make the reasoning set out in the two concurring judgments helpful to the considerations that must be given to the case at bar. In that case W. pled guilty to manslaughter after committing a series of killings. As a result of a finding of diminished responsibility he was confined to a mental institution. Ten years later, he applied pursuant to the appropriate regulations for a conditional discharge, or a transfer to a regional secure

unit. To this end, through his solicitors, W. consulted Dr. Egdell, a psychiatrist, who was to report on his mental state. His report did not support W.'s application for transfer. Rather he expressed grave concerns regarding W.'s lack of remorse and his continuing interest in homemade bombs and fireworks. As a result, W. withdrew his application.

70 Shortly thereafter, Dr. Egdell telephoned the tribunal that was to review W.'s application to ask whether it had received a copy of his report. He learned that it had not and that the application had been withdrawn. He telephoned W.'s solicitors for permission to forward his report to the assistant medical director of the hospital in which W. was incarcerated and was refused. Nonetheless, Dr. Egdell forwarded his report to the hospital, which then forwarded it to the Home Office. Both of these copies were sent without W.'s permission or knowledge.

71 By chance, several days later W.'s file was due for a three-year review under the *Mental Health Act*. It was then that his solicitors learned that Dr. Egdell's report had been forwarded to the hospital. W. began proceedings, seeking an injunction to prevent the mental health review tribunal from disclosing or considering Dr. Egdell's report, for the delivery of all copies of the report to him, and for damages for breach of the duty of confidence.

72 In their concurring judgments, Sir Stephen Brown P. and Bingham L.J. affirmed the trial judge's ruling dismissing W.'s suit. Bingham L.J. said at p. 848, "[T]he law treats such duties [of confidentiality] not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure". Both justices agreed with the trial judge that the threshold for disclosure was met. The harm that could result if W.'s mental illnesses were not adequately recognized and treated was serious, and the displacing of doctor-patient confidentiality was justified in light of the existing circumstances. The fact that W. had already committed murder was obviously significant. Sir Stephen Brown P. wrote at p. 846:

The balance of public interest clearly lay in the restricted disclosure of vital information to the director of the hospital and to the Secretary of State who had the onerous duty of safeguarding public safety.

In this case the number and nature of the killings by W must inevitably give rise to the gravest concern for the safety of the public.

73 In the United Kingdom the duty on a doctor not to disclose is never absolute. Further, the duty to disclose must be evaluated in the context of the existing circumstances and the specific facts presented.

C. The Public Safety Exception and Solicitor-Client Privilege

74 The foregoing review makes it clear that even the fundamentally important right to confidentiality is not absolute in doctor-patient relationships, and it cannot be absolute in solicitor-client relationships: *Solosky, supra*. When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor-client relationship is so fundamentally important that only a compelling public interest may justify setting aside solicitor-client privilege.

75 Danger to public safety can, in appropriate circumstances, provide the requisite justification. It is significant that public safety exceptions to the solicitor-client privilege are recognized by all professional legal bodies within Canada. See, for example, chapter 5, s. 12, of the British Columbia *Professional Conduct Handbook*:

12. A lawyer may disclose information received as a result of a solicitor-client relationship if the lawyer has reasonable grounds to believe that the disclosure is necessary to prevent a crime involving death or serious bodily harm to any person.

See as well the even broader Rule 4.11 of the Law Society of Upper Canada's *Professional Conduct Handbook*.

76 Quite simply society recognizes that the safety of the public is of such importance that in appropriate circumstances it will warrant setting aside solicitor-client privilege. What factors should be taken into consideration in determining whether that privilege should be displaced?

(1) Determining When Public Safety Outweighs Solicitor-Client Privilege

77 There are three factors to be considered: First, is there a clear risk to an identifiable person or group of persons? Second, is there a risk of serious bodily harm or death? Third, is the danger imminent? Clearly if the risk is imminent, the danger is serious.

78 These factors will often overlap and vary in their importance and significance. The weight to be attached to each will vary with the circumstances presented by each case, but they all must be considered. As well, each factor is composed of various aspects, and, like the factors themselves, these aspects may overlap and the weight to be given to them will vary depending on the circumstances of each case. Yet as a general rule, if the privilege is to be set aside the court must find that there is an imminent risk of serious bodily harm or death to an identifiable person or group.

(a) *Clarity*

79 What should be considered in determining if there is a clear risk to an identifiable group or person? It will be appropriate and relevant to consider the answers a particular case may provide to the following questions: Is there evidence of long range planning? Has a method for effecting the specific attack been suggested? Is there a prior history of violence or threats of violence? Are the prior assaults or threats of violence similar to that which was planned? If there is a history of violence, has the violence increased in severity? Is the violence directed to an identifiable person or group of persons? This is not an all-encompassing list. It is important to note, however, that as a general rule a group or person must be ascertainable. The requisite specificity of that identification will vary depending on the other factors discussed here.

80 The specific questions to be considered under this heading will vary with the particular circumstances of each case. Great significance might, in some situations, be given to the particularly clear identification of a particular individual or group of intended victims. Even if the group of intended victims is large considerable significance can be given to the threat if the identification of the group is clear and forceful. For example, a threat, put forward with chilling detail, to kill or seriously injure children five years of age and under would have to be given very careful consideration. In certain circumstances it might be that a threat of death directed toward single women living in apartment buildings could in combination with other factors be sufficient in the particular circumstances to justify setting aside the privilege. At the same time, a general threat of death or violence directed to everyone in a city or community, or anyone with whom the person may come into contact, may be too vague to warrant setting aside the privilege. However, if the threatened harm to the members of the public was particularly compelling, extremely serious and imminent, it might well be appropriate to lift the privilege. See in this regard *Egdell, supra*. All the surrounding circumstances will have to be taken into consideration in every case.

81 In sum, the threatened group may be large but if it is clearly identifiable then it is a factor -- indeed an essential factor -- that must be considered together with others in determining whether the solicitor-client privilege should be set aside. A test that requires that the class of victim be ascertainable allows the trial judge sufficient flexibility to determine whether the public safety exception has been made out.

(b) *Seriousness*

82 The “seriousness” factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. Many persons involved in criminal justice proceedings will have committed prior crimes or may be planning to commit crimes in the future. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor-client privilege because of fears for public safety. For the public safety interest to be of sufficient importance to displace solicitor-client privilege, the threat must be to occasion serious bodily harm or death.

83 It should be observed that serious psychological harm may constitute serious bodily harm, as this Court held in *R. v. McCraw*, [1991 CanLII 29 \(SCC\)](#), [1991] 3 S.C.R. 72, at p. 81:

So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase “serious bodily harm”. There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm.

84 The risk of serious bodily harm or death must be imminent if solicitor-client communications are to be disclosed. That is, the risk itself must be serious: a serious risk of serious bodily harm. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. A statement made in a fleeting fit of anger will usually be insufficient to disturb the solicitor-client privilege. On the other hand, imminence as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence when he is released from prison. If that threat is made with such chilling intensity and graphic detail that a reasonable bystander would be convinced that the killing would be carried out the threat could be considered to be imminent. Imminence, like the other two criteria, must be defined in the context of each situation.

85 In summary, solicitor-client privilege should only be set aside in situations where the facts raise real concerns that an identifiable individual or group is in imminent danger of death or serious bodily harm. The facts must be carefully considered to determine whether the three factors of seriousness, clarity, and imminence indicate that the privilege cannot be maintained. Different weights will be given to each factor in any particular case. If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor-client privilege, then the privilege must be set aside. When it is, the disclosure should be limited so that it includes only the information necessary to protect public safety. See in this respect *Descôteaux, supra*, at p. 891.

(2) Extent of Disclosure

86 The disclosure of the privileged communication should generally be limited as much as possible. The judge setting aside the solicitor-client privilege should strive to strictly limit disclosure to those aspects of the report or document which indicate that there is an imminent risk of serious bodily harm or death to an identifiable person or group. In undertaking this task consideration should be given to those portions of the report which refer to the risk of serious harm to an identifiable group; that the risk is serious in that it involves a danger of death or serious bodily harm; and that the serious risk is imminent in the sense given to that word in para. 84 above. The requirement that the disclosure be limited must be emphasized. For example, if a report contained references to criminal behaviour that did not have an imminent risk of serious bodily harm but disclosed, for example, the commission of crimes of fraud, counterfeiting or the sale of stolen goods, those references would necessarily be deleted.

D. Application of the Public Safety Exception to Solicitor-Client Privilege to the Case at Bar(1) Clarity

87 Would a reasonable observer, given all the facts for which solicitor-client privilege is sought, consider the potential danger posed by Mr. Jones to be clear, serious, and imminent? The answer must, I think, be in the affirmative. According to Dr. Smith's affidavit, the plan described by Mr. Jones demonstrated a number of the factors that should be considered in determining the clarity of the potential danger. They are the clear identification of the victim group, the specificity of method, the evidence of planning, and the prior attempted or actual acts that mirror the potential act of threatened future harm.

88 It is apparent that Mr. Jones had planned in considerable detail attacks on prostitutes on Vancouver's Downtown Eastside. He had gathered materials together that he planned to use to achieve his ultimate goal of forcing a prostitute to become his "sex slave" before killing her. He had arranged for vacation time from his job and had modified his basement apartment to ensure that no one else could enter. Mr. Jones had proceeded so far as to take rope and duct tape with him and had planned to shoot the intended victim in the face to obliterate her identity. Perhaps most important, he had called the initial assault to which he pled guilty a "trial run". These factors should be considered together with Dr. Smith's diagnosis of Mr. Jones, namely that he suffered a paraphiliac disorder with multiple paraphilias (in particular, sexual sadism), personality disorder with mixed features, and some antisocial features and drug abuse difficulty. The original planning and the prior attack on a prostitute emphasize the potential risk of serious bodily harm or death to prostitutes in the Downtown Eastside of Vancouver.

89 Although Mr. Jones attempted to explain his failure to seek treatment for fear of a longer sentence and the danger he would be exposed to in prison, this does not affect the gravity of the threatened attack on prostitutes. The combination of the factors referred to in the paragraph above meets the standard of clarity necessary to set aside solicitor-client privilege. The potential victim or group of victims is identifiable. Mr. Jones had already acted once in committing the crime for which he is waiting to be sentenced. It is clear that he intended to act again. The risk of serious bodily harm or death was readily apparent and the group of victims was readily identifiable. The harm potentially caused was of the utmost gravity.

(2) Seriousness

90 The seriousness of the potential harm, a sexually sadistic murder, is clearly sufficient. The fact that Mr. Jones has after careful and detailed planning already committed an assault upon a prostitute supports the finding that the potential harm caused would be extremely serious.

(3) Imminence

91 The most difficult issue to resolve is whether the risk of serious bodily harm can be termed “imminent”. Mr. Jones was arrested on September 17, 1996, for the assault he had committed three days earlier. He consulted Dr. Smith on July 30, 1997. Dr. Smith contacted Mr. Jones’s counsel the following day to inform him that, in Dr. Smith’s opinion, Mr. Jones was a dangerous individual. About three months later, some 14 months after Mr. Jones’s arrest, Dr. Smith telephoned Mr. Jones’s counsel again and learned that his (Dr. Smith’s) concerns would not be addressed in the sentencing hearing. He then began these legal proceedings. Mr. Jones has been in custody since December 15, 1997, pursuant to the order of Henderson J. Mr. Jones was thus at liberty from September 14, 1996, to December 15, 1997, a period of almost 15 months. During that time he did not carry out his plan to attack and kill another prostitute. Moreover, Mr. Jones has not carried out a series of attacks over a period of time, which would lead to the conclusion that another attack was imminent. He has been charged and convicted of only one incident.

92 No evidence was adduced as to whether Dr. Smith considered that a future attack was imminent. It is noteworthy that, first, he waited over three months to contact Mr. Jones’s counsel. Second, there is no evidence that he believed it was probable Mr. Jones would commit a serious attack in the near future. Yet it must be remembered that Dr. Smith did take it upon himself to call Mr. Jones’s counsel regarding the sentencing hearing. Even more significantly, Dr. Smith undertook these proceedings so that his report and opinion might be considered in the sentencing of Mr. Jones.

93 There are two important factors that indicate that the threat of serious bodily harm was indeed imminent. First, Mr. Jones admitted that he had breached his bail conditions by continuing to visit the Downtown Eastside where he knew prostitutes could be found. Second, common sense would indicate that after Mr. Jones was arrested, and while he was awaiting sentence, he would have been acutely aware of the consequences of his actions. This is of particular significance in light of his fear of being attacked while he was in jail.

94 Let us assume that the evidence as to imminence of the danger may not be as clear as might be desired. Nonetheless, there is some evidence of imminence. Furthermore, the other factors pertaining to clarity, the identifiable group of victims, and the chilling evidence of careful planning, when taken together, indicate that the solicitor-client privilege must be set aside for the protection of members of the public.

95 The judge of first instance very properly limited disclosure of Dr. Smith's affidavit to those portions of it which indicated that there was an imminent risk of death or serious bodily harm to an identifiable group comprising prostitutes located in the Downtown Eastside of Vancouver. In light of these conclusions, the solicitor-client privilege attaching to Dr. Smith's report, to the extent provided by the order of Henderson J., must be set aside.

E. Appropriate Procedures to Adopt

96 Dr. Smith chose to bring a legal action for a declaration that he was entitled to disclose the information he had in his possession in the interests of public safety. However, this is not the only manner in which experts may proceed. Although it is true that this procedure may protect the expert from legal consequences, there may not always be time for such an action. In

whatever action is taken by the expert, care should be exercised that only that information which is necessary to alleviate the threat to public safety is revealed.

97 It is not appropriate in these reasons to consider the precise steps an expert might take to prevent the harm to the public. It is sufficient to observe that it might be appropriate to notify the potential victim or the police or a Crown prosecutor, depending on the specific circumstances.

F. The Lifting of the Publication Ban

98 Henderson J. was concerned that, because of the nature of these proceedings, the protection offered by solicitor-client privilege would be improperly and irretrievably lost by premature publication of the details of this case. As a result, he sealed the file. The British Columbia Court of Appeal continued the order for sealing the file. The same order was confirmed by this Court. As well, publication of the contents of the file was prohibited.

99 For this Court to seal a file was a highly unusual procedure. It was required because if solicitor-client privilege did attach to Dr. Smith's report it could never be made public. In other words the file could only be unsealed and the documents made public if it was determined that solicitor-client privilege should not apply to the report because of the existence of the danger to the public.

100 In this Court the entire affidavit of Dr. Smith was read and considered. I agree with the deletions referred to in the order made by Henderson J. Those references are either not relevant to the issue of dangerousness or have such a minimal probative value that they should not form part of the consideration of danger to the public. Nor should they form part of the released record. It is true that the proceedings of this Court should be as open as possible. Yet the excised

portions could never form part of the record. They would be inadmissible as evidence on the issue of danger to the public. The record will be unsealed and the affidavit of Dr. Smith as edited pursuant to the order of Henderson J. will be made public together with all the other material in the court's file.

101 There may be situations where further consideration will have to be given to this issue. For example, where this Court takes into account more of the privileged document in determining the issue of dangerousness than did the courts below so that the entire document forms an integral part of the court's decision, more of the privileged document may need to be released. That question cannot, however, be resolved in this case.

102 In the result the file will be unsealed and the ban on the publication of the contents of the file is removed, except for those parts of the affidavit of the doctor which do not fall within the public safety exception. Subject to this direction the order of the British Columbia Court of Appeal is affirmed.

103 I would add that a motion was brought that this appeal be heard *in camera*. This motion was denied at the outset of the hearing. Members of the press and public were present throughout but were, until now, subject to the ban on publication.

G. Costs

104 Dr. Smith seeks to recover his costs. He should not have them. This case raised the issue of when solicitor-client privilege can be set aside. It has been found that, because of the danger posed by Mr. Jones to the public, solicitor-client privilege, which Mr. Jones had every right to believe attached to Dr. Smith's report, was set aside. This case arises in the context of criminal

proceedings and the result may well affect the sentence imposed on Mr. Jones. It would be unfair and unjust in the circumstances to impose the burden of costs on Mr. Jones and I would not do so.

III. Disposition

105 The file will be unsealed and the ban on the publication of the contents of the file is removed, except for those parts of the affidavit of the doctor which do not fall within the public safety exception. Subject to this direction the order of the British Columbia Court of Appeal is affirmed and this appeal is dismissed without costs.

Appeal dismissed, LAMER C.J. and MAJOR and BINNIE JJ. dissenting.

Solicitors for the appellant: Mackoff & Stevens, Vancouver.

Solicitors for the respondent: Harper Grey Easton, Vancouver.

Solicitors for the intervener: Blake, Cassels & Graydon, Toronto.

TAB 53

Goldman Sachs & Co. v. Sessions, 2000 BCSC 67 (CanLII)

Date: 2000-01-14
File number: C975892
Other citations: [2000] BCJ No 65 (QL) — [2000] BCTC 199
Citation: Goldman Sachs & Co. v. Sessions, 2000 BCSC 67 (CanLII),
<<https://canlii.ca/t/52qg>>, retrieved on 2025-10-28

Citation: Goldman Sachs v. Sessions
2000 BCSC 67

Date: 20000114
Docket: C975892
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GOLDMAN SACHS & CO.

PLAINTIFF

AND:

**ANTHONY SESSIONS, A.W. SESSIONS LTD. AND
KERDOS INVESTMENTS LTD.**

DEFENDANTS

REASONS FOR JUDGMENT**OF THE**

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiff:

Irwin G. Nathanson, Q.C.
Geoffrey B. Gomery

Counsel for the Defendants:

James P. Taylor, Q.C.
J. Christopher Russell

Dates and Place of Hearing:

December 17 and 20, 1999
Vancouver, BC

[1] There are several interlocutory motions to be dealt with, some by each party.

1. **Defendant's requests for documents**

[2] These applications highlight the tension between the parties' rights to pre-trial discovery and the effective management of the trial process.

[3] While administrative efficiencies are always desirable, they must not be allowed to overwhelm the legitimate interests of the litigants in the proper preparation of their cases. Accordingly, the objection that counsel have previously limited the scope of permissible discovery by agreement is not justiciable on this application. As Mr. Taylor remarked, his view of the case is changing as the case develops and as he speaks with his expert witnesses, and it would not be proper to confine him to earlier, evolving positions. Moreover, if there is an enforceable agreement in this regard that is breached and if consequences should flow from the breach, those matters may be taken into account in costs.

[4] The governing principle on this aspect of the applications is that set out in the well-known dictum of Brett L.J. in **Compagnie Financière du Pacifique v. Peruvian Guano Co.** (1882), 11 Q.B.D. 55 (C.A.) at p. 63, flld. **Boxer v. Reesor** (1983), 1983 CanLII 449 (BC SC), 43 B.C.L.R. 352 (S.C.) (In Chambers): the defendant is

entitled to have access to documents that may fairly lead him to a train of inquiry that may directly or indirectly advance his case or damage the plaintiff's case.

[5] Mr. Russell swore an affidavit setting out certain information that the defendant's expert considers necessary to enable him to formulate his opinion, and much of the plaintiff's argument was directed to whether the affidavit has established the relevance of the information. However, as was observed by McEachern C.J.S.C. (as he then was) in ***Boxer v. Reesor***, at p. 359, para. 25, there is no burden on the party seeking discovery to adduce evidence of *prima facie* relevance. Rather, relevance is to be determined from a description of the nature of the documents and a reasonable interpretation of the pleadings.

[6] Applying that approach here, I am persuaded that the defendant is entitled to the discovery he seeks. The plaintiff must disclose and produce the documents identified in Mr. Russell's affidavit sworn December 20, 1999, for the period October 20, 1997, to November 24, 1997, inclusive. As I understand it, it is agreed that these documents will form part of what is described as "Confidential Materials" in the confidentiality order.

2. **Scope of examination for discovery of Mr. Rogers**

[7] Counsel agreed that Mr. Taylor would be permitted to divide his examination for discovery over three representatives of the plaintiff, each with respect to generally-described relevant areas. The difficulty that has arisen is over counsels' interpretation of their agreement. I did not understand Mr. Nathanson to object that Mr. Taylor cannot examine at all on the

points in issue. Rather, I understand his position to be that Mr. Taylor agreed to limit his examination of Mr. Rogers in such a way that he cannot question Mr. Rogers in these areas.

[8] The proper scope of examination for discovery is determined by law, not by interpretation of an alleged agreement between counsel. If the subject of the proposed questions is relevant, which it appears to be in this instance, Mr. Taylor is entitled to examine upon it for discovery. Whether the examinee is to be Mr. Rogers or someone else is for counsel to work out and, failing that, for an application pursuant to Rule 27. It is commendable that counsel should co-operate in the management of pre-trial discovery but, when they have differences about what it is they have agreed upon, it is not the Court's role, as I see it, to adjudicate their disagreement.

3. Questions on examinations for discovery of Mr. Wickman, Mr. Lipstadt, and Mr. Rogers

(a) Wickman, p. 36, l. 14

[9] Mr. Taylor is entitled to know if the plaintiff gave corporate advice, directly or indirectly, through its customer representatives or otherwise, to some or all of its clients and, if so, to explore that issue. To ask what advice was given by the plaintiff's representatives severally to their customers is too broad and the answers are unlikely to be of significant utility.

(b) Wickman, p. 88, l. 15

[10] Mr. Taylor ascribes the relevance to the liquidation strategies adopted by the plaintiff. It is common ground that the securities market and the market in issue here are very

different. While it may be that something useful to the defendant could be gleaned from the plaintiff's liquidation of securities accounts, it is unlikely to have any direct bearing on the issues raised in this litigation and, given the number of securities customers of the plaintiff, to follow this path could well lead to a complicating and time-consuming diversion from the main issues in the case. Accordingly, this question need not be answered.

(c) Lipstadt - questions relating to claimed privilege

[11] These questions relate to a discussion, described by Mr. Lipstadt as being "of some length", between Mr. Lipstadt, Mr. Wickman, and Mr. Herman concerning what should be done about Mr. Sessions' account and, in particular, about his ability to meet a margin call. Ms. Litt, a lawyer employed by the plaintiff, was present at this discussion. Mr. Lipstadt testified, in part, as follows:

There was clearly a business discussion as to current market conditions and what possibility – what the continued risks were in maintaining the position should the market continue to decline. And there were also discussions with respect to various options available to us with which – in which Ms. Litt conferred as to the legal implications of each of those options.

Mr. Taylor asked questions to try to ascertain if there had been discussion about giving Mr. Sessions time to take steps to meet a margin call. Mr. Nathanson objected that Mr. Taylor was only entitled to answers if he should first establish that Ms. Litt was not involved in any such discussion and that her advice was not sought. Otherwise, Mr. Nathanson said, the answers are privileged.

[12] I cannot agree with Mr. Nathanson. The burden of establishing privilege rests on the party who asserts privilege. Communications between client and lawyer are not privileged simply on the basis of the status of the parties. Only communications made to Ms. Litt for the purpose of seeking legal advice or made by her to provide advice in her professional capacity as a lawyer are privileged. Privilege does not attach to any communications on purely business matters, whether Ms. Litt was involved or not. Accordingly, Mr. Taylor is entitled to an answer to his question as to whether there were any discussions about giving the defendant an opportunity to deal with the margin call.

(d) Rogers - p. 27, l. 9 and p. 28, l. 7

[13] The defendant is entitled to these answers, either from Mr. Rogers or from some other representative of the plaintiff. For the reasons already stated, I will not rule on the nature or effect of any agreement between counsel.

(e) Rogers - p. 123, l. 12

[14] There is evidence from the plaintiff's representatives that the plaintiff's instructions were to treat the defendant's account as if it were their own. The defendant is, therefore, entitled to know what the plaintiff did with respect to its own accounts during the relevant times. Whether this is within the terms of counsels' agreement is immaterial.

(f) Rogers - p. 324, l. 20

[15] The answer is relevant, given Mr. Wickman's testimony that margin calls from the Exchange were automatically passed on to all of the plaintiff's clients. The question must be answered. Whether it is beyond the scope of counsels' agreement is immaterial.

(g) Rogers - questions relating to Long Term Capital

[16] For the same reasons, the defendant is entitled to explore whether the plaintiff made any margin calls to Long Term Capital and their results, and whether the plaintiff received any margin calls that it did not pass on to Long Term Capital. The other questions concerning Long Term Capital are said to go to the issue of whether the plaintiff liquidated the defendant's account in a commercially reasonable way. If so, the answers will be of marginal utility, given that the Long Term Capital events post-dated the material events and were much different in nature and scope. As I understand it, expert witnesses will opine on what was commercially reasonable in the circumstances and on whether the plaintiff acted in a commercially reasonable way. How the plaintiff acted on a later occasion would seem, therefore, to be only potentially relevant to the credibility of the plaintiff's witnesses on this issue. The risk of confusion of issues and the undue consumption of time to obtain this evidence outweigh significantly its potential usefulness. These questions need not be answered.

(h) Rogers - questions relating to floor market-makers

[17] Mr. Taylor says that Mr. Rogers must inform himself from the floor market-makers because the defendant has alleged in his

pleading that the floor market-makers were the plaintiff's agents at the material times. The plaintiff denies any agency. My attention was not drawn to any evidence on this issue and I must therefore take the allegation of agency as unproven. Mr. Nathanson says that these persons are independent contractors and that the defendant can obtain the required information from them himself. He says it is neither necessary nor proper to compel Mr. Rogers to inform himself from these persons for the purpose of being examined for discovery. No evidence was identified to the effect that it will be impossible or impractical for the defendant to obtain the information sought directly from the market-makers nor that the plaintiff has the ability to obtain the information from them and, in the circumstances, I agree with Mr. Nathanson.

(i) *Rogers* - p. 202, 1. 6

[18] As I understand it, the objection was to the witness informing himself, and subsequently Mr. Taylor, as to whether Hull Trading was one of the brokers used by the plaintiff for trading generally, as opposed to trading in S & P futures and options, on the C.M.E. or the C.B.O.E. between October 27th and 31st, 1997, inclusive. The question relates to the fixing of settlement prices at the relevant times and Mr. Taylor is entitled to an answer with respect to the instruments identified in Mr. Russell's affidavit.

[19] I am not persuaded that any special order as to costs of further discovery should be made.

4. Plaintiff's application to sever and stay the counterclaim

[20] There are three counterclaims, one each by the defendant, A.W. Sessions Ltd., and Kerdos Investments Ltd. The defendant's counterclaim is for damages arising out of the same allegations as were made in the statement of defence – that the plaintiff breached its duty to the defendant in its dealings with his account. The counterclaims of A.W. Sessions Ltd. and Kerdos Investments Ltd., which are contained in a separate pleading, allege that the commencement of action against them in this Court and the *ex parte* pre-judgment attachment of their bank accounts constitute an abuse of the Court's process.

[21] Mr. Nathanson supported his submission by reference to ***Starbucks Corp. v. Second Cup Ltd.*** (1993), [1993 CanLII 1300 \(BC SC\)](#), 46 C.P.R. (3d) 492 (B.C.S.C.) (In Chambers). There, the plaintiff brought action for infringement of its trademark and the defendant counterclaimed that the action itself was an abuse of process in that it was brought for indirect and improper purposes. Donald J. (as he then was), stayed the counterclaim on the ground of fairness. He reasoned that, since an allegation in the counterclaim placed the plaintiff's litigation tactics in issue, the plaintiff was in an untenable position – it could not defend the counterclaim without opening its counsel's brief and disclosing its litigation strategy in the main action.

[22] Here, no such considerations apply with respect to the defendant's counterclaim, as it arises out of the same allegations as are in the statement of defence. The issue, therefore, is whether the counterclaims of A.W. Sessions Ltd. and Kerdos Investments Ltd. should be stayed for reasons of fairness.

[23] The situation at bar can be distinguished in two important respects from that in ***Starbucks***. First, it is not suggested here

that the action against the defendant, which is the subject of the main action, is an abuse of process. Rather, the impugned actions are those against A.W. Sessions Ltd. and Kerdos Investments Ltd., which were respectively dismissed by consent and dismissed after a summary trial. Secondly, there is no allegation in the counterclaim that can be said to put in issue the plaintiff's litigation strategy in the main action. Accordingly, there is no apparent need for the counterclaiming corporations to look into the plaintiff's litigation brief in the main action.

[24] In **Starbucks**, Donald J. referred at p. 498 to a "helpful analysis" as follows:

I address myself to the four factors set out in the most recent case cited by the defendants on the question of severance, **Beddow v. Megyesi** (1992), [1992 CanLII 970 \(BC SC\)](#), 4 C.P.C. (3d) 162, 63 B.C.L.R. (2d) 158, 30 A.C.W.S. (3d) 1131 (S.C.) at pp. 172-3:

In **King v. On-Stream Natural Gas Ltd. Partnership**, (June 18, 1990), Vancouver Doc. C894711, MacKinnon J. (S.C.), [1990] B.C.W.L.D. 1596, the court, followed **Morrison-Knudsen**, *supra*, and held that an order for severance should be made in certain circumstances:

- (a) In an extraordinary and exceptional case;
- (b) When the issue to be tried is simple;
- (c) When the issue to be tried separately is not interwoven with other issues in the action;
- (d) When there is some evidence which makes it at least probable that the trial of the separate issue will put an end to the action.

[25] The counterclaims here are unusual in the sense that actions for abuse of process are infrequent, but they are otherwise unexceptional. The issues on the counterclaim are relatively

simple and, but for the issue of credibility, they are not interwoven to any significant extent with the issues in the main action. The fourth factor is an important one and I cannot say that there is a probability that the trial of the main action will put an end to the counterclaims. Indeed, the result of the main action is unlikely, in itself, to cause the counterclaiming corporate plaintiffs to abandon their counterclaims.

[26] More importantly, the counterclaims and the main action arise out of the same events and they can be conveniently tried together, thus avoiding a multiplicity of proceedings. Moreover, both counsel have emphasized the importance of credibility in this case. While the disadvantages relating to the assessment of credibility inherent in holding separate trials can be minimized when the trials are held before the same judge, the danger still exists that evidence may be accepted or rejected in the main action that might have been treated differently had the evidence on the counterclaims been heard.

[27] Mr. Nathanson relied on a second ground for staying the counterclaims, namely, that the parties will not be ready to go to trial on the counterclaims on the scheduled trial date. Mr. Taylor disagrees. I think it would be improper to resolve this disputed point at this stage on the mere assertions of counsel.

[28] In the result, the plaintiff's application to sever and stay the counterclaims is dismissed.

[29] As I understand counsels' positions, the only issue here is the permissible scope of cross-examination of Mr. Sessions on his affidavit. Mr. Taylor says cross-examination should be limited to paragraphs 23 and 24 of his affidavit. Mr. Nathanson agrees, but says that it should include cross-examination on matters that arise naturally from or are connected to the factual assertions in those two paragraphs. I cannot rule in advance on this matter in a factual vacuum, nor can I declare the relevant law. If there should be an objection to a question or questions, counsel may return for a ruling.

6. Documents in defendant's possession or control relating to trades by A.W. Sessions Ltd. in the week of October 27th, 1999

[30] Mr. Nathanson seeks production of all documents in the defendant's possession or control relating to trades performed by A.W. Sessions Ltd. during the week of October 27th, 1997, on the ground that they will provide evidence of the defendant's expectations with respect to the market. He says that this will shed light on the defendant's allegation that the plaintiff did not deal with his account in a commercially reasonable way. As I understand his submission, it is that documents in the possession or control of A.W. Sessions Ltd. are also in the possession or control of the defendant and, further, that A.W. Sessions Ltd. is a party by virtue of its status as a plaintiff by counterclaim and is therefore obliged to give discovery of documents relevant to the issues in the main action.

[31] Issue is joined in the pleadings on whether the plaintiff breached its duty to the defendant by acting in an unreasonable

way. There is no allegation that the defendant breached a duty to anyone, nor any allegation that he acted unreasonably in advising his own clients or those of A.W. Sessions Ltd. If it could be shown that the defendant gave advice at the material times that was consistent with the plaintiff's actions regarding the defendant's account, that might suggest that the plaintiff was not behaving unreasonably but it would not be conclusive on the issue of breach of duty. The resolution of that issue will hinge on the nature and scope of the plaintiff's duty, the state of the plaintiff's knowledge, and the actions taken by the plaintiff in that context.

[32] Seen in that light, the evidence sought is not of significant probative value on the issue identified by Mr. Nathanson and, moreover, there are interests competing with its production. An order for production would raise the risk of confusing the issues. As well, discovery of these documents would require the expenditure of significant time and effort. Further, it would intrude into the confidentiality of the affairs of A.W. Sessions Ltd. and of its clients, who are not parties to the plaintiff's action. On balance, an order for production of these documents is not warranted. As a result, I need not deal with whether these documents are within the possession or control of the defendant, nor whether A.W. Sessions Ltd. can be compelled to produce them by reason of its status on the counterclaim.

7. Documents in defendant's possession or control relating to liquidation practices or policies, brokers' responsibilities, advice to clients of A.W. Sessions Ltd., views on market risk and views on the stock market generally from January 1, 1997, through December 31, 1997.

[33] As I understand it, what is sought here is production of documents in the possession or control of A.W. Sessions Ltd. on the ground that they are probative on the issue of the plaintiff's alleged breach of duty. For the reasons stated in the preceding paragraph, these documents need not be produced.

8. **Confidentiality order**

[34] The issue is the scope of the confidentiality order. Mr. Nathanson proposes the following term:

The defendants shall not use the Confidential Material for the purpose of identifying customers of the plaintiff to contact or interview concerning their dealings with the plaintiff, except that a lawyer retained by the defendants may contact the customers only for the purpose of verifying the information contained in the Confidential Material.

[35] Mr. Taylor objects that this order would improperly constrain him in the preparation of his client's case. He says that if these documents indicate, for example, that a customer of the plaintiff was benefiting from the liquidation of the defendant's account, he should be able to contact that customer to investigate whether the plaintiff enabled or assisted the customer to benefit at the expense of the defendant. In paragraph 16 of his amended statement of defence, the defendant pleads that the plaintiff committed an actionable breach of duty owed to him in a number of particulars, including the following:

- e. liquidating the options positions in Anthony Sessions' account in a manner inconsistent with the

Plaintiff's contemporaneous recommendations to its other customers.

- f. liquidating the options position in Anthony Sessions' account in a manner inconsistent with the Plaintiff's actions for its own account and for the account of its other customers.

Such inquiries as Mr. Taylor identified by way of example are therefore directly relevant to a pleaded issue and Mr. Taylor ought to be permitted to make them, with due regard to the confidentiality interests of the plaintiff and its customers.

[36] Mr. Nathanson referred to a number of case authorities in his submission, but they related to the protection of secret, valuable, proprietary information. The danger in those cases was that, unless confidentiality was protected, the discovering party would come into possession of trade secrets that could be used to compete with the disclosing party. The interest for which protection is sought here is quite different. The affidavit of Mr. Wickman, the plaintiff's managing director, sworn November 15, 1999, describes it in these terms:

6. Goldman Sachs treats its customers' affairs as strictly confidential and would not reveal them to a third party for any reason, except under compulsion of law. Through my 19 years of experience in the brokerage industry, I believe that Goldman Sachs' customers, like those of other firms, expect this treatment.

7. If unrestricted production is ordered, many customers of Goldman Sachs may be upset to learn that their dealings with Goldman Sachs have become known to the defendants and to be questioned in connection with them. I expect that Goldman Sachs' reputation would suffer as a result. I consider that there is a significant risk of serious harm to Goldman Sachs' commercial interests in this regard.

Thus, there is no suggestion that the defendant will acquire valuable information as a result of the discovery that he will be able to use in competition with the plaintiff. Moreover, the prospect of commercial harm is seen as a risk, not a likelihood.

[37] It must be remembered that the plaintiff chose to litigate this matter. Therefore, it must accept the defendant's right to take legitimate steps to defend the action. As observed by La Forest J. in *Hunt v. T & N plc*, 1993 CanLII 43 (SCC), [1993] 4 S.C.R. 289, at p. 329, paragraph 64, albeit in a different context, the fundamental importance of the right to discovery in British Columbia is emphasized by the *Rules of Court* and the case law "even at the cost of considerable loss of confidentiality." Accordingly, I decline to make the order in the terms requested by the plaintiff.

[38] The suggestion that the manner in which the defendant may contact the plaintiff's clients should be specified by the Court is premised on the assumption that there will be harm caused to the plaintiff if anyone other than a lawyer should speak to them. I am not prepared to make that assumption. Nevertheless, if the questioning of potential witnesses is to be delegated, counsel should take care to ensure that the questioner properly understands the limitations of the confidentiality order and the need to be sensitive to both the privacy interests of the potential witnesses and the commercial interests of the plaintiff. The Court should not attempt to police such matters in the absence of some clear reason for doing so and should ordinarily be able to rely on the professionalism of counsel.

Goldman, Sachs & Co. v. Sessions, 1999 CanLII 5317 (BC SC)

Date: 1999-12-08
File number: C975892
Other citations: 93 ACWS (3d) 231 — 38 CPC (4th) 143 —
[1999] BCJ No 2815 (QL)
Citation: Goldman, Sachs & Co. v. Sessions, 1999 CanLII 5317 (BC
SC), <<https://canlii.ca/t/1d461>>, retrieved on 2025-10-28

Date: 19991208
Docket: C975892
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GOLDMAN, SACHS & CO.

PLAINTIFF

AND:

**ANTHONY SESSIONS, A.W. SESSIONS LTD. and Kerdos
Investments Ltd.**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiff:

Irwin G. Nathanson, Q.C.
Geoffrey B. Gomery

Counsel for the Defendants:

James P. Taylor, Q.C.
Donald J. Jordan, Q.C.

Place and Date of Hearing:

Vancouver, B.C.
October 5, 1999

[1] The corporate defendants seek an order for production by the plaintiffs of documents relating to the plaintiffs' legal advice concerning the institution of this action and related pre-judgment garnishment proceedings. The plaintiffs oppose the application on the ground that the documents are protected by solicitor-client privilege.

[2] The documents are said to be relevant by reason of the counterclaim of the corporate defendants for damages for abuse of process. The essence of the allegations in the counterclaim is that the plaintiffs, knowing that they had no legitimate cause of action, joined the corporate defendants in this proceeding for an improper purpose, viz., so that they could garnish the defendants' bank accounts and cause them commercial distress, which they did, and thereby coerce the personal defendant, the corporate defendants' principal, into settling the claim against him to avoid damage to their businesses.

[3] The defence to counterclaim begins with a general denial of the allegations in the counterclaim. It goes on, in paragraph 15, to say:

...this action was commenced against the Defendants,
A.W. Sessions Ltd. and Kerdos Investments Ltd., in good

faith in the belief that they were valid legal claims against those Defendants.

[4] In reasons for judgment published on May 31, 1999, I dismissed the plaintiffs' action against the defendant Kerdos Investments Ltd. after a summary trial pursuant to Rule 18A. The plaintiffs had pled that Kerdos was liable for Anthony Session's debt, which is claimed to arise out of a contract made between him and the plaintiffs, because it was his alter ego. In dismissing the action, I said, at para. 19:

The plaintiff's position finds no support in the authorities cited. Moreover, Kerdos's assets are not the property of Sessions, and that the plaintiff should be left to execute on Sessions's assets if it should obtain judgment against him is not unjust nor is it so inconvenient as to require the wrenching of the concept of alter ego from its traditional roots and its application in the circumstances here. There is simply no basis in the pleadings, in evidence, or in law for the plea of alter ego in this case.

No appeal was taken from that decision and the plaintiffs subsequently consented to an order dismissing their action against A.W. Sessions Ltd., which was pled identically to the claim against Kerdos.

[5] Mr. Jordan, for the defendants, advanced two grounds in support of his application for production of the documents in question:

1. That the solicitor-client privilege does not attach to communications made between solicitor and client to facilitate the commission of the tort of abuse of process; and

2.If the solicitor-client privilege does attach to the communications in question, the plaintiffs have waived its protection by their plea in paragraph 15 of the defence to counterclaim.

1.Does solicitor-client privilege apply?

[6] The tension between privilege and discovery is a manifestation of two competing policies. The purpose of discovery is to advance the search for the truth of the dispute between the parties. The purpose of the privilege, which may result in the suppression of the truth, is to protect the legal system. There is a public interest in persons being able to confide freely and frankly in their legal advisers for the purpose of obtaining skilled, professional legal advice without fear that their confidences will be disclosed to third parties and used against them: **Smith v. Jones**, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455 at paras. 45-47.

[7] The rule was historically considered to be an evidential one but it is now recognized that it is part of a broader substantive right of confidentiality and is "a principle of fundamental importance to the administration of justice": **Smith v. Jones**, *supra*, at paras. 48-50.

[8] The privilege is not absolute, however, and it has long been recognized that communications that are obtained to facilitate the commission of a crime or a fraud are not protected: see **Solosky v. The Queen** (1979), 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, *per* Dickson J. (as he then was) at p. 835.

[9] Mr. Jordan contended, however, that the "future crimes and fraud exception" is no longer confined to cases of intended crimes and fraudulent conduct, and that the exception applies to conduct that amounts to a tortious abuse of process. I observe, parenthetically, that this is not really an "exception" to the rule of solicitor-client privilege. Rather, it is a limitation on the scope of the rule. However, it has often been characterized as an exception to the rule and I will continue with that convention for narrative ease.

[10] The courts have been reluctant to extend the exception beyond criminal and fraudulent conduct. For example, in ***Crescent Farm (Sidcup) Sports Ltd. v. Sterling Offices Ltd.*** (1971), [1972] Ch. D. 553, the plaintiffs argued that "fraud" should be liberally construed so as to include any conduct that would give rise to a tortious claim. In rejecting that submission, Goff J. said, at p. 565:

I do not consider the principle requires any extension. On the contrary, I think the wide submission of the plaintiffs would endanger the whole basis of legal professional privilege. It is clear that parties must be at liberty to take advice as to the ambit of their contractual obligations and liabilities in tort and what liability they will incur whether in contract or tort by a proposed course of action without thereby in every case losing professional privilege. I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit.

Similarly, in ***Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)*** (1988), 29 C.P.C. (2d) 82 (Ont. H.C.J.), the court refused

to extend the exception to cover communications relating to a claim of municipal bad faith in the issuance of a building permit, holding that criminal fraud must be established to warrant setting aside the privilege. In **Lougheed v. Filgate** (1995), [1995 CanLII 975 \(BC SC\)](#), 5 B.C.L.R. (3d) 101 (S.C.) this Court held that the exception must be confined to cases of fraud or unlawful acts and could not be the basis for production of privileged correspondence from an insurance adjuster's file in an action framed in negligence.

[11] However, recent cases suggest that the outer boundary of the exception may not be as fixed as those cases would suggest. In **Middelkamp v. Fraser Valley Real Estate Board** (1992), [1992 CanLII 1232 \(BC SC\)](#), 70 B.C.L.R. (2d) 157 (S.C.), *affd.* [1992 CanLII 2241 \(BC CA\)](#), [1993] 1 W.W.R. 436 (B.C.C.A.), this Court ordered disclosure of solicitor-client communications relating to an offence against a regulatory statute. The learned chambers judge expressly observed that she did not find it necessary to decide whether the exception extended to tortious conduct. In **McIntosh Estates Ltd. v. Surrey (City)** (1997), [1997 CanLII 3117 \(BC CA\)](#), 52 B.C.L.R. (3d) 277 (C.A.) the Court denied the protection of the privilege to communications relating to oppressive and discriminatory conduct by a municipal council against a plaintiff who alleged civic wrongdoing.

[12] In my view, the debate about whether the exception extends beyond crime and fraud has been ended by the judgment of the Supreme Court of Canada in **R. v. Campbell**, [1999 CanLII 676 \(SCC\)](#), [1999] 1 S.C.R. 565. There, Binnie J., writing for the Court, analyzed the "future crimes and fraud" exception and concluded

that the client's intention, not the characterization of the client's intended unlawful conduct, is the key to whether the exception applies. He began his analysis by quoting from the judgment of Stephen J. in the seminal case of ***R. v. Cox and Railton*** (1884), 14 Q.B.D. 153 at p. 168:

In order that the rule [the solicitor-client privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

[Emphasis per Binnie J.]

[13] Binnie J. went on to observe, in para. 57, that Professor Wigmore expressed the view, in ***Wigmore on Evidence***, vol. 8 (McNaughton Rev. 1961) sec. 2298, at p. 573, that the exception applies only where the client seeks the legal advice for a knowingly unlawful end. He continued, at para. 58:

Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "The Future Crime or Tort Exception to Communications Privileges" (1964), 77 Harv. L. Rev. 730, where they state as follows, at pp. 730-31:

The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. [Emphasis per Binnie J.]

The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:

The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be

inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counselling against unfounded claims or illegal projects is an important part of the lawyer's function. [Emphasis per Binnie J.]

[14] After noting, in para. 59, that this explanation of the rule is consistent with its exposition in the context of crime and fraud by Lamer J. in ***Descôteaux v. Mierzwinski***, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at p. 881 and by Lord Parmoor in ***O'Rourke v. Darbishire***, [1920] A.C. 581 (H.L.), at p. 621, Binnie J. made it clear that the client's intention is the pivotal consideration, quoting with approval from ***State ex rel. North Pacific Lumber Co. v. Unis***, 579 P.2d 1291 (Or. 1978) at p. 1295 as follows:

We approve of the requirement that, in order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper. [Emphasis per Binnie J.]

[15] The conduct in issue in ***R. v. Campbell*** was criminal conduct. However, the adoption into the analysis by the Court, without qualification, of the words "crime or tort" and "unfounded claims or illegal projects" from the journal article referred to leads, in my opinion, to the conclusions that the Court had in mind the proper delimitation of the scope of the rule and that it does not consider that "unlawful conduct" is confined strictly to criminal and fraudulent conduct.

[16] Accordingly, intended crimes and frauds are but instances of the application of the general principle that the privilege does not attach to communications in relation to intended unlawful conduct. In this context, "unlawful conduct" has a broader meaning than simply conduct that is prohibited by the criminal law. It includes breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. Breaches of contract and of civil duties are "unlawful" because, although they are not prohibited by any enactment, they cause injury to the legal rights of other citizens and give rise to legal remedies. They are therefore contrary to law.

[17] It follows, in my opinion, that professional legal communications obtained to facilitate an abuse of process are not protected by solicitor-client privilege. The privilege does not apply because it is no part of a solicitor's professional duties to counsel a client to misuse the court's process for improper purposes.

[18] Moreover, the same result would be reached on the view that the rule protects all such communications except those made in furtherance of a crime or fraud. Abuse of process amounts to a deceit of the court and is of the same order of moral turpitude as civil fraud. It therefore fits comfortably within the expansive definition of fraud referred to by Goff J. in ***Crescent Farm***, *supra*, at p. 565.

[19] I turn, now, to what must be shown by the defendants to succeed on this application.

[20] The defendants' burden is described in *Pax Management Ltd. v. C.I.B.C.* (1987), 1987 CanLII 153 (BC CA), 14 B.C.L.R. (2d) 257 (C.A.) at pp. 265-66, where Wallace J.A., speaking for the Court, adopted the reasoning of Viscount Finlay in *O'Rourke v. Darbishire*, *supra*, at p. 604, that there must be more than a mere allegation — there must be "something to give colour to the charge", that is, "some prima facie evidence that it has some foundation in fact." He identified the proper approach in this passage:

I have concluded that the plaintiffs have specifically pleaded fraudulent misrepresentation and that the surrounding circumstances, as revealed by the affidavits filed in support of the application, satisfy me that the claim is honestly advanced and has sufficient credence to justify exercising the Court's discretion to disallow the privilege so that all relevant material is before the Court when resolving this very serious allegation.

[21] Accordingly, it is not necessary for the court to weigh conflicting evidence and to make findings of fact on an application such as this. Rather, the court must examine the applicant's case in the light shed by all of the evidence and the surrounding circumstances to determine if it "gives colour to the charge."

[22] Before it can be determined whether the defendants have given colour to the charge here, it is necessary to consider the submission made by Mr. Nathanson, for the plaintiffs, that the defendants have not pled a cause of action for abuse of process in their counterclaim.

[23] Mr. Nathanson argued that the tort of abuse of process is comprised of two elements: (1) a misuse of the process of the

court predominantly for a purpose other than that which it was designed to serve, and (2) some overt act or threat distinct from the proceedings themselves in furtherance of that purpose. He contended, further, that the allegation against the plaintiffs is not an allegation of misuse of the court's process and that the alleged overt acts of pre-judgment garnishment were not distinct from the proceedings but were in furtherance of the legitimate use of the court's process for a purpose that he characterized as "the recovery of money from any of the defendants."

[24] There is reputable support for Mr. Nathanson's description of the elements of the cause of action: see Fleming, *The Law of Torts*, 9th ed. (Sydney: Law Book Co., 1998) at pp. 687-88. That formulation of the elements of the tort has been adopted in this Court: see, for example, *Deborah Resources Ltd. v. McDonald's Restaurant of Canada Ltd.* (7 August 1991), Vancouver C901130 (S.C.) at p. 5; *Olympic Industries Inc. v. McNeill* (1992), 67 B.C.L.R. (2d) 318 at para. 15, reversed on other grounds (1993), [1993 CanLII 318 \(BC CA\)](#), 86 B.C.L.R. (2d) 273 (C.A.).

[25] On the other hand, the necessity for proof of some overt act extraneous to the lawsuit has been questioned: *Starbucks Corp. v. Second Cup Ltd.* (1993), [1993 CanLII 1300 \(BC SC\)](#), 46 C.P.R. (3d) 492 (B.C.S.C.) at p. 495. I do not find it necessary to resolve that issue on this application as I have concluded that both a misuse of the court's process and an extraneous overt act have been alleged in the counterclaim.

[26] The flaw in Mr. Nathanson's submission is his overly broad statement of the purpose of the plaintiffs' action. It is

apparent from the amended statement of claim that the purpose is not the "recovery of money from any of the defendants", but rather the enforcement of Anthony Sessions' covenant, contained in his agreement with the plaintiffs, pled in paragraph 8. 3(c) of the amended statement of claim as follows:

to compensate [the plaintiffs] for any [and] all loss .
 . . incurred by [the plaintiffs] as a result, directly
 or indirectly, of [Anthony Sessions'] failure to comply
 with any provision of, or to perform any obligation
 under, this agreement.

In paragraphs 11 to 13 of the amended statement of claim, the plaintiffs have pled that they liquidated Anthony Sessions' account in accordance with the terms of their agreement with him and that he has failed to respond to their demand to pay them the debit balance remaining in his account, as he agreed to do. The claim against the corporate defendants was that, because they were the alter egos of Anthony Sessions, they were liable for the performance of that agreement.

[27] Thus, the knowingly baseless institution of a lawsuit against the corporate defendants would be, if proven, a misuse of the courts process if its purpose was to enable the plaintiffs to attach the funds on deposit in their bank accounts in order to coerce Anthony Sessions to settle the claim against him, as is alleged. The issuance of pre-judgment garnishing orders against those bank accounts would be, in those circumstances, an act "outside the ambit of the legal claim upon which the court is asked to adjudicate": Fleming, *The Law of Torts*, *supra*, at p. 688. It would be a step taken for the extraneous purpose of coercing Anthony Sessions by oppressing the corporate defendants.

[28] Accordingly, I cannot accept the submission that the corporate defendants have not pled a cause of action for abuse of process.

[29] The corporate defendants have made a clear allegation of abuse of process in their counterclaim and I am satisfied on the evidence considered in light of the surrounding circumstances that they have made the allegation honestly and have given sufficient credence to the charge to discharge the burden upon them.

[30] The showing of colour to the charge is not sufficient, in itself, to justify setting aside the privilege, however. If that threshold is crossed, the Court must then inspect the communications in camera to determine the legitimacy of the claim of privilege: **Middelkamp v. Fraser Valley Real Estate Board**, 1992 CanLII 2241 (BC CA), [1993] 1 W.W.R. 436 (B.C.C.A.) at para. 6.

[31] There will, therefore, be an order that the plaintiffs produce the documents described in the notice of motion to the court for inspection.

[32] This conclusion does not engage the risks that concerned Goff J. that the whole basis of privilege will be endangered and that persons will be prevented from seeking legitimate legal advice: **Crescent Farms**, *supra*, at p. 565. That concern is met by the requirement that the privilege will apply unless the recipient of the professional legal communication obtained it for a wrongful purpose: see **R. v. Campbell**, *supra*, at paras. 58-59, and by the requirement that the communication be inspected by the chambers judge before production will be ordered.

2.Has the solicitor-client privilege been waived?

[33] Had I concluded that the solicitor-client privilege applied in these circumstances, I would not have found a waiver by virtue of paragraph 15 of the defence to counterclaim. The plaintiffs' state of mind was put in issue by the defendants' plea that they knowingly abused the process of the court. The plaintiffs' plea in paragraph 15 of the defence to counterclaim was thoughtless and unnecessary, and serves only to obscure the allocation of the burden of proof on this issue. In my opinion, the decision in **Dusik v. Newton** (1983), [1983 CanLII 542 \(BC CA\)](#), 1 D.L.R. (4th) 568 (B.C.C.A.) is dispositive against the defendants on this issue.

[34] Mr. Nathanson made a further submission that, if the defendants' application should be granted, the counterclaim should be severed from the main action and adjourned to be tried at a later date. Counsel are scheduled to appear before me next week on a further case-management conference and it appears that the hearing of the counterclaim with the main action may be problematic for the defendants, as well. In the circumstances, I will defer my decision on the plaintiffs' application to sever the counterclaim until after that conference.

"K.J. Smith J."

Blank v. Canada (Justice), 2015 FC 956 (CanLII)

Date: 2015-08-07
File number: T-955-10
Other citations: [2015] FCJ No 949 (QL) — [2015] ACF no 949
Citation: Blank v. Canada (Justice), 2015 FC 956 (CanLII),
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Date: 20150807

Docket: T-955-10

Citation: 2015 FC 956

Ottawa, Ontario, August 7, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SHELDON BLANK

Applicant

and

THE MINISTER OF JUSTICE

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 41 of the *Access to Information Act*, RSC 1985, c A-1 [Act] for judicial review of the Department of Justice's [DOJ] refusal to disclose certain records in response to the Applicant's request for access under the Act.

II. BACKGROUND

[2] This is the latest in a long line of applications by Mr. Blank under s 41 of the *Act* seeking access to information that was not disclosed to him when he made a request for disclosure.

[3] The general context for Mr. Blank's requests for information and s 41 applications was summarized by the Federal Court of Appeal as long ago as 2004 in *Blank v Canada (Minister of Justice)*, 2004 FCA 287 [Blank FCA 2004]:

[5] On October 17, 1997, the appellant made a first request to the Access to Information and Privacy Office (Office) of the Department of Justice to obtain all records pertaining to his prosecution and the prosecution of Gateway Industries Ltd. (Gateway) for regulatory offences under the *Fisheries Act*, R.S.C. 1985, c. F-14 and the *Pulp and Paper Effluent Regulations*, SOR/92-269.

[6] The appellant was a Director of Gateway which operated a paper mill in the city of Winnipeg. Thirteen (13) charges were laid against him and Gateway in July 1995: five counts alleged pollution of the Red River and eight pertained to breaches of the reporting requirements of the *Fisheries Act*. A judicial saga regarding the prosecution of these charges ensued thereafter. Suffice it to say that the eight charges relating to the reporting requirements were quashed in April 1997 by the Manitoba Provincial Court. The prosecution continued on the five summary conviction offences of pollution only to see the charges quashed by the Manitoba Queen's Bench on April 10, 2001. The Crown laid, in July 2002, new charges by way of indictment. The trial had been set for April 19, 2004 to June 25, 2004, but in February 2004 the Crown stayed the proceedings and informed the appellant that the prosecution would not be reinstated.

[7] The appellant and Gateway sued the Federal Government in damages for alleged fraud, conspiracy, perjury and abuse of its prosecutorial powers. It is both in the context of the penal prosecution and the civil lawsuit that the appellant sought to access Government records pursuant to the *Act*.

[4] The access request behind the present s 41 application was dated June 4, 2004 and was received by the Department of Justice on June 14, 2004. It reads in relevant part as follows

(Respondent's Record at 19):

All records dealing with the continuation of the prosecution by indictment and all records dealing with the eventual decision to stay the proceedings

(In the [Fisheries Act](#) prosecution against me and my company Gateway Industries Ltd.)

[5] The request was processed and some seven hundred and ninety-eight (798) pages were released to Mr. Blank on March 30, 2007. Portions of the materials captured by the request were not released by virtue of s 19(1) of the [Act](#) (personal information), s 21(1) (government advice, recommendations, consultation or deliberation), and s 23 (solicitor-client privilege). These portions were redacted. Some documents were withheld in their entirety in reliance on the same exemptions.

[6] Mr. Blank made a complaint to the Office of the Information Commissioner of Canada [ICC] on August 1, 2007 pursuant to s 30 of the [Act](#) on the basis of "improper severing and improper exemptions." This resulted in the release of some of the information that had initially been redacted.

[7] In May 2010, the ICC completed its investigation into the Applicant's complaint. It concluded that portions of the Applicant's complaint were well founded: the DOJ had failed to meet statutory deadlines, and some of the information disclosed following the complaint had not properly been exempted. The ICC determined that personal information had been properly withheld under s 19, and that ss 21(1), 23 and 25 had been properly applied.

[8] In June 2010, the Applicant brought a s 41 application to have the Court review the undisclosed records. The Applicant challenges the DOJ's use of the ss 21(1) and 23 exemptions; its exercise of discretion not to disclose the records; and, the DOJ's application of s 25 of the [Act](#) (severability).

III. ISSUES

[9] The Applicant raises the following issues in this proceeding:

1. Whether the Court should accord deference to the ICC's findings;
2. Whether the DOJ discharged its duty to assist under s 4(2.1) of the [Act](#);
3. Whether the DOJ can claim solicitor-client privilege over records which demonstrate abuse of process and other blame-worthy conduct; and,
4. Whether any prosecutorial misconduct breached the Applicant's ss 7 and 24 rights under the *Canadian Charter of Rights and Freedoms*, Part I of the [Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[10] The Respondent submits that there are only two issues before the Court in a s 41 application. The first is whether the claimed exemption from disclosure was properly invoked. The second is whether the discretion to not disclose a record was properly exercised.

IV. STATUTORY PROVISIONS

[11] The following provisions of the [Act](#) are applicable in this proceeding:

Responsibility of government institutions

4. (1) Subject to this [Act](#), but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of [subsection 2\(1\)](#) of the [Immigration and Refugee Protection Act](#),

has a right to and shall, on request, be given access to any record under the control of a government institution.

[...]

Right to access to records

(2.1) The head of a government institution shall, without regard

Responsable de l'institution fédérale

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

a) les citoyens canadiens;

b) les résidents permanents au sens du [paragraphe 2\(1\)](#) de la [Loi sur l'immigration et la protection des réfugiés](#).

[...]

Droit d'accès

(2.1) Le responsable de l'institution fédérale fait tous les efforts

rd to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

[...]

Advice, etc.

21. (1) The head of a government institution may refuse to disclose any record requested under this [Act](#) that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,

[...]

if the record came into existence less than twenty years prior to the request.

[...]

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this [Act](#) that contains information that is subject to solicitor-client privilege.

[...]

rts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

[...]

Avis, etc.

21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

[...]

Secret professionnel des avocats

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

[...]

Severability

25. Notwithstanding any other provision of this [Act](#), where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

[...]

Review by Federal Court

41. Any person who has been refused access to a record requested under this [Act](#) or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

[...]

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this [Act](#) or a part thereof shall

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[...]

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[...]

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

all be on the government institution concerned.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this [Act](#) or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

[...]

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this [Act](#) shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this [Act](#), the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

[...]

Frais et dépens

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

Rules] are applicable in this proceeding:

When cross-examination may be made **Contre-interrogatoire de l'auteur d'un affidavit**

84. (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.

84. (1) Une partie ne peut contre-interroger l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande à moins d'avoir signifié aux autres parties chaque affidavit qu'elle entend invoquer dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

Filing of affidavit after cross-examination **Dépôt d'un affidavit après le contre-interrogatoire**

(2) A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

(2) La partie qui a contre-interrogé l'auteur d'un affidavit déposé dans le cadre d'une requête ou d'une demande ne peut par la suite déposer un affidavit dans le cadre de celle-ci, sauf avec le consentement des autres parties ou l'autorisation de la Cour.

[...]

[...]

Applicant's affidavits

Affidavits du demandeur

306. Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.

306. Dans les trente jours suivant la délivrance de l'avis de demande, le demandeur signifie les affidavits et pièces documentaires qu'il entend utiliser à l'appui de la demande et dépose la preuve de signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.

[...]

[...]

Applicant's record

Dossier du demandeur

309. (1) An applicant shall serve and file the applicant's record within 20 days after the day on which the parties' cross-examination is completed or within 20 days after the day on which the time for those cross-examinations is expired, whichever day is earlier.

309. (1) Le demandeur signifie et dépose son dossier dans les 20 jours suivant la date du contre-interrogatoire des auteurs des affidavits déposés par les parties ou dans les 20 jours suivant l'expiration du délai prévu pour sa tenue, selon celui de ces délais qui est antérieur à l'autre.

[...]

[...]

Contents of applicant's record Contenu du dossier du demandeur

(2) An applicant's record shall contain, on consecutively numbered pages and in the following order,
(2) Le dossier du demandeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après :

(a) a table of contents giving the nature and date of each document in the record;
(a) une table des matières indiquant la nature et la date de chaque document versé au dossier;

(b) the notice of application;
(b) l'avis de demande;

(c) any order in respect of which the application is made and any reasons, including dissenting reasons, given in respect of that order;
(c) le cas échéant, l'ordonnance qui fait l'objet de la demande ainsi que les motifs, y compris toute dissidence;

(d) each supporting affidavit and documentary exhibit;
(d) les affidavits et les pièces documentaires à l'appui de la demande;

(e) the transcript of any cross-examination on affidavits that the applicant has conducted;
(e) les transcriptions des contre-interrogatoires qu'il a fait subir aux auteurs d'affidavit;

(e.1) any material that has been certified by a tribunal and transmitted under Rule 318 that is to be used by the applicant at the hearing;
(e.1) tout document ou élément matériel certifié par un office fédéral et transmis en application de la règle 318 qu'il entend utiliser à l'audition de la demande;

(f) the portions of any transcript of oral evidence before a tribunal that are to be used by the applicant at the hearing;
(f) les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande;

(g) a description of any physical exhibits to be used by the applicant at the hearing; and
(g) une description des objets déposés comme pièces qu'il entend utiliser à l'audition;

(h) the applicant's memorandum of fact and law.
(h) un mémoire des faits et du droit.

V. SUBMISSIONS

A. Applicant

[13] The Applicant submits that the Court should give little deference to the ICC's findings. He says that the author of the report was in a conflict of interest because in a previous position with the DOJ, she dealt with several of the Applicant's requests. In that position, documents that she withheld from the Applicant were ultimately released. As a result, the Applicant alleges that the report's author was biased. He says that the delay in releasing the report also demonstrates bias.

[14] The Applicant also asks the Court to afford no deference to the DOJ's exercise of discretion. He says that refusals which arose during cross-examination on an affidavit in this proceeding demonstrate that the DOJ was not fulfilling its duty to assist under s 4(2.1) of the [Act](#).

[15] The Applicant also submits that the DOJ has wrongly claimed both ss 21(1)(b) and 23 exemptions when documents exempted are protected only by litigation privilege which has come to an end: *Blank v Canada (Minister of Justice)*, [2006 SCC 39](#) [*Blank* SCC 2006]. He says that disclosure problems have persisted since the criminal prosecution contrary to the Crown's obligations under *R v Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3 SCR 326 and *Krieger v Law Society of Alberta*, [2002 SCC 65](#) [*Krieger*]. The criminal prosecution is long over and these documents should be released.

[16] Finally, the Applicant submits that the DOJ cannot claim privilege over documents that demonstrate abuse of process and other blame-worthy conduct which breached his ss 7 and 24 rights under the [Charter](#): *R v Nixon*, [2011 SCC 34](#). He says that the Crown laid criminal charges against him and his company for improper political motivations. He says the Crown was fully aware it could not proceed with the criminal charges but nonetheless extended the process to some eight and a half years. The fact that the Crown offered to withdraw the charges demonstrates that the proceedings were launched for improper purposes: *Singh v Montreal (City of)*, [2014 QCCA 307](#).

B. Respondent

(1) Preliminary matters

[17] The Respondent raises two preliminary issues. First, the Respondent says that the only issue before the Court is whether the [Act](#)'s exemptions were properly applied. As a result, the Court need not consider the Applicant's submissions regarding how the prosecution was conducted, the alleged bias of the ICC, and his complaints regarding the way his access request was conducted.

[18] Second, the Respondent submits that the Court should not consider the affidavits in the Applicant's Record which were filed in support of interim motions as they offend [Rules 84\(2\), 306, and 309](#) of the *Federal Courts Rules*.

(2) The nature of the proceeding

[19] The Respondent submits that the Court's review is circumscribed by s 41 of the [Act](#). The Court's authority is limited to ordering access to a particular record if the refusal to disclose the record was contrary to the Act: *X v Canada (Minister of National Defence)* (1990), [1990 CanLII 13047 \(FC\)](#), [1991] 1 FC 670 at 675 (TD) [*X v Canada*]; *Connolly v Canada Post Corp* (2000), 197 FTR 161 at paras 8-10 [*Connolly*]. The Court does not have the authority to consider the manner in which government institutions respond to requests or to grant remedies when an institution is found to be at fault: *Connolly v Canada Post Corp*, [2002 FCA 50](#) at paras 3-4 [*Connolly FCA*]. The Court also does not have any authority to determine whether the government institution has complied with s 4(2.1) of the Act. The Applicant's submissions require an expansive interpretation of s 41 and have been rejected by the courts: *Blank v Canada (Minister of the Environment)*, [2000 CanLII 16437 \(FC\)](#), [2000] FCJ no 1620 (QL) at paras 9, 15, 19 (TD) [*Blank FC 2000*]; *Blank FCA 2004*, above, at paras 76-77; *Blank v Canada (Minister of the Environment)*, [2006 FC 1253](#) at para 33(g) [*Blank FC 2006*], aff'd [2007 FCA 289](#) [*Blank FCA 2007*].

[20] A s 41 application is not an appeal of the ICC's findings. The Court is reviewing the DOJ's decision not to disclose certain records, not the ICC's recommendations: *Blank v Canada (Justice)*, [2009 FC 1221](#) at para 26 [*Blank FC 2009*]. The Court has held that the ICC's report may be considered to assist the Court in its determination: *Blank v Canada (Minister of Justice)*, [2005](#)

FCA 405 at para 12 [*Blank* FCA 2005]; *Blank* FC 2009, above, at para 26; *Blank v Canada (Justice)*, 2010 FCA 183 at para 35 [*Blank* FCA 2010].

(3) Standard of review

[21] The Respondent submits that the DOJ's determination that a record falls within an exemption is reviewable on a standard of correctness. The DOJ's discretion to not disclose a record is reviewable on a standard of reasonableness. See *Kelly v Canada (Solicitor General)* (1992), 53 FTR 147, aff'd (1993), 154 NR 319 (FCA); *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at 457-458; *Blank* FC 2009, above, at paras 27-31.

(4) Bias

[22] There is no evidence to substantiate the Applicant's allegation of bias. In contrast, the ICC actually found that a number of the Applicant's complaints were substantiated and an additional six hundred pages of information were released.

(5) Section 23 – Solicitor-client privilege

[23] The Federal Court of Appeal has held that the common law governs whether a record is privileged, while the [Act](#) governs the discretion to disclose a privileged record: *Blank* FCA 2004, above, at paras 13-15. The Respondent says that the records at issue contain legal advice and the DOJ properly determined that the records fall within the s 23 exemption. Legal advice privilege applies to all interactions between client and lawyer concerning legal advice and protects those interactions from disclosure: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10 [*Blood Tribe*]. The non-redacted records consist of letters, memoranda and e-mail communications containing, or expressly or implicitly referencing, legal advice surrounding the two prosecutorial decisions referenced in the Applicant's request.

[24] The Respondent says that there is no recognized exception to solicitor-client privilege which would require disclosure of records establishing abuse of process. While there is an exception to criminality (see *Blood Tribe*, above, at para 10), abuse of process is not a criminal act

and so the exception does not apply: *Blood Tribe*, above, at para 10; *Blank FCA 2010*, above, at paras 19-20. In addition, there is no evidence of wrongdoing in the disputed records.

[25] In reviewing the DOJ's discretion to not disclose records, the Court is only required to determine whether the discretion not to disclose was exercised in good faith. The records at issue were not disclosed in order to maintain the records' confidentiality; there is no allegation that this was not exercised in good faith.

(6) Section 21(1) - Government advice

[26] The Respondent submits that these records consist of consultations and deliberations concerning the prosecution of the Applicant. The Respondent says that the DOJ properly determined that these records contain government advice, and exercised its discretion to not disclose in good faith.

(7) Section 25 - Severance

[27] The Respondent submits that s 25 was properly applied. The disclosure of any additional information would have revealed information protected by solicitor-client privilege, or would have resulted in the release of meaningless words and phrases.

VI. ANALYSIS

A. *Introduction*

[28] As with any s 41 application, the Court is asked to determine whether the refusals to disclose were properly made. In the present case this requires an examination of whether the ss 21 and 23 exemptions were properly applied, and whether proper severance occurred under s 25. In addition, the Applicant has asked the Court to consider whether any deference should be accorded to the Commissioner's report, whether the duty to assist under s 4(2.1) was discharged, and whether the exemptions relied upon were vitiated as a result of abuse of process and other prosecutorial misconduct that was so egregious that it violated the Applicant's rights under ss 7 and 24 of the *Charter*.

[29] The Respondent takes issue with two (2) affidavits (affirmed February 26, 2013 and March 11, 2013) filed by the Applicant on the grounds that they were affirmed and filed in a previous interlocutory motion (to compel answers to questions asked during cross-examination) and their inclusion would breach [Rules 84\(2\), 306, and 309](#) of the *Federal Courts Rules*.

[30] The Applicant alleges ignorance of the relevant rules and contends that the Respondent will suffer no prejudice if the affidavits are included.

[31] The Respondent points out that the Applicant has done this same thing in previous applications and is well aware that he is not following the proper procedure. Also, the Respondent points out that the affidavits were filed in an interlocutory motion that was dismissed. In that motion, the Respondent did not need to cross-examine on the affidavits. They have not been affirmed for this motion and they contain inadmissible hearsay upon which the Applicant wishes to rely heavily.

[32] I notice that in his recent decision of April 15, 2015 dealing with another s 41 application by Mr. Blank, Justice O'Reilly was asked to exclude two affidavits that had been proposed for purposes of a previous interlocutory proceeding but did not need to make a formal ruling because, after reviewing the documentation at issue, he found it irrelevant to the issues before him. See *Blank v Canada (Justice)*, [2015 FC 460](#).

[33] In the present case, I have to note that Mr. Blank is a very experienced litigant before this Court and that the issue of filing affidavits affirmed in other proceedings has been brought to his attention before. He really has not provided a justification for his failure to follow proper Federal Court practice and, because he is likely to make further applications, I do not think I can just turn a blind eye to his flouting of the rules, especially when, as the Respondent points out, this could place the Respondent at a disadvantage. Rule 84(2) bars the filing of an affidavit after the conduct of a cross-examination, and Mr. Blank cross-examined the Respondent's deponents in this

application in September 2012. The additional affidavits were affirmed in February and March 2013 in support of a motion to compel answers to questions asked during the cross-examination of the Respondent's deponent. The Court may, under Rule 84(2), grant leave to file an affidavit after cross-examination and the relevant factors to consider were set out in *Pfizer Canada Inc v Rhoxalpharma Inc*, 2004 FC 1685. It is clear, however, that Rule 84(2) is intended to deal with matters that arise during cross-examination and could not have been foreseen with reasonable diligence. In *Inverhuron & District Ratepayers' Assn v Canada (Minister of the Environment)* (2000), 2000 CanLII 14848 (FC), 180 FTR 314, leave to file was refused after cross-examination where the affidavit was directed to an issue which was in the contemplation of the party from the outset. In other words, a party must put its best foot forward at the first opportunity. Mr. Blank is simply attempting to supplement his record years after cross-examination on an issue that has been central to his application since the outset. He has provided no real justification for this and the problem has been brought to his attention before. Under these circumstances, to accept these affidavits as being properly before the Court does not serve the interests of justice, particularly when the February 26, 2013 affidavit contains the Higgins affidavit as an exhibit, upon which the Applicant places strong reliance and which is hearsay evidence upon that the Respondent could not cross-examine on at any time.

[34] I also note the recent decision of Justice Brown, *Blank v Canada (Minister of Justice)*, 2015 FC 753 in which Mr. Blank was denied the right to file affidavits in similar circumstances to the situation before me. Much of what Justice Brown had to say in that case is applicable to the present case.

C. *The Principal Assertion*

[35] At the heart of this application is Mr. Blank's assertion that the prosecutorial misconduct he was subjected to in the past was so egregious that, as a matter of law, it vitiates the ss 21 and 23 exemptions relied upon to deny him some of the documentation he requested. Indeed, he appears to be of the view that those parties involved in processing his request are conspiring to deny him the information he needs to advance his civil claim.

[36] As regards the law, Mr. Blank takes the position that the governing jurisprudence supports his position that the prosecutorial conduct to which he was subjected vitiates the ss 21 and 23 exemptions relied upon to deny disclosure of some materials, and even vitiates legal advice privilege. He has referred the Court to a number of cases to support this assertion.

[37] First of all, he says that one of his own cases that went all the way to the Supreme Court of Canada, *Blank* SCC 2006, above, stands for the proposition that legal advice privilege, as well as litigation privilege, is suspended upon a *prima facie* showing of actionable misconduct. He relies upon paragraphs 45, 55-57 of that decision:

[45] Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[...]

[55] Finally, we should not disregard the origins of this dispute between the respondent and the Minister. It arose in the context of a criminal prosecution by the Crown against the respondent. In criminal proceedings, the accused's right to discovery is constitutionally guaranteed. The prosecution is obliged under *Stinchcombe* to make available to the accused all relevant information if there is a "reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence ..." (p. 340). This added burden of disclosure is placed on the Crown in light of its overwhelming advantage in resources and the corresponding risk that the accused might otherwise be unfairly disadvantaged.

[56] I am not unmindful of the fact that *Stinchcombe* does not require the prosecution to disclose everything in its file, privileged or not. Materials that might in civil proceedings be covered by one privilege or another will nonetheless be subject, in the criminal context, to the "innocence at stake" exception — at the very least: see *McClure*. In criminal proceedings, as the Court noted in *Stinchcombe*:

The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. [p. 340]

[57] On any view of the matter, I would think it incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended.

[38] As I explained and discussed with Mr. Blank at the hearing before me, I do not think this case is of assistance to him. In fact, I think it assists the Respondent.

[39] *Blank* SCC 2006, above, grew out of a s 41 review application, but it dealt with litigation privilege and the Supreme Court of Canada took great pains to distinguish between litigation privilege and legal advice privilege:

[8] As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.

[...]

[14] This appeal concerns the respondent's repeated attempts to obtain documents from the government. He succeeded only in part. His requests for information in the penal proceedings and under the *Access Act* were denied by the government on various grounds, including "solicitor-client privilege". The issue before us now relates solely to the *Access Act* proceedings. We have not been asked to decide whether the Crown properly fulfilled, in the criminal proceedings, its disclosure obligations under *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. And in the record before us, we would in any event be unable to do so.

[...]

[26] Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[27] Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[...]

[29] With the exception of *Hodgkinson v. Simms* (1988), [1988 CanLII 181 \(BC CA\)](#), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: *Liquor Control Board of Ontario v. Lifford Wine Agencies Ltd.* (2005), [2005 CanLII 25179 \(ON CA\)](#), 76 O.R. (3d) 401; *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), [2002 CanLII 18055 \(ON CA\)](#), 62 O.R. (3d) 167 (“Big Canoe”); *College of Physicians & Surgeons (British Columbia) v. British Columbia (Information & Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002 BCCA 665](#); *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716, [2001 MBCA 11](#); *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.* (2000), 188 N.S.R. (2d) 173, [2000 NSCA 96](#); *General Accident Assurance Co. v. Chrusz* (1999), [1999 CanLII 7320 \(ON CA\)](#), 45 O.R. (3d) 321.

[30] American and English authorities are to the same effect: see *In re L. (A Minor)*, [1997] A.C. 16 (H.L.); *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)*, [2004] Q.B. 916, [2004] EWCA Civ 218, and *Hickman v. Taylor*, 329 U.S. 495 (1947). In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar “attorney work product” doctrine. This “distinct rationale” theory is also supported by the majority of academics: Sharpe; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at pp. 745-46; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 197-98; J.-C. Royer, *La preuve civile* (3rd ed. 2003), at pp. 868-71; G. D. Watson and F. Au, “Solicitor-Client Privilege and Litigation Privilege in Civil Litigation” (1998), 77 *Can. Bar Rev.* 315. For the opposing view, see J. D. Wilson, “Privilege in Experts’ Working Papers” (1997), 76 *Can. Bar Rev.* 346, and “Privilege: Watson & Au (1998) 77 *Can. Bar Rev.* 346: REJOINDER: ‘It’s Elementary My Dear Watson’” (1998), 77 *Can. Bar Rev.* 549.

[...]

[33] In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.

[34] The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[35] Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary," to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

[36] I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege: *Boulianne v. Flynn*, [1970 CanLII 339 \(ON SC\)](#), [1970] 3 O.R. 84; *Wujda v. Smith* (1974), [1974 CanLII 1350 \(MB KB\)](#), 49 D.L.R. (3d) 476; *Meaney v. Busby* (1977), [1977 CanLII 1311 \(ON SC\)](#), 15 O.R. (2d) 71; *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), [1995 CanLII 9236 \(AB KB\)](#), 176 A.R. 134. See also Sopinka, Lederman and Bryant; Paciocco and Stuesser.

[37] Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.

[...]

[42] In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the *Access Act*, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.

[43] The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.

[44] The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

[40] Anything which the Supreme Court of Canada said about legal advice privilege in *Blank* SCC 2006, above, was, strictly speaking, *obiter*, but it is clear that the Supreme Court of Canada was of the view that solicitor-client legal advice privilege is “absolute in scope” and “permanent in duration.” Supreme Court of Canada jurisprudence directly on point suggests that there is an exception to this general rule. In *Blood Tribe*, above, at paragraph 10, however, the Supreme Court of Canada made it clear just how narrow this exception is:

At the time the employer in this case consulted its lawyer, litigation may or may not have been in contemplation. It does not matter. While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity: *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837; *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at pp. 885-87; *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263; *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 S.C.R. 456, 2004 SCC 18, at paras. 40-47; *McClure*, at paras. 23-27; *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 2006 SCC 39, at para. 26; *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, 2006 SCC 31; *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189, 2006 SCC 36; *Juman v. Doucette*, [2008] 1 S.C.R. 157, 2008 SCC 8. A rare exception, which has no application here, is that no privilege attaches to communications criminal in themselves or intended to further criminal purposes: *Descôteaux*, at p. 881; *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565. The extremely limited nature of the exception emphasizes, rather than dilutes, the paramountcy of the general rule whereby solicitor-client privilege is created and maintained “as close to absolute as possible to ensure public confidence and retain relevance” (*McClure*, at para. 35).

[41] So I think we can say that the Supreme Court of Canada has made it clear that solicitor-client privilege generally must be maintained as close to absolute as possible to ensure public confidence and retain relevance. Litigation privilege comes to an end, absent closely related

proceedings, upon the termination of the litigation that gave rise to the privilege. Solicitor-client legal advice privilege, however, is absolute in scope and permanent in duration unless the communications in question are criminal in themselves or intended to further criminal purposes.

[42] Mr. Blank referred the Court to other cases which he believes establish a wider exception to the “absolute scope” of legal advice privilege. In particular he raises *Goldman, Sachs & Co v Sessions* (1999), [1999 CanLII 5317 \(BC SC\)](#), 38 CPC (4th) 143, [1999] BCJ no 2815 (QL)(SC); *Krieger*, above; *Dublin v Montessori Jewish Day School of Toronto* (2007), [2007 CanLII 8923 \(ON SC\)](#), 281 DLR (4th) 368, 85 OR (3d) 511 (SCJ) [*Dublin*]; *Bronskill v Canada (Canadian Heritage)*, [2011 FC 983 \[Bronskill\]](#).

[43] In *Dublin*, above, Justice Perell of the Ontario Superior Court of Justice, provides a summary of what he sees as the relevant jurisprudence:

[28] In order to ensure public confidence in the legal system and the effectiveness of the privilege, lawyer-and-client privilege is categorical and approaches an absolute right, rather than one that is decided on a case-by-case basis: *R. v. Lavallee, Rackel & Heintz*, [2002 SCC 61 \(CanLII\)](#), [2002] 3 S.C.R. 209 (S.C.C.); *R. v. McClure*, [2001 SCC 14 \(CanLII\)](#), [2001] 1 S.C.R. 445 (S.C.C.); *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31 \(CanLII\)](#), [2004] 1 S.C.R. 809 (S.C.C.), affg. (2003), [2003 CanLII 8701 \(ON CA\)](#), 63 O.R. (3d) 97 (Ont. C.A.). Exceptions to the lawyer-and-client privilege are possible, but their availability is strictly limited.

[29] No privilege is absolute, and there are exceptions to lawyer-and-client privilege and the other privileges: *Smith v. Jones*, [1999 CanLII 674 \(SCC\)](#), [1999] 1 S.C.R. 455 (S.C.C.). If a client seeks guidance from a lawyer to facilitate committing a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is a knowing participant or unwitting dupe of the client.

[30] The classic example of an exception to lawyer-and-client privilege is *R. v. Cox* (1884), 14 Q.B.D. 153 (Eng. C.C.R.), a stated case in criminal proceedings. In this case, after judgment had been issued against him in civil proceedings for libel, Railton executed a bill of sale of his newspaper. Railton was convicted of fraudulently conveying his assets to avoid his judgment creditor, and the crucial evidence came from a Mr. Goodman, the lawyer who had provided Railton with legal advice that there had to be a *bona fide* sale of the property. It may be noted that Mr. Goodman's advice itself appears to have been proper legal advice.

[31] On appeal, the question for the Court for Crown Cases Reserved was whether Goodman's evidence was properly admitted or whether it should have been excluded because of lawyer-and-client privilege. The case was first argued before five judges, and then, because of its importance, reargued before 10 judges. In the result, the court upheld the conviction and ruled that the evidence was properly admitted.

[32] Stephen, J. concluded that if a client attends on a legal adviser for advice intended to facilitate or to guide the client in committing a crime or fraud, the communication between the two is not privileged and can be disclosed by the lawyer. He stated that a communication in furtherance of a criminal purpose does not come within the ordinary scope of professional employment and is not privileged.

[33] For the future crime or fraud exception to apply, it must be shown that the client had an illegal purpose in mind and that the lawyer either shared that illegal purpose or was deceived as to the client's purpose. In other words, the exception applies only where the client knows or should have known that the intended conduct was unlawful: *R. v. Shirose*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 (S.C.C.) paras. 55-61.

[34] The client's intention to commit a wrongful act is the key determinant as to whether the communication is privileged: *Goldman, Sachs & Co. v. Sessions* (1999), 1999 CanLII 5317 (BC SC), 38 C.P.C. (4th) 143 (B.C. S.C.). In circumstances where the client has a wrongful intent, the lawyer, in providing advice that may facilitate the illegal activity, is not acting in a professional capacity. In contrast, if a lawyer bona fide communicates advice about the legality of proposed conduct, which is a normal and important function for a lawyer, then the communication is privileged, even if it turns out that the lawyer was wrong in advising that the conduct was legal: the privilege is not destroyed if the transaction turns out to be illegal: *R. v. Shirose*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 (S.C.C.) paras. 55-61.

[...]

[38] The authors of Canada's leading evidence text, Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada* (2nd ed.) (Markham: LexisNexis Canada Inc., 1999) state in para. 14.58: "There is no reason why this exception to the solicitor-client privilege should not also include those communications made with a view to perpetrating tortuous conduct which may become the subject of criminal proceedings."

[39] In my opinion, there is also no reason why the exception should not include communications perpetrating tortuous conduct that may become the subject of civil proceedings.

[40] In *Goldman, Sachs & Co. v. Sessions* (1999), 1999 CanLII 5317 (BC SC), 38 C.P.C. (4th) 143 (B.C. S.C.), K.J. Smith J. included within the scope of conduct that will remove a

communication from the protection, the tort of abuse of process, breaches of regulatory statutes, breaches of contract, and torts and other breaches of duty. See also *Northwest Mettech Corp. v. Metcon Services Ltd.* (1997), 1997 CanLII 3843 (BC SC), 78 C.P.R. (3d) 86 (B.C. S.C. [In Chambers]), where it was held that the crime and fraud exception may apply where the alleged unlawful conduct is a breach of fiduciary duty or a breach of confidence. It may be noted that these types of allegations are made in the case at bar.

[41] K.J. Smith, J. came to his conclusion about the scope of the exception to lawyer-and-client privilege by his reading of Binnie, J.'s judgment in *R. v. Shirose*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 (S.C.C.), which in turn was an interpretation of the seminal *R. v. Cox* (1884), 14 Q.B.D. 153 (Eng. C.C.R.). In paragraphs 13 to 15 of his judgment, K.J. Smith, J. discussed Binnie, J.'s judgment and stated:

13. Binnie J. went on to observe, in para. 57, that Professor Wigmore expressed the view, in Wigmore on Evidence, vol. 8 (McNaughton Rev. 1961) sec. 2298, at p. 573, that the exception applies only where the client seeks the legal advice for a knowingly unlawful end. He continued, at para. 58:

Although the issue has apparently not been directly considered in the Canadian case law, the Wigmore view was subsequently espoused by the authors of "*The Future Crime or Tort Exception to Communications Privileges*" (1964), 77 Harv. L. Rev. 730, where they state as follows, at pp. 730-31:

The attorney-client privilege has always been subject to the qualification that protection is denied to communications wherein a lawyer's assistance is sought in activity that the client knows to constitute a crime or tort. [Emphasis per Binnie J.]

The scope of the "future crimes" exception is circumscribed on a public policy basis, as explained at p. 731:

The knowledge requirement minimizes the effect of the exception on proper communications; absent this requirement legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged. Moreover, counseling against unfounded claims or illegal projects is an important part of the lawyer's function.

14. After noting, in para. 59, that this explanation of the rule is consistent with its exposition in the context of crime and fraud by Lamer J. in *Descôteaux v.*

Mierzwinski, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860 at p. 881 and by *Lord Parmoor in O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at p. 621, Binnie J. made it clear that the client's intention is the pivotal consideration, quoting with approval from *State ex rel. North Pacific Lumber Co. v. Unis*, 579 P.2d 1291 (Or. 1978) at p. 1295 as follows:

We approve of the requirement that, in order to invoke the exception to the privilege, the proponent of the evidence must show that the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful. Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper.

15. The conduct in issue in *R. v. Campbell* was criminal conduct. However, the adoption into the analysis by the Court, without qualification, of the words "crime or tort" and "unfounded claims or illegal projects" from the journal article referred to leads, in my opinion, to the conclusions that the Court had in mind the proper delimitation of the scope of the rule and that it does not consider that "unlawful conduct" is confined strictly to criminal and fraudulent conduct.

[42] As I understand K.J. Smith, J.,'s analysis, it advances the proposition that if it can be shown that the client communicated with a lawyer with the intention of committing an unlawful act, be it criminal or tortuous, because the client knew or ought to have known that the intended conduct was unlawful, then the communication with the lawyer is not privileged. See also: *McIntosh Estates Ltd. v. Surrey (City)*, [1996] B.C.J. No. 2008 (B.C. S.C.), affd. 1997 CanLII 3117 (BC CA), [1997] B.C.J. No. 2030 (B.C. C.A.).

[43] However, a mere assertion that the lawyer's advice was sought in furtherance of an illegal purpose would not be sufficient; some convincing evidence of the illegal purpose is required: *O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v. Darbishire*; *Goodman & Carr v. Minister of National Revenue*, [1968] O.J. No. 1248 (Ont. H.C.); *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, [2007] B.C.J. No. 179 (B.C. S.C.); *Goldman, Sachs & Co. v. Sessions* (1999), 1999 CanLII 5317 (BC SC), 38 C.P.C. (4th) 143 (B.C. S.C.); *Nanaimo Immigrant Settlement Society v. British Columbia*, [2003] B.C.J. No. 2305 (B.C. S.C.). The party challenging lawyer-and-client privilege on the grounds of fraud or criminal activity must make out a *prima facie* case of fraud before the privilege is lost: *O'Rourke v. Darbishire* (1918), [1919] 1 Ch. 320 (Eng. C.A.), affd. [1920] A.C. 581 (U.K. H.L.) *O'Rourke v.*

Darbishire; Sperry Corp. v. John Deere Ltd. (1984), 1984 CanLII 5875 (FC), 82 C.P.R. (2d) 1 (Fed. T.D.); *Silverman v. Morresi* (1982), 28 C.P.C. 239 (Ont. Master).

[44] In my opinion, the exception for communications to facilitate the commission of a crime or a fraud applies to the circumstances of the case at bar, which concern the commission of various intentional torts against Dr. Dublin and his son.

[44] Having provided his position, Justice Perell then acknowledges that there are competing authorities:

[47] I acknowledge, however, that my conclusion may be contentious. In *Rocking Chair Plaza (Bramalea) Ltd. v. Brampton (City)* (1988), 29 C.P.C. (2d) 82 (Ont. H.C.), which is a case decided before *R. v. Shirose*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565 (S.C.C.), the plaintiffs asked that the fraud exception be extended to include communications between solicitor and client that facilitated acts of negligence, malicious prosecution, abuse of process, and charter violation. Relying on the English case, *Crescent Farms (Sidcup) Sports Ltd. v. Sterling Officers Ltd.*, [1967] 1 Ch. D. 533, O'Driscoll, J. refused to extend generally the ambit of the exception for communications in furtherance of unlawful conduct to cover all torts.

[48] However, O'Driscoll, J. defined fraud to include all forms of fraud and dishonesty such as fraudulent breaches of trust, fraudulent conspiracy, trickery, and sham contrivances. As already noted, the Dublins in the case at bar sue for breach of trust.

[49] In *Hallstone Products Ltd. v. Canada (Customs & Revenue Agency)*, [2004] O.J. No. 496 (Ont. Master), Master Dash decided that while the ambit of the exception for communications in furtherance of unlawful conduct did not extend to all torts, it did extend to acts that were an abuse of the court's process including abuse of the criminal process, deliberate suppression of evidence, and malicious prosecution for an improper purpose.

[45] In *Krieger*, above, the Supreme Court of Canada ruled that a law society possesses the jurisdiction to review an allegation that a Crown prosecutor acting dishonestly or in bad faith failed to disclose relevant information, but the jurisdiction is limited to examining whether it is an ethical violation. I am not engaged in such a review and, in my view, this case does not support Mr. Blank's position in his s 41 review application before me.

[46] In *Bronskill*, above, my colleague, Justice Noël, made general comments arising from the facts under review in that case and the s 15 exemption under the [Act](#). Justice Noël said that “the Act’s exemptions are not to be validated by the Court when used to prevent embarrassment or to hide illegal acts...,” but this does not assist me in dealing with ss 21 and 23 exemptions and what may qualify as an exception to legal advice privilege. In other words, what kind of illegal act would terminate legal advice privilege under the Act.

[47] In summary, in *Dublin*, above, Justice Perell relies on case law from various jurisdictions and levels of court, but he fails to reconcile that case law with the Supreme Court of Canada jurisprudence. His decision was released before *Blood Tribe*, above, so it may have seemed that the Supreme Court of Canada was stepping back from the absolute nature of solicitor-client privilege in *Blank* SCC 2006. But *Blank* SCC 2006 did not actually limit the importance and broad scope that the Supreme Court of Canada has placed on legal advice privilege. Justice Perell fails to reconcile his reliance upon these cases with his opening acknowledgement that solicitor-client privilege is nearly absolute right (at para 28) for which point he relies upon three Supreme Court of Canada cases. He goes on to note that various jurisdictions and levels of courts and commentators have suggested that the exceptions should be expanded, and he finds this view persuasive, but he never reconciles this with the fact that the Supreme Court of Canada has said that solicitor-client privilege is nearly absolute. In my view, that has to be the guiding principle in the present case.

[48] In *Blank* FCA 2010, the Federal Court of Appeal held that the only exceptions to solicitor-client privilege were criminal conduct or to perpetuate a tort (at para 20):

[20] Further, “misconduct” by itself is not a recognized exception to the privilege that the respondent asserts over the three pages. There is an exception for “communication[s] in furtherance of a criminal purpose” or to perpetuate a tort: *Solosky v. Canada*, [1979 CanLII 9 \(SCC\)](#), [1980] 1 S.C.R. 821 at pages 755-757 and Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at pages 937-939. Where clients seek out a lawyer “for the purpose of assisting [them] to perpetuate a crime or fraud, there [is] no privilege”: Bryant et al., *supra* at page 937.

[49] The Supreme Court of Canada decision cited, however, does not provide for any exception relating to torts (*Solosky v Canada*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 835-836, footnotes omitted):

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, *O'Shea v. Woods*, at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox and Railton*, in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

[50] This suggests that either the Federal Court of Appeal expanded the Supreme Court of Canada's use of "fraud" to all torts, or the evidence text cited discusses the exemption of communications relating to torts. It is not clear from the Federal Court of Appeal's analysis whether "tort" was intended to be limited to fraudulent conduct or all torts:

[21] This exception does not apply to the three pages that the appellant seeks. During the course of the hearing, the appellant invited the Court to examine these three pages, which were appended to a confidential affidavit before this Court. The respondent did not object to this Court reviewing these pages. Having reviewed these pages, I conclude that there is no basis for this Court overturning the Federal Court's conclusion that these pages are privileged. Further, these pages are not "communication[s] in furtherance of a criminal purpose" or to perpetuate a tort and so the documents remain privileged.

[51] In a more recent case, the Supreme Court of Canada, again, confirmed that solicitor-client privilege is a near absolute right (*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 [*Criminal Lawyers' Association*]). The Supreme Court of Canada made no mention of the criminal or fraud or tort exceptions and says that the only exception is "public safety and the right to make full answer and defence":

[53] The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that 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". The purpose of this

exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzewski*, 1982 CanLII 22 (SCC), [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

[52] An exception for misconduct has been explicitly rejected by the Federal Court of Appeal. It is hard to believe that there is an exception for communications which perpetuate a tort in light of the Supreme Court of Canada's clear language. The Supreme Court of Canada has yet to provide a clear answer on what exactly is not protected by solicitor-client privilege. In *Blood Tribe*, above, the Supreme Court of Canada said that there was a "rare exception" for criminal communications. In *Criminal Lawyers' Association*, above, the Supreme Court of Canada said that the only two exceptions were for public safety and the right to make full answer and defence. Neither apply in the present case.

[53] In the end, and notwithstanding Justice Perell's views as to what should be exempted from solicitor-client privilege (which he acknowledged were contentious), I think I have to be guided by Supreme Court of Canada jurisprudence. I am left with the Supreme Court of Canada decision in *Blank* SCC 2006 and *Blood Tribe*, both above. This means, in my view, that I must treat legal advice privilege as absolute in scope and permanent in duration unless Mr. Blank can establish that the communications at issue in this s 41 application were "criminal in themselves or intended to further a criminal purpose."

[54] Mr. Blank has alleged prosecutorial misconduct, abuse of process, possible tortious conduct and possible criminal conduct (perjury), as justification for the vitiation of ss 21 and 23 privileges in this case. Given the Federal Court of Appeal's guidance in *Blank* FCA 2010, above, I will also examine whether any of the communications at issue perpetuate a tort.

[55] In this application Mr. Blank is seeking relief that both this Court and the Federal Court of Appeal have previously told him is not available under s 41 of the [Act](#). See *Blank* FC 2000; *Blank* FCA 2004; *Blank* FC 2006, aff'd *Blank* FCA 2007, all above.

[56] The jurisprudence on s 41 is clear that the right to seek review in this Court is narrowly circumstanced and is set out in ss 41 through 53 of the [Act](#). Briefly stated, the Court's reviewing authority only comes into play where access to a specific record has been refused, and the only relief the Court can provide is to order access to the record at issue if the refusal was contrary to the Act. See, for example, *X v Canada*, above, at para 10; *Connolly*, above, at paras 8-10, aff'd *Connolly* FCA, above.

[57] In effect, the only assistance the Court can render Mr. Blank in this application is to review the refused documents against the claimed exemptions and decide whether he should be given access to those documents in whole or in part. Notwithstanding Mr. Blank's lack of input on the criteria for review, I have examined each document in turn and determined that each exemption was correctly claimed and the discretion was reasonably exercised. I have also determined that the exemptions are not vitiated by any kind of wrongdoing. The Court cannot grant Mr. Blank disclosure of the documents at issue.

[58] As the issues raised by Mr. Blank reveal, he is attempting to intermingle access to information issues with issues that arise in his longstanding civil claim for prosecutorial misconduct. Mr. Blank takes the position that the DOJ is deliberately withholding documentation related to the prosecution of Mr. Blank and his company that was initiated by Environment Canada. He appears to believe that if this documentation is disclosed it will provide him with the

evidence he needs to succeed in his civil suit. This is why, in his disclosure request, he asked for documents “dealing with the continuation of the prosecution by indictment” and “dealing with the eventual decision to stay the proceedings.” In other words, Mr. Blank assumes that he is entitled to receive documentation that is inevitably protected by solicitor-client privilege. The basis for this assumption appears to be that solicitor-client privilege in this case is being used to conceal evidence of wrongdoing in the form of some kind of abuse of process, and that this vitiates the exemption claim.

[59] Having examined the non-redacted documentation in question, I find I have to agree with the Respondent in that:

- a) The s 23 exemption for solicitor-client privilege was correctly claimed because the documents in question are letters, memoranda and e-mail communications that expressly or implicitly reference legal advice with regard to the prosecutorial decisions that the Applicant references in his request for information;
- b) The solicitor-client privilege claim was not vitiated by abuse of process or any other wrongdoing, let alone the criminal conduct required under *Blood Tribe*, above. These communications are not criminal in themselves and there is no evidence that they are intended to further criminal purposes or to perpetuate any tort;
- c) The exercise of the discretion to deny access to documents under s 23 was exercised reasonably and in good faith in this case, and in accordance with the wording of s 23;
- d) As regards those documents (or redacted parts of documents) that were said to attract the s 21(1) exemption, the determination that the withheld materials attract the exemption was correct in that the materials record consultations and deliberations between and amongst government employees (including legal counsel) that concern advice and recommendations with regard to the two prosecutorial decisions that were referenced in Mr. Blank’s request for disclosure. The redacted portions contain government advice, consultations, deliberations and recommendations;
- e) The s 21 exemption was exercised reasonably and in good faith; and,

- f) For those documents where severance was applied, reasonable severance occurred in accordance with s 25 of the Act and in accordance with the guidance on severance provided by the Federal Court of Appeal in previous applications involving Mr. Blank. See *Sheldon Blank & Gateway Industries Ltd v Canada (Minister of the Environment)*, 2001 FCA 374, *Blank* FCA 2004, above; *Canada (Justice) v Blank*, 2007 FCA 87; *Blank* FCA 2007.

[60] Given the narrow range of review which the jurisprudence says is available to Mr. Blank under s 41 of the [Act](#), the Court cannot consider Mr. Blank's complaints that the response to his request was tardy and was not rendered in accordance with s 4(2.1) of the Act. The ICC has already addressed this complaint. Mr. Blank alleges bias against the ICC, but there is no real evidence to support this allegation, so that the ICC's decision in this case is entitled to the usual deference. See *Blank* FCA 2005, above, at para 12; *Blank* FC 2009, above, at para 26; *Blank* FCA 2010, above, at para 35.

[61] The Respondent has submitted a draft bill of costs in this matter, in the amount of \$10,850.00, but I think it would be appropriate to fix costs at \$5,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed with costs to the Respondent (Minister of Justice) in the amount of \$5,000.00.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-955-10

STYLE OF CAUSE:

SHELDON BLANK v THE MINISTER OF JUSTICE

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: JUNE 15-16, 2015

JUDGMENT AND REASONS: RUSSELL J.

DATED: AUGUST 7, 2015

APPEARANCES:

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ON HIS OWN BEHALF

John Faulhammer

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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ON HIS OWN BEHALF

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FOR THE RESPONDENT

TAB 54

Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342

Date:	1989-03-09
File number:	20411
Other citations:	57 DLR (4th) 231 — 92 NR 110 — [1989] 3 WWR 97 — AZ-89111035 — 75 Sask R 82 — 47 CCC (3d) 1 — 33 CPC (2d) 105 — 38 CRR 232 — 7 WCB (2d) 61 — [1989] CarswellSask 241 — EYB 1989-95668 — JE 89-499 — [1989] SCJ No 14 (QL) — [1989] ACS no 14
Citation:	Borowski v. Canada (Attorney General), 1989 CanLII 123 (SCC), [1989] 1 SCR 342, < https://canlii.ca/t/1ft7d >, retrieved on 2025-10-28
Most recent unfavourable mention	The Toronto Dominion Bank v Manah , 2025 ABCA 321 (CanLII) [...] [11] The remaining question is whether this Court should exercise its discretion to hear this appeal despite its mootness: Borowski at 353. [...]

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342

Joseph Borowski *Appellant*

v.

The Attorney General of Canada

Respondent

and

**Interfaith Coalition on the Rights
and Wellbeing of Women and Children,
R.E.A.L. Women of Canada and**

indexed as: borowski v. canada (attorney general)

File No.: 20411.

1988: October 3, 4; 1989: March 9.

Present: Dickson C.J. and McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

on appeal from the court of appeal for saskatchewan

Appeal -- Mootness -- Abortion provisions of [Criminal Code](#) -- Provisions under challenge already found invalid -- Ancillary questions relating to Charter rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case -- Criminal Code, R.S.C. 1970, c. C-34, s. 251 -- [Canadian Charter of Rights and Freedoms](#), ss. 7, 15.

Criminal law -- Abortion -- Provisions under challenge already found invalid -- Ancillary questions relating to [Charter](#) rights of the foetus -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Constitutional law -- [Charter of Rights](#) -- Right to life, liberty and security of the person -- Right to equality before and under the law -- Whether or not Charter rights extending to foetus -- Charter issues ancillary to question of validity of abortion provisions of [Criminal Code](#) -- Provisions under challenge already found invalid -- Whether or not issue moot -- Whether or not Court should exercise discretion to hear case.

Civil procedure -- Standing -- Standing originally found because action seeking declaration as to legislation's validity -- Provisions under challenge already found invalid -- Whether or not standing

as originally determined -- Whether or not s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982* able to support claim for standing.

Appellant attacked the validity of s. 251(4), (5) and (6) of the *Criminal Code* relating to abortion on the ground that they contravened the life and security and the equality rights of the foetus, as a person, protected by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Appellant's standing had been found on the basis that he was seeking a declaration that legislation is invalid, that there was a serious issue as to its invalidity, that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue could be brought before the Court.

The Court of Queen's Bench found s. 251(4), (5) and (6) did not violate the *Charter* as a foetus was not protected by either s. 7 or s. 15 of the *Charter* and also held that the s. 1 of *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation. The Court of Appeal concluded that neither s. 7 nor s. 15 of the *Charter* applied to a foetus. The constitutional questions stated in this Court queried: (1) if a foetus had the right to life as guaranteed by s. 7 of the *Charter*; (2) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated the principles of fundamental justice contrary to s. 7 of the *Charter*; (3) whether a foetus had the right to equal protection and equal benefit of the law without discrimination because of age or mental or physical disability as guaranteed by s. 15 of the *Charter*; (4) if so, whether s. 251(4), (5) and (6) of the *Criminal Code* violated s. 15; and (5) if questions (2) and (4) were answered affirmatively, whether s. 251(4), (5) and (6) of the *Criminal Code* were justified by s. 1 of the *Charter*. All of s. 251, however, was struck down subsequent to the Court of Appeal's decision but before the appeal reached this Court as a result of this Court's decision in *R. v. Morgentaler* (No. 2).

A serious issue existed at the commencement of the appeal as to whether the appeal was moot. Questions also existed as to whether the appellant had lost his standing and, indeed, whether the matter was justiciable. These issues were addressed as a preliminary matter and decision on them was reserved. The Court then heard argument on the merits of the appeal so that the whole appeal could

be decided without recalling the parties for argument should it decide that the appeal should proceed notwithstanding the preliminary issues.

Held: The appeal should be dismissed.

The appeal is moot and the Court should not exercise its discretion to hear it. Moreover, appellant no longer has standing to pursue the appeal as the circumstances upon which his standing was originally premised have disappeared.

The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it.

The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case. (In the interest of clarity, a case is moot if it does not present a concrete controversy even though a court may elect to address the moot issue.)

This appeal is moot as there is no longer a concrete legal dispute. The live controversy underlying this appeal -- the challenge to the constitutionality of s. 251(4), (5) and (6) of the *Criminal Code* -- disappeared when s. 251 was struck down in *R. v. Morgentaler* (No. 2). None of the relief sought in the statement of claim was relevant. Three of the five constitutional questions that were set explicitly concerned s. 251 and were no longer applicable. The remaining two questions addressed the scope of ss. 7 and 15 of the *Charter* and were not severable from the context of the original challenge to s. 251.

A constitutional question cannot bind this Court and may not be used to transform an appeal into a reference. Constitutional questions are stated to define with precision the constitutional points at issue, not to introduce new issues, and accordingly, cannot be used as an independent basis for supporting an otherwise moot appeal.

The second stage in the analysis requires that a court consider whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy. Courts may be guided in the exercise of their discretion by considering the underlying rationale of the mootness doctrine.

The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. The Court, in exercising its discretion in an appeal which is moot, should consider the extent to which each of these three basic factors is present. The process is not mechanical. The principles may not all support the same conclusion and the presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The Court should decline to exercise its discretion to decide this appeal on its merits because of concerns for judicial economy and for the Court's role in the law-making process. The absence of an adversarial relationship was of little concern: the appeal was argued as fully as if it were not moot.

With respect to judicial economy, none of the factors justifying the application of judicial resources applied. The decision would not have practical side effects on the rights of the parties. The case was not one that was capable of repetition, yet evasive of review: it will almost certainly be brought before the Court within a specific legislative context or possibly in review of specific governmental

action. An abstract pronouncement on foetal rights here would not necessarily obviate future repetitious litigation. It was not in the public interest, notwithstanding the great public importance of the question involved, to address the merits in order to settle the state of the law. A decision as to whether ss. 7 and 15 of the *Charter* protect the rights of the foetus is not in the public interest due to the potential uncertainty that could result from such a decision absent a legislative context.

A proper awareness of the Court's law-making function dictated against the Court's exercising its discretion to decide this appeal. The question posed here was not the question raised in the original action. Indeed, what was sought -- a *Charter* interpretation in the absence of legislation or other governmental action bringing it into play -- would turn this appeal into a private reference. The Court, if it were to exercise its discretion, would intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the Court's traditional role.

The appellant also lacked standing to pursue this appeal given the fact that the original basis for his standing no longer existed. Two significant changes in the nature of this action occurred since standing was granted by this Court in 1981. Firstly, the claim is now premised primarily upon an alleged right of a foetus to life and equality pursuant to ss. 7 and 15 of the *Charter*. Secondly, the legislative context of original claim disappeared when s. 251 of the *Criminal Code* was struck down. Standing could not be based on s. 24(1) of the *Charter* for an infringement or denial of a person's own *Charter*-based right was required. Here, the rights allegedly violated were those of a foetus. Standing could not be based on s. 52(1) of the *Constitution Act, 1982* as this is restricted to litigants challenging a law or governmental action pursuant to power granted by law.

Cases Cited

Referred to: *R. v. Morgentaler* (No. 2), 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575; *Morgentaler v. The Queen* (No. 1), 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616; *Dehler v. Ottawa Civic Hospital* (1980), 1980 CanLII 2715 (ON CA), 29 O.R. (2d) 677 (C.A.), leave to appeal refused [1981] 1 S.C.R. viii;

The King ex rel. Tolfree v. Clark, 1943 CanLII 3 (SCC), [1944] S.C.R. 69; *Moir v. The Corporation of the Village of Huntingdon* (1891), 1891 CanLII 36 (SCC), 19 S.C.R. 363; *Attorney-General for Alberta v. Attorney-General for Canada*, 1938 CanLII 251 (UK JCPC), [1939] A.C. 117; *Coca-Cola Company of Canada Ltd. v. Mathews*, 1944 CanLII 9 (SCC), [1944] S.C.R. 385; *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111; *Vic Restaurant Inc. v. City of Montreal*, 1958 CanLII 78 (SCC), [1959] S.C.R. 58; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, 1967 CanLII 116 (SCC), [1967] S.C.R. 628; *Re Cadeddu and The Queen* (1983), 1983 CanLII 1763 (ON CA), 41 O.R. (2d) 481; *R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Re Maltby and Attorney-General of Saskatchewan* (1984), 1984 CanLII 2546 (SK CA), 10 D.L.R. (4th) 745; *Hall v. Beals*, 396 U.S. 45 (1969); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *Sibron v. New York*, 392 U.S. 40 (1968); *Vadeboncoeur v. Landry*, 1976 CanLII 182 (SCC), [1977] 2 S.C.R. 179; *Bisaillon v. Keable*, 1983 CanLII 26 (SCC), [1983] 2 S.C.R. 60; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911); *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, 1970 CanLII 192 (SCC), [1970] S.C.R. 713; *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, 1973 CanLII 135 (SCC), [1973] S.C.R. 756; *Minister of Manpower and Immigration v. Hardayal*, 1977 CanLII 162 (SCC), [1978] 1 S.C.R. 470; *Re Opposition by Quebec to a Resolution to amend the Constitution*, 1982 CanLII 219 (SCC), [1982] 2 S.C.R. 793; *Forget v. Quebec (Attorney General)*, 1988 CanLII 51 (SCC), [1988] 2 S.C.R. 90; *Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24(1).

Constitution Act, 1982, s. 52(1).

Constitution of the United States of America, Art. III, s. 2(1).

Criminal Code, R.S.C. 1970, c. C-34, s. 251(4), (5), (6).

Rules of the Supreme Court of Canada, SOR/83-74, s. 32.

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APPEAL from a judgment of the Saskatchewan Court of Appeal (1987), [1987 CanLII 4890 \(SK CA\)](#), 56 Sask. R. 129, 39 D.L.R. (4th) 731, [1987] 4 W.W.R. 385, 33 C.C.C. (3d) 402, 59 C.R. (3d) 223, dismissing an appeal from a judgment of Matheson J. (1983), [1983 CanLII 2157 \(SK KB\)](#), 29 Sask. R. 16, 4 D.L.R. (4th) 112, [1984] 1 W.W.R. 15, 8 C.C.C. (3d) 392, 36 C.R. (3d) 259. Appeal dismissed.

Morris C. Shumiatcher, Q.C., and *R. Bradley Hunter*, for the appellant.

Claude R. Thomson, Q.C., and *Robert W. Staley*, for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children.

Angela M. Costigan and *Karla Gower*, for the intervener R.E.A.L. Women of Canada.

Edward Sojonky, Q.C., for the respondent.

Mary Eberts and *Helena Orton*, for the intervener Women's Legal Education and Action Fund (LEAF).

The judgment of the Court was delivered by

SOPINKA J. -- This appeal by leave of this Court is from the Saskatchewan Court of Appeal, [1987 CanLII 4890 \(SK CA\)](#), [1987] 4 W.W.R. 385, which affirmed the judgment at trial of Matheson J. of the Saskatchewan Court of Queen's Bench, [1983 CanLII 2157 \(SK KB\)](#), [1984] 1 W.W.R. 15, dismissing the action of the plaintiff (appellant in this Court). In the courts below, the plaintiff attacked the validity of subss. (4), (5) and (6) of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, relating to abortion on the ground that they contravened protected rights of the foetus. Subsequent to the decision of the Saskatchewan Court of Appeal but by the time the appeal reached this Court, s. 251, including the subsections under attack in this action, had been struck down in *R. v. Morgentaler*, [1988 CanLII 90 \(SCC\)](#), [1988] 1 S.C.R. 30 (hereinafter *R. v. Morgentaler* (No. 2)).

From this state of the proceedings it was apparent at the commencement of this appeal that a serious issue existed as to whether the appeal was moot. As well, it appeared questionable whether the appellant had lost his standing and, indeed, whether the matter was justiciable. The Court therefore called upon counsel to address these issues as a preliminary matter. Upon completion of these submissions, we reserved decision on these issues and heard the argument of the merits of the appeal so that we could dispose of the whole appeal without recalling the parties for argument should we decide that, notwithstanding the preliminary issues, the appeal should proceed.

In view of the conclusion that I have reached, it is necessary to deal with the issues of mootness and standing only. Since it is a change in the nature of these proceedings which gives rise to these issues, a review of the history of the action is necessary.

History of the Action

Mr. Borowski commenced an action in the Court of Queen's Bench of Saskatchewan by filing a statement of claim on September 5, 1978, which asked for the following relief:

- (a) An Order of this Honourable Court declaring section 251, subsections (4), (5) and (6) of the *Criminal Code* invalid and inoperative;
- (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in section 251, subsections (4), (5) and (6) are invalid and inoperative, and the outlay of such moneys is *ultra vires* and unlawful;
- (c) A permanent injunction enjoining the Minister of Finance, his servants and agents, from allocating, disbursing or in any way providing public moneys out of the Consolidated Revenue Fund for the establishment or maintenance of therapeutic abortion committees, for the performance of abortions or in support of any act or object relating to the abortion and destruction of individual human foetuses;
- (d) The costs of this action; and
- (e) Such further and other relief as to this Honourable Court seems just and expedient.

Prior to trial, a motion was brought by the respondents questioning the jurisdiction of the Court of Queen's Bench. That motion culminated in an appeal to this Court in which a central issue was Mr. Borowski's standing to bring the action. The resulting decision of the majority of this Court, reported in *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, was that Mr. Borowski had standing to attack the provisions of the *Code* referred to in his statement of claim. Martland J., speaking for the majority, stated, at p. 598:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

Laskin C.J., with whom Lamer J. concurred, would have denied standing on the basis that Mr. Borowski was not a person affected by the legislation and that there were others, such as doctors and hospitals, who might be so affected. The Chief Justice concluded, therefore, that Mr. Borowski did not have any judicially cognizable interest in the matter and that the Court ought to exercise its discretion to deny standing.

An amended statement of claim was filed on April 18, 1983, in which the original claims based on an alleged violation of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, were repeated. Allegations

based upon the *Canadian Charter of Rights and Freedoms*, which had been proclaimed on April 17, 1982, were added. The prayer for relief claimed:

- (a) An Order of this Honourable Court declaring Subsections (4), (5) and (6) of [Section 251](#) of the *Criminal Code* to be *ultra vires*, unconstitutional, invalid, inoperative and of no force or effect;
- (b) An Order of this Honourable Court declaring that the provisions of all Acts of the Parliament of Canada, and all legal instruments purporting to authorize the expenditure of public moneys for any of the purposes described in Subsections (4), (5) and (6) of [Section 251](#) of the *Criminal Code* are *ultra vires*, inoperative, unconstitutional, invalid and of no force or effect and the outlay of such moneys is unlawful;
- (c) The costs of this action; and
- (d) Such further and other relief as to this Honourable Court seems just.

The Saskatchewan Court of Queen's Bench dismissed Mr. Borowski's claim relating to an alleged violation of s. 1 of the *Canadian Bill of Rights*. Matheson J. held that both *Morgentaler v. The Queen*, [1975 CanLII 8 \(SCC\)](#), [1976] 1 S.C.R. 616 (hereinafter *Morgentaler v. The Queen* (No. 1)) and *Dehler v. Ottawa Civic Hospital* (1980), [1980 CanLII 2715 \(ON CA\)](#), 29 O.R. (2d) 677 (C.A.) (leave to appeal to S.C.C. refused [1981] 1 S.C.R. viii) concluded that the *Canadian Bill of Rights* did not give the courts the right to assess the substantive content or wisdom of legislation.

Matheson J. noted that Mr. Borowski's principal argument under the *Charter* was that the foetus is a person and therefore should be afforded the protection of s. 7 of the *Charter*. It was held, however, that s. 251(4), (5), and (6) did not violate the *Charter* as a foetus is not included in "everyone" so as to trigger the application of any s. 7 rights.

On appeal Mr. Borowski did not pursue his claim that government funding of abortions was unlawful. The Saskatchewan Court of Appeal dismissed Mr. Borowski's appeal by concluding that neither s. 7 nor s. 15 (which had come into effect on April 17, 1985, prior to the hearing before the Court of Appeal) applied to a foetus. Speaking for the Court, Gerwing J.A. examined the historical treatment of the foetus as well as the language and legislative history of s. 7 and concluded that the guarantees of s. 7 were not intended to extend to the unborn. As well, the foetus was held not to be included in "every individual" for the purpose of s. 15.

Leave to appeal to this Court was granted on September 3, 1987. The grounds for appeal alleged by the appellant in his notice of motion for leave to appeal refer primarily to ss. 7 and 15 of the *Charter*. On October 7, 1987, McIntyre J., pursuant to Rule 32 of the *Rules of the Supreme Court of Canada*, SOR/83-74, stated the following constitutional questions:

1. Does a child *en ventre sa mère* have the right to life as guaranteed by Section 7 of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question 1 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the principles of fundamental justice, contrary to Section 7 of the *Canadian Charter of Rights and Freedoms*?
3. Does a child *en ventre sa mère* have the right to the equal protection and equal benefit of the law without discrimination because of age or mental or physical disability that are guaranteed by Section 15 of the *Canadian Charter of Rights and Freedoms*?
4. If the answer to question 3 is "yes", do subsections (4), (5) and (6) of Section 251 of the *Criminal Code* violate or deny the rights guaranteed by Section 15?
5. If the answer to question 2 is "yes" or if the answer to question 4 is "yes", are the provisions of subsections (4), (5) and (6) of Section 251 of the *Criminal Code* justified by Section 1 of the *Canadian Charter of Rights and Freedoms*, and therefore not inconsistent with the *Constitution Act, 1982*?

On January 28, 1988, after leave to appeal was granted, this Court decided *R. v. Morgentaler* (No. 2), *supra*, in which all of s. 251 was found to violate s. 7 of the *Charter*. Accordingly, s. 251 in its entirety was struck down.

In July of 1988 in light of this Court's judgment in *R. v. Morgentaler* (No. 2), *supra*, counsel on behalf of the Attorney General of Canada applied to adjourn the hearing of the appeal. The respondent argued that the issue was now moot as s. 251 of the *Criminal Code* had been nullified and that the two remaining constitutional questions (numbers 1 and 3) which simply ask whether a child *en ventre sa mère* is entitled to the protection of ss. 7 and 15 of the *Charter* respectively are not severable from the other, now moot constitutional questions. Although the respondent claimed the matter was moot, no application to quash the appeal was made. The application to adjourn the hearing of the appeal was denied by Chief Justice Dickson on July 19, 1988, leaving it to the Court to address the mootness issue.

I am of the opinion that the appeal should be dismissed on the grounds that: (1) Mr. Borowski's case has been rendered moot and (2) he has lost his standing. When section 251 was struck down, the basis of the action disappeared. The initial prayer for relief was no longer applicable. The foundation for standing upon which the previous decision of this Court was based also disappeared.

Mootness

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

When is an Appeal Moot? -- The Authorities

The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

In *The King ex rel. Tolfree v. Clark*, [1943 CanLII 3 \(SCC\)](#), [1944] S.C.R. 69, this Court refused to grant leave to appeal to applicants seeking a judgment excluding the respondents from sitting and exercising their functions as Members of the Ontario Legislative Assembly. However, the Legislative Assembly had been dissolved prior to the hearing before this Court. As a result, Duff C.J., on behalf of the Court, held at p. 72:

It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. [Emphasis added.]

A challenged municipal by-law was repealed prior to a hearing in *Moir v. The Corporation of the Village of Huntingdon* (1891), [1891 CanLII 36 \(SCC\)](#), 19 S.C.R. 363, leading to a conclusion that the appealing party had no actual interest and that a decision could have no effect on the parties except as to costs. Similarly, in a fact situation analogous to this appeal, the Privy Council refused to address the constitutionality of challenged legislation where two statutes in question were repealed prior to the hearing: *Attorney-General for Alberta v. Attorney-General for Canada*, [1938 CanLII 251 \(UK JCPC\)](#), [1939] A.C. 117 (P.C.)

Appeals have not been entertained in situations in which the appellant had agreed to an undertaking to pay the respondent the damages awarded in the court below plus costs regardless of the disposition of the appeal: *Coca-Cola Company of Canada Ltd. v. Mathews*, [1944 CanLII 9 \(SCC\)](#), [1944] S.C.R. 385, and *Sun Life Assurance Company of Canada v. Jervis*, [1944] A.C. 111. In *Coca-Cola v. Mathews*, Rinfret C.J. held the result of the undertaking was to eliminate any further *lis* between the parties such that the Court would have been forced to decide an abstract proposition of law.

As well, the sale of a restaurant for which a renewal of a licence was sought as required by the impugned municipal by-law rendered an issue technically moot: *Vic Restaurant Inc. v. City of*

Montreal, 1958 CanLII 78 (SCC), [1959] S.C.R. 58. Issues in contention may be of a short duration resulting in an absence of a live controversy by the time of appellate review. Such a situation arose in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, 1967 CanLII 116 (SCC), [1967] S.C.R. 628, in which the cessation of a strike between the parties ended the actual dispute over the validity of an injunction prohibiting certain strike action by one party.

The particular circumstances of the parties to an action may also eliminate the tangible nature of a dispute. The death of parties challenging the validity of a parole revocation hearing (*Re Cadeddu and The Queen* (1983), 1983 CanLII 1763 (ON CA), 41 O.R. (2d) 481 (C.A.)) and a speeding ticket (*R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234) ended any concrete controversy between the parties.

As well, the inapplicability of a statute to the party challenging the legislation renders a dispute moot: *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357. This is similar to those situations in which an appeal from a criminal conviction is seen as moot where the accused has fulfilled his sentence prior to an appeal: *Re Maltby v. Attorney-General of Saskatchewan* (1984), 1984 CanLII 2546 (SK CA), 10 D.L.R. (4th) 745 (Sask. C.A.)

The issue of mootness has arisen more frequently in American jurisprudence, and there, the doctrine is more fully developed. This may be due in part to the constitutional requirement, contained in s. 2(1) of Article III of the American Constitution, that there exist a "case or controversy":

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

However, despite the constitutional enshrinement of the principle, the mootness doctrine has its roots in common law principles similar to those in Canada: see "The Mootness Doctrine in the Supreme

Court" (1974), 88 *Harvard L.R.* 373, at p. 374. Situations resulting in a finding of mootness are similar to those in Canada. For example, in *Hall v. Beals*, 396 U.S. 45 (1969), a challenge to a Colorado voter residency requirement of six months was held moot due to a legislative change in the law removing the plaintiff from the application of the statute. Mootness was also raised in *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), where a defendant voluntarily ceased allegedly unlawful conduct. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), mootness was an issue where an accused completed his sentence prior to an appeal of his conviction.

The American jurisprudence indicates a similar willingness to consider the merits of an action in some circumstances even when the controversy is no longer concrete and tangible. The rule that abstract, hypothetical or contingent questions will not be heard is not absolute (see: Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 84; Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory" (1974), 62 *Calif. L.R.* 1385). A two-stage process is involved in which a court may consider the merits of an appeal even where the issue is moot.

Is this Appeal Moot?

In my opinion, there is no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared. The basis for the action was a challenge relating to the constitutionality of subss. (4), (5) and (6) of s. 251. That section of the *Criminal Code* having been struck down in *R. v. Morgentaler* (No. 2), *supra*, the *raison d'être* of the action has disappeared. None of the relief claimed in the statement of claim is relevant. Three of the five constitutional questions that were set explicitly concern s. 251 and are no longer applicable. The remaining two questions addressing the scope of ss. 7 and 15 *Charter* rights are not severable from the context of the original challenge to s. 251. These questions were only ancillary to the central issue of the alleged unconstitutionality of the abortion provisions of the *Criminal Code*. They were a mere step in the process of measuring the impugned provision against the *Charter*.

In any event, this Court is not bound by the wording of any constitutional question which is stated. Nor may the question be used to transform an appeal into a reference: *Vadeboncoeur v. Landry*,

1976 CanLII 182 (SCC), [1977] 2 S.C.R. 179, at pp. 187-88, and *Bisaillon v. Keable*, 1983 CanLII 26 (SCC), [1983] 2 S.C.R. 60, at p. 71. The procedural requirements of Rule 32 of the *Rules of the Supreme Court of Canada* are not designed to introduce new issues but to define with precision the constitutional points in issue which emerge from the record. Rule 32 provides:

32. (1) When a party to an appeal

- (a) intends to raise a question as to the constitutional validity or the constitutional applicability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder,
- (b) intends to urge the inoperability of a statute of the Parliament of Canada or of a legislature of a province or of Regulations made thereunder.

such party shall, upon notice to the other parties, apply to the Chief Justice or a Judge for the purpose of stating the question, within thirty days from the granting of leave to appeal or within thirty days from the filing of the notice of appeal in an appeal with leave of the court of final resort in a province, the Federal Court of Appeal, or in an appeal as of right.

The questions cannot, therefore, be employed as an independent basis for supporting an appeal that is otherwise moot.

By reason of the foregoing, I conclude that this appeal is moot. It is necessary, therefore, to move to the second stage of the analysis by examining the basis upon which this Court should exercise its discretion either to hear or to decline to hear this appeal.

The Exercise of Discretion: Relevant Criteria

Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. This same problem in the United States led commentators there to remark that "the law is a morass of inconsistent or unrelated theories, and cogent judicial generalization is sorely needed." (Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, at p. 1387). I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal*, *supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

In the United States, the role of collateral consequences in the exercise of discretion to hear a case is well recognized. In *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U.S. 433 (1911), the United States Supreme Court was asked to examine an order of the Interstate Commerce Commission which fixed maximum rates for certain transportation charges. Despite the expiry of this order, it was held, in part, that the remaining potential liability of the railway company to shippers comprised a collateral consequence justifying a decision on the merits. The principle that collateral consequences of an already completed cause of action warrant appellate review was most clearly stated in *Sibron v. New York*, *supra*. The appellant in that case appealed his conviction although his sentence had already been completed. At page 55, Warren C.J. stated:

. . . most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness."

In Canada, the cases of *Law Society of Upper Canada v. Skapinker*, *supra*, and *R. v. Mercure*, *supra*, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.

The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal*, *supra*.

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be

tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970 CanLII 192 \(SCC\)](#), [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973 CanLII 135 \(SCC\)](#), [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1977 CanLII 162 \(SCC\)](#), [1978] 1 S.C.R. 470, and *Kates and Barker*, *supra*, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

This was the basis for the exercise of this Court's discretion in the *Re Opposition by Quebec to a Resolution to amend the Constitution*, [1982 CanLII 219 \(SCC\)](#), [1982] 2 S.C.R. 793. The question of the constitutionality of the patriation of the Constitution had, in effect, been rendered moot by the occurrence of the event. The Court stated at p. 806:

While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court.

In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered.

Patently, the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient. National importance is a requirement for all cases before this Court except with respect to appeals as of right; the latter, Parliament has apparently deemed to be in a category of

sufficient importance to be heard here. There must, therefore, be the additional ingredient of social cost in leaving the matter undecided. This factor appears to have weighed heavily in the decision of the majority of this Court in *Forget v. Quebec (Attorney General)*, 1988 CanLII 51 (SCC), [1988] 2 S.C.R. 90.

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 67.)

In my opinion, it is also one of the three basic purposes of the mootness doctrine in Canada and a most important factor in this case. I generally agree with the following statement in P. Macklem and E. Gertner: "Re Skapinker and Mootness Doctrine" (1984), 6 *Sup. Ct. L. Rev.* 369, at p. 373:

The latter function of the mootness doctrine -- political flexibility -- can be understood as the added degree of flexibility, in an allegedly moot dispute, in the law-making function of the Court. The mootness doctrine permits the Court not to hear a case on the ground that there no longer exists a dispute between the parties, notwithstanding the fact that it is of the opinion that it is a matter of public importance. Though related to the factor of judicial economy, insofar as it implies a determination of whether deciding the case will lead to unnecessary precedent, political flexibility enables the Court to be sensitive to its role within the Canadian constitutional framework, and at the same time reflects the degree to which the Court can control the development of the law.

I prefer, however, not to use the term "political flexibility" in order to avoid confusion with the political questions doctrine. In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to

suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

Exercise of Discretion: Application of Criteria

Applying these criteria to this appeal, I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot.

The second factor to be considered is the need to promote judicial economy. Counsel for the appellant argued that an extensive record had been developed in the courts below which would be wasted if the case were not decided on the merits. Although there is some merit in this position, the same can be said for most cases that come to this Court. To give effect to this argument would emasculate the mootness doctrine which by definition applies if at any stage the foundation for the action disappears. Neither can the fact that this Court reserved on the preliminary points and heard the appeal be weighed in favour of the appellant. In the absence of a motion to quash in advance of the appeal, it was the only practical course that could be taken to prevent the possible bifurcation of the appeal. It would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it.

None of the other factors that I have canvassed which justify the application of judicial resources is applicable. This is not a case where a decision will have practical side effects on the rights of the parties. Nor is it a case that is capable of repetition, yet evasive of review. It will almost certainly be possible to bring the case before the Court within a specific legislative context or possibly in review of specific governmental action. In addition, an abstract pronouncement on foetal rights in this case would not necessarily promote judicial economy as it is very conceivable that the courts will be asked to examine specific legislation or governmental action in any event. Therefore, while I express no opinion as to foetal rights, it is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation.

Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler (No. 2)*, *supra*, per Dickson C.J., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.

Even if I were disposed in favour of the appellant in respect to the first two factors which I have canvassed, I would decline to exercise a discretion in favour of deciding this appeal on the basis of the third. One element of this third factor is the need to demonstrate some sensitivity to the effectiveness or efficacy of judicial intervention. The need for courts to exercise some flexibility in the application of the mootness doctrine requires more than a consideration of the importance of the subject matter. The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do. What the appellant seeks is to turn this appeal into a private reference. Indeed, he is not seeking to have decided the same question that was the subject of his action. That question related to the validity of s. 251 of the *Criminal Code*. He now wishes to ask a question that relates to the *Canadian Charter of Rights and Freedoms* alone. This is not a request to decide a moot question but to decide a different, abstract question. To accede to this request would intrude on the right of the executive to order a reference and pre-empt a possible

decision of Parliament by dictating the form of legislation it should enact. To do so would be a marked departure from the traditional role of the Court.

Having decided that this appeal is moot, I would decline to exercise the Court's discretion to decide it on the merits.

Standing

Mr. Borowski's original action alleged that subss. (4), (5) and (6) of the *Criminal Code* violated the s. 1 right to life of the *Canadian Bill of Rights: Minister of Justice of Canada v. Borowski, supra*. This Court held Borowski had standing as he was able to demonstrate a "genuine interest" in the validity of the legislation.

Standing was granted premised upon Mr. Borowski's desire to challenge specific legislation. Martland J. considered the earlier standing decisions of the Supreme Court in *Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, and *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265, and concluded that the appellant had standing by reason of his "genuine interest as a citizen in the validity of the legislation" under attack (at p. 598):

The Court relied heavily upon the decision in *Thorson, supra*, where Laskin J. (as he then was), speaking for the majority, stated at p. 161:

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised [Emphasis added.]

I believe these decisions were clear in allowing an expanded basis for standing where specific legislation is challenged on constitutional grounds.

There have been two significant changes in the nature of this action since this Court granted Mr. Borowski standing in 1981. The claim is now premised primarily upon an alleged right of a foetus to

life and equality pursuant to ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Secondly, by holding s. 251 to be of no force and effect in *R. v. Morgentaler (No. 2)*, *supra*, the legislative context of this claim has disappeared.

By virtue of s. 24(1) of the *Charter* and 52(1) of the *Constitution Act, 1982*, there are two possible means of gaining standing under the *Charter*. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In my opinion s. 24(1) cannot be relied upon here as a basis for standing. Section 24(1) clearly requires an infringement or denial of a *Charter*-based right. The appellant's claim does not meet this requirement as he alleges that the rights of a foetus, not his own rights, have been violated.

Nor can s. 52(1) of the *Constitution Act, 1982* be invoked to extend standing to Mr. Borowski. Section 52(1) reads:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This section offers an alternative means of securing standing based on the *Thorson, McNeil, Borowski* trilogy expansion of the doctrine.

Nevertheless, in the same manner that the "standing trilogy" referred to above was based on a challenge to specific legislation, so too a challenge based on s. 52(1) of the *Constitution Act, 1982* is restricted to litigants who challenge a law or governmental action pursuant to power granted by law. The appellant in this appeal challenges neither "a law" nor any governmental action so as to engage the provisions of the *Charter*. What the appellant now seeks is a naked interpretation of two provisions of the *Charter*. This would require the Court to answer a purely abstract question which

would in effect sanction a private reference. In my opinion, the original basis for the appellant's standing is gone and the appellant lacks standing to pursue this appeal.

Accordingly, the appeal is dismissed on both the grounds that it is moot and that the appellant lacks standing to continue the appeal. In my opinion, in lieu of applying to adjourn the appeal, the respondent should have moved to quash. Certainly, such a motion should have been brought after the adjournment was denied. Failure to do so has resulted in the needless expense to the appellant of preparing and arguing the appeal before this Court. In the circumstance, it is appropriate that the respondent pay to the appellant the costs of the appeal incurred subsequent to the disposition of the motion to adjourn which was made on July 19, 1988.

Appeal dismissed.

Solicitors for the appellant: Shumiatcher - Fox, Regina.

Solicitors for the intervener Interfaith Coalition on the Rights and Wellbeing of Women and Children: Campbell, Godfrey & Lewtas, Toronto.

Solicitor for the intervener R.E.A.L. Women of Canada: Angela M. Costigan, Toronto.

Solicitor for the respondent: Frank Iacobucci, Ottawa.

Solicitors for the intervener Women's Legal Education and Action Fund (LEAF): Tory, Tory, DesLauriers & Binnington, Toronto.

TAB 55

Ontario Northland Transportation Commission (Re), 2013 CanLII 61848 (ON IPC)

Date: 2013-09-13
File number: PO-3255; PA12-343
Citation: Ontario Northland Transportation Commission (Re), 2013
CanLII 61848 (ON IPC), <<https://canlii.ca/t/g0s0p>>,
retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3255

Appeals PA12-343 & PA12-355

Ontario Northland Transportation Commission

September 13, 2013

Summary: Two individuals submitted requests to the Ontario Northland Transportation Commission (the ONTC) for information about payments made to a named third party and/or a named advertising company. In each case, the ONTC notified the third party (the affected party) of the request and sent a record it had created containing information claimed to be responsive to

each request. The affected party opposed the disclosure of both records, arguing that they do not contain information about him or his company. The ONTC issued access decisions, indicating that it would disclose the records. The affected party appealed the decisions to this office. For the purpose of the appeals, the ONTC created a third, joint, record for both requests and submitted it to this office. The adjudicator finds that the joint record created by the ONTC is not responsive to either request and, instead, orders disclosure of the two records sent to the appellant upon notification, with qualifying statements.

Statutes Considered: [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31](#), as amended, sections 24 and 54(3).

Orders and Investigation Reports Considered: Order MO-2863.

OVERVIEW:

[1] This order addresses two requests that were submitted six-weeks apart by different requesters under the [Freedom of Information and Protection of Privacy Act](#) (the *Act*) to the Ontario Northland Transportation Commission (the ONTC). The first request sought access to "... the cost of contracts the ONTC paid out to [a named company] from 1978 to 1993."^[1] The second request sought "... copies of all payments from the [ONTC] to [a named individual] and/or [a named company] from 1978 to present [2012]."^[2]

[2] The ONTC created a record for each request containing information about money paid to specific vendors in certain years. The ONTC notified the individual named in both requests as an affected party, and in accordance with [section 28](#) of the *Act*.^[3] The ONTC provided the affected party with a copy of the relevant record created for each request.

[3] In response to the notification letters sent by the ONTC regarding both requests, the affected party responded, opposing disclosure of the records and expressing concern about the source, and accuracy, of the information in the records created by the ONTC. In particular, he disclaimed any interest in the company identified in both of the records created by the ONTC for notification purposes. Specifically, the affected party advised the ONTC that in 1992, he sold the assets of the company named in the requests to the company listed in the records created by the ONTC.^[4]

[4] After receiving the affected party's representations, the ONTC issued a decision granting full access to the created records to both requesters. Upon receipt of the ONTC's access decisions, the affected party (now the appellant) appealed them to this office, which opened Appeals PA12-343 and PA12-355.

[5] A mediator was appointed to explore resolution of the issues. The same mediator dealt with both appeals. During mediation, some clarification was achieved through discussions with the parties, including the ONTC, the appellant and the original requesters.^[5]

[6] In Appeal PA12-343, respecting "contracts paid out" to the named company from 1978 to 1993, the original requester clarified that he was seeking information related to the appellant with respect to the business he had with the ONTC and what he was paid. In Appeal PA12-355, respecting "all payments" by the ONTC to the appellant or the

named company from 1978 to 2012, the original requester confirmed that she was seeking access to records relating to payments made to the appellant and/or his company.

[7] As stated, two separate records were created by the ONTC in response to the two requests and were provided to the appellant with the section 28 notification and with the subsequent access decisions. However, when the appeals were opened with this office, the ONTC created a different, third record and submitted a copy of the record as the single responsive record for both appeals. The appellant strongly disputes the responsiveness of the third record, in particular.

[8] As a mediated resolution was not possible, the appeals were transferred to the inquiry stage and assigned to me. I decided to conduct a joint inquiry into Appeals PA12-343 and PA12-355.

[9] In the usual course, an adjudicator sends out a Notice of Inquiry outlining the issues to seek representations from the party bearing the onus of proof with respect to establishing their position. Usually, this initial Notice of Inquiry is sent to the institution claiming exemptions under the [Act](#) to deny access to requested records. In third party matters, such as these two appeals, the Notice of Inquiry is typically sent first to the third party appellant, who is opposing an institution's proposed disclosure of records. After reviewing the files for Appeals PA12-343 and PA12-355, however, I concluded that further clarification of the ONTC's position on responsiveness should be obtained prior to contacting the appellant for his representations.

[10] Accordingly, I sent a letter Notice of Inquiry to the ONTC. I received representations from legal counsel for the ONTC in these appeals. The ONTC's representations contained yet another (fourth) record claimed to be responsive to both requests, which the ONTC asked me to share with the appellant. After obtaining additional clarification regarding submissions made by the ONTC, I sent a modified letter Notice of Inquiry to the appellant, along with the ONTC's representations and various attachments. The appellant submitted brief representations in response.

[11] In this order, I find that the record created for the appeal of the ONTC's decisions in Appeals PA12-343 and PA12-355 is not responsive to the requests. Instead, I order the ONTC to disclose the two separate records created for the purpose of notifying the appellant of the requests, under certain terms.

DISCUSSION:

[12] At an earlier stage of these appeals, the ONTC also argued that [section 17\(1\)](#) of the [Act](#) does *not* apply to the record and that it should be disclosed to the requesters. Notably, however, the appellant apparently does not claim that the mandatory third party information exemption in section 17(1) applies, or that the mandatory personal privacy exemption in section 21(1) does. Rather, as stated, he argues that the information the ONTC proposes to disclose is inaccurate or is not responsive to the requests. Accordingly, there is no appeal of these exemptions before me.

Is the record created by the ONTC responsive to the requests?

[13] As outlined in the introduction to this order, the ONTC initially provided the appellant with a separate responsive record for each request at the notification and decision stages. The record created by the ONTC for the first request (Appeal PA12-343) covers the period from 1988 to 1992 and consists of a chart outlining payments apparently made to a certain company by the ONTC in those five years. The record created by the ONTC in response to the second request (Appeal PA12-355) contains data from the years 1988 to 1992, 1995 and 2006 and consists of a chart listing payments apparently made to the appellant and two named companies by the ONTC.

[14] On appeal, however, the ONTC submitted a single, different record that it claimed is responsive to both appeals. This third record appears to combine the information in the two separate records initially created by the ONTC at the notification stage.^[6] The appellant challenges disclosure of the record because he believes that the information does not relate to him, but rather to a company in which he has never had an interest, financial or otherwise. The appellant's position is, essentially, that the numerous created records are not responsive to the requests. The ONTC maintains that the records are responsive to the requests, based on corporate searches and (unidentified) "internal documents."

[15] In the letter Notice of Inquiry sent to the parties, I set out the provisions of section 24 of the *Act* and the principles associated with determining responsiveness, as developed in past orders of this office. I noted that section 24 imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. The relevant parts state:

24(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...
(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, any ambiguity in the request should be resolved in the requester's favour.^[7]

[17] To be considered responsive to the request, records must "reasonably relate" to the request.^[8]

[18] In the letter Notice of Inquiry, I also stated the following:

Most relevant in the circumstances of these appeals is the principle described in the second bullet point, above, namely that to be considered

responsive to a request, information must be *reasonably related to* the request. Based on the wording of the requests submitted in Appeals PA12-343 and PA12-355, I am not satisfied that the record created by the ONTC^[9] is responsive to both requests. In fact, it appears that the created record contains information that is outside the scope of both requests and/or is inaccurate. While determination of the accuracy of a record is not, strictly speaking, a matter within the jurisdiction of this office, it is effectively raised in these appeals in the context of determining responsiveness under [section 24\(1\)](#) of the *Act*. ...

On this point, I require confirmation from the ONTC regarding what record is considered responsive in Appeals PA12-343 and PA12-355: the two versions sent to [the appellant] with notification, or the single version contained in the appeal files' records folder?

To explore and potentially resolve the issue of responsiveness in these appeals, and perhaps the appeals themselves, I am asking the ONTC to provide me with representations regarding the steps taken to identify information responsive to the request.

The ONTC is asked to provide information about what sources or documents were searched to compile the information about contracts with [the named company], or payments made to [the appellant] or [the named company], during the time periods specified in each request, leading to the creation of the record the ONTC proposes to disclose to the two original requesters. ...

In this regard, I am asking the ONTC to comment on the reporting of contracts with (PA12-343) or payments made to (PA12-355) [the specific company ("HDL")] as being in relation to the appellant. I have reviewed the 1992 incorporation documents for this company that were provided to this office during mediation. I am aware that the ONTC referred to "internal emails" about the appellant's purported involvement with ... HDL after 1992.

However, I am asking the ONTC to **provide representations in support of its position that funds paid to ... HDL by the ONTC constitute information responsive, or *reasonably related to*, the requests for information about the appellant ... in Appeals PA12-343 and PA12-355** [emphasis in original].

Representations

[19] During the inquiry, I did not seek representations from the original requesters because I concluded that the requesters had clearly conveyed their interest through the wording of each of the requests and during the earlier appeal stages. The requester in Appeal PA12-343 seeks information related to the appellant with respect to business he had with the ONTC and what he was paid. This requester indicates that he does not want information about a company that is not associated with the appellant. The requester in Appeal PA12-355 is looking for payments made by the ONTC to the appellant and any company in which he had an interest.

[20] The ONTC claims that it read the requests “liberally” as seeking information about payments made to the company named in the requests “or to companies with a similar name” within the relevant date range. The ONTC submits that its interpretation of the request was appropriate because:

Neither request should be read as a request for information about payments made to any specific corporation. Neither request uses the words “Inc” “Ltd” or “Corp” to denote the entity about which information is being sought. ... [T]hese factors suggest a general intent rather than an intent to use [the company named in the requests] in [a] technical or limiting way.

[21] The ONTC explains that its database search using the interpretation described above revealed that it had made payments to four specified entities for advertising and communication services. According to the ONTC, these are “payments reasonably related to a request for monies paid to [the named company].” The ONTC submits that it was then faced with:

... two reasonable options. One reasonable option was to go back to the requesters and ask whether they wanted access to information about payments made to ... HDL ..., [the appellant] and [another company with the appellant’s surname]. The other reasonable option was to decide the requests exactly as ONTC did.

ONTC could *not* have answered the requests by advising the requesters that it had no responsive records. ...

ONTC came to believe that the figures in its database that show payments to ... HDL ... from 1988^[10] to 1992 reflect payments actually made to [the company named in the requests] from 1988 to 1992.

[22] Second, the ONTC indicates that it “takes no position on the appellant’s affiliation with ... HDL or [a named company]” and claims that the issue of affiliation is not relevant in this appeal. The ONTC explains that it provided notice to the appellant because it believed that he was affiliated with HDL and the other corporations that included his surname in the company name.

[23] Third, the ONTC claims that the two separate records that it provided to the appellant in giving notice do not disclose all information in the ONTC’s custody or control. According to the ONTC, this “explains the discrepancy between the records under appeal” and the additional record sent to this office.^[11] The ONTC provided an additional, fourth, version of a payment record and pointed out certain features of it in comparison to the two records initially sent to the appellant with the section 28 notice.

[24] Finally, the ONTC submits that the responsive records were produced from its database “as data was recorded in the database.” The ONTC acknowledges that the responsive records appear to erroneously attribute to HDL revenues that were actually paid to the company named in the requests. The ONTC explains:

Given ... HDL ... did not exist until 1992, it appears that the attribution of payments to ... HDL ... [from] 1988 to 1992 is inaccurate in the records [as

provided to the appellant for notification purposes]. ONTC believes that it re-assigned [the] vendor number [of the company named in the requests] to ... HDL ... at some point after the sale and that the figures in its database that show payments to ... HDL ... from 1988 to 1992 reflect payments actually made to [the company named in the requests] from 1988 to 1992.

[25] With respect to this error, the ONTC proposes to address the payment attribution error by providing a qualifying statement to the requesters with the record. The record the ONTC is referring to is the fourth version of the record produced and submitted as Tab "G" with the ONTC's representations. The qualifying statement would indicate to the requesters that HDL had purchased the assets of the company named in the requests "in or around March 1992." The ONTC adds that the appellant ought to advise the ONTC if he views the qualifying statement as inaccurate.^[12]

[26] In response to the initial notification by the ONTC, the appellant stated that:

... HDL ... is NOT the company the request was made for, and therefore the statement you plan on issuing is completely inaccurate. To further re-iterate, I have never had any interest in ... HDL

[27] During mediation, the appellant reiterated the earlier statements about his lack of connection with HDL and stated: "There is no information relating to [me] contained in the records at issue." During the inquiry, the appellant responded to my acknowledgement of concerns with responsiveness (in the letter Notice of Inquiry) by expressing agreement with my "preliminary view" that the "record contains information that is outside the scope of both requests and/or is inaccurate." Further, the appellant submits that:

ONTC has no records of any cost of contracts paid out to [the company named in the requests] from 1978 to 1993. And they have no copies of payments from ONTC to [the company] from 1978 to present.

As I have repeatedly confirmed with ONTC, I do not have, and have never had, any interest or ownership in ... HDL ..., which is the record they intend to disclose.

Analysis and findings

[28] To begin, based on my consideration of the wording of the two requests submitted, and the confirmation provided by the requesters after the appeals were filed with this office, I am satisfied that each requester's interest was clear. I find that there was a shared interest in learning about funds paid by the ONTC to the appellant and his advertising company specifically, and that it did not extend to other unrelated entities whose names incidentally contained the appellant's surname.

[29] The importance of ensuring a request's clarity early on in the process, so that an institution might meet its obligations under the [Act](#), has been discussed in many orders of this office. Adjudicator Frank DeVries recently summarized it in Order MO-2863, as follows:

... Clarity concerning the scope of a request and what the responsive records are is a fundamental first step in responding to a request and, subsequently, determining the issues in an appeal. Furthermore, adopting a liberal interpretation of the request ensures that records which might be responsive to the request are not omitted from the search. In addition, if an institution chooses to adopt a limited interpretation of a request, it ought to indicate to a requester the limits of its search.^[13]

[30] I agree with Adjudicator DeVries. Such clarity is also crucial in circumstances where the attribution of information, or its reasonable relation to the request, is in question. In my view, the ONTC's processing of the requests went astray because the approach to identifying responsive information involved searching for "companies with a similar name" to the one listed in the requests *without further exploration or clarification* with the requesters. I reject the ONTC's submission that the absence of words such as "Inc." "Ltd." or "Corp." accompanying the company named in the requests "suggests a general intent rather than an intent to use [the company named in the requests] in [a] technical or limiting way." In my view, the ONTC had an obligation to indicate to the requesters the limits to its identification of responsive records earlier on in the processing of the requests, or at least as soon as the appellant had expressed reasonable concerns about responsiveness, which I accept that he did upon notification of the proposed disclosures.

[31] The ONTC conceded during this inquiry that it could have "go[ne] back to the requesters and ask[ed] whether they wanted access to information about payments made to ... HDL ..." as well as to the appellant and the company named in the requests. However, it chose not to do so, in spite of the appellant challenging the connection between the information produced by the ONTC as responsive and, in particular, his connection to HDL. This was unfortunate.

[32] To further compound matters, the ONTC amalgamated the information from the two separate records it created in Appeals PA12-343 and PA12-355 for notification purposes and created a third record for this office in processing the appeals. No rationale for creating a joint record has been provided. This order addresses two requests from two separate individuals, and although the subject matter is quite similar, the scope of each request is different. Accordingly, I find that the single record created and submitted to this office on appeal contains information that is outside the scope of each request.

[33] As stated, my preliminary view that this single record contains information falling outside the scope of each request was conveyed to the parties during the inquiry. This led the ONTC to create yet another (fourth) record, the one appearing at Tab "G" of its representations. This record contains additional information relating to payments made to two more vendors that appear, on the evidence before me, to have no connection to the appellant.^[14] As stated earlier, the ONTC claimed that emails or other information in its custody or control suggested a connection between the appellant and HDL after 1992. Despite being asked to provide information about the connection, the ONTC submitted no internal documents or other evidence, aside from the various corporate documents relating to HDL's purchase of the assets of the appellant's advertising company, and other corporate matters.

[34] The ONTC argues that affiliation and accuracy are not for me to determine. However, I must be satisfied by the evidence that the information the ONTC proposes to

disclose to the two original requesters is reasonably related to their respective requests. In my view, disclosure of either of the two records created by the ONTC during the appeal stage that compile (and supplement) the information provided to the appellant for notification purposes would entail disclosure of information that is *not* reasonably related to their requests. Further, I am not satisfied that the qualifying statement proposed by the ONTC (to the effect that HDL had purchased the assets of the company named in the requests “in or around March 1992”) would adequately dispel the impression made by the inclusion of information that is outside the scope of the respective requests.

[35] In fashioning a remedy in this situation, I rely on [subsections 54\(1\) and \(3\)](#) of the [Act](#), which state:

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. ...

Subject to this [Act](#), the Commissioner’s order may contain any terms and conditions the Commissioner considers appropriate.

[36] These provisions do not afford the Commissioner unlimited remedial power, but they do embody the Legislature’s intention that the Commissioner and her delegates should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the [Act](#). ^[15]

[37] In my view, the information that is reasonably related to both of the requests essentially already exists in the form of the two separate records initially created by the ONTC for notification purposes. In saying this, I accept that the listing of HDL as the vendor that supplied advertising services to the ONTC between 1988 and 1992 – when that company did not even exist during most of that period – is the result of an erroneous substitution of HDL for the company named in the requests.

[38] Since no exemptions are claimed and none of the mandatory exemptions apply, I will order the ONTC to disclose the two records, under terms intended to clarify the provenance of the information for the requesters.

[39] In Appeal PA12-343, the ONTC is to disclose the record that shows the cost of contracts the ONTC paid out to the named company from 1978 to 1993. In Appeal PA12-355, the ONTC is to disclose the record that shows payments from the ONTC to the appellant and/or the named company from 1978 to 2012.

[40] Along with each record, the ONTC is to provide each of the requesters with a relevant explanation of the limitations of the information identified as responsive. Specifically, the ONTC should clarify that:

1. There are limitations on the time periods of the responsive information (i.e., for PA12-343, no responsive data exists prior to 1988, or after 1992; and for PA12-355, no responsive data exists prior to 1988, and thereafter, from only seven years of the time period identified in the request);

2. The vendor name associated with the amounts for 1988-1992 (i.e., HDL) is not correct and requires qualification. As proposed by the ONTC, this note should explain the inadvertent and erroneous re-assignment of the vendor number for the company named in the request(s) to HDL, following the sale of assets of the named company to HDL in or around March 1992.
3. There is no documentation to support an accurate determination of the portion of the 1992 figure that was paid out to the company named in the request, compared to the portion of it paid out to HDL, after the March 1992 sale of the named company's assets to HDL. For this reason, the figure shown for 1992 is not considered a reliable representation of "contracts paid out" to the named company (PA12-343) or "payments made" to the appellant or the named company (PA12-355) for that year, as applicable.

[41] The ONTC may also include any further clarification thought necessary to ensure the original requesters' understanding of the content of each record.

ORDER:

I order the ONTC to disclose the two records to the respective requesters in Appeals PA12-343 and PA12-355, in accordance with the terms imposed by this order. The ONTC must send the relevant record to each of the original requesters by **October 21, 2013, but not before October 16, 2013.**

Original Signed by: _____

September 13, 2013 _____

Daphne Loukidelis
Adjudicator

[1] The first request was dated, and received by the ONTC on, April 30, 2012. This request led to Appeal PA12-343.

[2] The second request was undated, but is date-stamped by the ONTC as received on June 11, 2012. The second request led to Appeal PA12-355.

[3] Section 28(1) requires notification of affected parties prior to disclosure of information that might be subject to the mandatory third party information or personal privacy exemptions in [sections 17\(1\) and 21\(1\)](#) of the *Act*. In this way, affected parties are afforded an opportunity to provide submissions as to whether the requested records should be disclosed.

[4] This company is identified in this order as "HDL."

[5] For example, the ONTC advised that no data is available for the years before 1988.

[6] The record submitted to this office by the ONTC as the responsive record for both appeals is an 8½ x 14 chart with columns titled Vendor Number, Vendor Name, the years 1988 to 2012, and an untitled column containing the totals.

[7] Orders P-134 and P-880.

[8] Orders P-880 and PO-2661.

[9] The third, different, record, printed on 8½ x 14 paper, as described above.

[10] Throughout the ONTC's representations, reference is made to "1998" in the context of the time period of the responsive information, which is 1988 to 1992. Wherever this minor error appears in quoted excerpts of the ONTC's representations, I have corrected it to read "1988."

[11] "Additional record in your files" appears to refer to the single record submitted to this office as responsive to both requests.

[12] The ONTC's representations include submissions on the IPC's lack of jurisdiction over the "accuracy of the ONTC's business records." This order does not review the accuracy of the figures and so these representations are not set out in their entirety.

[13] In this passage, Adjudicator DeVries also outlines the issue of responsiveness as discussed in Orders P-880 and PO-1730.

[14] These two additional vendors appear to be related to HDL and/or its successor company.

[15] See Order M-618, where former Commissioner Tom Wright reviewed subsections 43(1) and 43(3) of *MFIPPA*, the equivalent provisions in the *Act's* municipal counterpart. See also the purposes of the *Act*, which are outlined in section 1.

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TAB 56

Penner v. Niagara (Regional Police Services Board), 2013 SCC 19 (CanLII), [2013] 2 SCR 125

Date:	2013-04-05
File number:	33959
Other citations:	356 DLR (4th) 595 — 442 NR 140 — 226 ACWS (3d) 139 — 304 OAC 106 — [2013] EXP 1164 — 32 CPC (7th) 223 — 49 Admin LR (5th) 1 — EYB 2013-220248 — JE 2013-639 — [2013] SCJ No 19 (QL) — [2013] ACS no 19
Citation:	Penner v. Niagara (Regional Police Services Board), 2013 SCC 19 (CanLII), [2013] 2 SCR 125, < https://canlii.ca/t/fw06 >, retrieved on 2025-10-28
Most recent unfavourable mention	Claybourn v. Toronto Police Services Board , 2013 HRT 1298 (CanLII) [...] provision in British Columbia's Human Rights Code as conferring only a very narrow discretion to hear the application that had been filed before the BCHRT. In my view, the reasoning behind the majority's decision, to the extent that it is still in force after Penner , is not applicable to s. 45.1 of the Ontario Code. [...]



SUPREME COURT OF CANADA

CITATION: Penner v. Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125 **DATE:** 20130405
DOCKET: 33959

BETWEEN:

Wayne Penner
Appellant
and

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow

Respondents

- and -

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association

Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT: Cromwell and Karakatsanis JJ. (McLachlin C.J. and Fish J. concurring)
(paras. 1 to 72)

DISSENTING REASONS: LeBel and Abella JJ. (Rothstein J. concurring)
(paras. 73 to 127)

Penner v. Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125

Wayne Penner

Appellant

v.

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow

Respondents

and

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association

Interveners

Indexed as: Penner v. Niagara (Regional Police Services Board)

File No.: 33959.

2012: January 11; 2013: April 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Issue estoppel — Administrative law — Police disciplinary proceedings — Complaint alleging police misconduct brought under [Police Services Act, R.S.O. 1990, c. P.15](#) (“PSA”) — Civil action for damages arising from same incident also commenced — PSA hearing officer finding no misconduct and dismissing complaint — Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer’s decision — Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created — Whether unfairness arises from application of issue estoppel in this case.

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the [Police Services Act](#) (“PSA”), alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer’s decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil action struck on the basis of issue estoppel. While finding several factors weighed against the

application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

Held (LeBel, Abella and Rothstein JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the parties' legitimate and reasonable expectations but may also undermine the efficacy and policy

goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way; however, the Court of Appeal failed to fully analyze the fairness of using the results of that process to preclude P's civil action. Nothing in the legislative text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

Per LeBel, Abella and Rothstein JJ. (dissenting): The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel

seeks to protect the reasonable expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, [2011 SCC 52](#), [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the “very limited” discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. The ultimate goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to

administrative law. The Court's residual discretion to refuse to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *PSA* and that required in a civil trial is irrelevant in this case. The hearing officer made unequivocal findings that there was virtually no evidence to support P's claims. That means that there is simply no evidence to support P's claims whatever standard of proof is applied. P should not be allowed to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of

Police designated an outside prosecutor and an independent adjudicator. Similar methods of appointment are quite common in other parts of the law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

Cases Cited

By Cromwell and Karakatsanis JJ.

Applied: *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), [2008 CanLII 729 \(ON SCDC\)](#), 232 O.A.C. 317; *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#), [2003] 3 S.C.R. 77; *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), [2006 CanLII 24342 \(ON SCDC\)](#), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), [1999 CanLII 3686 \(ON CA\)](#), 42 O.R. (3d) 321; *Schwenneke v. Ontario* (2000), [2000 CanLII 5655 \(ON CA\)](#), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), [1998 CanLII 6467 \(BC CA\)](#), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, [2002 YKCA 4 \(CanLII\)](#); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ. (dissenting)

British Columbia (Workers' Compensation Board) v. Figliola, [2011 SCC 52](#), [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, [2011 SCC 7](#), [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011 SCC 53](#), [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853; *Parker v. Niagara Regional Police Service* (2008), [2008 CanLII 729 \(ON SCDC\)](#), 232 O.A.C. 317; *EnerNorth Industries Inc., Re*, [2009 ONCA 536](#), 96 O.R. (3d) 1;

Tsaoussis (Litigation Guardian of) v. Baetz (1998), [1998 CanLII 5454 \(ON CA\)](#), 41 O.R. (3d) 257, leave to appeal refused, [1999] 1 S.C.R. xiv; *Revane v. Homersham*, [2006 BCCA 8](#), 53 B.C.L.R. (4th) 76; *Angle v. Minister of National Revenue*, [1974 CanLII 168 \(SCC\)](#), [1975] 2 S.C.R. 248; *Boucher v. Stelco Inc.*, [2005 SCC 64](#), [2005] 3 S.C.R. 279; *Rasanen v. Rosemount Instruments Ltd.* (1994), [1994 CanLII 608 \(ON CA\)](#), 17 O.R. (3d) 267; *Schweneke v. Ontario* (2000), [2000 CanLII 5655 \(ON CA\)](#), 47 O.R. (3d) 97; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62](#), [2011] 3 S.C.R. 708; *Wong v. Shell Canada Ltd.* (1995), [1995 CanLII 17974 \(AB CA\)](#), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv; *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

Statutes and Regulations Cited

[O. Reg. 123/98](#), Part V, Sch., s. 2(1)(g)(i), (ii).

[Police Services Act](#), R.S.O. 1990, c. P.15, Part II, Part V, ss. 56, 57, 60(4), 64(1), (7) to (10), 68(1), (5), 69(3), (4), (7), (8), (9), 70(1), 71(1), 76, 80, 83(7), (8), 95.

[Provincial Offences Act](#), R.S.O. 1990, c. P.33.

[Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, r. 21.01.

[Statutory Powers Procedure Act](#), R.S.O. 1990, c. S.22, ss. 10, [10.1](#).

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Moldaver and Armstrong JJ.A.), [2010 ONCA 616](#), 102 O.R. (3d) 688, 267 O.A.C. 259, 325 D.L.R. (4th) 488, 94 C.P.C. (6th) 262, [2010] O.J. No. 4046 (QL), 2010 CarswellOnt 7164, affirming a decision of Fedak J., 2009 CarswellOnt 9420. Appeal allowed, LeBel, Abella and Rothstein JJ. dissenting.

Julian N. Falconer, Julian K. Roy and Sunil S. Mathai, for the appellant.

Eugene G. Mazzuca, Kerry Nash and Rafal Szymanski, for the respondents.

Malliha Wilson, Dennis W. Brown, Q.C., and Christopher P. Thompson, for the intervener the Attorney General of Ontario.

Maureen Whelton and Richard Macklin, for the intervener the Urban Alliance on Race Relations.

Louis Sokolov and Daniel Iny, for the intervener the Criminal Lawyers' Association (Ontario).

Robert D. Holmes, Q.C., for the intervener the British Columbia Civil Liberties Association.

Ian J. Roland and Michael Fenrick, for the intervener the Canadian Police Association.

Tim Gleason and Sean Dewart, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ. was delivered by

[1] CROMWELL AND KARAKATSANIS JJ. — This appeal focuses on the discretionary application of issue estoppel. More particularly, the question is whether the Ontario courts erred by striking many of the claims in the appellant's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

[2] The appellant, Wayne Penner, was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act*, R.S.O. 1990, c. P.15 (“*PSA*”), alleging unlawful arrest and use of unnecessary force. He also started a civil action against the court security officer, the two police officers, their chief of police, and the Regional Municipality of Niagara Regional Police Services Board (“Police Services Board”) in the Superior Court of Justice, claiming damages arising out of the same incident.

[3] Mr. Penner’s complaint under the *PSA* was referred by the Chief of Police to a disciplinary hearing presided over by a retired police superintendent. The police officers were found not guilty of misconduct. Mr. Penner was a party to the disciplinary hearing and the subsequent appeals to the Ontario Civilian Commission on Police Services (“Commission”) and the Divisional Court.

[4] The respondents applied to have the civil action dismissed on the basis of issue estoppel because, in their view, the disciplinary hearing had finally resolved the key issues underpinning Mr. Penner’s civil claims.

[5] Many of Mr. Penner’s civil claims were struck on the basis of issue estoppel. The Ontario Court of Appeal agreed with the motion judge, and determined that the application of issue estoppel would not work an injustice in this case.

[6] On appeal to this Court, the appellant did not seriously challenge that the preconditions of issue estoppel had been met. The issue is whether the Court of Appeal erred in exercising its discretion to apply issue estoppel to bar Mr. Penner’s civil claims. Mr. Penner contends that the application of issue estoppel in this context would work an injustice or unfairness because of the public interest in promoting police accountability. He submits that the courts, as guardians of the Constitution and of individual rights and freedoms, must oversee the exercise of police powers: the importance of this judicial oversight requires that issue estoppel not apply to a disciplinary hearing decision under the *PSA*.

[7] The respondents reply that this case turns upon its own exceptional circumstances, that the civil suit represents a collateral attack on the final decision of the complaints process, and that the courts below were right to apply issue estoppel in order to preclude relitigation of the same issues finally decided in the disciplinary proceedings.

[8] We conclude that there is not and should not be a rule of public policy precluding the applicability of issue estoppel to police disciplinary hearings based upon judicial oversight of police accountability. The flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met. However, in our respectful view, the Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights. Further, it is unfair to use the decision of the Chief of Police's designate to exonerate the Chief in a subsequent civil action. In the circumstances of this case, it was unfair to the appellant to apply issue estoppel to bar his civil action. We would allow the appeal.

I. Background

[9] In January 2003, Mr. Penner was sitting in a Provincial Offences Court while his wife was on trial for a traffic ticket issued by Constable Nathan Parker. It was alleged that Mr. Penner disrupted the proceedings, refused to stop interrupting and to leave when asked to do so, and resisted arrest by Constable Nathan Parker. Constables Parker and Koscinski used force to remove him from the courtroom. Once outside the courtroom, they again used force and handcuffed him. Handcuffed, Mr. Penner was then taken to the Niagara Regional Police station by Constable Parker, where he was strip-searched and put into a holding cell. He sustained a black eye, numerous scrapes, a bruised knee, and a sore wrist, elbow and sore ribs. Mr. Penner was escorted by police to a hospital where he was examined and treated for injuries he had sustained during the arrest. Mr. Penner was subsequently returned to the police station and charged with causing a disturbance, breach of probation and resisting arrest. All charges were withdrawn by the Crown some five months later, in June 2003.

[10] After his arrest, Mr. Penner filed a public complaint under ss. 56 and 57 of the *PSA* against Constables Parker and Koscinski, alleging unlawful or unnecessary arrest, as well as use of unnecessary force. This led to a disciplinary hearing for both police officers. In addition, in July 2003, Mr. Penner filed a statement of claim in the Ontario Superior Court of Justice in relation to the same arrest, by which a civil action was commenced against the Police Services Board, Constables Parker and Koscinski, the Chief of Police and the Court Security Officer. Mr. Penner claimed damages for unlawful arrest, false imprisonment, use of unnecessary force during and after the arrest, an unnecessary strip-search, failure on the part of other officers to prevent his mistreatment, failure to provide timely medical assistance, improper use of handcuffs, malicious prosecution and failure to co-operate with the investigation of his allegations.

II. Summary of the Complaint Proceedings

A. *Disciplinary Hearing Under the PSA (Decision of Superintendent R. J. Fitches, Dated June 28, 2004; A.R., at pp. 99-116)*

[11] Under the *PSA*, a complaint is referred to the chief of police: s. 60(4). (All statutory references are to the legislation as it existed at the relevant time.) The chief is obliged to have the complaint investigated (with some exceptions not relevant here) and, in light of the results, to order a hearing into the matter if he or she is of the opinion that the officer's conduct could constitute misconduct: s. 64(1) and (7). If a hearing is ordered, it is conducted by the chief or a designate on his or her behalf: ss. 64(7) and 76. The chief also appoints the prosecutor: s. 64(8). The complainant is made a party by statute and has participatory rights (s. 69(3) and (4); *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 10 and 10.1), but no access to discovery or production of documents beyond what the prosecution relies on, and there is no right to compel the officer in question to testify: *PSA*, s. 69(7). The issue at the hearing is whether the alleged misconduct has been "proved on clear and convincing evidence" (s. 64(10)) and, if so, what penalty is to be imposed on the officer under s. 68(1) and (5). No remedy or costs may be awarded to the complainant.

[12] Here, disciplinary charges of unnecessary and unlawful arrest and use of unnecessary force were laid against two police officers: [O. Reg. 123/98](#), Part V, Sch., *Code of Conduct*, s. 2(1)(g)(i) and (ii). The Chief appointed a retired police superintendent of the Ontario Provincial Police to conduct the hearing on his behalf. The hearing took place over the course of several days in 2004. Mr. Penner represented himself. As the complainant, he led evidence, cross-examined witnesses and made submissions. Several individuals who were present in the courtroom at the time of Mr. Penner's arrest gave evidence before the hearing officer at the disciplinary hearing: the prosecutor, clerk of the court, court security officer, two lay people awaiting their own respective trials, Mr. Penner, his wife, and Constables Parker and Koscinski.

[13] The hearing officer rejected much of the Penners' testimony. Instead, he relied primarily on the testimony of other witnesses regarding the events surrounding Mr. Penner's arrest and concluded that Constables Parker and Koscinski had reasonable grounds to arrest Mr. Penner for causing a disturbance in a public place. On the issue of whether the officers had the lawful authority to make an arrest in a courtroom under the [Provincial Offences Act](#), R.S.O. 1990, c. P.33, while a Justice of the Peace was presiding, the hearing officer concluded that the prosecutor had failed to provide sufficient evidence to show, "in any clear and cogent way, that Mr. Penner's arrest was not authorized by statute": p. xiii (A.R., at p. 111). The hearing officer therefore dismissed the allegation of unlawful arrest and found the constables not guilty of misconduct on this count.

[14] Turning to the allegation of unnecessary use of force, the hearing officer found that the Constables used a level of force that was necessary to gain control over Mr. Penner. Relying upon his review of the video record at the police station, he found that there was "no clear, convincing, or cogent evidence whatsoever" of unnecessary force there either: p. xvi (A.R., at p. 114).

B. *Appeal Before the Commission (Decision Dated April 22, 2005; A.R., at pp. 117-30)*

[15] As a party to the disciplinary hearing, Mr. Penner appealed the decision of the hearing officer to the Commission pursuant to [s. 70\(1\)](#) of the [PSA](#). He took the position before the

Commission that there were no legal grounds for his arrest.

[16] The Commission concluded that the arrest in the courtroom was unlawful because the Justice of the Peace gave no direction to the Constables to arrest Mr. Penner. The Commission was satisfied that there was clear and convincing evidence that Constables Parker and Koscinski were guilty of misconduct due to an unlawful and unnecessary arrest, and thus any force used was unjustified and unnecessary.

C. *Appeal Before the Ontario Superior Court of Justice — Divisional Court (Parker v. Niagara Regional Police Service (2008), 2008 CanLII 729 (ON SCDC), 232 O.A.C. 317)*

[17] On a further appeal by the constables pursuant to s. 71(1) of the *PSA*, the Divisional Court held that the Commission unreasonably ignored findings of fact made by the hearing officer, and that the Commission was not justified in substituting their own findings. The Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's finding that the constables were not guilty of misconduct.

III. History of the Civil Action

[18] Mr. Penner initiated a civil action in July 2003 based on the same events that formed the subject matter of the disciplinary hearing, alleging, among other things, unlawful arrest and use of excessive force. After the decision from the disciplinary hearing was reinstated by the Divisional Court in January 2008, the respondents filed a motion to dismiss the civil action on the basis of issue estoppel.

A. *Ontario Superior Court of Justice (Fedak J.; 2009 CarswellOnt 9420)*

[19] The motion judge concluded that Mr. Penner was estopped from bringing these claims. Mr. Penner's civil action raised, among others, the same two questions that were already decided by the disciplinary hearing and restated by the Divisional Court: (1) was the arrest lawful?

and (2) was unnecessary force used, either at the court or at the police station? The judge applied the test outlined in *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460, and concluded that the three preconditions for issue estoppel had been met.

[20] First, the hearing officer's decision was judicial and the hearing fulfilled the requirements of procedural fairness because Mr. Penner made the complaint, appeared before the decision maker, led evidence, examined witnesses and made written submissions. Second, the decision was final. And third, the same parties to the civil action were also engaged in the disciplinary hearing.

[21] As to the second part of the *Danyluk* test, the motion judge stated that there were no grounds to exercise his discretion to not apply issue estoppel.

[22] We are assuming but not deciding that the decision of the hearing officer was admissible before the motion judge for the purpose of considering issue estoppel. This issue was not addressed in the decisions below. Given our disposition, it is not necessary to decide the issue.

B. *Ontario Court of Appeal (Laskin J.A., Moldaver and Armstrong J.J.A. Concurring; 2010 ONCA 616, 102 O.R. (3d) 688)*

[23] The Court of Appeal agreed with the motion judge that the three preconditions for issue estoppel had been met. However, the Court of Appeal found that the motion judge erred in failing to explain why there were no grounds to exercise his discretion to not apply issue estoppel. Accordingly, the Court of Appeal considered whether it would be unfair or unjust to apply issue estoppel despite the satisfaction of the three preconditions.

[24] The Court of Appeal acknowledged that the different purposes of the disciplinary hearing and the civil action weighed against the application of issue estoppel. The Court of Appeal concluded that the legislature did not intend to preclude Mr. Penner's civil action simply because he filed a public complaint under the [PSA](#): para. 42. Further, the Court of Appeal considered that

Mr. Penner had no financial stake in the disciplinary hearing (as the statute does not provide for compensation to a public complainant affected by police misconduct), although the strength of that factor was diminished, in its view, by the potential benefit to Mr. Penner had there been a finding of misconduct. Despite these factors weighing against the application of issue estoppel, the Court of Appeal concluded that they were not determinative considerations in the discretionary analysis.

[25] The Court of Appeal ultimately concluded that applying issue estoppel would not work an injustice and decided against exercising its discretion to not apply the doctrine based on the following factors:

- on issues of reasonable and probable grounds for arrest, as well as the use of excessive force during arrest, the hearing officer had as much expertise as a court (para. 45);
- the disciplinary hearing had “all the hallmarks of an ordinary civil trial”, and, in this case, the different standards of proof in police disciplinary hearings and in civil actions are immaterial (paras. 48-51);
- Mr. Penner actively participated in the disciplinary hearing (para. 52); and
- the *PSA* provides an aggrieved party with the right to appeal to the Commission, a right which Mr. Penner exercised (para. 53).

[26] Accordingly, the Court of Appeal dismissed the appeal.

IV. Standard of Review

[27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court’s discretionary decision is also appropriate where the lower court gives no or insufficient

weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 76-77.

V. Analysis

A. *Issue Estoppel: The Legal Framework*

[28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[29] The one relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

[30] The principle underpinning this discretion is that “[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice”: *Danyluk*, at para. 1; see also *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 52-53.

[31] Issue estoppel, with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers; however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative

scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts. However, as this Court said in *Danyluk*, at para. 67: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case."

B. *No Public Policy Rule Precluding Issue Estoppel With Respect to Police Disciplinary Hearings*

[32] The Ontario Court of Appeal applied a conventional analysis of issue estoppel, analyzing the various factors identified in *Danyluk*. Mr. Penner and a number of interveners ask this Court, as a matter of public policy, to prohibit the application of issue estoppel to findings made in a police disciplinary hearing if it prevents a complainant from accessing the courts for damages on the same claims. They submit that the application of issue estoppel to police disciplinary hearings usurps the role of the courts as guardians of the Constitution and the rule of law, and that public policy requires that police accountability be subject to judicial oversight. These submissions were raised overtly for the first time before this Court.

[33] Police oversight is a complex issue that attracts intense public attention and differing public policy responses. Over time, legislative frameworks have been revised with the stated goals of promoting efficient police services and increasing the transparency and accountability of the public complaints process. In a 2006 case, the Ontario Divisional Court concluded that the legislature allowed for "institutional bias" in the manner of appointing a hearing officer under s. 76(1) of the *PSA*: *Sharma v. Waterloo Regional Police Service* (2006), 2006 CanLII 24342 (ON SCDC), 213 O.A.C. 371, at para. 27. The parties in this case do not contest that this is a legitimate exercise of the legislature's authority, and the Divisional Court in *Sharma*, at para. 28, concluded that the ability to appoint "retired police officers not associated with this force is capable of founding such independence as necessary". See also the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005), at pp. 77-78.

[34] The public complaints process incorporates a number of features to enhance public participation and accountability. For instance, pursuant to Part II of the *PSA*, the Commission, as an agency comprised of civilian members, provides independent oversight of police services in Ontario to ensure fairness and accountability to the public. Part V sets out a comprehensive public complaints process by which members of the public can file official complaints against policies or services. Judicial oversight of disciplinary hearings under the *PSA* is available by statutory right of appeal to the Commission and then to the Divisional Court: see ss. 70(1) and 71(1).

[35] We are not persuaded that it is either necessary or desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust.

C. *Discretionary Application of Issue Estoppel*

(1) Approach to the Exercise of Discretion

[36] We agree with the decisions of the courts below that all three preconditions for issue estoppel are established in this case. Thus, this case turns upon the Court of Appeal's exercise of discretion in determining whether it would be unjust to apply the doctrine of issue estoppel in this case.

[37] This Court in *Danyluk*, at paras. 68-80, recognized several factors identified by Laskin J.A. in *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321 (C.A.), that are relevant to the discretionary analysis in the context of a prior administrative tribunal proceeding.

[38] The list of factors in *Danyluk* merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel.

The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis.

[39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(a) *Fairness of the Prior Proceedings*

[40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.

[41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

(b) *The Fairness of Using the Results of the Prior Proceedings to Bar Subsequent Proceedings*

[42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their*

results to preclude the subsequent proceedings. Fairness, in this second sense, is a much more nuanced enquiry. On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system. However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. We recognize that there will always be differences in purpose, process and stakes between administrative and court proceedings. In order to establish unfairness in the second sense we have described, such differences must be significant and assessed in light of this Court's recognition that finality is an objective that is also important in the administrative law context. As Doherty and Feldman JJ.A. wrote in *Schwenke v. Ontario* (2000), [2000 CanLII 5655 \(ON CA\)](#), 47 O.R. (3d) 97 (C.A.), at para. 39, if courts routinely declined to apply issue estoppel because the procedural protections in the administrative proceedings do not match those available in the courts, issue estoppel would become the exception rather than the rule.

[43] Two factors discussed in *Danyluk* — “the wording of the statute from which the power to issue the administrative order derives” (paras. 68-70) and “the purpose of the legislation” (paras. 71-73), including the degree of financial stakes involved — are highly relevant here to the fairness analysis in this second sense. They take into account the intention of the legislature in creating the administrative proceedings and they shape the reasonable expectations of the parties about the scope and effect of the proceedings and their impact on the parties' broader legal rights: *Minott*, at pp. 341-42.

[44] For example, in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), [1998 CanLII 6467 \(BC CA\)](#), 50 B.C.L.R. (3d) 1 (C.A.), a defendant in a civil action relied on the decision of a Deputy Chief Forester to preclude the Crown's civil action for damages caused by a forest fire. The Court of Appeal upheld the chambers judge's decision to exercise discretion against applying issue estoppel. As the statute did not contemplate that the Deputy Chief Forester's decision about the cause of a fire would be a final resolution of that issue,

it followed that it “was not within the reasonable expectation of either party at the time of those proceedings” that it would be: *Bugbusters*, at para. 30.

[45] Thus, where the purposes of the two proceedings diverge significantly, applying issue estoppel may be unfair even though the prior proceeding was conducted with scrupulous fairness, having regard to the purposes of the legislative scheme that governs the prior proceeding. For example, where little is at stake for a litigant in the prior proceeding, there may be little incentive to participate in it with full vigour: *Toronto (City)*, at para. 53.

[46] There is also a general policy concern linked to the purpose of the legislative scheme which governs the prior proceeding. To apply issue estoppel based on a proceeding in which a party reasonably expected that little was at stake risks inducing future litigants to either avoid the proceeding altogether or to participate more actively and vigorously than would otherwise make sense. This could undermine the expeditiousness and efficiency of administrative regimes and therefore undermine the purpose of creating the tribunal: *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII), at para. 28; *Minott*, at p. 341; and *Danyluk*, at para. 73. In the context of this appeal, it might discourage citizens from filing complaints about police misconduct.

[47] Thus, the text and purpose of the legislative scheme shape the parties’ reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine in such circumstances might not only upset the parties’ legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings by either encouraging more formality and protraction or even discouraging access to the administrative proceedings altogether.

[48] These considerations are also relevant to weighing another factor identified in *Danyluk*: the procedural safeguards available to the parties in the prior administrative process. The consideration of a party’s decision whether to take advantage of procedural protections available in

the prior proceeding cannot be divorced from the consideration of the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes of the two proceedings. The connections between the relevant considerations must be viewed as a whole.

(2) Fairness of Using the Disciplinary Finding to Preclude a Civil Action in This Case

[49] In our respectful view, the Court of Appeal failed to focus on fairness in the second sense we have just described. We do not quarrel with the finding of the Court of Appeal that the disciplinary hearing was itself fair and that Mr. Penner participated in a meaningful way. However, while the court thoroughly assessed the fairness of the disciplinary proceeding itself, it failed to fully analyze the fairness of using the results of that process to preclude the appellant's civil claims, having regard to the nature and scope of those earlier proceedings and the parties' reasonable expectations in relation to them.

(a) *The Legislation Establishing the Disciplinary Hearing*

[50] As the Court of Appeal pointed out, "the legislature did not intend to foreclose [Mr. Penner's] civil action simply because he filed a complaint under the [PSA]": para. 42. The *PSA* features statutory privilege provisions, three of which are noteworthy here. Documents generated during the complaint process are inadmissible in civil proceedings: s. 69(9). Persons who carry out duties in the complaint process cannot be forced to testify in civil proceedings about information obtained in the course of their duties: s. 69(8). Finally, persons engaged in the administration of the complaints process are obligated to keep information obtained during the process confidential, subject to certain exceptions: s. 80. These provisions specifically contemplate parallel proceedings in relation to the same subject matter.

[51] Here, as recognized by the Court of Appeal, the legislation does not intend to foreclose parallel proceedings when a member of the public files a complaint. This would shape

the reasonable expectations of the parties and the nature and extent of their participation in the process.

[52] Nothing in the legislative text, therefore, could give rise to a reasonable expectation that the disciplinary hearing would be conclusive of Mr. Penner's legal rights against the constables, the Chief of Police or the Police Services Board in his civil action.

(b) *Reasonable Expectations of the Parties: Different Purposes of the Proceedings and Other Considerations*

[53] The Court of Appeal recognized that the purposes of a police disciplinary proceeding and a civil action were different and that this weighed against the application of issue estoppel.

[54] The police disciplinary hearing is part of the process through which the officers' employer decides whether to impose employment-related discipline on them. By making the complainant a party, the [PSA](#) promotes transparency and public accountability. However, this process provides no remedy or costs for the complainant. A civil action, on the other hand, provides a forum in which a party that has suffered a wrong may obtain compensation for that wrong.

[55] In addition to the legislative text, several other facts point to the same conclusion about the parties' reasonable expectations about the impact of the disciplinary hearing on the civil action.

[56] First, Mr. Penner's civil action was filed in July 2003, almost a year *before* the hearing officer released his decision on June 28, 2004. In *Danyluk*, the civil proceedings had commenced before the administrative proceedings concluded. Binnie J. reasoned that this weighed against applying issue estoppel because "the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings": para. 70.

[57] Second, Hermiston J., in the most pertinent Ontario case on the question of issue estoppel in the police disciplinary hearing context at the time, *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL) (S.C.J.), stated that an acquittal of an officer at a disciplinary hearing *did not* give rise to issue estoppel in relation to the same issues in a subsequent civil action.

[58] Third, a person in Mr. Penner’s position might well think it unlikely that a proceeding in which he or she had no personal or financial stake could preclude a claim for significant damages in his or her civil action.

(c) *Financial Stake in the Disciplinary Hearing*

[59] The Court of Appeal noted that the lack of a financial stake in the administrative proceeding, on its own, does not ordinarily resolve how the court should exercise its discretion in applying issue estoppel in a civil action. However, the Court of Appeal went further. With respect to the absence of a financial stake in the outcome of the disciplinary hearing, the court said, at para. 43:

This is an important consideration weighing against applying issue estoppel, but its strength is diminished by the potential indirect benefit to Mr. Penner from the disciplinary proceedings. If, for example, the hearing officer had found that the two police officers did not have reasonable and probable grounds to arrest Mr. Penner or used excessive force on him, those findings would likely have estopped the officers from asserting otherwise in Mr. Penner’s civil action. In other words, issue estoppel works both ways.

[60] In our view, this analysis is flawed. It cannot necessarily be said that issue estoppel “works both ways” here. As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be “proved on clear and convincing evidence” (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor’s failure to prove the charges by “clear and convincing evidence” does not necessarily

mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard". Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[61] By assuming that issue estoppel "works both ways", the Court of Appeal attached too little weight to the fact that Mr. Penner had no financial stake in the disciplinary hearing and wrongly concluded that he had more at stake than he could reasonably have thought at the time.

(d) *Issue Estoppel May Work to Undermine the Purpose of Administrative Proceedings*

[62] Another important policy consideration referred to earlier arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. It is true that Mr. Penner could have participated even more fully in the proceedings by hiring counsel in an attempt to obtain a finding of misconduct so as to assist his civil action. But accepting this line of argument too readily may lead to unintended and undesirable results. It risks turning the administrative process into a proxy for Mr. Penner's civil action. If it is before the hearing officer, and not the court, that an action for damages is to be won or lost, litigants in Mr. Penner's position will have every incentive to mount a full-scale case, which would tend to defeat the expeditious operation of the disciplinary hearing.

[63] In the context of this appeal, it would also mean that the officers, who have much at stake in the hearing, would effectively be forced to face two prosecutors rather than one, given the presence of counsel for the complainant. We doubt that this would enhance either the efficacy of the disciplinary hearing, or the fairness to the officers in that hearing. Finally, a further significant

risk is that potential complainants will simply not come forward with public complaints in order to avoid prejudicing their civil actions.

(e) *The Role of the Chief of Police*

[64] Under the public complaints process of the *PSA* at the relevant time, the Chief of Police investigated and determined whether a hearing was required following the submission of a public complaint. The Chief of Police appointed the investigator, the prosecutor and the hearing officer.

[65] It has been recognized that these arrangements are not objectionable for the purposes of a disciplinary hearing (as in *Sharma*). However, in our view, the fact that this decision was made by the designate of the Chief of Police should be taken into account in assessing the fairness of using the results of the disciplinary process to preclude Mr. Penner's civil claims. While this point was not clearly placed before the Court of Appeal, we think it is an important one.

[66] Applying issue estoppel against the complainant here had the effect of permitting the Chief of Police to become the judge of his own case, with the result that his designate's decision had the effect of exonerating the Chief and his police service from civil liability. In our view, applying issue estoppel here is a serious affront to basic principles of fairness.

[67] We emphasize that this unfairness does not reside in the Chief of Police carrying out his statutory duties. The parties accept that, given the statutory framework, there is no objection on fairness grounds to the role of the Chief and there is certainly no suggestion that he failed in any way to carry out his statutory duties. Further, no obvious unfairness arises if the disciplinary decision finds police misconduct, as this is a decision against the interests of the chief or the Police Services Board. The unfairness that concerns us only arises at the point that the Chief's (or his designate's) decision that there was no police misconduct in a disciplinary context is used for the quite different purpose of exonerating him, by means of issue estoppel, from civil liability relating to the same matter.

[68] Had the Court of Appeal been given the opportunity to fully consider the importance of these points, our view is that it would have seen that applying issue estoppel against the appellant in the circumstances of this case was fundamentally unfair.

VI. Conclusion

[69] Issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case. We see no reason to depart from that approach and create a rule of public policy to preclude the application of issue estoppel in the context of public complaints against the police.

[70] Given the legislative scheme and the widely divergent purposes and financial stakes in the two proceedings, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would determine the outcome of Mr. Penner's civil action. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as Mr. Penner's status as a party and the procedural protections afforded by the administrative process. Further, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim.

[71] Applying issue estoppel against Mr. Penner to preclude his civil claim for damages in the circumstances of this case was fundamentally unfair.

VII. Disposition

[72] We would allow the appeal with costs to the appellant throughout.

The reasons of LeBel, Abella and Rothstein JJ. were delivered by

[73] LEBEL AND ABELLA JJ. (dissenting) — Litigation must come to an end, in the interests of the litigants themselves, the justice system and our society. The finality of litigation is a fundamental principle assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel advances this principle. It seeks to protect the reasonable expectation of litigants that they are able to rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. The purposes of proceedings may vary like the governing procedures, but the principle of finality of litigation should be maintained.

[74] This appeal concerns the proper approach to the discretionary application of issue estoppel in the context of prior administrative proceedings dealing with police conduct.

[75] The applicable approach to issue estoppel was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, [2011 SCC 52](#), [2011] 3 S.C.R. 422. This is the precedent, therefore, that governs the application of the doctrine in this case.

[76] The key relevant aspect of this precedent is that it moved away from the approach taken in *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44](#), [2001] 2 S.C.R. 460, which enunciated a different test for the discretionary application of issue estoppel in the context of administrative tribunals. In so doing, *Danyluk* said that the approach should be “fairness” and set out a number of factors for assessing how “fairness” applied. In our view, these factors can no longer play the same role, nor be given the same weight, based on this Court’s subsequent jurisprudence starting with *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), [2008] 1 S.C.R. 190. These factors have largely been overtaken by the Court’s subsequent jurisprudence. For example, the breach of natural justice factor based on the procedural differences between courts and administrative tribunals and the expertise of the decision maker focus on concepts eschewed by this Court in *Dunsmuir* and *Smith v. Alliance Pipeline Ltd.*, [2011 SCC 7](#), [2011] 1 S.C.R. 160. The factors dealing with the wording of the statute and the purpose of the legislation are now referred to

as the tribunal's mandate (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*), 2011 SCC 53, [2011] 3 S.C.R. 471).

[77] The approach of our colleagues is not only inconsistent with recent developments in the law of judicial review, it also raises potential difficulties in the branch of judicial review which is concerned with procedural fairness. Inasmuch as a process is considered to be unfair, the proper way to attack it would be to challenge it, under the principles of natural justice. In addition, the position of our colleagues may also ignore the ability of legislatures to design administrative processes and define the nature and limits of procedural fairness in the absence of constitutional considerations. Finally, the justice system faces important difficulties in respect of access to civil and criminal justice. To hold that the traditional model of civil and criminal justice is the golden standard against which the fairness of administrative justice is to be measured clearly does not meet the needs of the times from a policy perspective.

[78] The “twin principles” which underlie the doctrine of issue estoppel — “that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause” (*Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.), at p. 946) — are core principles which focus on achieving fairness and preventing injustice *by preserving the finality of litigation*. This, as the majority said in *Figliola*, is the case whether we are dealing with courts or administrative tribunals. Our colleagues’ approach undermines these principles and risks transforming issue estoppel into a free-floating inquiry into “fairness” and “injustice” for administrative tribunals and revives an approach that our Court refused to apply in *Figliola*.

I. Background

[79] The appellant, Wayne Penner, filed a public complaint against two police officers alleging that the officers were guilty of police misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15, and the *Code of Conduct* (O. Reg. 123/98, Part V, Sch.). His complaint alleged that the officers made an unlawful arrest and used unnecessary force, both during the arrest and at the police station. Mr. Penner also commenced a civil action in the Ontario Superior Court of Justice

seeking damages against the same police officers for unlawful arrest, use of unnecessary force, false imprisonment, and malicious prosecution.

[80] In 2004, Mr. Penner's complaint under the *Police Services Act* proceeded to a disciplinary hearing before a hearing officer, a retired superintendent of the Ontario Provincial Police, who was appointed by the Chief of Police. The hearing took place over the course of several days, during which time 13 witnesses were called, exhibits were filed, including audio and video recordings of the relevant events, and each party including Mr. Penner had the opportunity to make submissions on points of law. Mr. Penner, as the complainant, had the option to retain legal counsel but chose to represent himself. He was active in the proceedings: he testified, participated in cross-examination, and provided written submissions.

[81] The hearing officer gave written reasons for his decision. In his reasons, he dismissed Mr. Penner's complaint and found the police officers not guilty of any misconduct, rejecting most of Mr. Penner's evidence, and preferring the testimony of the other witnesses, as well as the audio and video recordings of the events.

[82] He made the following findings of fact:

- he “was unable to see any evidence whatsoever of any excessive or unnecessary force used on Mr. Penner” (A.R., at p. 112 (emphasis added));
- “there is no clear, convincing or cogent evidence whatsoever to indicate that Mr. Penner was the victim of the unnecessary or unlawful application of force while in custody at the police station” (p. 114 (emphasis added)); and
- he was “convinced that Mr. Penner was exhibiting behaviour that would be consistent with escalating hostility” and that therefore “the force that was used during Mr. Penner's arrest was totally justified” (p. 115 (emphasis added)).

[83] Mr. Penner appealed on the basis of these findings to the Ontario Civilian Commission on Police Services. The Commission overturned the decision of the hearing officer for the reason that the officers did not have the lawful authority to arrest Mr. Penner in a courtroom presided over by a Justice of the Peace.

[84] The respondents sought judicial review of the Commission's decision in the Ontario Divisional Court. The Divisional Court unanimously found the Commission's decision to be unreasonable and restored the hearing officer's decision (*Parker v. Niagara Regional Police Service* (2008), 2008 CanLII 729 (ON SCDC), 232 O.A.C. 317). The Divisional Court found that the findings of fact made by the hearing officer were based on an "ample evidentiary foundation" and that there was "no manifest error, no ignoring of conclusive or relative evidence, nor any indication he misunderstood the evidence or drew erroneous conclusions from it" (para. 28). Mr. Penner did not appeal the decision of the Divisional Court to the Ontario Court of Appeal.

[85] Following the conclusion of the judicial review proceedings, the respondents (who are defendants in the civil action) brought a motion under Rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss Mr. Penner's civil claims for unlawful arrest, use of unnecessary force, false imprisonment and malicious prosecution, all on the basis of issue estoppel. The motion judge granted the Rule 21 motion and struck these allegations from Mr. Penner's statement of claim.

[86] The Ontario Court of Appeal dismissed Mr. Penner's appeal (2010 ONCA 616, 102 O.R. (3d) 688). The Court of Appeal agreed with the motion judge that the preconditions for issue estoppel had been met and found that there were no grounds to exercise their discretion not to apply the doctrine in this case.

[87] In his appeal to this Court, Mr. Penner does not directly challenge the Court of Appeal's finding that the preconditions for issue estoppel are satisfied. Rather, his appeal focuses on whether the Court of Appeal properly exercised its discretion to apply issue estoppel and argues that it should have declined to do so.

II. Analysis

A. *The Role of Issue Estoppel*

[88] The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. It arose as a doctrinal response to the “twin principles . . . that there should be an end to litigation and . . . that the same party shall not be harassed twice for the same cause” (*Carl Zeiss Stiftung*, at p. 946; K. R. Handley, *Spencer Bower and Handley: Res Judicata* (4th ed. 2009), at p. 4; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 4-7).

[89] These twin principles are often expressed in terms of the public interest in ensuring the finality of litigation, whether it is civil, criminal or administrative, and the individual interests of protecting the parties against the unfairness of repeated suits and prosecutions (see *EnerNorth Industries Inc., Re*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 53; Handley, at p. 4; Lange, at p. 7). However, it is clear that the overarching goal underlying both principles is to protect the fairness and integrity of the justice system by preventing duplicative proceedings. In other words, these principles are not competing values, but are fundamentally linked. As this Court recently recognized in *Figliola*, the ultimate goal of issue estoppel is not achieved by simply balancing fairness and finality, but in seeking to protect the “fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them” (para. 36 (emphasis added)).

[90] The foundational importance of finality to the judicial system and the individual parties was emphatically explained by Doherty J.A. in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (C.A.), at pp. 264-65, leave to appeal refused, [1999] 1 S.C.R. xiv:

Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and

it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change.

[91] As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange, at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle — they are “not merely . . . technical rule[s]” but rather, “[g]o to the heart of a system of civil justice that strives for the truth of the matter [and] recognizes that perfection is an unattainable goal and finality is a practical necessity” (*Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

B. *The Test for Issue Estoppel*

[92] The three preconditions for the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248: (1) whether the same question has been decided; (2) whether the judicial decision which is said to create the estoppel is final; and (3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).

[93] However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel:

The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, *supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied . . . [Emphasis in original; citations omitted; para. 33.]

[94] Although initially developed in the context of prior court proceedings, issue estoppel has long been applied to judicial or quasi-judicial decisions pronounced by administrative boards and tribunals. In the administrative law context, “the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided” (*Danyluk*, at para. 21).

[95] Consistent with the principles underlying issue estoppel, the fairness to the parties is focused on preventing parties from undergoing the burden of duplicative litigation — the objective of fairness is linked to the principle of finality. Indeed, in *Danyluk*, Binnie J., writing for the Court, focused on the importance of finality in litigation:

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [para. 18]

[96] In other words, Binnie J. stated, “[a] litigant . . . is only entitled to one bite at the cherry” (para. 18). Underlying the application of issue estoppel in this context is the theory that “estoppel is a doctrine of public policy that is designed to advance the interests of justice” (para. 19).

[97] This Court revisited the exercise of discretion to apply issue estoppel in the context of prior administrative proceedings in *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279. The Court acknowledged the different purposes of the competing procedures. Nevertheless, in that case considerable emphasis was placed on the stability and finality of decisions and the importance of deference and adequate alternative remedies in the administrative context as crucial considerations in determining whether issue estoppel should be applied in a particular case:

The situation in which the respondent could find itself if the principles of *res judicata* or issue estoppel were not applied illustrates the danger of a collateral attack and of the failure to avail oneself in a timely manner of the recourses against decisions of administrative bodies or courts of law that are available in the Canadian legal system. The stability and finality of judgments are fundamental objectives and are

requisite conditions for ensuring that judicial action is effective and that effect is given to the rights of interested parties. [Emphasis added; para. 35.]

[98] More recently, in *Figliola*, this Court considered the discretionary application of issue estoppel and its related doctrines in administrative proceedings. In that case, the majority emphasized the importance of the underlying principle of finality to the integrity of the justice system, noting that the discretionary application of doctrines such as issue estoppel, “should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of . . . relitigation” (para. 36).

[99] In *Figliola*, the majority explicitly rejected an approach that suggests that fairness and finality are discrete objectives. Rather, the majority embraced the notion that preserving the finality of administrative adjudication and preventing relitigation better protected the fairness and integrity of the justice system and the interests of justice:

Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them. [para. 36]

[100] This approach is consistent with the long-standing principles underlying issue estoppel and *res judicata* that emphasize and protect the finality of litigation.

C. *Issue Estoppel and Administrative Decisions*

[101] This Court’s recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is crucial to preserving the principles underlying our modern approach to administrative law. Our colleagues’ failure to safeguard the finality of litigation also substantially undermines these principles. In applying the doctrine of issue estoppel, there is no reason to treat administrative proceedings differently from court proceedings in the name of “fairness”. To do so would undermine the entire system of administrative law.

[102] In *Rasanen v. Rosemount Instruments Ltd.* (1994), [1994 CanLII 608 \(ON CA\)](#), 17

O.R. (3d) 267 (C.A.), the purpose of administrative tribunals was described as follows:

[Administrative tribunals] were expressly created as independent bodies for the purpose of being an alternative to the judicial process, including its procedural panoplies. Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly

. . . The methodology of dispute resolution in these tribunals may appear unorthodox to those accustomed only to the court-room's topography, but while unfamiliar to a consumer of judicial justice, it is no less a form and forum of justice to *its* consumers. [Emphasis in original; pp. 279-80.]

[103] In applying issue estoppel in the context of administrative law, differences in the process or procedures used by the administrative body should not be used to override the principle of finality. The different purposes of administrative tribunal proceedings should not be invoked either. Otherwise, every substantive legal issue could be reconsidered in subsequent or concurrent civil proceedings, as it could almost always be said that such proceedings have different purposes. The discretionary application of issue estoppel in the administrative law context recognizes that the full panoply of protections and procedures may not exist in an administrative proceeding, but that neither a lack of such protections nor the different objectives of an administrative process are, by themselves, sufficient to warrant the exercise of the court's discretion. In other words, the moving party cannot seek to "rely on general fairness concerns which exist whenever the finding relied on emanates from a tribunal whose procedures are summary and whose tasks are narrower than those used and performed by the courts" (*Schweneke v. Ontario* (2000), [2000 CanLII 5655 \(ON CA\)](#), 47 O.R. (3d) 97 (C.A.), at para. [41](#)).

[104] The majority in *Figliola* consistently referred to tribunal and court decisions together when discussing the applicable principles, including the exercise of discretion, and never distinguished between them. The idea that discretion should be exercised more broadly when dealing with administrative tribunals was found only in the dissent (para. 61).

[105] The policy objectives underlying issue estoppel — avoiding duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings — are enhanced by acknowledging administrative decisions as binding in appropriate circumstances. As this Court recognized in *Figliola*,

[r]espect for the finality of a[n] . . . administrative decision increases fairness and the integrity of . . . administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 38 and 51). [para. 34]

[106] Moreover, the principle of finality underlying issue estoppel is directly linked to the principles of deference in the administrative law. The application of issue estoppel recognizes that “[p]arties should be able to rely particularly on the conclusive nature of administrative decisions . . . since administrative regimes are designed to facilitate the expeditious resolution of disputes” (*Figliola*, at para. 27). It also acknowledges the principle of deference which underlies the judicial review jurisprudence of this Court and the importance and values that it attaches to administrative decisions (see, for example, *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). It also gives effect to the “adequate alternative remedy” principle, which requires parties to use the appropriate judicial review or appeal mechanism to challenge the validity or correctness of an administrative decision, by preventing parties from circumventing these processes to seek a different result in a new forum. The broad exercise of the residual discretion not to apply issue estoppel in the present case can hardly be reconciled with the importance of deference to administrative decisions which underlies the judicial review jurisprudence of this Court. In so doing, our colleagues deny the value and importance of administrative adjudication, which this Court has so strongly emphasized on many occasions.

[107] The court’s residual discretion not to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with principles of deference that lie at the core of administrative law. Where the legislature has provided a tribunal with the

requisite authority to make a decision, and that decision is judicial or quasi-judicial in nature, it would run counter to the principles of deference to broaden the court's discretion in a manner that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn, instead, to the courts for a re-adjudication of the merits. As the Ontario Court of Appeal found in *Schwenke*, an overly broad application of discretion in the administrative context would “swallow whole the rule that makes the doctrine applicable to findings made by tribunals whose processes, although judicial, are less elaborate than those employed in civil litigation” (para. 39).

[108] This leads us to consider how the principles set out in *Figliola* should be applied to this case.

D. *Application*

[109] The thrust of Mr. Penner's submissions on appeal is that the police disciplinary proceedings lacked the “hallmarks of an ordinary civil trial”. In particular, he emphasizes that he had limited rights of participation as a public complainant, that the statutory scheme is incompatible with the application of issue estoppel, that the hearing officer lacked true independence, and that the standard of proof in the disciplinary proceedings was higher than a civil trial. For these reasons, he argues, the Court should exercise its discretion not to apply issue estoppel in this case.

[110] Mr. Penner's submissions are completely inconsistent with this Court's prior jurisprudence and the approach to issue estoppel recently articulated by this Court in *Figliola*. The Court's residual discretion not to apply issue estoppel should be governed by the interests of fairness in preserving the finality of litigation. It should not be exercised in a manner that would impose a particular model of adjudication, undermine the integrity of administrative tribunals, and deny their decisions the deference owed to them under the jurisprudence of this Court. Applying these principles to the case before us, there is no reason to exercise our discretion not to apply issue estoppel.

[111] The disciplinary hearing conducted by the hearing officer is designed to be an independent, fair, accountable and binding adjudicative process. It was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness: see *Police Services Act*, ss. 64(7) to (10), 69; *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The hearing officer considered sworn testimony and written submissions. Mr. Penner, as a party to the proceedings, had the opportunity to lead evidence, cross-examine witnesses, and make submissions. He had the option to retain legal counsel. Judicial oversight of the proceedings was available under a statutory right of appeal — a right Mr. Penner exercised in this case and which ultimately led to a review of the hearing officer’s decision by the Divisional Court.

[112] Thus, the hearing officer’s decision was made in circumstances in which Mr. Penner knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer’s decision would have been no less binding.

[113] This *quid pro quo* of issue estoppel, in turn, bears directly on Mr. Penner’s argument that the purpose of the proceedings was different and that, because the disciplinary hearing did not permit him to seek damages, he should be permitted to pursue a civil action. As the Court of Appeal found, the different purposes of the two proceedings is not determinative in this case, since Mr. Penner had the opportunity to receive an indirect financial benefit in the disciplinary hearing. Had the hearing officer made a positive finding of police misconduct, the application of issue estoppel would have assisted the complainant in a subsequent civil action for damages. Essentially, in such a case, the complainant would be relieved of having to prove liability and the civil case would proceed straight to an assessment of damages. In other words, as the Court of Appeal noted, in the present case, “issue estoppel works both ways” (para. 43).

[114] Mr. Penner further relies on specific provisions of the *Police Services Act*, which he states are incompatible with the application of issue estoppel, since they specifically contemplate parallel civil proceedings. He relies, in particular, on ss. 69(8), 69(9) and 80 (now ss. 83(7), 83(8) and 95), which deal with statutory privilege and confidentiality. We do not find this to be persuasive. These provisions of the *Police Services Act* are designed to ensure the integrity of the

disciplinary process. They do not suggest that issue estoppel cannot apply to bar civil proceedings. As Lange observes, where legislatures intend issue estoppel not to apply to an administrative decision, there should be clear language in the statute to foreclose this possibility (p. 122).

[115] Even in cases where the wording of the statute specifically contemplates corollary civil rights or remedies, the courts have applied issue estoppel. For example, in *Wong v. Shell Canada Ltd.* (1995), 1995 CanLII 17974 (AB CA), 174 A.R. 287, leave to appeal refused, [1996] 3 S.C.R. xiv, the Alberta Court of Appeal considered whether s. 9(1)(a) of the *Employment Standards Code*, S.A. 1988, c. E-10.2, precluded the application of issue estoppel. Section 9(1)(a) provided that “[n]othing in this Act affects any civil remedy that an employee has against his employer”. The employee argued that s. 9(1) of the *Code* was intended to preserve a civil action regardless of the fact that he had sought relief under the *Code* and obtained a final decision. The Court of Appeal rejected this interpretation:

While s. 9(1)(a) does not purport to remove any common law rights, and, in fact, seeks to preserve them, the wording does not preclude the application by the courts of issue estoppel. The legislature has provided the employee with a choice of forum. The employee may commence an action or may pursue remedies under the *Code*. The legislation does not provide that both remedies may be pursued by the employee in respect of the same complaint. [para. 14]

(See also *Rasanen*.)

[116] Similarly, the provisions relied upon by Mr. Penner in this case, which contemplate civil proceedings, do not specifically preclude the application of issue estoppel by a court.

[117] Moreover, to interpret these provisions in a manner that would preclude the application of issue estoppel would be contrary to the purposes of the *Police Services Act*, which is designed to increase public confidence in the provision of police services, including the processing of complaints. Preventing the courts from applying issue estoppel in the context of disciplinary proceedings would run counter to this purpose — decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public

confidence in the complaints process and in the integrity of the administrative decision-making process more broadly.

[118] Mr. Penner further takes issue with the independence of the hearing officer in this case. In particular, Mr. Penner submits that because the *Police Services Act* required that the chief of police appoint the investigator, prosecutor, and hearing officer to handle the complaint, the disciplinary hearing process lacked an independent and unbiased adjudicator. This issue was raised *de novo* on Mr. Penner's appeal to this Court.

[119] The method used to appoint an adjudicator should not provide a basis for the exercise of the court's discretion not to apply issue estoppel in this case.

[120] In 2004, the Government of Ontario commissioned a report from the Honourable Patrick J. LeSage, Q.C., to review the complaints process under the *Police Services Act* (see the Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (2005)). The LeSage Report was published in 2005 and made a number of recommendations with respect to the investigation and hearing of police complaints. In the Report, LeSage explicitly rejected concerns with respect to the independence of investigators and adjudicators in the complaints process:

I also heard submissions advocating an independent hearings process where the matter has arisen from a public complaint. This would include fully independent prosecutions and fully independent adjudication. I appreciate the demands for greater independence in the hearings process. Indeed, there is much merit to the arguments in support of independence. Conflicts of interest need to be avoided. It would be inappropriate for hearings to be staffed entirely by members of the police service who interact with each other on a daily basis. This problem is especially acute in small police services where outside prosecutors and hearing officers would be necessary. This is already addressed in the current legislation by allowing chiefs of police to appoint prosecutors and hearing officers from outside the police service. [Emphasis added; pp. 77-78.]

[121] In short, the LeSage Report upheld the method used to appoint investigators and adjudicators under the *Police Services Act*. In fact, LeSage found that concerns with respect to conflicts of interest and independent adjudication were already sufficiently addressed by the very system of appointment Mr. Penner seeks to challenge in this appeal.

[122] In any event, the Chief of Police played no role in the events that formed the basis of the complaints in this case. He designated an outside prosecutor and an independent adjudicator who was a retired superintendent from another police service. There was no challenge to the hearing officer's impartiality at the disciplinary hearing itself or at any of the proceedings below. There is no evidence that the Chief of Police interfered in any manner with the work of the adjudicator. We must add that similar methods of appointment are quite common in labour law, as well as in other areas of law, and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

[123] Finally, Mr. Penner argues that issue estoppel should not apply in this case since the burden of proof is different in civil proceedings. The statutory standard of proof under the *Police Services Act* requires that a finding of misconduct against a police officer be "proved on clear and convincing evidence" (s. 64(10); now s. 84(1)). This standard is higher than the balance of probabilities standard required in a civil trial.

[124] Mr. Penner relies on *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL), where the Ontario Superior Court of Justice reasoned that because the hearing officer's decision "was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard" (para. 11), issue estoppel should not preclude a subsequent civil action.

[125] Unlike *Porter*, however, the standard of proof was immaterial to the hearing officer's decision in this case. The hearing officer made unambiguous findings of fact against Mr. Penner. His findings are unequivocal: he found "no . . . evidence whatsoever" to support Mr. Penner's claims (A.R., at p. 114 (emphasis added)). On judicial review, the Divisional Court found that there was no error in these factual findings and that they were supported by "an ample evidentiary foundation" (para. 28). The burden of proof is therefore irrelevant in this case — there is simply *no evidence* to support Mr. Penner's claims on any standard.

[126] We see no reason to allow Mr. Penner to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding, which, in this case, would inevitably yield the same result.

[127] We would therefore dismiss the appeal with costs throughout.

Appeal allowed with costs throughout, LEBEL, ABELLA and ROTHSTEIN JJ. dissenting.

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Tab 57

Smith Estate v. National Money Mart Company, 2008 ONCA 746 (CanLII)

Date:	2008-11-03
File number:	C49114; C49116
Other citations:	92 OR (3d) 641 — 303 DLR (4th) 175 — 170 ACWS (3d) 452 — 243 OAC 173 — 61 CPC (6th) 72 — [2008] OJ No 4327 (QL)
Citation:	Smith Estate v. National Money Mart Company, 2008 ONCA 746 (CanLII), < https://canlii.ca/t/21cmf >, retrieved on 2025-10-28

**Kenneth Smith, Estate Trustee of the Last Will and
Testament of Margaret Smith, deceased, et al. v. National
Money Mart Co. et al.**
[Indexed as: Smith Estate v. National Money Mart Co.]

92 O.R. (3d) 641

**Court of Appeal for Ontario,
Winkler C.J.O., Sharpe, Gillese, Blair and
MacFarland J.J.A.
November 3, 2008**

Judgments and orders -- Issue estoppel -- Plaintiffs bringing class action against defendant payday loan providers alleging that they charged criminal interest rate -- Defendants moving unsuccessfully to stay action on basis of arbitration clause in some loan agreements -- Court of Appeal dismissing defendants' appeal and leave to appeal to Supreme Court of Canada denied -- Defendants subsequently renewing motion for stay on basis that two decisions of Supreme Court of Canada had changed law in Ontario and that they were entitled to benefit of that change -- Motion judge properly dismissing motion -- Doctrine of issue estoppel applying -- Litigant having no automatic or presumptive right to relitigate issue on account of change in law -- Granting stay at this late stage of proceedings would be fundamentally unjust to plaintiffs.

The defendants were in the business of providing "payday" loans. In 2001, the defendants began inserting a class action waiver into their payday loan agreements whereby the borrower purportedly waived the right to bring a court action with respect to the loan and was required to submit any dispute to binding arbitration. The plaintiffs brought a class action against the defendants alleging that they charged a criminal interest-rate. The defendants moved

unsuccessfully to stay the claim pursuant to s. 7(1) of the [Arbitration Act, 1991, S.O. 1991, c. 17](#). An appeal from that decision was dismissed in 2005. The Court of Appeal agreed with the motion judge that the issue of whether to stay the action on account of the arbitration clause should be dealt with at the certification hearing. The Supreme Court of Canada refused the defendants' request for leave to appeal. The case proceeded to a certification hearing, and the action was certified as a class proceeding. The defendants again moved for a stay under the Arbitration Act and added a request for decertification, arguing that two 2007 decisions of the Supreme Court of Canada had changed the law in Ontario and that they were entitled to the benefit of that change. The motion was dismissed. The motion judge held that the two Supreme Court decisions were distinguishable and inapplicable in Ontario; that provisions of the [Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A](#) allowing the plaintiffs to pursue their claim in court despite the arbitration clauses applied retroactively; and that the stay should be refused pursuant to s. 7(2)5 of the Arbitration Act. In the alternative, he held that the defendants were estopped from renewing their stay motion under the doctrine of issue estoppel. The defendants appealed.

Held, the appeal should be dismissed.

The appeal could and should be resolved solely on the basis of issue estoppel. For the purposes of the appeal, it was assumed without deciding that the two Supreme Court of Canada decisions changed the law of Ontario and that ss. 7 and 8 of the [Consumer Protection Act, 2002](#) did not have retroactive effect. The preconditions at the first stage of the test for issue estoppel were met. The same question was decided when the Court of Appeal held that the defendants were not [page642] entitled to a stay and that the issue of whether the dispute should be resolved by way of arbitration or class proceedings was a matter to be decided at the "preferable procedure" stage of the certification hearing. The decision on that issue was final. The parties or their privies were the same. At the second stage of the test, it was clear that issue estoppel ought to be applied. A litigant has no automatic or presumptive right to relitigate an issue on account of a change in the law. The matter rests upon the discretion of the court to ensure that the finality principle is applied in a manner consistent with the interests of justice. In this case, the defendants' loss of the benefit of the purported change in the law was clearly outweighed by the adverse consequences to the plaintiffs of revisiting the stay issue at this late stage in the proceedings. A stay would almost certainly defeat the claims subject to arbitration clauses, not on the merits but for reasons of practicality. Enforcing the arbitration clauses would not lead to arbitration but would immunize the defendants from any claims. Even if the claims subject to arbitration clauses were stayed, the defendants would almost certainly still have to defend a reconstituted class action by the class of borrowers who did not sign similar agreements or who signed agreements after the Consumer Protection Act, 2002 provisions came into force. The motion judge did not err in exercising his discretion in favour of applying issue estoppel in the circumstances of this case.

APPEAL from the order of Perell J., [2008] O.J. No. 2248, [2008 CanLII 27479 \(S.C.J.\)](#) dismissing a motion for a stay of class action.

Cases referred to Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, [2001 SCC 44](#), 201 D.L.R. (4th) 193, 272 N.R. 1, J.E. 2001-1439, 149 O.A.C. 1, 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, [2001] CLLC Â210-033, 7 C.P.C. (5th) 199, 106 A.C.W.S. (3d) 460, apld Hockin v. Bank of British Columbia, [1995 CanLII 6268 \(BC CA\)](#), [1995] B.C.J. No. 688, 123 D.L.R. (4th) 538, 57 B.C.A.C. 255, 3 B.C.L.R. (3d) 193, 10 C.C.E.L. (2d) 157, 54 A.C.W.S. (3d) 784 (C.A.) [Leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 256], distd Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, [2007 SCC 34](#), 284 D.L.R. (4th) 577, 366 N.R. 1, J.E. 2007-1426, 34 B.L.R. (4th) 155, 44 C.P.C. (6th) 205, 158 A.C.W.S. (3d) 870, EYB 2007-121973; Minott v. O'Shanter Development Co. (1999), [1999 CanLII 3686 \(ON CA\)](#), 42 O.R. (3d) 321, [1999] O.J. No. 5, 168 D.L.R. (4th) 270, 117 O.A.C. 1, 40 C.C.E.L. (2d) 1, 99 CLLC Â210-013, 85 A.C.W.S. (3d) 351 (C.A.); Rogers Wireless Inc. v. Muroff, [2007] 2 S.C.R. 921, [2007] S.C.J. No. 35, [2007 SCC 35](#), 284 D.L.R. (4th) 675, 365

N.R. 177, J.E. 2007-1409, 36 B.L.R. (4th) 79, 44 C.P.C. (6th) 373, 158 A.C.W.S. (3d) 869, EYB 2007-121974, conso Other cases referred to *Angle v. Canada* (Minister of National Revenue), 1974 [CanLII 168 \(SCC\)](#), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, 47 D.L.R. (3d) 544, 2 N.R. 397, 74 D.T.C. 6278; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, [1991] 2 A.C. 93 (H.L.); *Frey v. Bell Mobility Inc.*, [2008] S.J. No. 105, 2008 [SKQB 79](#); *Huras v. Primerica Financial Services Ltd.*, 2000 [CanLII 16892 \(ON CA\)](#), [2000] O.J. No. 3772, 137 O.A.C. 79, 100 A.C.W.S. (3d) 184 (C.A.); *MacKinnon v. National Money Mart Co.*, [2008] B.C.J. No. 1026, 2008 [BCSC 710](#), 293 D.L.R. (4th) 478, 166 A.C.W.S. (3d) 629 [Leave to appeal to B.C.C.A. granted [2008] B.C.J. No. 1285, 2008 [BCCA 292](#), 295 D.L.R. (4th) 304, 168 A.C.W.S. (3d) 10 (C.A.)]; *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2003), 2003 [CanLII 37356 \(ON CA\)](#), 68 O.R. (3d) 131, [2003] O.J. No. 4388, 233 D.L.R. (4th) 285, 178 O.A.C. 351, 41 C.P.C. (5th) 52, 127 A.C.W.S. (3d) 9 (C.A.); *Smith v. National Money Mart Co.*, 2005 [CanLII 36153 \(ON CA\)](#), [2005] O.J. No. 4269, 258 D.L.R. (4th) 453, 204 O.A.C. 47, 12 B.L.R. (4th) 29, 20 C.P.C. (6th) 345, 142 A.C.W.S. (3d) 718 (C.A.), affg [2005] O.J. No. 2660, [2005] O.T.C. 547, 8 B.L.R. (4th) 159, 18 C.P.C. (6th) 1, 140 A.C.W.S. (3d) 29 (S.C.J.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 528, 223 O.A.C. 394n]; [page643] *Smith v. National Money Mart Co.* (2006), 2006 [CanLII 14958 \(ON CA\)](#), 80 O.R. (3d) 81, [2006] O.J. No. 1807, 266 D.L.R. (4th) 275, 209 O.A.C. 190, 18 B.L.R. (4th) 22, 28 C.P.C. (6th) 34, 147 A.C.W.S. (3d) 748 (C.A.), affg [2005] O.J. No. 2660, [2005] O.T.C. 547, 8 B.L.R. (4th) 159, 18 C.P.C. (6th) 1, 140 A.C.W.S. (3d) 29 (S.C.J.) [Leave to appeal to S.C.C. refused 2006 [CanLII 33458 \(SCC\)](#), [2006] S.C.C.A. No. 267, 227 O.A.C. 397n]; *Smith v. National Money Mart Co.*, [2007] O.J. No. 46, 37 C.P.C. (6th) 171, 29 E.T.R. (3d) 199, 154 A.C.W.S. (3d) 25 (S.C.J.) [Leave to appeal to Div. Ct. refused [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.)]; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 2003 [SCC 63](#), 232 D.L.R. (4th) 385, 311 N.R. 201, J.E. 2003-2108, 179 O.A.C. 291, [2003] CLC 220-071, 17 C.R. (6th) 276, REJB 2003-49439, 59 W.C.B. (2d) 334, 120 L.A.C. (4th) 225; *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), 1998 [CanLII 14615 \(ON CA\)](#), 42 O.R. (3d) 618, [1998] O.J. No. 5291, 116 O.A.C. 272, 42 C.L.R. (2d) 241, 84 A.C.W.S. (3d) 829 (C.A.) Statutes referred to [Arbitration Act, 1991](#), S.O. 1991, c. 17, s. 7(1), (2), (6) [Canadian Charter of Rights and Freedoms](#), s. 7 [Civil Code of Quebec](#), C.C.Q. [Class Proceedings Act, 1992](#), S.O. 1992, c. 6, s. 5(1)(d) [Consumer Protection Act, 2002](#), S.O. 2002, c. 30, Sch. A, ss. 7, (2), 8, (1) [Consumer Protection Statute Law Amendment Act, 2002](#), S.O. 2002, c. 30 [Criminal Code](#), R.S.C. 1985, c. C-46, s. 347 [as am.]

F. Paul Morrison, Mahmud Jamal and Christopher M. Hubbard,
for appellants.

Harvey T. Strosberg, Q.C., David Stratas and Trevor Guy, for
respondents.

The judgment of the court was delivered by

SHARPE J.A.: -- Overview

[1] The central issue on this appeal is whether a class proceeding involving thousands of small claims by "payday" loan borrowers for allegedly illegal interest should be stayed on the ground that the loan agreements contain arbitration clauses. The appellants, the lenders, have already unsuccessfully litigated that issue all the way to the Supreme Court of Canada.

[2] The appellants nonetheless renewed their request for a stay in the court below and asked that the class proceeding be decertified. They argued that two subsequent decisions of the Supreme Court of Canada in cases from Quebec, *Dell Computer Corp. v. Union des consommateurs*, 2007 [SCC 34 \(CanLII\)](#), [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, and *Rogers Wireless Inc. v. Muroff*, 2007 [SCC 35 \(CanLII\)](#), [2007] 2 S.C.R. 921, [2007] S.C.J. No. 35, [page644] changed the law in

Ontario and that they were entitled to the benefit of that change. The respondents, the borrower class, countered with a motion for summary judgment.

[3] The motion judge dismissed both motions. He held that Dell and Rogers were distinguishable and inapplicable in Ontario; provisions of the [Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A](#) allowing the respondents to pursue their claim in court despite the arbitration clauses applied retroactively; and the stay should be refused pursuant to [s. 7\(2\)5 of the Arbitration Act, 1991, S.O. 1991, c. 17](#). In the alternative, he held that the appellants were estopped from renewing their stay motion under the doctrine of issue estoppel.

[4] The appellants come to this court asking that the motion judge's decision be set aside and that the class proceeding be stayed and decertified. For the reasons that follow, I conclude that even if Dell and Rogers have changed the law of Ontario, and even if the [Consumer Protection Act, 2002](#) provisions do not have retroactive effect, the motion judge properly exercised his discretion to apply the doctrine of issue estoppel and deny the appellants' motion to stay and decertify the class proceeding. Facts

(i) The class action

[5] The appellants, National Money Mart and its American parent Dollar Financial Group, are in the business of providing "payday" loans. These are small, short-term loans with due dates connected to the borrower's payday. The rate of interest is specified at 59 per cent and there are other fees payable by the borrower at the time of repayment.

[6] The plaintiff class, estimated to include 210,000 members and to involve over four million transactions, seeks damages estimated at more than \$300 million, alleging that the rate of interest and fees charged by the appellants for these loans exceed the rate of interest prescribed by [s. 347 of the Criminal Code, R.S.C. 1985, c. C-46](#).

(ii) The arbitration clauses

[7] In 2001, the appellants began inserting a class action waiver clause into their payday loan agreements whereby the borrower purportedly waives the right to bring a court action with respect to the loan and is required to submit any dispute for resolution to binding arbitration. Margaret Smith, who has since died, was formerly one of the representative plaintiffs. She entered into various loan agreements containing arbitration [page 645] clauses. The first agreement, dated February 13, 2003, contained the following clause:

Any claim, dispute or issue whether in contract, tort or otherwise, arising out of or in connection with the Loan or this Loan Agreement or any prior or future loan agreement between the parties, including any issue regarding related fees, advertising, promotion or any oral or written statement or the absence thereof, default of payment, and/or the relationship between the parties shall, upon election by either party be resolved by binding arbitration in accordance with The Arbitration Act of Ontario as amended ("the Act"). No joinder or consolidation of claims with other persons are permitted without the consent of the parties hereto. In the event of a conflict between this arbitration provision and the Act, the terms of this arbitration provision shall govern.

[8] Subsequent agreements contained differently worded clauses providing for mediation and arbitration of disputes, as well as the following class action waiver:

Each party also agrees not to commence or participate in any class action either as a representative plaintiff or as a member of a plaintiff class, and to opt out of any class action, if the class involves, directly or indirectly, any Claim [arising out of the Loan Agreement].

[9] The appellants concede that not all loan agreements covered by the class proceeding have arbitration clauses.

(iii) Prior proceedings

[10] In 2005, the appellants moved to stay the representative plaintiff's claim pursuant to s. 7(1) of the Arbitration Act. That section provides:

7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[11] That motion, and a motion to stay the action against Dollar Financial Group for want of jurisdiction, was dismissed by E.M. Macdonald J.: [2005] O.J. No. 2660, 18 C.P.C. (6th) 1 (S.C.J.). She held that the Ontario courts did have jurisdiction to entertain the claim against Dollar Financial Group and that the request for a stay should be determined by the judge hearing the certification motion when deciding whether a class proceeding was the "preferable procedure" under s. 5(1)(d) of the [Class Proceedings Act, 1992, S.O. 1992, c. 6](#).

[12] On October 7, 2005, this court quashed an appeal from that decision: [2005 CanLII 36153 \(ON CA\)](#), [2005] O.J. No. 4269, 258 D.L.R. (4th) 453 (C.A.). Writing for the court, Weiler J.A. held that the motion judge had correctly held that the issue of whether to stay the action on account of the arbitration clause should be dealt with at the [page646] certification hearing. As the stay issue had been deferred to the certification judge, the order denying the stay was interlocutory in nature and this court had no jurisdiction to entertain the appeal. The Supreme Court of Canada refused the appellants' request for leave to appeal: [2005] S.C.C.A. No. 528, 223 O.A.C. 394n.

[13] In 2006, the appellants brought a second appeal to this court, this time against E.M. Macdonald J.'s ruling that Ontario had jurisdiction to entertain the action against Dollar Financial Group. This court dismissed the appeal and application for leave to appeal to the Supreme Court of Canada was refused: (2006), [2006 CanLII 14958 \(ON CA\)](#), 80 O.R. (3d) 81, [2006] O.J. No. 1807 (C.A.), leave to appeal to S.C.C. refused [2006 CanLII 33458 \(SCC\)](#), [2006] S.C.C.A. No. 267, 227 O.A.C. 397n.

[14] The case then proceeded to a certification hearing. On January 5, 2007, Hoy J. certified the action as a class proceeding: [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.). With respect to the arbitration clause and the appellants' submission that the respondents were obliged to arbitrate and were precluded from litigating, Hoy J. held, at para. 132:

I am satisfied that a class proceeding is preferable to arbitration or mediation. Money Mart itself says that the cost of proving individual claims would exceed any possible recovery by class members. Money Mart does not concede that it has breached [section 347](#) of the [Criminal Code](#) or offer to fund counsel for borrowers who elect to mediate or arbitrate. The uncontradicted evidence of plaintiffs' counsel is that, if retained, the cost to prepare for and attend an individual mediation or arbitration would exceed \$15,000 and \$20,000, respectively. The plaintiffs cannot afford such legal fees. The legal fees would be disproportionate to the amount [in] issue in an individual mediation or arbitration. Ms. Smith's claim, by way of example, involves only about \$83. Plaintiffs' counsel is acting on a contingency basis in this action, and the plaintiffs have obtained funding from the Class Proceedings Fund. Money Mart has never elected to arbitrate any dispute with any of its customers at any time; it has instead chosen to resort to the courts, instituting over 137,000 [sic] actions during the class period against customers who did not repay their loans. Nor has a customer ever asked for arbitration or mediation. I do not believe that any class member would spend the time, or expend the effort, necessary to mediate or arbitrate.

[15] The appellants' request for leave to appeal to the Divisional Court from the certification order was dismissed by Jennings J.: [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.). At paras. 6-7 of

his reasons, he stated:

This matter has been alive since 2003. It has been the subject of numerous motions, appeals, and even, I was told, two trips to the S.C.C. Discoveries are yet to be had, although scheduled for next July.

In the interim, the activities of the defendants which form the basis for this class action continue on a daily basis. In my opinion, it is now time for the issues raised to be sent on for trial. The interests of justice and I would have thought, the parties, demand resolution. [page647]

[16] The matter has since proceeded to discovery, has been set down for trial and is scheduled to be tried in April 2009. Consequently, this appeal was heard on an expedited basis.

(iv) The Dell and Rogers decisions and the appellants' renewed stay motion

[17] In early 2008, the appellants again moved for a stay under the Arbitration Act to which they added a request for decertification, relying on the Supreme Court of Canada's decisions in Dell and Rogers. The appellants submit that these decisions stand for three propositions: (1) class action rights are mere procedural rights that can be waived under the [Quebec Civil Code of Quebec](#), C.C.Q.; (2) Quebec legislation requires a court to stay a class action where there is an arbitration clause; and (3) under Quebec legislation, challenges to an arbitrator's jurisdiction are to be resolved by the arbitrator, not the court.

[18] The appellants contend that the arbitration and class action legislation in Ontario and Quebec are identical in all relevant aspects. They submit that the principles in Dell and Rogers are therefore applicable in Ontario and that these cases overrule this court's 2005 decision that the stay issue is to be determined under the "preferable procedure" branch of the test for certification.

[19] The respondents, on the other hand, argue that the decisions in Dell and Rogers were based on Quebec legislation and are not applicable in Ontario.

(v) The [Consumer Protection Act, 2002](#)

[20] The respondents rely on provisions of the [Consumer Protection Act, 2002](#), which they say apply retroactively. In particular, they rely on s. 7(2) which declares any term in a consumer agreement to be invalid "insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice". In addition, they rely on s. 8(1) which provides that a consumer may commence a class action despite any term in a consumer agreement "that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding". These provisions came into force on July 30, 2005: see [Consumer Protection Statute Law Amendment Act, 2002, S.O. 2002, c. 30](#), in force July 30, 2005 (O. Gaz. 2005.1207).

[21] On the eve of the hearing of the appeals in Dell and Rogers, Quebec enacted similar legislation. Neither the Ontario nor the Quebec legislation explicitly applies retroactively. In Dell, the [page648] Supreme Court held that as the Quebec legislation took away a substantive contractual right, in the absence of specific language making the legislation retroactive, it only applied prospectively. The Motion Judge's Decision

[22] The motion judge held that Dell and Rogers were distinguishable and thus inapplicable in Ontario and that ss. 7 and 8 of the [Consumer Protection Act, 2002](#) have retroactive effect. He also held that as the matter was "a proper one for summary judgment" (despite the fact that he refused to grant the respondents' motion for summary judgment), the stay should be refused pursuant to s. 7(2)5 of the Arbitration Act.

[23] The motion judge held, in the alternative, that the doctrine of issue estoppel prevented the appellants from relitigating the issue of whether the class proceeding should be stayed on the basis of the arbitration clauses. At para. 180, he held that "in all the circumstances of this very particular case, it does not seem unfair to deny Money Mart a referral to arbitration". Among the specific factors he mentioned was the fact that since not all loan agreements contained arbitration clauses, the class action would proceed in any event. In addition, he held, at para. 181, that "the [p]laintiffs and other class members were bound to follow the law [as decided by this court] until it was changed, and with a considerable investment of time and expense, they did so, before the law they relied on was overruled".

[24] In dismissing the respondents' motion for summary judgment, the motion judge stated that two defences raised by the appellants, namely the "voluntary payment" defence and the argument that s. 347 of the [Criminal Code](#) violates s. 7 of the [Canadian Charter of Rights and Freedoms](#), were without merit. Issues

[25] The appellants argue that the motion judge erred by (1) holding that ss. 7 and 8 of the [Consumer Protection Act, 2002](#) have retroactive effect; (2) concluding that Dell and Rogers did not change the law in Ontario; (3) denying a stay on the ground that the action was "a proper one" for summary judgment under s. 7(2)5 of the Arbitration Act; and (4) refusing the stay on grounds of issue estoppel.

[26] The respondents argue that this court does not have jurisdiction to hear the appeal, and that if it does, the motion judge did not err in refusing to grant a stay and decertify the class proceeding. [page649]

[27] With respect to the respondents' motion for summary judgment, the appellants argue that the motion judge erred in rejecting the two defences referred to above. Analysis

[28] In my view, the appeal against the refusal to grant a stay can and should be resolved solely on the basis of issue estoppel. Accordingly, for the purposes of this appeal, I will assume without deciding that Dell and Rogers do change the law of Ontario and that ss. 7 and 8 of the [Consumer Protection Act, 2002](#) do not have retroactive effect. Before discussing issue estoppel, I will briefly address the jurisdictional issues. 1. Jurisdiction to entertain the appeal from the refusal to grant a stay

[29] The respondents rely on s. 7(6) of the Arbitration Act which provides that "[t]here is no appeal from the court's decision" from an order made on an application for a stay under s. 7. In *Huras v. Primerica Financial Services Ltd.*, 2000 CanLII 16892 (ON CA), [2000] O.J. No. 3772, 137 O.A.C. 79 (C.A.), at para. 10, this court affirmed a line of authority to the effect that where a stay is refused on the ground that the dispute lies beyond the reach of s. 7 and the Arbitration Act is not applicable, the prohibition in s. 7(6) against an appeal is equally not applicable. Here, the motion judge ruled that the Arbitration Act was not applicable in the face of the [Consumer Protection Act, 2002](#) provisions that rendered the waiver of the right to bring an action invalid. It follows, in my view, that s. 7(6) does not apply to deny the appellants a right of appeal.

[30] During oral argument, the panel raised the question of whether the order denying a stay was an interlocutory order. That proposition was also rejected, at para. 12, in *Huras* on the ground that an order denying a s. 7 stay "finally determines the forum in which the dispute between the parties is to be resolved" and deprives the party seeking the stay of the substantive contractual right to arbitration. Similarly, orders denying a stay for want of jurisdiction or on the ground of forum non conveniens have been held to be final for the purposes of appeal: see, e.g., *M.J. Jones Inc. v. Kingsway General Insurance Co.* (2003), 2003 CanLII 37356 (ON CA), 68 O.R. (3d) 131, [2003] O.J. No. 4388 (C.A.). By denying the appellants' request to "go back to square one" on the stay issue and by refusing the stay,

the motion judge finally disposed of the appellants' claim for a stay and finally determined the forum in which the dispute will be resolved. It follows that the order was final in nature for the purposes of this appeal. [page650] 2. The summary judgment appeal

[31] At the conclusion of oral argument on the summary judgment issue, we indicated that that appeal from the motion judge's comments regarding the defences would be dismissed for want of jurisdiction. The motion judge's order dismissing the respondents' motion for summary judgment is an interlocutory order from which no appeal lies to this court. The statements or findings made by the motion judge to the effect that the appellants failed to make out certain defences to the claim are obiter, they do not bind the parties and this court has no jurisdiction to entertain an appeal against them: *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), [1998 CanLII 14615 \(ON CA\)](#), 42 O.R. (3d) 618, [1998] O.J. No. 5291 (C.A.). 3. Issue estoppel

[32] I come now to issue estoppel which, in my view, is dispositive of the remaining issues on this appeal.

[33] The doctrine of issue estoppel precludes a party from relitigating a legal or factual issue that has been conclusively resolved in a prior proceeding. The doctrine rests on the finality principle, "a compelling consideration" that ordinarily limits a litigant "to one bite at the cherry": *Danyluk v. Ainsworth Technologies Inc.*, [2001 SCC 44 \(CanLII\)](#), [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, at paras. 18-19. Once a point has been decided, the winning litigant is entitled to rely on the result, to be assured of peace and to be able to plan the future on the basis of the court's decision. The finality principle is fundamental to a secure legal order. It avoids "[d]uplicative litigation, potentially inconsistent results, undue costs, and inconclusive proceedings": *Danyluk*, at para. 18.

[34] On the other hand, issue estoppel "is a doctrine of public policy that is designed to advance the interests of justice" and where the application of issue estoppel would itself produce an injustice, courts have a discretion to relieve against it: *Danyluk*, at para. 19.

[35] In *Danyluk*, the Supreme Court of Canada set out a two- step test designed to ensure that issue estoppel and the finality principle are applied so that justice is done. At para. 33, Binnie J., for the court, held:

The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel If successful, the court [page651] must still determine whether, as a matter of discretion, issue estoppel ought to be applied. (Emphasis in original; citations omitted)

[36] Binnie J. held, at para. 25, that the preconditions at the first stage of the test are those set out by Dickson J. in *Angle v. Canada (Minister of National Revenue)*, [1974 CanLII 168 \(SCC\)](#), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, at p. 254 S.C.R.:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[37] In this case, the prior determination that the appellants are not entitled to a stay on account of the arbitration clauses meets all three requirements.

[38] First, the same question was decided when this court held in 2005 that the appellants were not entitled to a stay and that the issue of whether the dispute should be resolved by way of arbitration or class proceedings was a matter to be decided at the "preferable procedure" stage of the certification hearing. The certification judge rejected the contention that arbitration was preferable to a class proceeding and the appellants exhausted their rights of appeal.

[39] Second, the decision on that issue was final. The appellants' application for leave to appeal to the Supreme Court of Canada was dismissed, the matter proceeded to certification and the appellants' application for leave to appeal the certification order was also dismissed. While the claim of the respondents has yet to be resolved on its merits and, in that sense, remains "in the system", the issue of arbitration or class proceeding has been finally resolved and is no longer in play.

[40] The third requirement that the parties or their privies are the same is now subject to the abuse of process doctrine:

see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64. In any event, it is clear here that the parties are the same and that the third requirement is met.

[41] I turn to the second stage of the Danyluk test, namely, whether, as a matter of discretion, issue estoppel ought to be applied. The appellants submit that the change in the law brought on by Dell and Rogers entitles them to avoid the prior determination and to relitigate the stay issue and that the motion judge erred in exercising his discretion against them. [page652] Strong reliance is placed on the following sentence from *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321, [1999] O.J. No. 5 (C.A.), at p. 340 O.R.: "If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings." That sentence, however, must be read in the context in which it is found, at pp. 340-41 O.R.:

Issue estoppel is a rule of public policy and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two interests will be in conflict, or at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings. It would be unfair to do otherwise. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 at p. 50 (H.L.), Lord Keith wrote:

. . . there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . (Emphasis added)

[42] Particularly when read in the light of *Danyluk*, *Minott* does not lay down an iron-clad guarantee that a litigant who has fought an issue and lost will always be accorded the benefit of a

change in the law. A litigant has no automatic or presumptive right to relitigate an issue on account of a change in the law: the matter rests upon the discretion of the court to ensure that the finality principle is applied in a manner consistent with the interests of justice. The "special circumstances" qualification on issue estoppel from *Minott and Arnold* [*Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, [1991] 2 A.C. 93 (H.L.)] is consistent with *Danyluk*. It qualifies the rigorous application of issue estoppel, not with another strict exception, but rather with a discretion to ensure that the interests of justice are met. [page653]

[43] In my view, in the circumstances of this case, the motion judge did not err in exercising his discretion in favour of applying issue estoppel and against allowing the appellants to upset the prior determination with the consequence of unravelling all that had happened since.

[44] In reliance on this court's 2005 decision, the respondents have prosecuted this action through a series of costly and time consuming stages:

- they successfully fought a challenge to the court's jurisdiction all the way to the Supreme Court of Canada;
- they fought and won a strongly contested motion for certification;
- discoveries have been held and are near completion;
- substantial disbursements have been incurred and a significant amount of time has been docketed; and
- the action has been set down for trial.

[45] In sum, after several years of motions, three appeals to this court and two applications for leave to appeal to the Supreme Court of Canada, the respondents have finally advanced the matter to the point of trial.

[46] Against the respondents' reliance on the prior determination, one must consider the fact that the appellants will lose the benefit of the purported change in the law brought about by *Dell and Rogers*. For the following reasons, I conclude that this loss is clearly outweighed by the adverse consequences to the respondents of revisiting the stay issue at this late stage in the proceedings.

[47] The appellants strongly rely on *Hockin v. Bank of British Columbia*, [1995 CanLII 6268 \(BC CA\)](#), [1995] B.C.J. No. 688, 123 D.L.R. (4th) 538 (C.A.), a case which, in my view, is distinguishable. There, employees claimed surplus funds in a pension fund. It had been determined on a preliminary point of law that the employer was entitled to the funds. That decision was affirmed by the Court of Appeal and the Supreme Court of Canada denied leave to appeal [[1995] S.C.C.A. No. 256]. Before the remaining issues came to trial, the Supreme Court of Canada decided another appeal and expressly disagreed with the Court of Appeal's decision in *Hockin* that the employer was entitled to the surplus. On appeal by the employees from a decision that they were bound by the prior determination under the doctrine of issue estoppel, the Court of Appeal [page654] held, at paras. 35-36, that the "special circumstances" referred to in *Arnold* were met, that the employees should not be "denied a hearing on the merits" and that the interests of justice required that they be given the benefit of the change in the law despite the prior ruling.

[48] While I acknowledge that *Dell and Rogers* characterize the contractual right to arbitrate as a substantive right, one must not lose sight of the fact that, in the end, it is a right to have a dispute resolved by way of a different process. Although the application of issue estoppel will deprive the appellants of that right, the loss of this right is considerably less serious than in *Hockin*. There, issue estoppel went to the merits of the claim and effectively deprived the employees of any remedy. In a class proceeding, the appellants would not be denied any defence to the claim that they could raise in arbitration. Simply put, although the appellants would lose the right to arbitrate, they would suffer no loss of rights in relation to the merits of the claim.

[49] In my view, the loss of the appellants' right to arbitrate pales into insignificance when measured against the impact that a contrary ruling would have on the respondents. Such a ruling

would force the respondents to radically alter the scope of the class proceeding to exclude those claims that are subject to arbitration clauses and to forgo all or part of the significant cost of advancing the class proceeding to its present stage. The respondents' efforts to this point would be forgone in the name of individual arbitration, a procedure that has no air of practical reality given the nature of the claims they advance.

[50] As the certification judge observed, the claim of each class member is small. For instance, the representative plaintiff's claim is for \$83. As the certification judge found, it is simply not economically feasible to arbitrate a claim of that size. In addition, some of the loan agreements signed by the representative plaintiff preclude the "joinder or consolidation of claims with other persons . . . without the consent of the parties" and other agreements contain class action waivers. When asked during oral argument, counsel for the appellants could not assure us that their clients would agree to waive their right to object to any form of joinder or consolidated arbitration. It is almost certainly the case that a stay would defeat the claims subject to arbitration clauses, not on the merits but for reasons of practicality. Enforcing the arbitration clauses would not lead to arbitration but would immunize the appellants from any claims. This is hardly a compelling case for the exercise of judicial discretion.

[51] Furthermore, even if the claims subject to arbitration clauses were stayed, the appellants would almost certainly still [page655] have to defend a reconstituted class action by the class of borrowers who did not sign similar agreements or who signed agreements after the [Consumer Protection Act, 2002](#) provisions came into force. I fail to see the justice in an exercise of discretion that would stay these claims at this late stage. It would surely be in the interests of justice to have all claims resolved in one proceeding.

[52] I would also weigh in the balance the fact that the appellants appear to lack a genuine interest in arbitration. As the certification judge found, they never seek arbitration when enforcing their own rights and routinely bring court actions against borrowers to enforce the loan agreements. It is difficult to avoid the inference that the appellants insist upon arbitration, not with any serious intention of arbitrating, but simply as a way to defeat the respondents' class proceeding.

[53] I conclude that the motion judge did not err in exercising his discretion in favour of applying issue estoppel in the circumstances of this case. Even if Dell and Rogers would now compel a court to stay a class proceeding in the face of a consumer agreement providing for arbitration, when all of the circumstances of this case are considered, I agree with the motion judge that it would not be unjust to apply issue estoppel and to hold the appellants to the prior determination.

[54] I note in passing that Brown J. reached a similar conclusion in *MacKinnon v. National Money Mart Co.*, [2008 BCSC 710 \(CanLII\)](#), [2008] B.C.J. No. 1026, 293 D.L.R. (4th) 478 (S.C.), leave to appeal to B.C.C.A. granted [2008 BCCA 292 \(CanLII\)](#), [2008] B.C.J. No. 1285, 295 D.L.R. (4th) 304 (C.A.). While a stay was granted following Dell and Rogers in *Frey v. Bell Mobility Inc.*, [2008] S.J. No. 105, [2008 SKQB 79](#), Gerein J. noted, at para. 10, that although he had determined before Dell and Rogers were decided that a class proceeding was preferable to arbitration, the certification motion was "in limbo" and had been adjourned sine die, so issue estoppel did not arise. For the reasons discussed above, the same cannot be said in this case. Conclusion

[55] Even if the [Consumer Protection Act, 2002](#) provisions do not have retroactive effect and even if the Supreme Court of Canada's decisions in Dell and Rogers have changed the law in Ontario, I conclude that the doctrine of issue estoppel precludes the appellants from relitigating the issue of whether this action should be stayed on account of the arbitration clauses. The appellants have fully litigated the issue all the way to the Supreme Court of Canada and lost. Following that loss, the action proceeded to certification, discovery and it is now set down for trial. It would be fundamentally unjust at this late [page656] stage of the proceedings to grant the appellants a stay

that would not, in fact, send this case to arbitration but rather would have the effect of denying any remedy to borrowers who are subject to arbitration clauses.

[56] Accordingly, I would dismiss the appellants' appeal against the motion judge's refusal to grant a stay and decertify the class proceeding as well as their appeal from the order dismissing the respondents' motion for summary judgment. If the parties are unable to resolve the issue of costs, we will entertain written submissions from the respondents within 20 days of the release of this judgment and from the appellants within ten days thereafter.

Appeal dismissed.

TAB 58

Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 (CanLII), [2021] 2 SCR 785

Date: 2021-09-24
File number: 38992
Other citations: 461 DLR (4th) 635 — [2021] SCJ No 33 (QL)
Citation: Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 (CanLII), [2021] 2 SCR 785, <<https://canlii.ca/t/jj7kf>>, retrieved on 2025-10-28



SUPREME COURT OF CANADA

CITATION: Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33, [2021] 2 S.C.R. 785

APPEAL HEARD: March 17, 2021
JUDGMENT RENDERED: September 24, 2021
DOCKET: 38992

BETWEEN:

Canadian Broadcasting Corporation
Appellant

and

**Her Majesty The Queen, Stanley Frank Ostrowski, B.B., spouse of the late M.D., and J.D.,
in his capacity as executor of the estate of the late M.D.**
Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia, Centre for Free Expression,
Canadian Association of Journalists, News Media Canada, Communications Workers of America/Canada and Ad Idem/Canadian Media Lawyers Association**
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ. concurring)
(paras. 1 to 107)

DISSENTING REASONS: Abella J.
(paras. 108 to 131)

Canadian Broadcasting Corporation

Appellant

v.

**Her Majesty The Queen,
Stanley Frank Ostrowski,
B.B., spouse of the late M.D., and
J.D., in his capacity as executor of the estate of the late M.D.**

Respondents

and

**Attorney General of Ontario,
Attorney General of British Columbia,**

Centre for Free Expression,
Canadian Association of Journalists,
News Media Canada,
Communications Workers of America/Canada and
Ad Idem/Canadian Media Lawyers Association

Interveners

Indexed as: Canadian Broadcasting Corp. v. Manitoba

2021 SCC 33

File No.: 38992.

2021: March 17; 2021: September 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Courts — Jurisdiction — Publication bans — Variation — Criminal proceedings — Court of Appeal ordering indefinite publication ban on affidavit filed in criminal proceedings before it — Motion brought by media representative after judgment on merits of proceedings rendered asking Court of Appeal to set aside publication ban — Court of Appeal declining to hear motion on basis that jurisdiction exhausted — Whether court retains jurisdiction to reconsider publication ban orders and other such ancillary orders after merits of criminal proceedings decided.

An affidavit filed in a criminal matter before the Court of Appeal had been subject to a publication ban pending a decision as to its admissibility as new evidence. In its November 2018 reasons allowing the appeal on the merits, the Court of Appeal dismissed the motion for new evidence but ordered that the publication ban remain in effect indefinitely. In May 2019, the CBC brought a motion before the Court of Appeal to have the publication ban set aside, arguing that

having access to the affidavit would shed light on the criminal matter before the Court of Appeal and the court's conclusion on the merits that a miscarriage of justice had occurred at trial.

The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion. The CBC applied for and was granted leave to appeal to the Court from both the Court of Appeal's 2019 decision refusing to reconsider the publication ban ("2019 Jurisdiction Judgment") and the Court of Appeal's 2018 decision ordering the indefinite publication ban ("2018 Publication Ban Judgment").

Held (Abella J. dissenting): The appeal from the 2019 Jurisdiction Judgment should be allowed and the matter remanded to the Court of Appeal. The appeal from the 2018 Publication Ban Judgment should be adjourned *sine die*.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.: The Court of Appeal had jurisdiction to consider the CBC's motion to set aside the publication ban. While the court could not rehear the appeal on the merits and while the doctrine of *functus officio* precluded it from reconsidering the substance of the appeal, the court retained the authority to supervise access to the record of its own proceeding, which allowed it to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. The matter should be remanded to the Court of Appeal, as it is best placed to decide the CBC's motion and the discretionary and fact-specific issues raised. It would be inappropriate for the Court to decide the CBC's appeal from the 2018 Publication Ban Judgment before the Court of Appeal has had a chance to consider the CBC's motion to have the publication ban set aside.

According to the rule of *functus officio*, a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction once the formal judgment has been entered. This rule serves goals of finality and

of an orderly appellate procedure. If lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court.

That said, it is important to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. Even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter. This power is part of a court's authority to control its own process and arises by necessary implication from the legislative grant of a court's adjudicative authority. It is anchored in the vital public policy favouring public access to the workings of the courts. Important decisions about the openness of the court record, such as rendering, varying or vacating publication bans and sealing orders, may need to be taken after the proceeding on the merits is over. Recognizing that a court's jurisdiction to control its record survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments as the doctrine of *functus officio* was never intended to restrict the ability of lower courts to control their own files.

That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. A publication ban or sealing order is susceptible of reconsideration by the issuing court on two narrow grounds and regardless of whether formalized in an order or not.

First, a court may vary or set aside a publication ban or sealing order it has made on timely motion by an affected person, such as the media, who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose. Regarding publication bans in criminal matters, standing should be thought of as a matter of a court's discretion. The media should generally have standing to challenge an order that threatens the open court principle where they are able to show they will make submissions that were not considered and that could have affected the result. A court does retain residual discretion to deny standing where hearing the

motion would not be in the interests of justice, such as where it would unduly harm the parties or duplicate argument already before the court. As to delay, a moving party is expected to take prompt action to challenge such an order once it has become aware it exists. In the absence of legislative direction, a court must be guided by the purpose of the rule and the circumstances of each case. The task is a contextual balancing of finality and timely justice against the importance of the matter being heard on the merits. This determination is inherently tied to the facts of each particular case and the nature of the issue raised.

Second, a court may vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed. The moving party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms. The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances.

Instances in which a court may reconsider a publication ban or sealing order are distinct from an appeal or application for *certiorari* made to a higher court from such decisions, as the original court is not being asked to reconsider its decision because it is wrongly decided. Finally, the general principles underlying the two grounds for reconsideration can be displaced by legislation, such as applicable rules of court.

In the present case, the Court of Appeal erred in concluding that applicable legislation, such as its rules of court procedure, or the doctrine of *functus officio* deprived it of jurisdiction to consider the CBC's motion to set aside the publication ban. The Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered. That the Court of Appeal had jurisdiction to consider the CBC's motion does not mean, however, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts, a determination that should be made by the Court of Appeal. Since the CBC has not established a material change of circumstances, it will therefore have to rely on the Court of Appeal's power to reconsider an order on the basis that it was

made without notice to an affected party. The impugned order was made of the Court of Appeal's own accord at the oral hearing and then continued indefinitely. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The Court of Appeal will have to determine whether the CBC has standing to challenge the relevant order and whether CBC's motion was timely. Furthermore, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test for discretionary limits on court openness: a court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects.

Per Abella J. (dissenting): The appeals should be dismissed. The CBC is not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay.

The media is a crucial voice in protecting and promoting the openness of courts, and their right to challenge publication bans is undisputed. But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. Although the application of *functus officio* is less formalistic and more flexible in respect of ancillary orders and publication bans, and circumscribed avenues must be maintained through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over, the rationales underlying this doctrine show that it has a role to play in respect of publication ban orders.

Finality matters. The parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over. A reconsideration of a publication ban must therefore be sought in a timely manner, and a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests of finality and the interests in support of the open court principle.

Courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions, and there is no reason to assume that did not happen in this case.

In the present case, the CBC is unable to establish a material change in circumstances. The only bases under which it could move for reconsideration of the publication ban are by showing that the ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met.

First, the publication ban was not issued without notice. If the media is present in the courtroom when a publication ban is issued, as was the CBC, it follows that it knows of its existence. Second, the CBC has not discharged its burden of showing that its proposed submissions could make a material, or even any difference in the outcome.

Third, and more significantly, the CBC's failure to act in a timely manner is determinative. An unexplained six-month delay for filing a motion to have a publication ban reconsidered is inordinately long. Under no definition of "due dispatch" can this delay be justified, particularly since the CBC was fully aware of the ban from the outset of the proceedings. The delay in this case causes acute harm to the parties, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings.

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By Kasirer J.

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By Abella J. (dissenting)

Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Adams*, 1995 CanLII 56 (SCC), [1995] 4 S.C.R. 707; *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 85, 246 N.S.R. (2d)

104; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *R. v. Khela*, 1995 CanLII 46 (SCC), [1995] 4 S.C.R. 201; *Hollinger Inc. v. Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521; *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, 1977 CanLII 231 (SCC), [1977] 2 S.C.R. 740.

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Canadian Charter of Rights and Freedoms, s. 2(b).

Code of Civil Procedure, CQLR, c. C-25.01, art. 349.

Court of Appeal Rules, Man. Reg. 555/88R, r. 21(4), 33(4), 46.2(1), (2), (4), (12).

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Criminal Code, R.S.C. 1985, c. C-46, ss. 696.1, 696.3(3)(a)(ii).

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APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), [2019 MBCA 122](#) (*sub nom. R. v. Ostrowski*), [2019] M.J. No. 334 (QL), 2019 CarswellMan 923 (WL Can.), dismissing a motion to set aside a publication ban. Appeal allowed, Abella J. dissenting.

APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), [2018 MBCA 125](#), 369 C.C.C. (3d) 139 (*sub nom. R. v. Ostrowski*), [2018] M.J. No. 306 (QL), 2018 CarswellMan 550 (WL Can.), ordering *inter alia* that a publication ban remain in effect. Appeal adjourned *sine die*, Abella J. dissenting.

Jonathan B. Kroft and *Sean A. Moreman*, for the appellant.

Michael Bodner and *Denis Guénette*, for the respondent Her Majesty The Queen.

Harvey T. Strosberg, Q.C., and *James Lockyer*, for the respondent Stanley Frank Ostrowski.

Robert Gosman, for the respondents B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.

Michael Bernstein, for the intervener the Attorney General of Ontario.

Lesley A. Ruzicka, for the intervener the Attorney General of British Columbia.

Fredrick Schumann, for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and Communications Workers of America/Canada.

Tess Layton, for the intervener Ad Idem/Canadian Media Lawyers Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer J.J. was delivered by

KASIRER J. —

I. Overview

[1] The principal issue in these appeals concerns a court’s jurisdiction to render, vary or vacate orders — sealing orders, publication bans and the like — that limit the open court principle. The question is whether a court retains jurisdiction over these ancillary matters after it has decided the merits of the case and has entered its formal judgment. Does the doctrine of *functus officio* — the notion that once a court has performed its function, it has exhausted its authority — preclude that court from revisiting a publication ban that it had ordered or a sealing order put in place in the course of criminal proceedings?

[2] An affidavit filed in a criminal matter before the Court of Appeal of Manitoba had been held under seal and subject to a publication ban pending a decision as to its admissibility as new evidence. In its reasons allowing the appeal on the merits, the court dismissed the motion for new evidence because it was not relevant to the issue at hand. It nevertheless ordered that the publication ban remain in place indefinitely.

[3] Relying on the open court principle and the constitutionally-protected right of freedom of the press with which it is bound up, the appellant Canadian Broadcasting Corporation (“CBC”) brought a motion in which it sought access to the affidavit and asked to have the publication ban set aside. It had been covering the proceedings as a representative of the media. Lifting the publication ban, said the CBC, would shed light on the principal matter before the Court of Appeal and its conclusion on the merits that a miscarriage of justice had occurred at trial. The Crown opposed the motion to disturb the ban, however, arguing that the affidavit was not relevant and the Court of Appeal had no continuing authority over the matter. Family members of a

deceased person mentioned in the affidavit under seal also opposed lifting the ban since, they said, doing so would result in an unjustifiable violation of their privacy.

[4] The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion and said the CBC should turn to this Court, on appeal, to seek redress.

[5] In point of fact, this Court is seized of two appeals. In the first, leave was granted from the Court of Appeal's refusal to hear the motion in which it was asked to reconsider its own publication ban and, in addition, to grant the CBC access to the affidavit. This first appeal raises preliminary issues about the Court of Appeal's powers to reconsider such decisions after it had entered the formal order on the merits of the miscarriage of justice case, including consideration of the doctrine of *functus officio*. In the second appeal for which leave was also granted, the CBC challenges the publication ban directly. This second appeal is taken directly from the publication ban itself, and unlike the first appeal, it does not concern the order granting access to the affidavit also sought in the CBC's motion. It raises the sole issue of whether the Court of Appeal was correct to order the final, indefinite publication ban made in the judgment which disposed of the merits of the appeal.

[6] As to the first appeal, and so said with great respect, I do not share the Court of Appeal's view that it was without jurisdiction to consider the motion brought by the CBC. It is true that, in the exercise of its appellate authority, the Court of Appeal could not rehear the appeal on the merits and that the doctrine of *functus officio* precludes it from reconsidering the substance of the appeal. But after a court loses jurisdiction over the merits, it generally retains the authority to supervise access to the record of its own proceedings. Even after the formal judgment on the merits is filed, this ongoing authority allows the court to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. Indeed, it is critical to upholding the responsibility all

courts have to manage their records in accordance with the *Canadian Charter of Rights and Freedoms* and the proper administration of justice. As ancillary court openness issues have no bearing on the judgments on the merits, there was no reason for the Court of Appeal to tie its own hands in service of the finality of the underlying judgment that was not at risk.

[7] Moreover, the Court of Appeal had ordered the continuing publication ban in its judgment on the merits without a hearing to determine whether the open court principle should be limited in the circumstances. The Court of Appeal ought to have considered whether it was appropriate to set aside its publication ban on motion by the CBC in these circumstances.

[8] For the reasons that follow, to dispose of the first appeal I propose that the matter should be remanded to the Court of Appeal to decide the CBC's motion. That court is best placed to decide the discretionary and fact-specific issues raised, including whether the CBC should be granted standing to challenge the publication ban, whether the motion was unreasonably delayed such that it is not in the interests of justice to hear it and whether the lifting of the publication ban is justified here taking into account this Court's decision in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521

[9] Given that I propose to dispose of the first appeal by returning the matter to the Court of Appeal to decide the CBC's motion, in my respectful view it would be inappropriate for this Court to decide the second appeal challenging the ban directly now, before the Court of Appeal has had a chance to reconsider the matter. Accordingly, I would adjourn the second appeal *sine die*.

II. Background and Proceedings Below

A. *The Miscarriage of Justice Reference*

[10] Following a jury trial in 1987, Stanley Ostrowski was convicted of first degree murder. He appealed the conviction unsuccessfully to the Court of Appeal and later this Court (*R.*

v. Ostrowski and Correia (1989), 1989 CanLII 7367 (MB CA), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, 1990 CanLII 116 (SCC), [1990] 2 S.C.R. 82).

[11] In 2014, the Minister of Justice referred the matter to the Court of Appeal pursuant to ss. 696.1 and 696.3(3)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. These provisions allow matters to be referred back to the Court of Appeal in circumstances where, in the Minister's view, there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

[12] Certain new evidence relating to the conviction at trial in 1987 was proposed for consideration by the Court of Appeal upon joint motion of the Crown and Mr. Ostrowski. Unusually, this included the live testimony of 12 witnesses heard before a panel of appellate justices. The Crown conceded this evidence was admissible, that it proved a miscarriage of justice had occurred and, accordingly, that the 1987 conviction should be set aside. The concession was based on evidence pointing to the existence of a deal made between prosecutors and a witness whose testimony had linked Mr. Ostrowski to the murder. The evidence had not been disclosed to Mr. Ostrowski at trial, violating his right to make full answer and defence.

[13] The parties did not agree on the appropriate remedy for the miscarriage of justice. The Crown sought a new trial order and a judicial stay of those proceedings, while Mr. Ostrowski asked that an acquittal be entered by the Court of Appeal.

[14] Mr. Ostrowski also sought to introduce further new evidence, specifically an affidavit sworn by his lawyer, Richard Posner ("Posner affidavit"). The affidavit contained details of certain events that had occurred after one of the 12 witnesses, M.D., had testified before the Court of Appeal in this matter. Unlike the material relating to the other motion for new evidence, the Crown did not consent to the Posner affidavit being admitted into evidence.

[15] The Court of Appeal heard oral argument from the parties on May 28, 2018, including submissions regarding the admissibility of the Posner affidavit. The affidavit was sealed, pursuant to the *Court of Appeal Rules*, Man. Reg. 555/88R, relating to motions for new evidence, but the

Court of Appeal nevertheless reviewed it on the consent of the parties (r. 21(4)). It also ordered a publication ban respecting this material at the outset of the May 28 hearing:

THE COURT: . . . [I]n our view, unless counsel feel otherwise, there must be a publication ban. There's no point in having the sealed material to the extent that it's referred to in argument without a publication ban. So there will be a publication ban as well unless counsel wish to address that?

Ban on Publication

(R.R. (Crown), at p. 137)

[16] As it would later concede before the Court of Appeal, the CBC was reporting on the proceedings, and its journalists could have attended any of the hearings, including the May 28 hearing.

B. *The 2018 Publication Ban Judgment (2018 MBCA 125, 369 C.C.C. (3d) 139 — Beard, Burnett and Pfuetzner J.J.A.)*

[17] The Court of Appeal found a miscarriage of justice as a result of the non-disclosure based on material revealed by the first motion for new evidence, accepting the concession of the Crown noted above. This was sufficient to conclude the conviction should be set aside. The Court of Appeal ultimately quashed the conviction, ordered a new trial and entered a stay of any further proceedings, and continued the publication ban indefinitely (“2018 Publication Ban Judgment”).

[18] The court declined to admit the Posner affidavit as further new evidence, because it concluded that it was not relevant to the determination of the only live issue of the appropriate remedy for Mr. Ostrowski. Instead, the evidence went to “the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice” (para. 82). Beard J.A. wrote the following in concluding: “I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect” (*ibid.*).

[19] For our purposes, it bears emphasizing that the publication ban that the Court of Appeal had ordered at the hearing was, in para. 82 of the court’s reasons on the merits, ordered to “remain in effect.” This was done without either a motion to that end or particularized pleadings on the appropriateness of the continuing order in light of the open court principle. The Posner affidavit had been sealed pursuant to a rule of court during the proceedings on appeal (*Court of Appeal Rules*, r. 21(4)). That sealing order is not mentioned in the 2018 Publication Ban Judgment.

[20] A formal certificate of decision of this judgment was entered in January 2019, recording the orders on the appeal and the two new evidence motions. The certificate made no reference to a sealing order or a publication ban.

C. *The 2019 Jurisdiction Judgment (2019 MBCA 122 — Beard, Burnett and Pfuetzner JJ.A.)*

[21] Following the disposition of the appeal on the miscarriage of justice, the CBC petitioned the Court of Appeal to obtain access to the Posner affidavit and to ask the court to set aside the publication ban referred to in the 2018 Publication Ban Judgment. The CBC’s motion was brought in May 2019, following the release of reasons on the merits of Mr. Ostrowski’s appeal and the filing of the formal judgment in that matter.

[22] The CBC had contacted the Registrar at the Court of Appeal seeking access to the Posner affidavit. Evidence suggests the CBC received word from the Court of Appeal’s media relations officer alerting it to the existence of the publication ban in the days following the release of the 2018 reasons on the merits of Mr. Ostrowski’s appeal. However, it was over five months later that the CBC filed the above-mentioned motion.

[23] The CBC relied on s. 2(b) of the *Charter* and alleged that the evidence did not support “any continued restriction on the right of the media and the public to access and report upon the full record of these [p]roceedings” (A.R., at p. 75). In its motion brief, the CBC emphasized its purpose to render transparent the circumstances that led to the miscarriage of justice, arguing that it was of the utmost importance that material in the Posner affidavit concerning M.D., one of the 12

witnesses at the miscarriage of justice proceeding, be open to public scrutiny. In an affidavit filed in support of the motion, the CBC's Director of Investigative Journalism: Regions observed that there had been no formal motion filed requesting a publication ban of the material and there was no notice to the public or the media that a ban was being sought.

[24] M.D.'s spouse, B.B., and the executor of his estate, J.D. (collectively, "interested parties") opposed the CBC's motion on jurisdictional grounds, as did the Crown. Noting that the certificate of decision had already been entered, the interested parties and the Crown argued that the Court of Appeal had no authority to decide the motion by reason of the rule against rehearing in the *Court of Appeal Rules*.

[25] The Court of Appeal dismissed the motion, citing a lack of jurisdiction ("2019 Jurisdiction Judgment"). It explained that the CBC was seeking a rehearing of a publication ban order made as part of the final disposition of Mr. Ostrowski's appeal. "[N]o rehearing of an appeal, or any issue dealt with on an appeal, can occur once the certificate of decision has been entered", wrote Pfuetzner J.A. for the court, relying on r. 46.2 of the *Court of Appeal Rules* and the common law doctrine of *functus officio* (para. 17 (CanLII)). The certificate had been entered well before the motion was brought. The fact that the certificate did not mention the publication ban was held not to be determinative because it was "subsidiary" to the ruling on the new evidence motion and the final disposition of the appeal. It was further barred by r. 46.2(12), which provides a motion cannot be reheard. The Court of Appeal concluded that the "proper route for a third party . . . to challenge a publication ban issued by a superior court (including one issued by an appellate court) is to seek leave to appeal to the Supreme Court of Canada" (para. 21). It dismissed the motion on this jurisdictional basis alone.

III. Issues

[26] As is plain from the CBC's two applications seeking leave, the terms of the leave judgment and the arguments of the parties before us, this matter raises two distinct appeals. The CBC is appealing both from the 2019 Jurisdiction Judgment dismissing the motion for

reconsideration, and from the 2018 Publication Ban Judgment, which made the indefinite publication ban at issue in this case.

[27] In these two appeals, the CBC seeks three orders from this Court. First, the CBC asks for an order setting aside the 2019 Jurisdiction Judgment. It argues the Court of Appeal erred in concluding it had no jurisdiction to hear its motion and should have addressed the issues of whether to reconsider the publication ban and of whether the public and the press have the right to access the Posner affidavit. Notably, the CBC argues that neither the rule against rehearings in the *Court of Appeal Rules* nor the doctrine of *functus officio* deprived the Court of Appeal of jurisdiction to consider the motion based in constitutional principles of court openness. It says that the publication ban could be reconsidered on the basis of a change in circumstances or because, as an affected party, it did not have notice of the making of this order.

[28] The CBC also asks this Court for a second order setting aside the continuing publication ban in the 2018 Publication Ban Judgment and a third giving it access to the Posner affidavit as part of the court record. It argues the open court principle applies to material that is tendered as new evidence even if, at the end of the day, it is not admitted. In this instance, it says the publication ban fails the test for discretionary limits on this principle set forth in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. It contends further that the public is legally entitled to access the Posner affidavit because the applicable rules do not provide for continued sealing of this material. Mr. Ostrowski adopts the CBC's position and adds that the orders of the Court of Appeal preclude the proper accountability of public officials whose actions he alleges contributed to his wrongful conviction.

[29] The Crown takes the position that the Court of Appeal was right to conclude that it had no jurisdiction to consider the CBC's motion. The Crown says, however, that if the Court of Appeal had authority to consider these issues, this Court does not have jurisdiction with respect to the publication ban and, if it does, it should decline to exercise its authority. Should this Court proceed to consider the merits, the Crown's position is that the Court of Appeal's decision to

impose a continuing publication ban was correct, even if it might have given more fulsome reasons. The material in the Posner affidavit is deeply personal and speaks to intimate details about M.D. that would re-traumatize the family, such that a discretionary limit on court openness was justified here. Similarly, the interested parties argue that the limits on court openness are necessary to protect the privacy of M.D.'s family and that the limit is justified given the inadmissible, irrelevant and unreliable nature of the proposed new evidence.

[30] The parties raise a broad series of questions before this Court bearing on jurisdiction over and the appropriateness of a publication ban or sealing order in the circumstances. It is sufficient to answer the following questions to dispose of this matter:

1. Did the Court of Appeal err in concluding it had no jurisdiction to consider the CBC's motion to reconsider the publication ban and gain access to the Posner affidavit?
2. Should the matter be remanded to the Court of Appeal to hear the merits of that motion?

[31] For the reasons that follow I am respectfully of the view, in the first appeal from the 2019 Jurisdiction Judgment, that the Court of Appeal did err on the issue of jurisdiction and that as a result the matter should be remanded to that court. This ends the analysis. The second appeal from the 2018 Publication Ban Judgment would best not proceed until the Court of Appeal decides the CBC's motion.

IV. Analysis

A. Jurisdiction to Make, Vary and Set Aside Orders Concerning Court Openness

- (1) Supervisory Jurisdiction Over the Court Record Survives Entering a Judgment on the Merits

[32] In concluding that it lacked jurisdiction to vary or set aside the relevant orders concerning court openness, the Court of Appeal relied, in part, on the doctrine of *functus officio*. The term *functus officio* — often rendered as “having performed his or her office” — has traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision (A. S. P. Wong, “Doctrine of *Functus Officio*: The Changing Face of Finality’s Old Guard” (2020), 98 *Can. Bar Rev.* 543, at pp. 546-47; see A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 193, who also uses the term *functa officio*).

[33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see *Chandler v. Alberta Association of Architects*, 1989 *CanLII 41* (SCC), [1989] 2 S.C.R. 848, at p. 860; *Reekie v. Messervey*, 1990 *CanLII 158* (SCC), [1990] 1 S.C.R. 219, at pp. 222-23; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 *SCC 62*, [2003] 3 S.C.R. 3, at paras. 77-79). A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered (*R. v. Adams*, 1995 *CanLII 56* (SCC), [1995] 4 S.C.R. 707, at para. 29; *R. v. Smithen-Davis*, 2020 *ONCA 759*, 68 C.R. (7th) 75, at paras. 33-34). After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits (*Chandler*, at p. 861, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, 1934 *CanLII 1* (SCC), [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 1997 *CanLII 418* (ON CA), 33 O.R. (3d) 202 (C.A.), at pp. 214-15, citing *The Queen v. Jacobs*, 1970 *CanLII 143* (SCC), [1971] S.C.R. 92; see also *R. v. Burke*, 2002 *SCC 55*, [2002] 2 S.C.R. 857, at para. 54).

[34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (*Chandler*, at p. 861; *H. (E.)*, at p. 214). As Doherty J.A. wrote in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 *CanLII 5454* (ON CA), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More

specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court (*Doucet-Boudreau*, at para. 79; see also *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103, at paras. 11-12). The appeal record would be written on “shifting sand”, ultimately inhibiting effective review (Wong, at p. 548).

[35] That said, *functus officio* is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of *functus officio* as narrow in scope (*Reekie*, at pp. 222-23; see also Wong, at pp. 555-56). So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality.

[36] It is useful to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. As I will endeavour to explain, even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter (see, e.g., *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330, at paras. 185-86).

[37] Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts (*Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, at p. 189; see also *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 12). As Goudge J.A. observed in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 2002 CanLII 41398 (ON CA), 59 O.R. (3d) 18 (C.A.), “it is important to remember that the court’s jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts” (para. 13). Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive to

“competing important public interests” that may be put at risk by that openness (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 26 and 28).

[38] The need to attend to the appropriate balance between these fundamental public interests does not disappear merely because the order on the merits is final and could have been appealed. Court records may be accessed even when proceedings have come to an end. Indeed, important decisions about the openness of the court record may need to be taken after the proceeding on the merits is over (see, e.g., *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190). If jurisdiction over court openness ceased when the formal order on the merits were entered, courts would lose control over their own record without good reason. Consider, for example, a case where no order limiting court openness is made before the formal judgment on the merits is entered, and a need to protect an important public interest is later discovered. In my respectful view, to conclude that this power is wholly lost once the formal order on the merits is entered would risk undermining the proper administration of justice in service of a reading of the doctrine of *functus officio* unconnected with its purpose.

[39] Recognizing that this jurisdiction survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments associated with the doctrine of *functus officio*. Relief granted pursuant to this power leaves the substance of the underlying proceeding and the reasons that support it undisturbed. While some interlocutory motions, such as motions relating to the admissibility of evidence, may have an impact on the final decision on the merits, deciding public access to the court record has no bearing on the underlying proceeding or its appeal. The doctrine of *functus officio* reflects the transfer of the decision-making authority in respect of final judgments from the court of first instance to the appellate court (*Chandler*, at p. 860, citing *In re St. Nazaire Co.* (1879), 12 Ch. D. 88). It was never intended to restrict the ability of those lower courts to control their own files in respect of these decisions.

[40] To be clear, this does not mean that *functus officio* never applies to publication bans or sealing orders. The point is simply that a court is not precluded from deciding a motion concerning

court openness merely because it is *functus officio* with respect to the merits of the underlying proceeding.

(2) Decisions Regarding Court Openness May Be Reconsidered in Limited Circumstances

[41] That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. Where a decision concerning court openness is formalized in an order, *functus officio* may apply, regardless of whether or not it is ancillary to some other proceeding. Even where, as here, a decision concerning court openness is not formalized in an order, finality remains an important value in the making of publication bans and sealing orders. Indeed, in this case the CBC has in fact appealed an ancillary publication ban that has never been formalized in an order. The need to provide litigants with a stable basis from which to launch an appeal — a central rationale underpinning *functus officio* (see *Doucet-Boudreau*, at para. 79) — can apply, even where *functus officio* technically does not.

[42] Therefore, regardless of whether a court is deprived of jurisdiction by the doctrine of *functus officio*, the importance of finality will mean courts will be rightly reluctant to reconsider questions of court openness. A publication ban or sealing order is, however, susceptible to reconsideration by the issuing court, albeit on narrow grounds. This will include cases where an affected party not given notice proposes to make novel submissions that could affect the result, or on the basis of a material change in circumstances. This applies to both publication bans and sealing orders that are formalized in an order and those that are not.

[43] Central to the CBC's claim that the Court of Appeal had jurisdiction to vary the 2018 publication ban is that it was made without proper notice to the press as an affected party.

[44] One basis for revisiting a publication ban or sealing order may indeed arise when an affected person who was not given notice of the making of the order later seeks to vary it or have it set aside. Natural justice is understood to require that whenever a person is affected by a decision,

they generally have the right to appropriate notice of that decision and an opportunity to be heard (*Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219, at pp. 233-34). When an order is made without the submissions of an affected person because that person was not given proper notice, such as an *ex parte* order, the law recognizes that the court that made that order generally has authority to review it on motion of that affected person (*Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 607, citing *Dickie v. Woodworth* (1883), 1883 CanLII 51 (SCC), 8 S.C.R. 192). This ensures that affected persons are not unfairly subjected to orders made without the benefit of their submissions (see, generally, F.-O. Barbeau, “Rétractation du jugement”, in *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2nd ed. (loose-leaf)), by P.-C. Lafond, ed., fasc. 31, at No. 39). This principle also finds expression in various rules of court procedure (see, e.g., *Court of Queen’s Bench Rules*, Man. Reg. 553/88R, r. 37.11 (“*Queen’s Bench Rules*”)). Similar principles apply to orders concerning court openness: I note for example that courts in Ontario have relied on the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to decide challenges to sealing orders brought by media representatives who were not given proper notice of the hearing at which the order was made (*Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721, at para. 43, per Juriansz J.A., dissenting in part but not on this point).

[45] To challenge an existing order concerning court openness, the moving party must qualify as an affected person to whom standing should be granted. Further, where so required, that party must have acted with due dispatch in seeking to set aside the impugned order. Both of these points merit brief comment in view of arguments made here.

[46] First, it is important to recognize that applying this principle to publication bans or sealing orders requires some consideration of standing, because of the broad effects of such an order. Insofar as a publication ban or a sealing order impinges on the open court principle, such orders can, for example, affect the public’s right to freedom of expression and freedom of the press under s. 2(b) of the *Charter* (*Vancouver Sun*, at para. 26). Court openness is understood as a public good, not an interest that belongs to a particular individual or entity. Further, the risks to competing important interests which justify limits on court openness must also reflect public values, even if

they might be aimed at protecting particular persons (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 55). Yet, in the interest of the orderly administration of justice, it cannot be that every member of the public or media entity has standing to bring an individual motion to set publication bans aside in the absence of such notice. This would make the number of parties entitled to reconsideration potentially endless. Instead, as this Court held in *Dagenais*, with regard to publication bans in criminal matters, standing in these cases should be thought of as a matter of the court's discretion (pp. 869 and 872; see also *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, at para. 12, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721).

[47] In respect of standing, an order limiting court openness engages the constitutionally-protected right of a free press to report on judicial proceedings (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 2; *Vancouver Sun*, at para. 26). When that order has been made in the absence of notice to the media, a representative of the media should generally have standing to challenge an order that threatens the open court principle where they are able to show that they will make submissions that were not considered in its making that could affect the result (see, generally, *Hollinger*, at paras. 36-39). In practice, and properly in my view, standing is seldom refused to the media to participate in open court proceedings where it is sought (J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 8.1.10). Equally, a person directly affected by an order concerning court openness because it might harm their individual interests should, as a matter of course, have standing to challenge that order (see, generally, *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 2003 CanLII 43168 (ON CA), 63 O.R. (3d) 769 (C.A.), at para. 27). Courts should nevertheless retain some residual discretion to deny standing where hearing the motion would not be in the interests of justice, as in the case, for example, that it would unduly harm the parties or merely duplicate argument that is already before the court (*Dagenais*, at p. 869; *White*, at para. 12; see, e.g., *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 2000 CanLII 50628 (NS SC), 184 N.S.R. (2d) 159 (S.C.), at paras. 18-21). The requirement of standing, therefore, by limiting who may challenge a publication ban or sealing

order, serves the goals of finality and mirrors the discretionary approach to standing that this Court has previously endorsed.

[48] Second, as to delay, courts may decline to hear a motion to vary or set aside an order dealing with court openness made without notice if the moving party was unreasonably slow in bringing that motion after becoming aware of the order, such that it is no longer in the interests of justice to hear it. Once the moving party has become aware the order exists, they are then expected to take prompt action to challenge the order or otherwise acquiesce to its existence (see, e.g., 9095-7267 *Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878 (Que. C.A.), at para. 46; see also *Rules of Civil Procedure*, r. 37.14 (Ontario); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 349 (Quebec); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.15; *Queen's Bench Rules*, r. 37.11 (Manitoba)). Strathy J., as he then was, explained that a timeliness requirement reflects the common sense presumption that “a party who sits on his or her rights in the face of a court order has accepted the legitimacy of the order” (*Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751 (Ont. S.C.), at para. 43).

[49] In some instances, the legislature will provide indications of the appropriate period of delay. In the absence of legislative direction, courts must be guided by the purpose of the rule and the circumstances of each case (see, generally, *Johnswood*, at para. 45). As in other cases where courts are asked not to hear proceedings by reason of an unacceptable delay, the task is not a mechanical calculation, but rather a contextual balancing of finality and timely justice against the importance of the matter being heard on its merits (*Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, at para. 34; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 19). By way of example, under the *Rules of Civil Procedure*, a period of three months to bring a motion to set aside an order dismissing the action for delay was held to be reasonable in the context of one dispute (*Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306, at para. 36), but a largely unexplained ten-month delay meant in another case that the applicant had not moved forthwith (*1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361, at paras. 102 and 121 (CanLII)). In one Manitoba case, a delay of five months in moving to set aside

a judgment was found not to be unreasonable in the circumstances (*585430 Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191, at para. 56). I stress, however, that this determination is inherently tied to the facts of each particular case and the nature of the issue raised. Especially where this delay has caused meaningful prejudice to the responding parties, courts may conclude it is not in the interests of justice to hear a motion. This requirement safeguards finality by circumscribing reconsideration in the temporal dimension.

[50] On the basis of these principles, then, and in the absence of explicit legislation to the contrary, a court may vary or set aside an order concerning court openness it has made on timely motion by an affected person who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose.

[51] To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

[52] Indeed this Court has explicitly recognized the discretion of courts to decide when notice to the media is required in the case of search warrants and production orders. In *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, this Court held that granting a search warrant in the absence of the affected media organization was not a jurisdictional error; the issuing judge had discretion regarding the timing and modality of notice to the media (paras. 83-84). Similarly, in *R.*

v. Vice Media Canada Inc., 2018 SCC 53, [2018] 3 S.C.R. 374, Moldaver J. considered a media organization's argument that notice of an application for a production order affecting it was required (para. 59). He rejected that submission because the *Criminal Code* explicitly provided for *ex parte* proceedings and the negative impact on the media was mitigated by the statutory right to apply to have the order varied or revoked at a later stage (paras. 61-62). It follows from these authorities that giving notice is not a pre-requisite to the issuance of a valid order in these circumstances. At the same time, this jurisprudence does not exclude the possibility of providing notice after an order has been granted or entertaining a motion to vary or set aside an order by an affected person who was not given prior notice.

[53] I also agree with the CBC that courts may exercise discretion to vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed in accordance with the principle set out by this Court in *Adams*. As Sopinka J. observed in that case, “[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed” (para. 30). This rule applies to orders involving court openness (see, e.g., *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257, at paras. 15-22; *Morin v. R.* (1997), 1997 CanLII 12082 (ON CA), 32 O.R. (3d) 265 (C.A.), at pp. 272-73).

[54] I hasten to say, however, that I do not read *Adams* to bear the meaning the CBC attributes to it in their factum. The CBC says the case was about “whether the doctrine of *functus officio* prevented a trial judge from rescinding a publication ban it had previously issued” and suggests that it is a case about how the doctrine of *functus officio* applies to ancillary orders (A.F., at paras. 82-83). On my understanding, *Adams* dealt simply with the question as to when a judge could reconsider a previous order made in the course of trial. The impugned order, which purported to lift a publication ban previously made, was decided as the trial judge dismissed the charges against the accused (*Adams*, at para. 5). This Court concluded that the trial judge did not have the power to revoke the order because the circumstance that made the order mandatory had not changed (para. 31). Subsequent appellate jurisprudence has interpreted the judgment to provide a general rule about varying such orders, rather than a rule about *functus officio* (see, e.g., *BCTF*, at

para. 22; *R. v. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206, at para. 51; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123). The principles in *Adams* balance finality and flexibility even when the court is not *functus officio*, by permitting the reconsideration of such orders where there has been a material change of circumstances.

[55] In deciding whether this rule from *Adams* applies, I do agree that a first question for the court will be whether there has been a material change in circumstances since the making of the initial order (para. 30). The burden of establishing this change falls to the party seeking a variation in the order (see, by analogy, *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 31). That party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms (*L.M.P.*, at para. 32; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, at paras. 75-76; *R. v. Baltovitch* (2000), 2000 CanLII 5680 (ON CA), 47 O.R. (3d) 761 (C.A.), at para. 6). The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances (*L.M.P.*, at para. 33; *Droit de la famille — 132380*, at para. 78).

[56] Instances in which a court may reconsider a decision respecting its court record are distinct from an appeal or application for *certiorari* made to a higher court from such decisions (see, generally, *Dagenais*, at pp. 870-72). In a motion to reconsider on both grounds described above, the original court is not being asked to reconsider its decision because it is wrongly decided, but rather because it was made without relevant submissions from an affected party or on the basis of a material change in the circumstances that justified the initial decision.

[57] Finally, I note that the general principles considered here can, of course, be displaced by legislation, such as the applicable rules of court, designed to determine more exactly when it is appropriate to reconsider orders concerning court openness.

B. *Application to the Facts of This Case*

(1) The Court of Appeal Erred in Concluding It Had No Jurisdiction to Consider the CBC's Motion

[58] In answer to the preliminary question raised by the first appeal from the 2019 Jurisdiction Judgment, I turn now to whether the Court of Appeal erred in concluding it did not have jurisdiction to hear the CBC's motion to gain access to the Posner affidavit and set aside the publication ban.

[59] The CBC submits that the Court of Appeal was mistaken when it declined jurisdiction on the basis of the doctrine of *functus officio*. For the CBC, the flexible approach to *functus officio* spoken to in *Adams* requires ancillary orders, such as the publication ban here, to be treated separately from the merits of the main proceeding. Moreover, the circumstances in which the ban was ordered had changed. It was made without notice to the affected parties and no mention in a certificate of decision of the publication ban had been entered. The CBC maintains that it was not asking for a "rehearing" of the appeal or of the motion which, it recognizes, is prohibited by the *Court of Appeal Rules*. In the alternative, even if the prohibition against rehearings does apply, it must be interpreted flexibly as is the case with the doctrine of *functus officio*.

[60] The Crown answers that the Court of Appeal rightly held it was without jurisdiction given that the formal judgment had been entered. In its view, the only exception to the doctrine of *functus officio* that might conceivably apply here is that the CBC's arguments were never heard on their merits. That exception, says the Crown, does not apply here. While the CBC did not make submissions, it was covering the case and could have challenged the ban anytime between when the initial publication ban was made in May 2018 and when the certificate of decision was entered in January 2019. The CBC provides no proper explanation for its delay in taking action to set aside the publication ban. Even if a material change of circumstances would allow the Court of Appeal to reconsider its order, there was no such change in this case. The Court of Appeal's jurisdiction over the matter was exhausted.

[61] I agree with the CBC that the Court of Appeal did have the authority to uphold, vary or vacate the 2018 publication ban and grant or withhold access to the court record.

[62] It is best to note at the outset that appellate jurisdiction, such as that being exercised by the Court of Appeal in the proceeding below, must be grounded in legislation (*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 21). In addition to any explicit grant, statutory and appellate courts should be understood to have the implicit power to control their own process and exercise other powers that are practically necessary to accomplish the role the law assigns them (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720, at para. 27 (CanLII)). I agree with the Attorney General of British Columbia that it may be unhelpful to describe this implicit authority as “inherent jurisdiction” given that appellate powers are, ultimately, rooted in statute (transcript, at pp. 100-1).

[63] The legislative foundation for the Court of Appeal’s jurisdiction over the motion on court openness is plain here. As I have said, the supervisory jurisdiction over the court record is a feature of all courts (*MacIntyre*, at p. 189) and this is no less true of an appellate court. As part of the court’s authority to control its own process, the power over the openness of proceedings and over the court record arises here by necessary implication from the legislative grant of the appellate court’s adjudicative authority (see, generally, *Cunningham*, at para. 19). As a matter of procedural necessity — a publication ban or a sealing order may remain in place long after the substance of the appeal has been decided — this jurisdiction continues even after the formal judgment on the merits of a given appeal has been entered unless ousted by legislation. The Court of Appeal therefore had continuing, ancillary jurisdiction to consider the CBC’s motion regarding sealing orders and publication bans. This included implied jurisdiction to vary or vacate its orders limiting court openness in accordance with the common law principles considered above. The only remaining question is whether any applicable legislation limits this jurisdiction for the Court of Appeal in this case.

[64] The *Court of Appeal Rules* do prohibit a “rehearing of an appeal” (in French, “*appel . . . entendu de nouveau*”) after the certificate of decision has been entered, a rule on which the Court of Appeal relied in this case (r. 46.2(1) and (2), applicable by virtue of r. 45 of the *Manitoba Criminal Appeal Rules*, SI/92-106). This rule also prohibits the “rehearing” of motions (in French, “*faire l’objet d’une nouvelle audience*”) (r. 46.2(12)). Relevant portions of r. 46.2 are as follows:

46.2(1) There shall be no rehearing of an appeal except by order of the court or at the instance of the court.

46.2(2) A rehearing of an appeal may be ordered before the certificate of decision has been entered.

46.2(12) There shall be no rehearing on an application for leave or a motion.

[65] It is true that the certificate of decision referred to in r. 46.2(2) has been entered here in respect of the appeal bearing on the miscarriage of justice. Accordingly, a rehearing of Mr. Ostrowski's appeal on the merits is precluded in accordance with r. 46.2. Similarly, any motion that had been heard in the course of the proceeding cannot now be reheard, as this is foreclosed by r. 46.2(12).

[66] But these rules did not deprive the Court of Appeal of the ability to hear the CBC's motion concerning court openness. This is certainly not a "rehearing of an appeal" as contemplated by r. 46.2(1) and (2). The CBC brought a motion concerning access to the court file and did not seek to reopen the miscarriage of justice proceeding itself. Interpreting the prohibition against rehearing an appeal as precluding the Court of Appeal from hearing a motion concerning court openness, distinct from the merits of the appeal, is not plain from the text. The appeal is not to be "*entendu de nouveau*", to advert to the French text of r. 46.2(1) and (2). Nor does it accord with the purpose of rules prohibiting rehearings of the appeal that reflect the same core objectives of finality and stability of judgments associated with the doctrine of *functus officio* (see *Doucet-Boudreau*, at para. 79). There is nothing in r. 46.2 that prevents the CBC from seeking ancillary orders related to court openness after the certificate of decision has been entered on the merits.

[67] Similarly, the prohibition on the rehearing of motions in r. 46.2(12) cannot be interpreted to prohibit the CBC from moving to set aside the publication ban made without notice and which affects the open court principle. The impugned order was made of the Court of Appeal's own accord, with the consent of the parties, at the oral hearing and then continued indefinitely in para. 82 of the 2018 Publication Ban Judgment. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the

impugned ban shortly after the reasons were released. The CBC was not asking the Court of Appeal for a “rehearing” of a motion. The idea of a “rehearing” spoken to in r. 46.2 necessarily implies there was an original hearing and that the court would be hearing the same motion again, as the French (“*nouvelle audience*”) in r. 46.2 makes plain.

[68] Instead, the CBC brought an altogether new motion to set aside the 2018 publication ban made in its absence. This may engage, as the CBC suggests, a fundamental principle of the administration of justice that parties affected by orders be given the opportunity to be heard. There is nothing in the text of r. 46(12) that modifies the generally applicable rule allowing the Court of Appeal to vary or rescind its publication ban or sealing order on motion from an affected person not given notice of the making of the order.

[69] The CBC also argued that the Court of Appeal should have taken up its rightful jurisdiction to vary the publication ban covering the Posner affidavit because there had been a material change of circumstances.

[70] I disagree. I think it should be recorded that the CBC did not, in the proceedings below, establish a material change of circumstances.

[71] While it may be the case that the finding of a miscarriage of justice by the Court of Appeal increased the public interest in the materials, that conclusion was made in the 2018 Publication Ban Judgment in which the continuation of the publication ban was ordered. It cannot, therefore, be a change of circumstances that has occurred *since* the impugned order was made, as is required (*Adams*, at para. 30; *L.M.P.*, at para. 31).

[72] Equally, the subsequent appearance of the CBC in the proceedings as a party did not constitute, in itself, a material change in circumstances. Assuming the initial order was correctly made, as one must at this stage (*L.M.P.*, at para. 33), and recognizing that the CBC did not make submissions on the initial order, in my view the CBC’s mere presence would not likely have resulted in a different outcome for the purposes of the applicable test. This is not to exclude the

possibility that, had the CBC made submissions, the result might have been different. But acknowledging this possibility requires one to consider whether the Court of Appeal may have erred in applying the relevant test without the benefit of the CBC's argument. This is contrary to the well-established principle that one must not consider the possibility that the original court erred when determining whether a material change has occurred (*L.M.P.*, at para. 33). The Court of Appeal is therefore presumed at this stage to have balanced the interest of the media in open court proceedings with competing public interests even in the absence of a representative of the press, as is required (*Mentuck*, at para. 38). The CBC's absence at the making of the initial order is more properly considered in reference to the principles relating to orders made without notice to an affected party, since it is a lost opportunity to make submissions, and not in reference to a change in the circumstances relied on by the Court of Appeal.

[73] In sum, the Court of Appeal erred in concluding that r. 46.2 or the doctrine of *functus officio* deprived it of jurisdiction to hear the CBC's motion. Said respectfully, the Court of Appeal's interpretation of these principles was unnecessary to protect the values of finality and orderly appellate review. It had an adverse impact on the opportunity of the media to make representations in respect of this order limiting the open court principle. The better view is that the Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered.

(2) The Matter Should Be Remanded to the Court of Appeal

[74] That the Court of Appeal had jurisdiction to consider the CBC's motion and its request for access to the Posner affidavit, does not mean, of course, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts here, a determination that would be best made at first instance by the Court of Appeal.

[75] In respect of the publication ban, the CBC will rely on the Court of Appeal's power to rescind an order on the basis that it was made without notice to an affected party. As a preliminary matter, the Court of Appeal must determine, in keeping with the principles sketched above,

whether the CBC has standing to challenge the relevant order. This initial hurdle, which the CBC must clear, serves to restrict the scope of those who are able to challenge an order made without notice to the media to those representatives who were deprived of the ability to make useful submissions that may have affected the result.

[76] The CBC will also be required to show that the delay from the time it became aware of the impugned order to the time it filed its motion in May 2019 was not unreasonable. I note that the Crown argues the CBC ought to have brought its motion earlier. In response to questions from my colleagues at the oral hearing, the CBC rightly conceded it knew of the publication ban shortly after the 2018 Publication Ban Judgment was released. Its delay in bringing the motion was in the order of six months. While the matter was not advanced by the Crown as a basis for dismissing the appeal, at the hearing before this Court the CBC did say the delay was justified in the circumstances, pointing to initial confusion as to the nature of the order, and asserted the public interest in deciding this open court issue that affects the rights of all Canadians.

[77] Turning to the substance of the CBC’s motion, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test from *Sierra Club* as recently recast by this Court in *Sherman*. Court proceedings are presumptively open to the public (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11). A court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects (*Sherman*, at para. 38, citing *Sierra Club*, at para. 53).

[78] Before this Court, both the Crown and M.D.’s family invoke the privacy and dignity of the interested parties as an important public interest that would be threatened if the publication ban was lifted. The CBC answers that the interests raised are merely personal, without the public component required to displace the open court principle. Much like in *Sherman*, the parties’ disagreement is rooted in the inherent tension between the open court principle and what Dickson J., as he then was, once described as competing “superordinate” values (*MacIntyre*, at

pp. 186-87). Both privacy and court openness have been recognized in law as pillars of a free and democratic society (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, at para. 23; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25). If open courts are to remain the rule rather than the exception, some degree of privacy loss for those whose lives are the subject of litigation is inevitable. But circumstances do exist where openness poses a serious risk to an aspect of privacy that evinces an important public interest.

[79] The Court of Appeal did not have the advantage of considering the judgment of this Court in *Sherman* where it was held that there is an important public interest in a narrower dimension of privacy concerning the protection of individual dignity. In order to show a serious risk to this interest, an individual must establish that the information about them that would be disseminated as a result of court openness is sufficiently sensitive such that it strikes at their biographical core, revealing something “intimate and personal about the individual, their lifestyle or their experiences” (*Sherman*, at paras. 73-77, 79 and 85). If they succeed, the question becomes whether, in light of the totality of the circumstances, court openness poses a risk to individual dignity that strikes meaningfully at this important public interest. A serious risk need not be supported by direct evidence but may be reasonably inferred on the basis of available circumstantial facts (*Bragg*, at paras. 15-16). If the party succeeds in establishing this serious risk, they must then show that the order they seek is necessary to prevent the risk and that the benefits of the order outweigh its negative effects, including the effects on constitutionally-protected court openness (*Sierra Club*, at para. 53).

[80] The parties disagree about the extent to which the test for discretionary limits on court openness applies to determine access to and publication of the Posner affidavit. The CBC argued that the sealing order that applied to the affidavit by operation of the *Court of Appeal Rules* ended once the new evidence motion was dismissed. The Crown took the position that the relevant rule is silent on what happens to material under seal after a new evidence motion is dismissed such that the Court of Appeal was entitled not to enter the proposed evidence into the public record. As for the publication ban covering the details of this evidence, the CBC argued that it fails the test for

discretionary limits on court openness, which it says applies even though the Posner affidavit was ultimately not admitted into evidence. The Crown and the interested parties stressed instead the Posner affidavit's alleged irrelevance as a factor in this analysis.

[81] For two reasons, I conclude that any limits on access to or publication of the Posner affidavit in this case must meet the generally applicable test for discretionary limits on court openness. First, I agree with the CBC that [r. 21\(4\)](#) of the *Court of Appeal Rules* does not provide for a permanent sealing order over the Posner affidavit. Rule 21(4), which specifies that the new evidence remains sealed “until the motion is decided”, explicitly anticipates that the sealing prescribed by this rule will cease once there is a decision. This decision occurred when the new evidence motion was dismissed. There is nothing in the rule to indicate that the seal is to protect the information from public dissemination and that this is meant to extend indefinitely after the motion is decided. In my view, [r. 21](#) does not continue to seal the Posner affidavit.

[82] Second, the fact that the Posner affidavit was not admitted as new evidence for the purposes of the miscarriage of justice proceeding should not shield the publication ban from review. The Crown submits that the Court of Appeal’s “practice” not to admit such evidence into the court registry fills the silence in [r. 21\(4\)](#). But an administrative practice cannot have the effect of taking this matter outside the scope of the test for discretionary limits on the open court principle. Court openness serves to maintain the legitimacy of the exercise of judicial power — including the decision to dismiss the motion for new evidence — by allowing the public to scrutinize this exercise in service of ensuring that justice is being dispensed fairly (*Vancouver Sun*, at para. 25). Public access to the court record facilitates this scrutiny (*Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326, at p. 1339, per Cory J.).

[83] Consistent with this purpose, all materials that are made available to the court for the purposes of deciding the case — in other words, for the purposes of exercising its judicial power — are subject to the open court principle (see *Canadian Broadcasting Corp. v. R.*, [2010 ONCA 726](#), 102 O.R. (3d) 673, at paras. [42-44](#); see also *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, [2018 ABCA 133](#), 70 Alta. L.R. (6th) 246, at para. [48](#)). In this case, the Court

of Appeal had before it a motion to admit the Posner affidavit as new evidence. With the consent of the parties, the court reviewed that affidavit in considering the motion. While the court ultimately declined to admit it, the affidavit was considered in deciding the new evidence motion. It follows that any discretionary limit on access to or publication of the Posner affidavit must meet the requirements affirmed in *Sierra Club* and *Sherman*.

[84] In sum, to the extent the requested relief required it to reconsider its publication ban, the Court of Appeal should have asked whether it was appropriate to vary or set aside that decision on motion by the CBC given it was made without notice. On the substance of the motion, the Court of Appeal should have considered whether any discretionary limits it imposed on publication of the court record, which includes the Posner affidavit, complied with the test for discretionary limits on court openness.

[85] The remaining question is which court should decide these issues raised in the context of the first appeal from the 2019 Jurisdiction Judgment. I recall that the Crown suggests that if the Court of Appeal had jurisdiction to hear the motion for reconsideration, it follows that this Court does not. It argues that in this scenario the publication ban is not a “final or other judgment of . . . the highest court of final resort” for the purposes of s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, under which leave to appeal in this matter was granted.

[86] I disagree. The Court of Appeal’s reconsideration of its publication ban is not, as we have seen, an appeal of the publication ban order. The only route of appeal from either the Court of Appeal’s 2018 Publication Ban Judgment or the 2019 Jurisdiction Judgment was to this Court with leave pursuant to s. 40(1) of the *Supreme Court Act* (see, generally, *Dagenais*, at p. 872). Accordingly, I have no difficulty concluding that both were “final or other judgment[s] of . . . the highest court of final resort” from which this Court has jurisdiction to hear an appeal with leave (see, generally, *Mentuck*, at paras. 20-21).

[87] That said, I am of the view that fairness to all the parties requires that we remand the motion that resulted in the 2019 Jurisdiction Judgment to the Court of Appeal. The remaining

issues raised are best decided by the Court of Appeal. The Court of Appeal ended its analysis after concluding it was *functus officio* and we do not have the benefit of any reasons below on these issues. As I have noted above, the motion required the Court of Appeal to make several discretionary decisions: whether to grant the CBC standing, whether to hear the motion given the delay, and ultimately whether to uphold a discretionary limit on the openness of its own record. These are decisions the Court of Appeal is best placed to make given they are intimately connected to the facts and procedural history of this case, in which that court effectively acted as a court of first instance.

[88] In my view, it is not in the interests of justice for this Court to step into the Court of Appeal's shoes and decide these matters at first instance. This is quite different from considering such issues on appeal through the deferential lens this Court would take in reviewing the exercise of discretion below (see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117). Other appellate courts have been rightly cautious to dictate to lower courts in this way (see, e.g., *GEA Refrigeration*, at para. 184).

[89] I note as well that the issue of delay was not fully argued before this Court and we are therefore not well placed to come to the appropriate balance in this case in any event. This Court has remanded matters to the Court of Appeal where a question was not addressed below and the record and arguments are “too sparse to . . . resolve the matter confidently” (see, e.g., *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 46). The CBC did not raise the issue in its factum because it considered the issue to have been resolved when we granted its motions for extensions of time to seek leave to appeal. While the Crown pointed to the delay in passing, it never argued the appeal bearing on the motion for reconsideration could be dismissed on that basis alone. This further militates towards remanding the matter.

[90] Even if this Court were to exercise its jurisdiction to decide these issues, it does not have the benefit of submissions from the parties on how the principles from *Sherman* outlined above apply to these facts. That decision was released only after this matter had been heard and, in my view, fairness would require further submissions from the parties with respect to its impact on

the issue at hand. This Court had previously considered privacy in the context of this test in *Bragg*, but was clear that it was not a question of privacy without more but was combined with “the relentlessly intrusive humiliation of sexualized online bullying” (para. 14).

[91] *Sherman* provided an opportunity for this Court to confront this issue directly from a distinct perspective. The Court of Appeal had identified privacy interests as mere personal concerns that could not “without more” justify a limit on court openness (*Sherman*, at para. 18). This Court concluded on appeal that it was “inappropriate . . . to dismiss the public interest in protecting privacy as merely a personal concern” (para. 52), and went on to recognize that “privacy understood in relation to dignity is an important public interest for the purposes of the test” (para. 86).

[92] Of course, it is not uncommon that this Court clarifies the law in an appeal, or series of appeals heard together, and then applies that clarified law to those appeals. But the situation here is different because these parties were not heard in settling the approach taken in *Sherman*. That they would also not be heard on how this approach applies on the facts of their case would be fundamentally unfair to them, not to mention a disadvantage to this Court in deciding the matter. The need for these further submissions on *Sherman* attenuates any judicial economy that would be gained by deciding the matter here rather than remanding it below.

[93] I recognize, as the Crown argued at the hearing, that remanding the matter will prolong the period of uncertainty for the interested parties as to whether the publication ban will ultimately be set aside. It is important to remember, however, that the interested parties will continue to benefit from the publication ban they say is necessary to protect their privacy in the interim.

[94] This is a completely different situation from cases such as *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, and *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, where it had been approximately a decade since the impugned conduct that was the subject of the litigation and this Court had the benefit of a reasonable decision supported by the

record and made by the appropriate first instance decision-maker (*Saadati*, at para. 45; *Wells*, at para. 68). In this case, the publication ban that is the subject of these proceedings was made less than three years ago and we have no decision from a first instance decision-maker on the motion, let alone a reasonable one.

[95] In the circumstances, the value of shortening this period of uncertainty does not outweigh the importance of fairness to all parties, served by ensuring the matter is decided by the appropriate first instance decision-maker and with the benefit of appropriate submissions.

[96] I would therefore allow the appeal from the 2019 Jurisdiction Judgment and remand the matter to the Court of Appeal to decide the CBC's motion in accordance with these reasons (*Supreme Court Act*, s. 46.1).

[97] The second appeal from the 2018 Publication Ban Judgment itself presents a procedural complication. As I mentioned above, the CBC sought and was granted leave not only from the dismissal of its motion for reconsideration, but also directly from the publication ban. This is plain from the leave judgment and the parties specifically argued both appeals before this Court. That appeal raises a single remaining issue concerning the legality of the publication ban as an exception to the open court principle.

[98] In light of my conclusion that the Court of Appeal did have jurisdiction to hear the CBC's motion, I would not decide the issues raised in the appeal from the 2018 Publication Ban Judgment before the Court of Appeal has decided the motion for reconsideration. I note that appellate courts in similar circumstances have generally insisted that recourse be sought at the original court before hearing an appeal (see, e.g., *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209, at paras. 54-55; *GEA Refrigeration*, at para. 184). Similarly, in this case, it is not in the interests of justice to consider the appeal from the 2018 Publication Ban Judgment before the CBC's motion is decided, given this appeal could be rendered moot as a consequence of that proceeding. We are accordingly not in a useful or informed position to dismiss or allow the second appeal.

[99] Nor would it be appropriate to remand this appeal in whole to the Court of Appeal. Unlike remanding the 2019 Jurisdiction Judgment to the Court of Appeal to reconsider the publication ban following submissions from an affected party not given notice, which as I noted earlier is distinct from an appeal, returning the 2018 Publication Ban Judgment to the Court of Appeal would require it to sit in appeal of its own publication ban.

[100] It follows, in the unusual circumstances of this case, that the appeal from the 2018 Publication Ban Judgment should be adjourned *sine die* pending determination of the motion for reconsideration at the Court of Appeal (see, e.g., *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98, at para. 61). I note that if the Court of Appeal engages with the merits of the publication ban and the 2018 Publication Ban Judgment appeal is then reopened, then those reasons will be before this Court and it will benefit from them as it decides this appeal.

[101] This Court heard appeals thus both directly from a judgment and, simultaneously, from the denial of reconsideration of that same judgment. Leave was granted from both judgments here, a fact that has created the procedural difficulty, but this difficulty is not insurmountable. Appellate courts have used the *sine die* adjournment to deal with appeals identified as premature due to ongoing proceedings below which ought to be completed before the appeal is heard (*Libya*, at para. 83; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65, at para. 33; *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135, at para. 22; *Aleong v. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44, at para. 47). This is more than a procedural concern here: we cannot, in my respectful view, dismiss the second appeal now without conflating the issues at stake on reconsideration of the 2019 Jurisdiction Judgment and those at play in a direct appeal of the 2018 Publication Ban Judgment.

[102] Finally, even if it were appropriate for this Court to decide the reasonableness of the CBC's delay in bringing its motion, and even if its view was that the motion should have been dismissed on this basis, that conclusion alone would be insufficient to dismiss the appeal directly from the 2018 Publication Ban Judgment. This Court granted leave to appeal, and an extension of

time to seek leave to appeal, directly from this separate judgment. I am of the respectful view that it would be inappropriate to effectively reverse these decisions or retroactively limit their scope. If this Court sought only to dispose of the reconsideration issues raised in the appeal from the 2019 Jurisdiction Judgment, it could have granted leave from that judgment alone. But it granted leave from both judgments.

[103] The CBC has not acquiesced in the 2018 Publication Ban Judgment from which it appeals directly to this Court and, with respect for other views, this second appeal has not “lost its *raison d’être*” (*Canadian Cablesystems (Ontario) Ltd. v. Consumers’ Association of Canada*, 1977 CanLII 231 (SCC), [1977] 2 S.C.R. 740, at pp. 744 and 747). The question it raises is whether the publication ban should be set aside, which is an ongoing issue of live controversy between the parties, and which is distinct from the appropriateness of the reconsideration raised in the appeal from the 2019 Jurisdiction Judgment. There is no basis to say this second appeal has become moot.

[104] Unlike in the first appeal bearing on the reconsideration motion, in the direct appeal from the 2018 Publication Ban Judgment there is no preliminary issue about the delay in bringing the motion, a motion that was not even filed before this judgment was rendered. The only issue in this second appeal is the validity of the final and indefinite publication ban imposed in the 2018 Publication Ban Judgment, which requires the application of the test for discretionary limits on court openness. To resolve this issue now, this Court would have to advert to and apply this test, including, with proper submissions, the recent judgment of this Court in *Sherman*. In my respectful view, that task should not be undertaken until the motion for reconsideration is resolved by the Court of Appeal.

V. Conclusion

[105] I would allow the appeal from the 2019 Jurisdiction Judgment of the Court of Appeal, set aside that judgment, and remand the matter to that court to decide the CBC’s motion in accordance with these reasons.

[106] I would adjourn the appeal from the 2018 Publication Ban Judgment of the Court of Appeal *sine die*. I would order that if no motion for directions is filed in this Court within 30 days after the date of the judgment of the Court of Appeal deciding the matter remanded to it in accordance with these reasons, the appeal will be dismissed as abandoned.

[107] The CBC does not request costs of these appeals and I would make no order as to costs.

The following are the reasons delivered by

[108] ABELLA J. (dissenting) — These appeals involve a request by a member of the media to reconsider a publication ban after the underlying proceedings have ended. While I generally agree with Justice Kasirer’s analysis of the “notice” issues, I do not share his view that the appeal should be remanded to the Manitoba Court of Appeal for disposition.

[109] As this Court has repeatedly stressed, the media is a crucial voice in protecting and promoting the openness of courts. That is why the media’s right to challenge orders like publication bans is undisputed and why the courts have the discretion to give them notice of publication ban hearings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835, this Court clearly stated that members of the media are “third parties” and that notice remains “in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law” (p. 869).

[110] But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. In *R. v. Adams*, [1995 CanLII 56 \(SCC\)](#), [1995] 4 S.C.R. 707, Sopinka J. recognized that the application of *functus officio* is “less formalistic and more flexible” in respect of ancillary orders including publication bans (para. 29). It is therefore imperative to maintain circumscribed avenues through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over.

[111] The rationales underlying the doctrine of *functus officio* show that it has a role to play in respect of publication ban orders, even when those orders are ancillary to the underlying proceedings. *Functus officio* is “commonly described as a ‘rule about finality’” (A. S. P. Wong, “Doctrine of *Functus Officio*: The Changing Face of Finality’s Old Guard” (2020), 98 *Can. Bar Rev.* 543, at p. 549, citing *Nova Scotia Government and General Employees Union v. Capital District Health Authority* (2006), 2006 NSCA 85 (CanLII), 246 N.S.R. (2d) 104 (C.A.), at para. 36). As Doherty J.A. observed in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (C.A.):

Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. [pp. 264-65]

[112] Finality is important, in part, because it provides a stable basis for an appeal (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, at para. 79). But finality is also important because it provides economic and psychological security to parties who are dragged into the justice system, including those impacted by publication ban decisions.

[113] It has been settled since *Adams* that publication ban orders, which are ancillary to the underlying proceedings, “can be varied or revoked if the circumstances that were present at the time the order was made have materially changed” (para. 30; *R. v. Henry* (2012), 2012 BCCA 374 (CanLII), 327 B.C.A.C. 190, at para. 11; *British Columbia v. BCTF* (2015), 2015 BCCA 185 (CanLII), 75 B.C.L.R. (5th) 257 (C.A.), at para. 22). The change must “relate to a matter that

justified the making of the order in the first place” *and* the moving party must act “at the earliest opportunity” after the change in circumstances occurs (*Adams*, at para. 30, citing *R. v. Khela*, 1995 CanLII 46 (SCC), [1995] 4 S.C.R. 201, at pp. 210-11). I agree with the majority that a material change in circumstances cannot be established in this case.

[114] In the absence of a material change, trial and appellate courts have recognized that the media are “affected by” orders relating to court openness, meaning that they can generally apply for reconsideration when such an order is issued without notice (see e.g. *Hollinger Inc. v. The Ravelston Corp.* (2008), 2008 ONCA 207 (CanLII), 89 O.R. (3d) 721 (C.A.), at para. 43, and cases cited therein). As Justice Kasirer confirms, this approach applies if the media can show that their submissions are made with “due dispatch” and “prompt action”, could make a material difference to the outcome and that the nature of those submissions was not originally considered by the court that issued the ban. The courts have discretion to decide whether it is in the interests of justice to reopen a publication ban under such circumstances.

[115] These two avenues for after-the-fact media challenges to publication bans reflect the fact that the media is indispensable to court openness. But the applicable tests also take the concept of finality seriously. At a certain point, the parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over.

[116] That is why reconsideration of a publication ban must be sought in a timely manner, and why a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media’s application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests underlying finality and the interests in support of the open court principle.

[117] In balancing these principles, and with great respect, I come to a different conclusion from the majority on whether to remand the matter to the Manitoba Court of Appeal.

[118] As noted, the CBC is unable to establish a material change in circumstances under *Adams*. As a result, the only basis on which it could move for reconsideration once the proceedings are over is by showing that the publication ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met in this case.

[119] To start, the CBC’s argument that the publication ban was issued without notice is difficult to accept in the circumstances. At the hearing before the Manitoba Court of Appeal, counsel for the CBC candidly admitted that the CBC was reporting on the Ostrowski case throughout the course of the proceedings. And before this Court, counsel confirmed that the CBC had a representative in the courtroom when the publication ban was originally ordered on May 28, 2018. At no point in the intervening period between the original publication ban order and its continuation in the Court of Appeal’s reasons of November 27, 2018 did the CBC attempt to assert its interests.

[120] In any event, it is not clear to me what further “notice” would be required in such circumstances. Courts do not issue formal invitations to their hearings — the courtroom is, and should be, open to all, including and especially the media. If the media is present in the courtroom when a publication ban is issued, it follows that it knows of its existence. That is what notice is supposed to be for.

[121] Nor has the CBC discharged its burden of showing that its proposed submissions could make a material difference in the outcome. It is well-established that courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions (*R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442, at para. 38). There is no reason to assume that did not happen in this case. The CBC does not propose to advance a new or unique position or to introduce evidence of which the Court of Appeal was unaware. It simply wishes to argue that the open court principle outweighs the interests supporting the ban, a foundational submission that the Court of Appeal is presumed to have already considered. Furthermore, having heard the CBC’s complete argument on

the propriety of the publication ban in this Court, I find it difficult to see how its submissions could make a difference in the result.

[122] More significantly, and relatedly, the CBC's failure to act in a timely manner is, in my respectful view, determinative. The publication ban was originally ordered on May 28, 2018 and was continued by the Court of Appeal in its reasons for judgment on November 27, 2018. But the CBC did not file its motion for reconsideration until May 10, 2019, over five months later. And it did not file its application to this Court for leave to appeal the original publication ban until January 27, 2020, nearly two years after the ban was first imposed and well over a year after it was continued in the November 2018 reasons for judgment.

[123] The CBC has suggested that its delay can be explained in part by its confusion as to the nature and scope of the publication ban, resulting in communications with the Court of Appeal to determine precisely what was prohibited.

[124] The correspondence between the CBC and the Manitoba Court of Appeal following the November 27, 2018 reasons demonstrates clearly that this is hardly a robust explanation. On November 30, 2018, the Executive Assistant to the Chief Justices and the Chief Judge informed the CBC that the media was entitled to review the material "protected by the ban on publication", but that the actual fresh evidence affidavit was not available for review because the fresh evidence was not filed with the court after the motion was dismissed. After some further clarifying correspondence, by January 21, 2019, the Registrar had spelled out in unmistakable terms that "at the outset of proceedings on May 28, 2018, the [c]ourt imposed a publication ban preventing the publication of any of the details of the proposed fresh evidence. In paragraph 82 of the reasons, the [c]ourt ordered that the publication ban would remain in effect". Yet it took the CBC another four months to file a motion for reconsideration.

[125] It is useful to put this delay in perspective by reference to some timelines provided for by [Manitoba's Court of Appeal Rules](#), Man. Reg. 555/88R. If a party to an appeal before the court of appeal wants a rehearing before the certificate of decision has been entered, they presumptively

have 30 days to file a motion after reasons for judgment are delivered (r. 46.2(4)). If the appellant fails to file its factum in accordance with the timelines set out in the rules, its appeal will be deemed to be abandoned 30 days after the appellant receives notice from the registrar (r. 33(4)). These timelines are a legislated acknowledgement of the importance of timeliness in the resolution of court cases.

[126] An unexplained six month delay for filing a motion to have a publication ban reconsidered — even a four month delay, on a charitable interpretation of when the CBC had full and complete notice of the nature of the publication ban — is inordinate. Under no definition of “due dispatch” or “prompt action” can this delay be justified, particularly since the CBC was fully aware — and present — from the outset of the proceedings, the ban, and the ban’s continuation. On the other hand, the delay in this case causes acute harm to the family, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings and that they would not be brought back to court. I see no reason to prolong their distress further.

[127] While it is true that the CBC’s appeal directly from the publication ban technically came to this Court on a separate application for leave to appeal from that of its appeal from the Court of Appeal’s refusal to reconsider that ban, both appeals ultimately seek the same relief: that the publication ban be set aside. In the unique context of this case, it makes sense that leave was granted concurrently in both appeals since the ultimate relief sought in both was the same. Moreover, the legal question of when the media can reopen a publication ban order after the case is over raised an issue of “public importance” requiring this Court’s guidance (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1)).

[128] Since, in my respectful view, the CBC was not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay, it would be incongruous to conclude that the impact of the CBC’s delay is different for its appeal from the ban itself and for the appeal from the reconsideration motion. The reconsideration appeal is an appeal of that same ban. It would be the triumph of procedural formalism over substantive reality to pretend that these are two

different and unrelated legal issues requiring separate conceptual consideration. An undue delay in one is an undue delay in the other.

[129] As for how to deal with this Court's recently released decision in *Sherman Estate v. Donovan*, [2021] 2 S.C.R. 521, it was open to the majority to seek further submissions based on the *Sherman* reasons. This would have been more consistent with this Court's usual practice in dealing with appeals of publication bans, namely, deciding them in our Court rather than remanding them back to the issuing court. It would also have curtailed the prolongation of these proceedings. In any event, with respect, I do not see anything in the *Sherman* decision of such determinative relevance to the CBC's interests that it justified ignoring the unjustified delay.

[130] This Court retains a narrow discretion to refuse to entertain the merits of an appeal even after leave has been granted. As Laskin C.J. wrote for the Court in *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, 1977 CanLII 231 (SCC), [1977] 2 S.C.R. 740,

Although it will be rarely that this Court, leave having been granted, will thereafter refuse to entertain the appeal on the merits, its power to do so is undoubted
[p. 742]

This is one of those rare cases where the interests of justice warrant a refusal to entertain the appeal on the merits.

[131] I would dismiss the appeals.

Appeal from motion to set aside publication ban allowed. Appeal from publication ban adjourned sine die. ABELLA J. dissenting.

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Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and the Communications Workers of America/Canada: Stockwoods, Toronto.

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TAB 59

Judicial Review Procedure Act, RSO 1990, c J.1

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Judicial Review Procedure Act

R.S.O. 1990, CHAPTER J.1

Consolidation Period: From July 8, 2020 to the [e-Laws currency date](#).

Last amendment: 2020, c. 11, Sched. 10.

Definitions

1 In this Act,

“application for judicial review” means an application under subsection 2 (1); (“requête en révision judiciaire”)

“court” means the Superior Court of Justice; (“Cour”)

“licence” includes any permit, certificate, approval, registration or similar form of permission required by law; (“autorisation”)

“municipality” has the same meaning as in the *Municipal Affairs Act*; (“municipalité”)

“party” includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); (“partie”)

“statutory power” means a power or right conferred by or under a statute,

- (a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,
- (b) to exercise a statutory power of decision,
- (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,
- (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; (“compétence légale”)

“statutory power of decision” means a power or right conferred by or under a statute to make a decision deciding or prescribing,

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
 - (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,
- and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

Lack of evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (3).

Power to set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision. R.S.O. 1990, c. J.1, s. 2 (4).

Power to refuse relief

(5) The court may refuse to grant any relief on an application for judicial review. 2020, c. 11, Sched. 10, s. 1.

(6) Repealed: 2020, c. 11, Sched. 10, s. 1.

Defects in form, technical irregularities

3 On an application for judicial review in relation to a statutory power of decision, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where the decision has already been made, may make an order validating the decision, despite such defect, to have effect from such time and on such terms as the court considers proper. R.S.O. 1990, c. J.1, s. 3.

Interim order

4 On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application. R.S.O. 1990, c. J.1, s. 4.

Time for bringing application

5 (1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2). 2020, c. 11, Sched. 10, s. 2.

Extension

(2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay. 2020, c. 11, Sched. 10, s. 2.

Same, other Acts

(3) Subsection (2) applies with respect to any limitation of time for the bringing of an application for judicial review under any other Act, unless that Act expressly provides otherwise. 2020, c. 11, Sched. 10, s. 2.

Transition

(4) Subsection (1) applies with respect to the judicial review of a decision that is made or of a matter that occurs on or after the day section 2 of Schedule 10 to the *Smarter and Stronger Justice Act, 2020* comes into force. 2020, c. 11, Sched. 10, s. 2.

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. R.S.O. 1990, c. J.1, s. 6 (2); 2006, c. 19, Sched. C, s. 1 (1).

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (3).

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2). R.S.O. 1990, c. J.1, s. 6 (4); 2006, c. 19, Sched. C, s. 1 (1).

Summary disposition of mandamus, etc.

7 An application for an order in the nature of mandamus, prohibition or certiorari shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review. R.S.O. 1990, c. J.1, s. 7.

Summary disposition of actions

8 Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the Superior Court of Justice may on the application of any party to the action, if he or she considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 6 (2). R.S.O. 1990, c. J.1, s. 8; 2006, c. 19, Sched. C, s. 1 (1).

Sufficiency of application

9 (1) It is sufficient in an application for judicial review if the applicant sets out in the notice of application the grounds on which the applicant is seeking relief and the nature of the relief. 2020, c. 11, Sched. 10, s. 3.

Exerciser of power may be a party

(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application. R.S.O. 1990, c. J.1, s. 9 (2).

Idem

(3) For the purposes of subsection (2), any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission or by any other collective title, shall be deemed to be a person under such collective title. R.S.O. 1990, c. J.1, s. 9 (3).

Notice to Attorney General

(4) Notice of an application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application. R.S.O. 1990, c. J.1, s. 9 (4).

Record to be filed in court

10 When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

References in other Acts, etc.

11 (1) Subject to subsection (2), where reference is made in any other Act or in any regulation, rule or by-law to any of the proceedings enumerated in subsection 2 (1), such reference shall be read and construed to include a reference to an application for judicial review. R.S.O. 1990, c. J.1, s. 11 (1).

Proceedings under *Habeas Corpus Act*

(2) Nothing in this Act affects proceedings under the *Habeas Corpus Act* or the issue of a writ of certiorari thereunder or proceedings pursuant thereto, but an application for judicial review may be brought in aid of an application for a writ of *habeas corpus*. R.S.O. 1990, c. J.1, s. 11 (2).

Tab 60

BETWEEN:)
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)
 METRO ONTARIO REAL ESTATE LIMIT)) *Shane Rayman and Conner Harris, for the A*
 ED)) *pplicant*
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 Applicant)
)
 – **and** –)
)
)
 THE CORPORAION OF THE CITY OF O)) *Robert Wood, for the Respondent*
 RILLIA)
)
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 Respondent)
)
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)

Swinton J.

Overview

[1] Metro Ontario Real Estate Limited (“Metro”) brought an application for judicial review of decisions of the City of Orillia related to the proposed expropriation of certain restrictive covenants in a lease. After oral argument, the Court stated,

We are of the view that there has been no denial of procedural fairness in relation to the issues raised by the applicant. We exercise our discretion not to deal with the validity of the expropriation decision on the grounds of prematurity. Accordingly, the application for judicial review is dismissed with reasons to follow.

These are the reasons for that decision.

Factual Background

The parties

[2] Metro leases land located in a shopping plaza at 70 Front Street North in Orillia. Its parent company operates a Metro grocery store there.

[3] The City acquired ownership of the shopping plaza in January 2016 as part of its plan to transform Orillia’s downtown. The redevelopment plan has been in place since at least 2012, when the City produced its Downtown Tomorrow Plan. As part of the plan, Coldwater Street would be extended, so that it no longer ends at Front Street but continues through the shopping plaza site. This would improve access from the downtown to the waterfront of Lake Couchiching. However, the City would have to demolish part of the shopping plaza and redevelop the southern portion of the site. Metro’s store is on the northern portion of the site and can continue to operate.

[4] When the City acquired the shopping plaza, it assumed the lease that Metro had with the prior owners. The lease, originally made between different parties than Metro and the prior owners, dates from 1978 and contains restrictive covenants. Article 12 prohibits the landlord from permitting the shopping plaza, or other lands it owns within a three mile radius, from being used for the sale, distribution or parking for the sale of food or any food product, as defined in the lease. A second covenant in Article 15(4) prohibits the construction of buildings or structural improvements valued in excess of \$25,000 at the shopping plaza that would reduce the parking available for the Metro store or impede accessibility for delivery trucks without the consent of Metro, which cannot be unreasonably withheld.

[5] In July 2017, the City requested Metro’s consent to demolish the shopping plaza south of the Metro store to extend Coldwater Street. Metro took the position that the planned development would reduce its parking and impede deliveries. Negotiations ensued but were unsuccessful, and the City decided to invoke the expropriation process.

The legislative framework

[6] Subsection 4(1) of the *Expropriations Act*, R.S.O. 1990, c. E.26 (the “Act”) provides that “an expropriating authority shall not expropriate land without the approval of the approving authority.” Pursuant to s. 5(1)(a), the approving authority in the present expropriation is the municipal council of the City.

[7] Upon applying for approval under s. 4, the expropriating authority must serve a notice of its application for approval to expropriate upon each registered owner of the lands to be expropriated and give public notice (s. 6(1)). An affected owner can then request a Hearing of Necessity (“HON”) pursuant to s. 6(2). The HON is conducted by an Inquiry Officer. Such a hearing is designed to “inquire into whether the taking of the lands or any part of the lands ... is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” (see s. 6(5)).

[8] After hearing evidence and submissions, the Inquiry Officer prepares a report containing a summary of the evidence and arguments, his or her findings of fact, and an opinion on the merits of the application for approval and the reasons for the opinion (s. 7(6)). After considering the report, the approving authority shall approve or not approve of the proposed expropriation and may impose modifications (s. 8(1)). Written reasons for its decision must be provided (s. 8(2)).

The present expropriation

[9] In the present case, the City served a formal Notice of Application for Approval to Expropriate Land on April 9, 2019. The Notice is broadly worded to include “all right, title and interest” in the identified lands, although with respect to Metro, the City seeks only to expropriate the two restrictive covenants in the lease described above.

[10] On May 13, 2019, Metro requested a HON, which was scheduled to begin August 14, 2019. On August 8, 2019, the City delivered its Notice of Grounds to Metro, in which it set out the objectives on which it intended to rely at the HON. [Subsection 7\(4\)](#) of the [Act](#) requires that such notice be delivered at least five days before the hearing date.

[11] The [Act](#) also requires the expropriating authority to “make available for inspection by the parties any documents, including maps and plans, that the expropriating authority intends to use at the hearing.” The City delivered copies of its documents to Metro on August 9, 2019.

[12] Metro objected to the timing of the Notice of Grounds and the disclosure. It asserted that the Notice raised issues it could not have anticipated and that the documents could not be adequately reviewed in time for the hearing, given the volume. Metro then asked the City to consent to an adjournment of the HON. The City did not initially consent, but then offered an adjournment to August 16 or 19. Metro’s counsel indicated that he was not available on those dates.

[13] At the hearing of the present application for judicial review, counsel for Metro stated that Metro was looking for an adjournment of the HON for 30 days. However, it did not convey this fact to the City in August 2019. Instead of seeking an adjournment from the Inquiry Officer at the HON, Metro withdrew its request for a HON before the hearing date. Counsel explained that he thought it unlikely that an adjournment would have been granted, and Tim Lawlor, affiant for Metro, expressed concern that the HON would have resulted in findings that could have prejudiced other litigation between the parties concerning the lease. No detail about this possible prejudice has been provided.

The Application for Judicial Review

[14] Metro then launched this application for judicial review, alleging a denial of procedural fairness by the City because of the timing of the service of the Notice of Grounds and the disclosure and because of the refusal of the City to consent to adjourn the HON. It seeks to quash those decisions. The usual remedy for a denial of procedural fairness, were the application for judicial review to succeed, would be to refer the matter back for a proceeding held in accordance with the applicable rules of procedural fairness.

[15] However, Metro goes far beyond this type of remedy, seeking an order quashing the Notice of Application for Approval given by the City in April 2019, an order quashing and/or striking approval by City Council of the expropriation of interests of Metro (an approval that has not yet been given), and a declaration that the expropriation is null and void.

[16] It relies on two broad arguments in support of these claims for relief. First, it argues that the restrictive covenants are not an interest in land within the meaning of s. 1(1) of the Act and cannot be expropriated. Second, it submits that the expropriation is an abuse of process, as it is a collateral attack on the provisions in the lease respecting dispute settlement, and the City is acting for an improper purpose – namely, the maximization of profit in the future sale of the shopping plaza lands.

The Availability of Judicial Review

[17] Pursuant to s. 43 of the Act, a party may bring an application to set aside or quash any proceeding or step taken under the Act within 30 days after the step or proceeding in respect of which the application is made.

[18] Section 43 sets out what is, in effect, a limitation period. However, it does not change the law respecting the availability of judicial review. For example, if the applicant challenges an administrative decision on procedural fairness grounds, it can do so successfully only if the administrative decision-maker owes a duty of procedural fairness and that duty has been breached. Moreover, the availability of judicial review remedies will depend on the application of the common law doctrine of prematurity, including the doctrine of adequate alternative remedies.

The Standard of Review

[19] There is no need to identify the standard of review for an issue of procedural fairness. The role of the reviewing court is to determine whether the appropriate level of procedural fairness was accorded in the circumstances.

There was no denial of procedural fairness

Metro's position

[20] The City met its statutory obligations pursuant to s. 7(4) of the Act respecting the timing of the Notice of Grounds and disclosure, as it gave the required notice at least five days before the hearing date. Indeed, it went beyond its statutory obligations with respect to disclosure by providing copies of the documentation, and not just access to inspect the documents.

[21] However, Metro relies on *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 and argues that the City owed it a broader common law duty of procedural fairness. It submits that the City breached this duty in two ways. First, the City served the Notice of Grounds and provided disclosure so close to the HON that Metro was unable to properly prepare for participation at the HON. Second, the City refused to consent to an adjournment, beyond the two to five days offered, thus denying Metro a fair hearing before the Inquiry Officer.

There was no breach of the duty of procedural fairness

[22] There is no merit to Metro's argument, as the "decisions" that it seeks to overturn are not ones where the City owed a duty of procedural fairness. Moreover, Metro is not entitled to any relief from the Court, as it failed to pursue its proper avenue for relief – a request for an adjournment from the Inquiry Officer.

[23] In *Baker*, the Supreme Court of Canada explained when a duty of procedural fairness will arise at common law: there must be an administrative decision, and that decision must affect “the rights, privileges or interests of an individual” (at para. 20).

[24] If there is such a decision, the Supreme Court held that the content of the duty of procedural fairness would vary and depend on the statutory context and the rights affected (at para. 22). The Court set out a number of factors to consider in determining the content of the duty in a particular case that I need not set out here. Notably, for purposes of the present application, the Court emphasized that the purpose of the duty of procedural fairness is to ensure participatory rights in the process leading to a decision. As the Court stated (at para. 22),

I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

In other words, the duty of procedural fairness is designed to give a party who will be affected by a decision notice and an opportunity to provide its position on the issues with appropriate supporting material before the decision is made.

[25] The actions of the City that Metro seeks to overturn are not “decisions” with respect to the rights, privileges or interests of Metro that give rise to a common law duty of procedural fairness. In serving the Notice of Grounds and in providing disclosure when it did, the City was not making a decision affecting the rights and interests of Metro. Rather, it was acting in the course of preparation for the HON.

[26] I agree with the City’s submission that “the scheme of the *Expropriations Act* is that the HON is effectively an adversarial legal proceeding” (City’s Factum at para. 40). At the HON, Metro and the City would be parties (s. 7(8)), and they have different roles and interests. The Inquiry Officer is required by the Act to give every party an opportunity to present evidence and argument and to examine and cross-examine witnesses (s. 7(9)(b)). After hearing the evidence and argument, the Inquiry Officer will make findings of fact and give an opinion on the merits of the application for approval. The onus of proof is on the expropriating authority to prove the expropriation is fair, sound and reasonably necessary to meet its objectives.

[27] Metro clearly had a right to a fair process before the Inquiry Officer, given the Inquiry Officer’s role to find facts and to render an opinion about the proposed expropriation (*Bezić Construction Ltd. v. Ontario (Ministry of Transportation)*, 2006 CanLII 85159 (Ont. Div. Ct.) at para. 6). However, the City had no duty of procedural fairness with respect to the delivery of the Notice of Grounds and the disclosure other than that set out in the *Act*, with which it complied.

[28] As well, given the nature of the HON process, the City made no reviewable decision when it refused to consent to an adjournment of the hearing. It reasonably refused the adjournment, given its conclusion that Metro had proper notice of the issues and an ability to respond and its concerns about the delay that would come with an adjournment.

[29] Finally, there is no merit to Metro’s argument that it had a legitimate expectation with respect to the delivery of the Notice and disclosure or a consent to an adjournment. There were no representations by the City with respect to process that could give rise to a legitimate expectation here.

This application for judicial review is premature

[30] Judicial review is a discretionary remedy. There is a principle of administrative law that an application for judicial review is premature and relief should be denied if the applicant has an adequate alternative remedy to address the issues (*Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paras. 68, 70 and 73; *C.B. Powell Ltd. v. Canada (Agence des services frontaliers)*, 2010 FCA 61 at paras. 30-33).

[31] Metro had an adequate alternative remedy to this application for judicial review. It could have proceeded to the HON and requested an adjournment on the basis that it had had inadequate time to prepare and to participate in the hearing because of the timing of the Notice of Grounds and the timing of the disclosure. No doubt the City would have argued that there was adequate notice, and there was no element of surprise given that the Downtown Tomorrow Plan had been adopted in 2012 and the parties had been in extensive negotiations over the years with respect to the Coldwater Street extension and the redevelopment plan for the downtown. It would then have been up to the Inquiry Officer to determine whether an adjournment was warranted in the interests of a fair hearing.

[32] Counsel stated that he did not think Metro would have been successful, citing *Bezic*, above. In that case, the Divisional Court dismissed an application for judicial review of a decision of an Inquiry Officer that denied an adjournment request.

[33] It is impossible to know if Metro would have been successful, had it requested an adjournment. That would have depended in part on the Inquiry Officer's review of the disclosure and a weighing of the competing interests, including the length of the proposed adjournment and the prejudice to both parties if an adjournment was granted or not. By withdrawing from the HON, Metro precluded a review by the Inquiry Officer, who would have been in a better position than this Court to assess whether there was need for an adjournment.

[34] By coming to this Court on judicial review rather than proceeding before the Inquiry Officer, Metro has ignored the statutory process in place under the [Act](#). I agree with the submission of the City that Metro has, in effect, engaged in a collateral attack on that process. It is not entitled to a remedy in this Court.

[35] As there has been no breach of the duty of procedural fairness, and no attempt by Metro to use the remedy available to it under the [Act](#), this ground of judicial review fails.

The Validity of the Expropriation

[36] Metro has sought also relief that would, if granted, put an end to the whole expropriation process. It seeks an order in the nature of *certiorari* to quash the Notice of Application for Approval in April, 2019 or an order quashing and/or striking approval by City Council of the expropriation of the interests of Metro, and a declaration that the expropriation is null and void. As I said above, Metro relies on a number of arguments: that a restrictive covenant is not an interest in land that can be expropriated; that the expropriation is an abuse of process because the City has not resorted to the dispute resolution provisions of the lease; and that the expropriation is an abuse of process because the City is not pursuing a proper public purpose, as it seeks to enhance the value of the land in a future sale by getting rid of the food covenant.

[37] The application is out of time with respect to the Notice of Application for Approval (see [s. 43](#) of the [Act](#)). However, in any event, there is no decision respecting the expropriation of the restrictive covenants in the Notice of Application for Approval that is reviewable. The Notice is just that – a notice that the expropriating authority will seek approval for the proposed expropriation.

[38] With respect to the relief sought concerning the ultimate expropriation, this application is premature. There has been no expropriation decision made by the approving authority, and so

there is no decision to quash.

[39] Nevertheless, the City asked this Court to deal with the alternative arguments made by Metro, despite the prematurity of the application. It too asks for a declaration - that the City has jurisdiction to expropriate Metro's leasehold interests from the southern half of the shopping plaza lands notwithstanding that Metro and the City are parties to the lease and the expropriated interests "may" be restrictive covenants.

[40] This Court can grant declaratory relief only with respect to the exercise or proposed exercise of a statutory decision (*Judicial Review Procedure Act*, R.S.O. 1980, c. J.1, s. 2(1)2). The power to expropriate has yet to be exercised. Expropriation of the interests at issue requires a decision by municipal council, the approving authority, pursuant to s. 8 of the *Act*.

[41] While this Court can give a declaration with respect to a proposed exercise of a statutory power of decision, courts do not give declarations in the abstract. In the present case, there has been no expropriation and until the expropriation process has run its course, this Court does not know precisely what the ultimate decision will be.

[42] Moreover, it is inappropriate for this Court to enter into a consideration of whether the City is motivated by an improper purpose – that is, the possible enhancement of the purchase price of the shopping plaza site without the food covenant. The determination of the fairness and reasonableness of the expropriation should have been the subject of the HON. Again, Metro chose to withdraw from that process. It is not appropriate for this Court to now engage in the assessment of the City's purpose and the fairness of the expropriation until the process has run its course.

[43] This aspect of Metro's application, attacking the expropriation as a whole, is premature, and for that reason, the Court declined to hear argument on these issues.

Conclusion

[44] Accordingly, the application for judicial review is dismissed.

[45] The City sought costs on a substantial indemnity basis in the amount of \$107,669.00. While Metro's application is without merit, I see no basis for a punitive award of costs.

[46] On a partial indemnity basis, Metro sought \$91,175.00 and the City \$79,522.00. Metro argues that the City should receive about half its costs, as success was divided, given that the Court declined to adjudicate the merits of the expropriation. I disagree. The City has been fully successful on this application, and it is entitled to its partial indemnity costs. The amount sought is reasonable, given the comparison to Metro's proposed costs. Therefore, costs to the City are awarded in the amount of \$79,522.00 all inclusive.

Swinton J.

I agree

Pattillo J.

I agree

Bloom J.

CITATION: Metro Ontario Real Estate Limited v. Corporation of the City of Orillia, 2020 ONSC 7002

DIVISIONAL COURT FILE NO.: 19-691-JR

DATE: 20201118

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Pattillo and Bloom JJ.

BETWEEN:

METRO ONTARIO REAL ESTATE LIMITED

Applicant

– and –

THE CORPORATION OF THE CITY OF ORILLIA

Respondent

REASONS FOR JUDGMENT

Swinton J.

Date of Release: November 18, 2020

Tab 61

Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541 (CanLII)

Date: 2012-08-20
File number: C54339
Other citations: 111 OR (3d) 561 — 355 DLR (4th) 518 —
220 ACWS (3d) 240 — 295 OAC 164 —
40 Admin LR (5th) 307 — [2012] OJ No 3871 (QL)
Citation: Volochay v. College of Massage Therapists of Ontario,
2012 ONCA 541 (CanLII), <<https://canlii.ca/t/fsdgd>>,
retrieved on 2025-10-28

COURT OF APPEAL FOR ONTARIO

CITATION: Volochay v. College of Massage Therapists of Ontario,
2012 ONCA 541
DATE: 20120820
DOCKET: C54339

O'Connor A.C.J.O., Laskin and Cronk JJ.A.

BETWEEN

Oleg Volochay

Applicant (Respondent)

and

College of Massage Therapists of Ontario

Respondent (Appellant)

Peter J. Osborne and Ian MacLeod, for the appellant

Robert C. Morrow, for the respondent

Heard: December 16, 2011

On appeal from the judgment of Justice Lynn D. Ratushny of the Divisional Court, dated March 29, 2011, with reasons reported at [2011 ONSC 2225](#).

Laskin J.A.:

A. INTRODUCTION

[1] The overriding question on this appeal is whether the application judge was wrong in principle to grant judicial review and quash two decisions of the College's investigatory bodies.

[2] Oleg Volochay is a massage therapist and a member of the College of Massage Therapists of Ontario. In July 2008, a former female patient complained to the Registrar of the College that she and Volochay had engaged in sexual intercourse while she was a patient – conduct that is prohibited by the *Health Professions Procedural Code* and attracts a penalty of loss of certificate to practice for a minimum of five years.

[3] The College's Complaints Committee investigated the complaint. However, in breach of the requirements of the Code, Volochay was not given notice of the complaint or an opportunity to make written submissions to the Committee. In April 2009, the Complaints Committee decided to refer the matter to the College's Executive Committee to consider a full investigation of Volochay's practice. It made its decision without ever telling Volochay the substance of the allegations against him or giving him a chance to refute the allegations.

[4] In November 2010, 19 months after the decision of the Complaints Committee, its successor body, the Inquiries, Complaints and Report Committee (ICRC) appointed an investigator to inquire into and examine Volochay's practice.

[5] Ratushny J. granted Volochay's judicial review application and quashed the initial decision of the Complaints Committee on the ground that the College

violated its “statutorily mandated procedures” and “did not comply with the most basic principles of natural justice and procedural fairness”. She also quashed the later decision to appoint an investigator on the ground that it was “simply a ratification” of the initial decision. She concluded that the issue before her was a “true question of jurisdiction” and that the College had violated its statutory authority to proceed, rendering its proceeding on the complaint a nullity.

[6] On its appeal, the College contends that the court ought not to have intervened before the administrative proceedings under the Code had run their course. In support of this contention, the College advances three submissions:

- (1) The application judge erred in holding that the College’s failure to give Volochay notice of the complaint raised a true question of jurisdiction;
- (2) No exceptional circumstances justified judicial review before the College proceedings were completed, especially because Volochay had an adequate alternative remedy, a review before the Health Professions Appeal and Review Board (HPARB), which he declined to exercise; and
- (3) Volochay’s “egregious conduct” after the complaint was made disentitled him to relief.

[7] Before outlining the facts that put these submissions in context, I will set out the regulatory framework that governs this case.

B. REGULATORY FRAMEWORK

[8] The College of Massage Therapists is a self-regulating body for the practice of massage therapy in Ontario. Like other health professions in Ontario, it is subject to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, and the *Health Professions Procedural Code*, which is Schedule 2 to the Act.

[9] The Code establishes the procedural framework for registration, complaints and discipline.^[1] Section 3(1) sets out the objects of the Code, one of which is to

regulate the practice of the profession and to govern its members in accordance with the Act and the Code. Section 3(2) stipulates that “[i]n carrying out its objects, the College has a duty to serve and protect the public interest.”

Sexual Intercourse With a Patient is Professional Misconduct

[10] A member who sexually abuses a patient commits an act of professional misconduct. Sexual abuse includes sexual intercourse, even if consensual, between a patient and a member. The penalty for sexual abuse involving intercourse is revocation of the member’s certificate to practice. The member cannot apply for reinstatement for five years: see Code ss. 1(3), 51(5) and 72(3); and *Leering v. College of Chiropractors of Ontario*, 2010 ONCA 87, 98 O.R. (3d) 561.

Complaints by Members of the Public

[11] The Complaints Committee, now the ICRC, has the statutory authority to investigate and take action on a complaint. The Committee performs a screening function: it determines whether the complaint should go forward to a discipline hearing or for other action. Sections 25(1) and (2) of the Code provide:

25(1) A complaint filed with the Registrar regarding the conduct or actions of a member shall be investigated by a panel selected by the chair of the Complaints Committee from among the members of the Committee.

(2) A panel shall be composed of at least three persons, at least one of whom shall be a person appointed to the Council by the Lieutenant Governor in Council.

[12] Section 25(5) is a key provision on this appeal. It states:

The Registrar shall give the member who is the subject of a complaint notice of the complaint and of the provisions of subsection 26(1).

Volochay was not given notice of the complaint, as required by this provision.

[13] The purpose of the notice provision is to give the member the right to make written submissions to the Committee. Section 26(1) states:

A member who is the subject of a complaint may make written submissions to the panel within thirty days after receiving notice under subsection 25(5).

Volochay was not afforded the right to make submissions to the Complaints Committee.

[14] The powers of a Committee investigating a complaint are set out in s. 26(2). In exercising these powers the Committee must consider the submissions of the member. Section 26(2) states:

26(2) A panel, after investigating a complaint regarding the conduct or actions of a member, considering the submissions of the member and considering or making reasonable efforts to consider all records and documents it considers relevant to the complaint, may do any one or more of the following:

1. Refer a specified allegation of the member's professional misconduct or incompetence to the Discipline Committee if the allegation is related to the complaint.
2. Refer the member to the Executive Committee for incapacity proceedings.
3. Require the member to appear before the panel or another panel of the Complaints Committee to be cautioned.
4. Take action it considers appropriate that is not inconsistent with the health profession Act, this Code, the regulations or by-laws

In this case, without any submissions from Volochay, the Committee acted under s. 26(2)4: it referred the matter to the Executive Committee of the College to consider a full investigation of Volochay's practice. The application judge quashed this decision.

[15] Under s. 26(5) the Committee, after considering the written submissions of the complainant and the member, shall take no action on a complaint where it is

satisfied that the complaint is frivolous, vexatious, made in bad faith or otherwise an abuse of process.

[16] Section 28(1) provides for the timely disposal of complaints. The Committee is required to dispose of a complaint within 120 days after it has been filed (although this time may be extended). In this case, the Committee took nine months to dispose of the complaint against Volochay. However, the length of time the Committee took to deal with the complaint is not in issue on this appeal.

Section 75 Investigations

[17] Section 75 of the Code provides for three circumstances in which the Registrar can appoint an investigator to determine whether a member has committed an act of professional misconduct:

75. The Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if,

(a) the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent and the Executive Committee approves of the appointment;

(b) the Executive Committee has received a report from the Quality Assurance Committee with respect to the member and has requested the Registrar to conduct an investigation; or

(c) the Complaints Committee has received a written complaint about the member and has requested the Registrar to conduct an investigation.

[18] In this case, in September 2008, at the request of the Complaints Committee, the Registrar appointed an investigator under s. 75(c) of the Code. In November 2010, an investigator was appointed under s. 75(a) of the Code to examine Volochay's practice. The application judge also quashed the November 2010 decision appointing an investigator.

Reviews and Appeals

[19] Under s. 29(2) of the Code, Volochay had the right to ask the HPARB to review the Complaints Committee's decision to refer the matter to the Executive Committee.

29(2) The complainant or the member who is the subject of the complaint may request the Board to review a decision of a panel of the Complaints Committee unless the decision was,

- (a) to refer an allegation of professional misconduct or incompetence to the Discipline Committee; or
- (b) to refer the member to the Executive Committee for incapacity proceedings.

[20] Volochay asked for a review and then withdrew his request. Section 30(1) states:

30(1) The Board shall not review a decision if the party who requested the review withdraws the request and the other party consents.

[21] Section 33(1) specifies that the HPARB may consider both the adequacy of the investigation and the reasonableness of the decision.

33(1) In a review, the Board shall consider either or both of,

- (a) the adequacy of the investigation conducted; or
- (b) the reasonableness of the decision.

[22] Section 35(1) sets out the powers of the HPARB:

After conducting a review of a decision, the Board may do any one or more of the following:

1. Confirm all or part of the decision.
2. Make recommendations the Board considers appropriate to the Complaints Committee.
3. Require the Complaints Committee to do anything the Committee or a panel may do under the health profession Act and this Code except to request the Registrar to conduct an investigation.

[23] Review decisions of the HPARB may be appealed to the Divisional Court on a question of law or fact. Section 70 of the Code states:

70(1) A party to proceedings before the Board concerning a registration hearing or review or to proceedings before a panel of the Discipline or Fitness to Practise Committee, other than a hearing of an application under subsection 72 (1), may appeal from the decision of the Board or panel to the Divisional Court.

(2) An appeal under subsection (1) may be made on questions of law or fact or both.

(3) In an appeal under subsection (1), the Court has all the powers of the panel that dealt with the matter and, in an appeal from the Board, the Court also has all the powers of the Board.

C. ADDITIONAL RELEVANT BACKGROUND

(a) The Respondent Oleg Volochay

[24] The respondent has been a registered massage therapist and a member of the College since December 2005. He practises in Ottawa. He is married and has one child, a son.

(b) The Complaint

[25] S.D. was one of Volochay's patients. She received massage therapy treatments from him for nearly four years – from September 2004 to June 2008.

[26] In July 2008, she sent a written complaint to the College. She alleged that for nearly a year – between August 2005 and July 2006 – she and Volochay had a sexual relationship, which included consensual sexual intercourse. After the sexual relationship, S.D. continued to receive massage therapy treatments from Volochay for nearly two years.

[27] In his affidavit sworn in support of his judicial review application, Volochay denied S.D.'s allegations of sexual impropriety. He said that her complaint was "both false and defamatory.

(c) The Complaints Committee's Investigation and S.D.'s Withdrawal of her Complaint

[28] The Complaints Committee investigated the complaint. It asked the Registrar to appoint an investigator under s. 75(c) of the Code. The Registrar did so in early September 2008.

[29] The investigator met with S.D. She also advised Volochay that a complaint had been made against him, but did not disclose either the identity of the complainant or the nature of the allegations. On September 21, 2008, S.D. sent an email to the College withdrawing her complaint against Volochay. She said that "I do not believe Mr. Volochay should lose his licence or be penalized because of our personal relationship. His treatments as a massage therapist were always professional and he never behaved inappropriately." The College, however, claims that Volochay pressured S.D. to withdraw her complaint.

[30] Nonetheless, because S.D. had withdrawn her complaint, the College investigator was instructed not to serve Volochay with notice of the complaint. And, in fact, Volochay never was served. Nor did the College ever tell him the nature of the complaint. Indeed, in a reporting memorandum, a College investigator said that Volochay "was not aware of the College's ongoing investigation and that what was shared between S.D. and the College would remain confidential until the very end".

[31] On September 23, 2008, the College wrote to Volochay to advise him that the complainant wished to withdraw the complaint. The letter also said that "a panel of the Complaints Committee will need to review this information to confirm

the withdrawal of the complaint.” This was the last correspondence that Volochay received from the College until the decision of the Complaints Committee in April 2009.

[32] Meanwhile, at a meeting in early January 2009, S.D. refused to cooperate with the College’s investigator. And apparently the College has not heard from her since that time.

(d) The Decision of the Complaints Committee, April 2009

[33] The Complaints Committee concluded that it retains jurisdiction to investigate a complaint, even when the complaint has been withdrawn. It determined that the allegations were serious and constituted acts of professional misconduct. The Committee also expressed concerns about S.D.’s allegation that Volochay had threatened her during the currency of their personal relationship. The Committee observed that this “additional information provided in the complaint, but not forming part of the allegations, may be suggestive of a pattern of behaviour with serious public interest implications.”

[34] The Committee concluded its decision as follows:

It is noted that the Registrar with the approval of the Executive Committee can commence an investigation pursuant to Section 75(a) of the *Code* where information is received by the College which establishes reasonable and probable grounds for the Registrar that a member has committed an act of professional misconduct or may be incompetent. In this regard, the panel has determined that this matter will be referred to the Executive Committee for their consideration in terms of a full investigation inquiring into the practice of the member given the seriousness of the allegations involved and the public interest concerns.

[35] Nowhere in its decision did the Committee advert to its obligation under s. 25(5) of the *Code* to give Volochay notice of the complaint or to its failure to give him an opportunity to make written submissions to the Committee.

(e) Volochay Asks for and then Withdraws his Request for a Review Before the HPARB

[36] Volochay received a copy of the decision of the Complaints Committee in late April 2009. In May 2009, his lawyer (not Mr. Morrow) requested a review of the decision of the Complaints Committee. This review was scheduled for November 19, 2010. However, in August 2010, his lawyer gave the HPARB notice that Volochay was withdrawing his request for a review “without prejudice” to his right to contest or dispute the complaint. The College did not object to Volochay’s withdrawal of his request.

[37] In September 2010, Mr. Morrow wrote the College asking that S.D.’s complaint be dismissed.

(f) The Decision to Appoint an Investigator Under Section 75(a) of the Code

[38] The College refused to dismiss the complaint. Instead, on November 30, 2010, it wrote Volochay’s counsel to advise him that an investigator had been appointed under s. 75(a) “to inquire into and examine the practice of Mr. Volochay”. This was the investigation contemplated in the decision of the Complaints Committee 19 months earlier.

(g) Decision of the Divisional Court

[39] Volochay sought judicial review and asked for leave under [s. 6\(2\)](#) of the [Judicial Review Procedure Act](#), R.S.O. 1990, c. J-1, to have his application heard before a single judge of the Divisional Court on the ground of urgency. He asked that both the April 16, 2009 decision of the Complaints Committee and the November 2010 decision appointing an investigator under s, 75(a) of the Code be

quashed. Leave was granted and the application judge quashed both decisions.

She wrote at paras. 33-34:

In addition to violating its statutorily mandated procedures, the respondent did not comply with the most basic of principles of natural justice and procedural fairness during its investigation and before coming to a decision. It gave the applicant no notice of the allegations and no opportunity to answer and defend them during the investigation process and before the First Decision was made.

The Second Decision is simply a ratification of the First Decision, relying again on an investigation and process that violated the applicant's right to procedural fairness.

[40] She observed at para. 31:

While the applicant did receive notice in September 2008 that there was a complaint and then later that it had been withdrawn, the evidence is that he never did receive notice of its subject matter or its specific allegations. In the respondent's concern for the complainant and her interests and safety, the applicant's interests including his right to notice of the complaint and to make written submissions on it appear to have been passed over and forgotten.

[41] She also rejected, at para. 35, the suggestion that Volochay had notice of the complaint because he had caused S.D. to withdraw it.

It is no answer to say that the applicant had actual notice of the complaint because he had caused the complainant to withdraw it in September 2008. The matter of the withdrawal is part of the complainant's side of the story that the applicant should have had the opportunity to answer as part of the respondent's investigation. To attribute notice to him of a fact he denies but has not been given the opportunity to deny cannot be deemed to amount to any notice whatsoever.

[42] The application judge acknowledged that judicial review is discretionary and "absent exceptional circumstances, administrative proceedings before administrative tribunals should not be fragmented until there is a full record and the

administrative proceeding has come to an end” (citation omitted). However, in her view, the College had acted “without jurisdiction so that its proceedings to date in respect to the complaint are a nullity.”

[43] She viewed the issue before her as a “true question of jurisdiction.” The process violated the College’s statutory authority to proceed; it violated the College’s duty to proceed fairly; and it violated Volochay’s right to procedural fairness. Finally, that Volochay’s right to continue his profession and his employment were at stake, was “fundamental to a consideration of the fairness of the process”.

[44] In September 2011, a panel of this court granted leave to appeal from the application judge’s decision.

D. ANALYSIS

[45] As I said at the outset, the question on this appeal is whether the application judge was wrong in principle in exercising her discretion to grant judicial review and quash the College’s decisions of April 2009, and November 2010. Four points assist to put this question in context.

[46] First, I agree with the application judge that the College was entitled to continue to investigate S.D.’s complaint even though she had withdrawn it. The College has a statutory mandate to serve and protect the public interest. It need not stop an investigation because the complainant no longer wishes to proceed, especially where it believes that a member may have influenced the withdrawal of the complaint.

[47] That leads to my second point: Having decided to proceed with its investigation, the College could not ignore its statutory obligations and the duty of fairness it owed to Volochay. But, as the application judge found, that is precisely what the College did. It breached the rules of natural justice and its own statutory

obligations when it failed to give Volochay notice of the complaint and an opportunity to make written submissions to the Complaints Committee, before the Committee made its April 2009 decision.

[48] Adequate notice is a fundamental component of fairness at common law. It ensures that individuals affected by a decision have sufficient information and a reasonable opportunity to answer the case against them. Section 25(5) of the Code, which required the Registrar to give Volochay notice of the complaint, codifies this rule of natural justice and statutorily imposes a duty of procedural fairness on the College, even at the investigatory stage of its processes. That it does so no doubt reflects the potentially serious consequences for a member who is under investigation.

[49] Moreover, the College could not avoid its statutory duties by suggesting that Volochay knew what the complaint was about. He says otherwise, and even if he did know something about it, the College's duty in s. 25(5) is unqualified.

[50] Third, the College's decision in November 2010, to appoint an investigator to inquire into Volochay's practice was tied to the Complaints Committee's decision in April 2009. That is evident from the Complaints Committee's reasons, which contemplated the appointment of an investigator under s. 75(a) of the Code. The application judge fairly concluded that the November 2010 decision "effectively ratified" the April 2009 decision. In oral argument, counsel for the College acknowledged that if the April 2009 decision of the Complaints Committee was quashed, the November 2010 decision appointing an investigator could not survive.

[51] The record shows that the Registrar also appointed an investigator under s. 75(c) of the Code. That appointment was made in September 2008 at the request of the Complaints Committee. The record is unclear when that investigation

ended. However, I think a reasonable conclusion is that it ended when the Complaints Committee rendered its decision in April 2009.

[52] The last point is that judicial review is a discretionary remedy. An appellate court must defer to the exercise of that discretion unless “the conclusion is unreasonable or has been reached on the basis of an irrelevant or extraneous consideration, a *wrong principle*, or as a result of insufficient or no weight having been given to a relevant consideration” (emphasis added): see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995 CanLII 145 \(SCC\)](#), [1995] 1 S.C.R. 3, per Sopinka J., at para. 112.

[53] Thus, I return to the question whether the application judge exercised her discretion on a wrong principle when she granted judicial review. In contending that she did so, the College makes two main points. First, the application judge erred in principle by characterizing the issue before her as a “true question of jurisdiction.” And second, she erred in principle by failing to find that Volochay had an adequate alternative remedy – a review before the HPARB – and instead holding that the denial of procedural fairness to Volochay was an exceptional circumstance justifying judicial intervention before the College proceedings were completed.

(a) “True Question of Jurisdiction”?

[54] The application judge concluded that whether the College breached its duty of procedural fairness was a “true question of jurisdiction”, and that the College’s breach rendered its action on the complaint a nullity. She held that the College “did not have the statutory authority to investigate without according the applicant the right to respond”. This was an “exceptional circumstance” justifying judicial review even though the proceedings before the College had not been completed.

[55] The College submits that the application judge erred in characterizing the question as one of jurisdiction and that judicial intervention was not justified on that basis. I agree with this submission.

[56] As the application judge acknowledged, the phrase “true question of jurisdiction” comes from the Supreme Court of Canada’s decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In that case, and those that followed, the Supreme Court reconsidered and, arguably, narrowed the scope of a question of true jurisdiction: see *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; and, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. Under this line of authorities, a true question of jurisdiction now refers to whether the tribunal had authority to make the inquiry in the first place: see *Dunsmuir*, at para. 59.

[57] Is a question of procedural fairness a true question of jurisdiction in the *Dunsmuir* sense? The strongest support for the application judge’s conclusion comes from the powerful dissenting reasons of Dickson J. in *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561. There, he characterized a breach of the rules of natural justice as an error going to jurisdiction or closely “akin” to a jurisdictional error.

[58] However, the prevailing view, reflected in the majority reasons of Beetz J. in *Harelkin*, and in later cases, is that a question of procedural fairness or natural justice is not a true question of jurisdiction in the narrow sense that phrase is used in *Dunsmuir*. Whether a tribunal breached its duty of fairness is not relevant to whether it had authority to begin its inquiry. A breach of the duty of fairness only arises after the inquiry has lawfully begun. Though a tribunal that breaches its duty of fairness may be said to have abused or exceeded its jurisdiction, this is not

the same thing as having no jurisdiction to even start an inquiry: see for example *Toronto Hydro Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481; *Service Employees' International Union Local No. 333 v. Nipawin District Staff Nurses' Association*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 389.

[59] Thus, I do not agree with the application judge's holding that because the Complaints Committee did not give Volochay notice of the complaint and the right to respond, it did not have the statutory authority to investigate. Her holding would turn the notice requirement in s. 25(5) of the Code into a pre-condition to the Committee's jurisdiction. However, s. 25(5) is simply a statutory codification of an affected party's right to procedural fairness or natural justice. It is not a provision that goes to the Committee's jurisdiction to investigate a complaint.

[60] Accordingly, the application judge was wrong in principle to characterize the question before her as a "true question of jurisdiction." But, more importantly, even if her characterization were correct, it does not follow that early judicial review was justified solely on that basis.

(i) Jurisdictional defects and early judicial review

[61] Whether a question is one of "true jurisdiction" is relevant to determining the appropriate standard of review of a tribunal's decision. True questions of jurisdiction invite review on a standard of correctness, not reasonableness. However, characterizing a question as one of true jurisdiction does not determine whether early judicial intervention is warranted.

[62] Admittedly, there is case law from this court suggesting that early judicial review is automatically available for jurisdictional defects, even defects arising from a denial of natural justice. For example, in *Howe v. Institute of Chartered*

Finlayson J.A., writing for the majority, said:

I think it is trite law that the court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it: see *Re Gage and Attorney General for Ontario* (1992), 1992 CanLII 8517 (ON SCDC), 90 D.L.R. (4th) 537 (Div. Ct.) and *Re Roosma and Ford Motor Co.* (1988), 1988 CanLII 5633 (ON SCDC), 53 D.L.R. (4th) 90 (Div. Ct.). In *Gage*, *supra*, the court found that the failure of the board of inquiry to provide a policeman with timely written notice of its decision to order a hearing into a complaint regarding his behaviour, pursuant to its statutory obligation, was a denial of natural justice which resulted in a loss of jurisdiction. In *Roosma*, *supra*, the court held that judicial review was open to challenge proceedings tainted with a fatal jurisdictional defect at the outset even where an appeal was provided: at p. 490.

[63] However, in my view, this passage has been overtaken by Supreme Court of Canada jurisprudence and no longer reflects the governing law. The passage relies on lower court authorities and makes no reference to *Harelkin*. Moreover, the court did not have the benefit of the Supreme Court's reasons in *Matsqui*. These cases show that neither a breach of natural justice nor a question of true jurisdiction entitles an aggrieved party to automatic access to the courts.

[64] In *Harelkin* the majority held that the court should exercise its discretion to refuse judicial review for a breach of natural justice if the aggrieved individual – there a student – had an “adequate alternative remedy” – there an internal appeal. In so holding, the majority said that a decision made in breach of the rules of natural justice is not a nullity, as the application judge held in the present case, but is curable on appeal.

[65] The more significant case is *Matsqui*. *Matsqui* was decided after *Howe*. It affirmed *Harelkin* and extended its reach to true questions of jurisdiction.

Canadian Pacific challenged assessments levied by Indian bands on land on which its railways ran. The company contended that the land was not “in the reserve” and thus not within the taxing authority of the bands. Instead of raising this issue before the various tribunals established under the legislation to hear assessment appeals, Canadian Pacific went to court and sought judicial review of the initial assessments. The trial judge denied relief on the ground that Canadian Pacific had resort to an adequate alternative remedy.

[66] All members of the court accepted that the issue was jurisdictional – a true question of jurisdiction in the *Dunsmuir* sense. Relying on *Harelkin*, Lamer C.J.C. for the majority of the court held that despite the jurisdictional nature of the inquiry, Canadian Pacific did not have automatic access to the court. The court maintained discretion to refuse to deal with the issue because the internal appeals provided an adequate alternative remedy that ought to have been pursued. It was therefore not an unreasonable exercise of the trial judge’s discretion to deny relief.^[2]

[67] In *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] F.C.R. 332, at para. 42, Stratas J.A. of the Federal Court of Appeal commented that “the use of the label “jurisdiction” to justify judicial interference with ongoing administrative decision making processes is no longer appropriate.” I agree. Even a true question of jurisdiction is not, by itself, an exceptional circumstance justifying judicial review before administrative proceedings are completed. A “jurisdictional” ground of review does not, standing alone, deprive a reviewing court of its discretion to refuse relief.

(b) Alternative Remedies and Exceptional Circumstances?

[68] The application judge recognized the principle that unless exceptional circumstances exist, a court should not interfere in an administrative proceeding until it has run its course. The principle has particular force where adequate alternative remedies are available under the administrative scheme. Ordinarily an

affected individual must pursue these remedies before seeking relief from the court.

[69] The rationales for this principle are well known. The principle respects administrative decision-making and the legislature's intent that internal review processes be exhausted before the court intervenes. At the same time, the principle preserves the right of the court to intervene in those exceptional circumstances where the justice of the case calls for intervention. Stratas J.A. summarized the rationales for the principle in *C.B. Powell* at paras. 31-32, and I can do no better than quote his words:

Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge. [Citations omitted.]

See also David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pp. 485-494 and *Ackerman v. Ontario (Provincial Police)*, [2010 ONSC 910](#), 259 O.A.C. 163 (Div. Ct.).

[70] In my view, this principle applies even though [s. 2\(1\)](#) of the *Judicial Review Procedure Act* provides that an application for judicial review may be brought "despite any right of appeal" to either an administrative tribunal or to the court. The

ability to bring an application for judicial review does not compel the court to undertake judicial review - exceptional circumstances are still required to justify early intervention.

[71] The College submits that Volochay had an adequate alternative remedy available to him – a review before the HPARB – which he declined to exercise. As he did not pursue this remedy, and there were no exceptional circumstances to otherwise justify early judicial review, the application judge was wrong in principle to quash the College's decisions of April 2009, and November 2010. I agree with this submission.

(i) Was a review by the HPARB an adequate alternative remedy?

[72] Because the application judge concluded that the College's breach of natural justice rendered the proceedings a nullity, she did not consider the effect of Volochay's decision not to proceed with a review before the HPARB. However, the application judge erred in her conclusion. The College's breach of natural justice did not render its investigation a nullity. Thus, if a review of the Complaints Committee's decision was an effective or adequate alternative remedy, then absent exceptional circumstances, early judicial review was not appropriate.

[73] To be an effective or adequate remedy, the defect alleged – here a denial of procedural fairness – must be capable of being raised before the reviewing body, and the reviewing body must be capable of “curing” the defect. A review before the HPARB satisfies these two criteria.

[74] Section 33(1)(a) of the Code authorizes the HPARB to review the adequacy of the Complaints Committee's investigation. An investigation conducted without giving the member notice of the complaint and an opportunity to make written submissions is an inadequate investigation. Thus, the HPARB could have considered the failure of the Complaints Committee to afford Volochay procedural

fairness: see *D.L.M. v. S.E.-S.*, 2010 CanLII 70389 (ON HPARB), at paras. 26, 35-38.

[75] Under s. 35(1)3 of the Code, the HPARB could have required the ICRC to reconsider the S.D. complaint, but this time after ensuring that Volochay had notice of the complaint and an opportunity to make written submissions. In other words, the HPARB could have ordered the ICRC to give Volochay his procedural rights during the reconsideration.

[76] What the HPARB could not have done was give Volochay the remedy he sought, and that was granted, in the Divisional Court: an order quashing the decision of the Complaints Committee and the later decision appointing an investigator. However, in my opinion, a reconsideration of the investigation after giving Volochay notice of the complaint and the opportunity to make submissions would be an adequate alternative remedy. We must assume that the ICRC would conduct the reconsideration fairly and with an open mind. The HPARB would, therefore, be capable of curing the initial failure of the Complaints Committee to treat Volochay fairly.

[77] Considerations of cost, convenience and timeliness may bear on the adequacy of an alternative remedy. To the extent that they are relevant, these considerations also favour review before the HPARB. That review was scheduled some 20 months ago, and therefore, could have long since been completed, and no doubt for a relatively modest cost.

[78] Volochay's failure to seek a review of the Complaints Committee's decision before the HPARB ought to have precluded relief by judicial review, absent exceptional circumstances.

(ii) Were there exceptional circumstances?

[79] The Complaints Committee's decision, which called for an examination of Volochay's entire practice, was a far-reaching order. It went well beyond simply referring S.D.'s complaint to the Discipline Committee. Were it not for the availability of a review before the HPARB, I would have been inclined to uphold the application judge's order quashing the College's decisions. The far-reaching nature of the Complaints Committee's decisions, made without giving Volochay the procedural fairness to which he was entitled, would have been an exceptional circumstance justifying early judicial review.

[80] But, as I have found that a review before the HPARB was an adequate alternative remedy, Volochay must be able to point to some exceptional circumstance to justify resort to the courts instead of review by the Board. He has not been able to do so. And I can see none. For example, I see no evidence of hardship, or prejudice, or costs, or delay that would support Volochay's decision to bypass the HPARB and apply for judicial review. Indeed, Volochay invoked the administrative review process for 15 months, only to withdraw his request shortly before the hearing date. He must, therefore, accept responsibility for the delay and any increased costs.

E. CONCLUSION

[81] I therefore conclude that the application judge was wrong in principle to grant judicial review. It is thus not necessary to consider the College's final submission that Volochay's conduct after S.D. filed her complaint disentitled him to relief. I would allow the appeal, set aside the order of the application judge and dismiss Volochay's application for judicial review.

[82] I offer this final comment. The Complaints Committee made a decision not simply to refer the S.D. complaint to discipline, but to call for an examination of Volochay's entire practice. And it made this decision with complete disregard for

Volochay's rights under the Code and at common law. He was entitled to better from his governing body. At the same time, however, he was not justified in bypassing the reviewing body specifically established under the Act to hear parties dissatisfied with a decision of the Complaints Committee. Whether Volochay could now reinstate his request for review before the HPARB was not before us.

[83] The College is entitled to its costs of the judicial review in the Divisional Court, which I would fix in the amount of \$10,000, inclusive of disbursements and all applicable taxes. The College is also entitled to its costs of the appeal, including the motion for leave, which I would fix in the amount of \$12,500, inclusive of disbursements and all applicable taxes.

Released: August 20, 2012 ("J.L.")

"John Laskin J.A."

"I agree D. O'Connor A.C.J.O."

"I agree E.A. Cronk J.A."

[1] Unless otherwise indicated, all references to statutory provisions are those in place at the time of the complaint. Slight changes to many of these provisions came into force on June 4, 2009 as a result of Schedule M to the *Health Systems Improvement Act*, 2007, [S.O. 2007, c. 10](#).

[2] Lamer C.J.C. did find that the trial judge exercised his discretion unreasonably in failing to consider that the appeal tribunals lacked sufficient independence from the Band Chiefs and Councils.

Tab 62

C.B. Powell Limited v. Canada (Border Services Agency), 2010 FCA 61 (CanLII), [2011] 2 FCR 332

Date: 2010-02-23

File number: A-245-09

Other citations: 400 NR 367 — 185 ACWS (3d) 914 — AZ-50613379 — [2011] EXP 3678 — [2010] CarswellNat 391 — [2010] FCJ No 274 (QL)

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Acknowledgements: The official copies of the [Federal Courts Reports' decisions](#) are available on the website of the [Office of the Commissioner for Federal Judicial Affairs Canada](#).

[2011] 2 F.C.R. 332

A-245-09

2010 FCA 61

The President of the Canada Border Services Agency and the Attorney General of Canada (*Appellants*)

v.

C.B. Powell Limited (*Respondent*)

INDEXED AS: C.B. POWELL LIMITED V. CANADA (BORDER SERVICES AGENCY)

Federal Court of Appeal, Nadon, Evans and Stratas JJ.A.—Montréal, February 2; Ottawa, February 23, 2010.

Customs and Excise — Customs Act — Appeal from Federal Court decision allowing judicial review seeking declaration that lack of jurisdiction ruling by President of Canadian Border Services Agency a "decision" appealable to the Canadian International Trade Tribunal (C.I.T.T.) under Customs Act,

s. 67(1) — Respondent submitting customs form, subsequently realizing that incorrect tariff treatment claimed — President declining to conduct re-determination under Act, s. 60(1) — Respondent not appealing to C.I.T.T. but applying for judicial review before Federal Court — Federal Court finding President's refusal to exercise jurisdiction "decision" appealable to C.I.T.T. — Whether presence of jurisdictional issue exceptional circumstance allowing party to launch judicial review before administrative process completed — Adjudications, appeals under Customs Act not allowing courts to become involved — Jurisdictional issues not exceptional circumstance justifying court intervention — "Jurisdiction" label to justify judicial interference not appropriate herein — Determination of "jurisdiction" by President involving same questions of law, fact that President normally considers — Calling one ruling "jurisdictional", not the other result-oriented labelling — Respondent not entitled to bypass appeal to C.I.T.T. herein — Not for Federal Court, this Court, to interpret word "decision" in s. 67(1), but for C.I.T.T. — Mueller Canada Inc. v. Minister of National Revenue not supporting belief that only Federal Court can rule that "non-decision" or "jurisdictional decision" a "decision" under s. 67(1) or that only "decisions on the merits" can be appealed to C.I.T.T. — Rule against judicial interference with ongoing administrative processes applying herein — Appeal allowed.

This was an appeal from a Federal Court decision allowing an application for judicial review seeking a declaration to the effect that the ruling of the President of the Canadian Border Services Agency (CBSA) that he did not have jurisdiction was a "decision" that could be appealed to the Canadian International Trade Tribunal (C.I.T.T.) under subsection 67(1) of the Customs Act.

The respondent had submitted a customs form to the CBSA for imported goods. The CBSA did not go beyond the form and the value for duty of the goods were deemed to be determined by what had been entered. An audit of the form revealed a mistaken tariff classification number and the CBSA invited the respondent to examine the matter before issuing a re-determination under section 59 of the Act. The respondent accepted that the classification number it had entered was wrong, but discovered that it also should have claimed a different tariff treatment. The prescribed delay to correct the tariff treatment had passed, but the respondent nevertheless advised the CBSA of the mistake. In issuing its re-determination, the CBSA corrected the classification number, but left the tariff treatment unchanged. The President declined to conduct a re-determination of the tariff treatment because the CBSA had not determined tariff treatment earlier, and therefore there was nothing for him to re-determine under subsection 60(1) of the Act. Rather than pursuing an appeal before the C.I.T.T., the respondent proceeded to the Federal Court by way of judicial review. The Federal Court, citing *Mueller Canada Inc. v. Minister of National Revenue (Mueller)*, declared that the President's negative decision could be appealed to the C.I.T.T.

At issue was whether the presence of a jurisdictional issue is an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed.

Held, the appeal should be allowed.

Parliament established an administrative process of adjudications and appeals under the *Customs Act* that does not allow the courts, absent exceptional circumstances, to become involved before this process is completed. The presence of jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. The use of the label “jurisdiction” to justify judicial interference with ongoing administrative process is not appropriate. The inappropriateness of this labelling approach is well-illustrated by the ruling of the President in this case. The President considered his “jurisdiction” by interpreting subsection 60(1), determining the nature of the respondent’s request for a ruling, and deciding whether this request fell within the scope of subsection 60(1) as interpreted. These questions of law, of fact, and of mixed fact and law, respectively, are the same questions that the President normally considers when determining the nature of imported goods, what classifications are legally available, and what classifications ought to apply to these goods. Calling one ruling “jurisdictional” and not the other, when they are both the same type, is result-oriented labelling. Applying the “jurisdictional” label to the ruling of the President under subsection 60(1) in this case did not permit the respondent to proceed to the Federal Court, bypassing the remainder of the administrative process, namely the appeal to the C.I.T.T. under subsection 67(1). It is not for the Federal Court or this Court to interpret the word “decision” in subsection 67(1) and determine whether the C.I.T.T. can hear the respondent’s appeal. That is the task of the C.I.T.T. when an appeal is brought to it under subsection 67(1). *Mueller* does not support the belief that only the Federal Court can rule that a “non-decision” or “jurisdictional decision” is a “decision” under subsection 67(1), or that only “decisions on the merits” can be appealed to the C.I.T.T. under subsection 67(1). It was not the task of the Federal Court in *Mueller* to interpret the word “decision”. The normal rule against judicial interference with ongoing administrative processes applies herein. The Federal Court should have dismissed the respondent’s application as premature.

STATUTES AND REGULATIONS CITED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 8.

Customs Act, R.S.C., 1985 (2nd Supp.), c. 1, ss. 42 (as am. by S.C. 2001, c. 25, s. 32; 2005, c. 38, s. 68), 42.01 (as enacted by S.C. 1997, c. 36, s. 160; 2005, c. 38, s. 69), 42.1 (as enacted by S.C. 1993, c. 44, s. 86; 1997, c. 14, s. 38; c. 36, s. 161; 2005, c. 38, s. 70; 2009, c. 6, s. 24), 58 (as am. by S.C. 1997, c. 36, s. 166; 2005, c. 38, s. 73), 59 (as am. by S.C. 1997, c. 36, s. 166; 2001, c. 25, s. 41; 2005, c. 38, s. 74), 60(1) (as am. by S.C. 2001, c. 25, s. 42), 62 (as am. by S.C. 1997, c. 36, s. 166), 67(1) (as am. by S.C. 1997, c. 36, s. 169; 2001, c. 25, s. 48(F); 2005, c. 38, s. 85), 74(3)(b)(ii) (as am. by S.C. 1997, c. 36, s. 175).

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 28(1)(e) (as am. *idem*, s. 35).

TREATIES AND OTHER INSTRUMENTS CITED

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United

CASES CITED

CONSIDERED:

Mueller Canada Inc. v. Minister of National Revenue (1993), 70 F.T.R. 197 (F.C.T.D.); *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Fritz Marketing Inc. v. Canada*, 2009 FCA 62, [2009] 4 F.C.R. 314, 387 N.R. 1, revg 2008 FC 703, 174 C.R.R. (2d) 74, 329 F.T.R. 221; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, (1979), 25 N.B.R. (2d) 237, 97 D.L.R. (3d) 417.

REFERRED TO:

Harellkin v. University of Regina, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, (1979), 96 D.L.R. (3d) 14, [1979] 3 W.W.R. 676; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, (1995), 122 D.L.R. (4th) 129, 26 Admin. L.R. (2d) 1; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, (1995), 125 D.L.R. (4th) 583, 30 Admin. L.R. (2d) 1; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706, (1998), 38 O.R. (3d) 576, 158 D.L.R. (4th) 193; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, 183 D.L.R. (4th) 14, [2000] 4 W.W.R. 149; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, 210 D.L.R. (4th) 193, 34 Admin. L.R. (3d) 163; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141, 223 D.L.R. (4th) 395, 23 C.C.E.L. (3d) 1; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, 250 D.L.R. (4th) 385, 41 C.C.E.L. (3d) 159; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257, 250 D.L.R. (4th) 454, 27 Admin. L.R. (4th) 1; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, 252 D.L.R. (4th) 529, 28 Admin. L.R. (4th) 1; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68; *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 1993 CanLII 3430 (ON SCDC), 11 O.R. (3d) 798, 99 D.L.R. (4th) 738, 63 O.A.C. 393 (Div. Ct.); *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 119 D.L.R. (4th) 136, [1995] 1 W.W.R. 738, 98 B.C.L.R. (2d) 212 (B.C.S.C.), affd (1995), 1995 CanLII 1305 (BC CA), 130 D.L.R. (4th) 461, [1996] 4 W.W.R. 293, 15 B.C.L.R. (3d) 136 (B.C.C.A.); *Jafine v. College of Veterinarians of Ontario*, (1951), 1991 CanLII 7126 (ON SC), 5 O.R. (3d) 439, 6 Admin. L.R. (2d) 147 (Gen. Div.); *University of Toronto v. C.U.E.W., Local 2* (1988), 1988 CanLII 4757 (ON SC), 65 O.R. (2d) 268, 52 D.L.R. (4th) 128, 30 Admin. L.R. 310 (Div. Ct.); *Canada (National Revenue Re)*, 1996 CanLII 7820 (C.I.T.T.); *Bell v. Ontario Human Rights Commission*, 1971 CanLII 195 (SCC), [1971] S.C.R. 756; (1971), 18 D.L.R. (3d) 1; *Air Canada v. Lorenz*, 1999 CanLII 9373 (FC), [2000] 1 F.C. 494, (1999), 175 F.T.R. 211 (T.D.); *Myers v. Law Society of Newfoundland* (1998), 1998 CanLII 18110 (NL CA), 165 Nfld. & P.E.I.R. 150, 163 D.L.R. (4th) 62, 9 Admin. L.R. (3d) 78 (Nfld. C.A.); *Canadian National Railway Co. et al. v. Winnipeg City Assessor* (1998), 1998 CanLII 5028 (MB CA),

131 Man. R. (2d) 310, 13 Admin. L.R. (3d) 15 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 1999 CanLII 32830 (NB CA), 210 N.B.R. (2d) 386 (C.A.).

AUTHORS CITED

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Mullan, David J. *Administrative Law*. Toronto: Irwin Law, 2001.

APPEAL from a decision of the Federal Court (2009 FC 528) allowing an application for judicial review that sought a declaration to the effect that the President of the Canadian Border Services Agency had made a decision that could be appealed to the Canadian International Trade Tribunal under subsection 67(1) of the *Customs Act*. Appeal allowed.

APPEARANCES

Jacques Savary for appellants.

Michael D. Kaylor for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellants.

Lapointe Rosenstein Marchand Melançon LLP, Montréal, for respondent.

The following are the reasons for judgment rendered in English by

STRATAS J.A.:

A. Introduction

[1] The respondent, C.B. Powell Limited, imported bacon bits into Canada. The Canada Border Services Agency (CBSA) assessed certain duties on the bacon bits. C.B. Powell disagreed with the CBSA's assessment. So, pursuing its rights under subsection 60(1) [as am. by S.C. 2001, c. 25, s. 42] of the *Customs Act*, R.S.C., 1985 (2nd Supp.), c. 1, C.B. Powell asked the President of the Canada Border Services Agency to rule on the matter.

[2] The President of the CBSA ruled that he did not have jurisdiction to decide the matter. Under subsection 67(1) [as am. by S.C. 1997, c. 36, s. 169; 2001, c. 25,

s. 48(F); 2005, c. 38, s. 85] of the Act, "decision[s]" of the President can be appealed to the Canadian International Trade Tribunal (C.I.T.T.). But C.B. Powell did not follow that route. Instead, it brought a judicial review in the Federal Court, essentially seeking the advice of that Court about whether

there was a “decision” that could be appealed under subsection 67(1) of the Act. It asked for a declaration to that effect. Harrington J. of the Federal Court granted that declaration: [2009 FC 528](#). The Crown appeals to this Court, arguing that the President of the CBSA was correct in deciding that he did not have jurisdiction to decide the matter and so there was no “decision” that could be appealed to the C.I.T.T. under subsection 67(1) of the Act.

[3] In my view, the appeal must be allowed.

[4] The Act contains an administrative process of adjudications and appeals that must be followed to completion, unless exceptional circumstances exist. In this administrative process, Parliament has assigned decision-making authority to various administrative officials and an administrative tribunal, the C.I.T.T., not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing any recourse to the courts, even on so-called “jurisdictional” issues.

[5] In this case, C.B. Powell’s recourse against the President’s ruling is to pursue an appeal to the C.I.T.T. under subsection 67(1) of the Act. It is for the C.I.T.T. to interpret the word “decision” in subsection 67(1) and decide whether it has jurisdiction to consider C.B. Powell’s appeal in these circumstances and, if so, to decide the appeal on its merits. When the C.I.T.T. completes that task, the administrative process under the Act will be exhausted. Only at that point can an aggrieved party pursue a judicial review to this Court under paragraph 28(1)(e) [as am. by [S.C. 2002, c. 8](#), s. 35] of the [Federal Courts Act](#), R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)].

B. The facts

[6] I shall describe what happened in this particular case by examining each step in the administrative process of adjudications and appeals under the Act.

The customs form

[7] Under the *Customs Act*, an importer of goods, such as C.B. Powell, must report and declare and pay such duty and sales taxes as may be owing. It does so by submitting a form. Among other things, the importer declares the value of the imported goods, specifies a particular tariff treatment, and states a particular tariff classification number.

[8] In this case, C.B. Powell imported bacon bits from the United States in 2005. On the form, it declared the value of the bacon bits, specified Most-Favoured-Nation Tariff treatment and entered a particular classification number.

Going beyond the form

[9] When the goods are imported, the CBSA can go beyond the form and determine the origin, tariff classification and value for duty of the goods. This is set out in subsection 58(1) [as am. by [S.C. 2005, c. 38, s. 73](#)]:

Determ
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58. (1) Any officer, or any officer within a class of officers, designated by the President for the purposes of this section, may determine the origin, tariff classification and value for duty of imported goods at or before the time they are accounted for under subsection 32(1), (3) or (5).

[10] However, where the CBSA receives the form and does not immediately go beyond it, the origin, tariff classification and value for duty of the goods are deemed to be determined by what was entered on the form. This is set out in subsection 58(2) [as am. by [S.C. 1997, c. 36, s. 166](#)]:

58. ...

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(2) If the origin, tariff classification and value for duty of imported goods are not determined under subsection (1), the origin, tariff classification and value for duty of the goods are deemed to be determined, for the purposes of this Act, to be as declared by the person accounting for the goods in the form prescribed under paragraph 32(1)(a). That determination is deemed to be made at the time the goods are accounted for under subsection 32(1), (3) or (5).

[11] In this case, the CBSA did not go beyond the form, and so the entries of C.B. Powell were taken as declared.

The audit and the re-determination

[12] However, under sections 42 [as am. by [S.C. 2001, c. 25, s. 32](#); [2005, c. 38, s. 68](#)], 42.01 [as enacted by [S.C. 1997, c. 36, s. 160](#); [2005, c. 38, s. 69](#)] and 42.1 [as enacted by [S.C. 1993, c. 44, s. 86](#); [1997, c. 14, s. 38](#); [c. 36, s. 161](#); [2005, c. 38, s. 73](#); [2009, c. 6, s. 24](#)] of the Act, the CBSA can conduct audits and verifications of the forms. The findings from those audits and verifications can cause it to “re-determine the origin, tariff classification or value for duty of imported goods” under section 59 of the Act. The relevant portions of section 59 [as am. by [S.C. 1997, c. 36, s. 166](#); [2001, c. 25, s. 41](#); [2005, c. 38, s. 74](#)] are as follows:

Re-determi
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59. (1) An officer, or any officer within a class of officers, designated by the President for the purposes of this section may

etermination
on

(a) in the case of a determination under section 57.01 or 58, re-determine the origin, tariff classification, value for duty or marking determination of any imported goods...

...

(b) further re-determine the origin, tariff classification or value for duty of imported goods...on the basis of an audit or examination under section 42, a verification under section 42.01 or a verification of origin under section 42.1...

Notice req
uirement

(2) An officer who makes a determination under subsection 57.01(1) or 58(1) or a re-determination or further re-determination under subsection (1) shall without delay give notice of the determination, re-determination or further re-determination, including the rationale on which it is made, to the prescribed persons.

[13] In this case, in 2008, the CBSA audited the form submitted for the bacon bits. It discovered a mistake: C.B. Powell had entered the wrong classification number on the form. Before issuing a re-determination under section 59, it invited C.B. Powell to examine the matter.

C.B. Powell's examination

[14] C.B. Powell accepted that the classification number it had entered was wrong. But it discovered a further mistake.

[15] C.B. Powell discovered that it should have claimed NAFTA [*North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, December 17, 1992, [1994] Can. T.S. No. 2] treatment with no duty, rather than Most-Favoured-Nation Tariff treatment with 12.5% duty. Under subparagraph 74(3)(b)(ii) [as am. by [S.C. 1997, c. 36](#), s. 175] of the Act, such a mistake can be corrected within one year. But three years had elapsed.

[16] Nevertheless, C.B. Powell advised the CBSA of the mistaken tariff treatment. After all, the CBSA was correcting the mistaken classification number under section 59 so, in C.B. Powell's view, the CBSA could also correct the mistaken tariff treatment.

The section 59 re-determination

[17] The CBSA issued its section 59 re-determination. It corrected only the classification number. It left unchanged the tariff treatment, with its 12.5% duty:

This decision represents a re-determination of the tariff classification only. The tariff treatment has not been reviewed and is not being re-determined on this detailed adjustment statement.

C.B. Powell takes the matter further

[18] C.B. Powell pursued its rights under subsection 60(1) of the Act and asked the President of the CBSA to conduct a re-determination of the tariff treatment (known as "tariff origin" under the Act). Subsection 60(1) provides as follows:

Request for re-determination or further re-determination

60. (1) A person to whom notice is given under subsection 59(2) in respect of goods may, within ninety days after the notice is given, request a re-determination or further re-determination of origin, tariff classification, value for duty or marking. The request may be made only after all amounts owing as duties and interest in respect of the goods are paid or security satisfactory to the Minister is given in respect of the total amount owing.

The ruling of the President of the CBSA

[19] The President of the CBSA declined to look at the matter. In his view, he could act under subsection 60(1) only if there had been an earlier determination of tariff treatment by the CBSA. This is because subsection 60(1) uses the words "re-determination" and "further re-determination". In his view, since the CBSA had not determined tariff treatment earlier, there was nothing for him to "re-determine" or "further re-determine" under subsection 60(1).

Section 67 of the Act

[20] Subsection 67(1) of the Act provides for a further administrative appeal from the President of the CBSA to the C.I.T.T.:

Appeal to the Canadian International Trade Tribunal

67. (1) A person aggrieved by a decision of the President made under section 60 or 61 may appeal from the decision to the Canadian International Trade Tribunal by filing a notice of appeal in writing with the President and the Secretary of the Canadian International Trade Tribunal within ninety days after the time notice of the decision was given.

[21] However, C.B. Powell proceeded immediately to Federal Court by way of judicial review, rather than pursuing an appeal to the C.I.T.T.

The judicial review in the Federal Court

[22] In the Federal Court, C.B. Powell sought “an order” (in reality a declaration) that a decision had been made under subsection 60(1) and so there was an appeal available to it under subsection 67(1). In case the Federal Court found that no decision had been made under subsection 60(1), C.B. Powell alternatively sought an order of *mandamus* that would force the President to make a decision under subsection 60(1).

[23] The Crown took the position that, on the facts of this case, no re-determination was possible under subsection 60(1). As a result, there was no decision that could be judicially reviewed, nor could the Federal Court order any decision to be made under subsection 60(1).

[24] In the Federal Court, both parties were content to have the Court decide these issues. No one took the position that the Federal Court should decline jurisdiction. No one took the position that the C.I.T.T. should deal with the matter by way of appeal under subsection 67(1). However, just in case, the parties did agree that the time limits for an appeal to the C.I.T.T. would not apply, pending judicial determination.

The judgment of the Federal Court

[25] The Federal Court granted the application for judicial review and declared that the president’s decision is “a negative decision ... to which an application lies to the Canadian International Trade Tribunal pursuant to s. 60.2”.

[26] I assume that the reference to section 60.2 is a typographical error, as that subsection deals with applications to the C.I.T.T. for an extension of time to appeal to the President of the CBSA. It is clear from the reasoning of the Federal Court that it found that an appeal to the C.I.T.T. was available and, as noted above, subsection 67(1) is the relevant provision.

[27] In reaching this result, the Federal Court engaged in a thorough review of the case law. It found that *Mueller Canada Inc. v. Minister of National Revenue* (1993), 70 F.T.R. 197 (F.C.T.D.) governed the outcome of the application. In *Mueller*, Rouleau J. held that a so-called “non-decision” or refusal to exercise jurisdiction could be appealed to the C.I.T.T.

C. Analysis

Parliament has established an administrative process to be followed

[28] Under the Act, Parliament has established an administrative process of adjudications and appeals in this area. This administrative process consists of initial CBSA decisions or deemed assessments under section 58, further determinations by CBSA officials under section 59, additional determinations by the President of the CBSA under section 60 and appeals to the C.I.T.T. under subsection 67(1). The courts are no part of this. Allowing the courts to become involved in this administrative process before it is completed would inject an alien element into Parliament's design.

[29] In addition to designing an administrative process without courts, Parliament, for good measure, has gone further and has forbidden any judicial interference. At every stage of this administrative process, in subsections 58(3) [as am. by [S.C. 1997, c. 36](#), s. 166] and 59(6) [as am. *idem*] and section 62 [as am. *idem*], Parliament has specified that the only permissible reviews, re-determinations or appeals are found in the administrative process described in the Act:

58. ...

Review of determination

(3) A determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by sections 59 to 61.

...

59. ...

Review of re-determination or further re-determination

(6) A re-determination or further re-determination made under this section is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 59(1) and sections 60 and 61.

...

No review

62. A re-determination or further re-determination under section 60 or 61 is not subject to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 67.

The principle of judicial non-interference with ongoing administrative processes

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706, at paragraphs 38-43; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at paragraphs 14-15, 58 and 74; *Goudie v. Ottawa (City)*, 2003 SCC 14, [2003] 1 S.C.R. 141; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun*, above, at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 1993 CanLII 3430 (ON SCDC), 11 O.R. (3d) 798 (Div. Ct.). Further,

only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g., *Consolidated Maybrun*, above, at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 1994 CanLII 3350 (BC SC), 119 D.L.R. (4th) 136 (B.C.S.C.), affd (1995), 1995 CanLII 1305 (BC CA), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians of Ontario* (1991), 1991 CanLII 7126 (ON SC), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 48.

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D. J. M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) (Toronto: Canvasback, 1998), at paragraphs 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 485–494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin*, above; *Okwuobi*, above, at paragraphs 38–55; *University of Toronto v. C.U.E.W., Local 2* (1988), 1988 CanLII 4757 (ON SC), 65 O.R. (2d) 268 (Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

Customs Act decisions in this area

[34] The general principle against judicial interference with ongoing administrative processes has already been applied a number of times to the *Customs Act* regime that is in issue in this appeal.

[35] The Court below [at paragraph 35] appropriately cited *Mueller*, above, for the proposition that so-called "non-decisions" or refusals to exercise

jurisdiction under this statutory regime were “decisions” that could be appealed to the C.I.T.T.

[36] The Court below [at paragraph 33] also appropriately cited *Fritz Marketing Inc. v. Canada*, 2009 FCA 62, [2009] 4 F.C.R. 314. The issue in *Fritz Marketing* was whether the Federal Court [2008 FC 703, 329 F.T.R. 221], on judicial review, should set aside a CBSA determination made under section 59 of the Act because it was based on evidence that was obtained contrary to section 8 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. Sharlow J.A., writing for this Court, stated (at paragraphs 33 and 34) that the validity of the section 59 determination, including the Charter issue, should have been pursued under the administrative process set out in the Act.

[37] In this case, the Court below was very mindful of these authorities and others to similar effect. However, it wondered whether the situation was different because the President’s ruling was a “jurisdictional” determination. For example, it did not see *Fritz Marketing* as being necessarily determinative of the issues in this case because it did not concern “jurisdictional facts” (at paragraph 33). Further, it noted that the parties did not cite any authorities of this Court concerning a decision of the President made “on jurisdictional grounds” (at paragraph 34).

[38] The C.I.T.T. has also wondered about its ability to hear an appeal under subsection 67(1) from “non-decisions” or “jurisdictional” determinations by the President of the CBSA under subsection 60(1): see *Canada (National Revenue Re)*, 1996 CanLII 7820 (C.I.T.T.). As the Court below observed (at paragraph 36), the C.I.T.T. has been leaving it to the Federal Court to deal with “non-decisions” or “jurisdictional” determinations.

“Jurisdictional” grounds and “jurisdictional” determinations

[39] When “jurisdictional” grounds are present or where “jurisdictional” determinations have been made, can a party proceed to court for that reason alone? Put another way, is the presence of a “jurisdictional” issue, by itself, an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed?

[40] In my view, the answer to these questions are negative. An affirmative answer would resurrect an approach discarded long ago.

[41] Long ago, courts interfered with preliminary or interlocutory rulings by administrative agencies, tribunals and officials by labelling the rulings as “preliminary questions” that went to “jurisdiction”: see, e.g., *Bell v. Ontario*

Human Rights Commission, 1971 CanLII 195 (SCC), [1971] S.C.R. 756. By labelling tribunal rulings as “jurisdictional,” courts freely substituted their view of the matter for that of the tribunal, even in the face of clear legislation instructing them not to do so.

[42] Over 30 years ago, that approach was discarded: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227. In that case, Dickson J. (as he then was), writing for a unanimous Supreme Court declared (at page 233), “The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.” Recently, the Supreme Court again commented on the old discarded approach, disparaging it as “a highly formalistic, artificial ‘jurisdiction’ test that could easily be manipulated”: *Dunsmuir*, above, at paragraph 43. Quite simply, the use of the label “jurisdiction” to justify judicial interference with ongoing administrative decision-making processes is no longer appropriate.

[43] The inappropriateness of this labelling approach is well illustrated by the ruling of the President of the CBSA in this case. In his ruling, the President considered his “jurisdiction.” He did this by interpreting the words of subsection 60(1), determining the nature of C.B. Powell’s request for a ruling, and deciding whether C.B. Powell’s request fell within the scope of the subsection, as interpreted. These are questions of law, questions of fact and questions of mixed fact and law, respectively.

[44] But these are exactly the same questions that the President of the CBSA normally considers. For example, when deciding upon the tariff classification that ought to apply to particular imported goods under subsection 60(1), the President must determine the nature of the imported goods, what classifications are legally available, and finally, what classifications ought to apply to these goods. These are, respectively, determinations of questions of fact, law and mixed fact and law. Calling one ruling “jurisdictional” and the other not, when they are both really the same type of ruling, is, in reality, result-oriented labelling.

[45] It is not surprising, then, that courts all across Canada have repeatedly eschewed interference with intermediate or interlocutory administrative rulings and have forbidden interlocutory forays to court, even where the decision appears to be a so-called “jurisdictional” issue: see *e.g.*, *Matsqui Indian Band*, above; *Greater Moncton International Airport Authority*, above, at paragraph 1; *Air Canada v. Lorenz*, [2000] 1 F.C. 94 (T.D.), at paragraphs 12 and 13; *Delmas*, above; *Myers v. Law Society of Newfoundland* (1998), 1998 CanLII 18110 (NL CA), 165 Nfld. & P.E.I.R. 150 (Nfld. C.A.); *Canadian National Railway Co. et al. v. Winnipeg City Assessor* (1998), 1998 CanLII

5028 (MB CA), 131 Man. R. (2d) 310 (C.A.); *Dowd v. New Brunswick Dental Society* (1999), 1999 CanLII 32830 (NB CA), 210 N.B.R. (2d) 386 (C.A.).

[46] I conclude, then, that applying the “jurisdictional” label to the ruling of the President of the CBSA under subsection 60(1) of the Act in this case changes nothing. In particular, applying the “jurisdictional” label to the President’s ruling did not permit C.B. Powell to proceed to Federal Court, bypassing the remainder of the administrative process, namely the appeal to the C.I.T.T. under subsection 67(1) of the Act.

What should happen in this case

[47] It follows that if C.B. Powell wishes to have recourse against the ruling of the President of the CBSA, it should pursue an appeal to the C.I.T.T. under subsection 67(1). It is not for the Federal Court or this Court to interpret the word “decision” in subsection 67(1) and determine whether the C.I.T.T. can hear C.B. Powell’s appeal. That is the task of the C.I.T.T. when an appeal is brought to it under subsection 67(1).

[48] According to the Court below (at paragraph 36), the C.I.T.T. believes, based on its reading of *Mueller*, above, that only the Federal Court can rule that a “non-decision” or “jurisdictional decision” is a “decision” under subsection 67(1) of the Act. Further, the C.I.T.T. believes, based on its reading of *Mueller*, that only “decisions on the merits” can be appealed to the C.I.T.T. under subsection 67(1) of the Act: *Canada (National Revenue Re)*, above.

[49] I do not read *Mueller* as supporting either of these beliefs. Further, *Mueller* was decided on an application for judicial review that was brought prematurely—before the parties had exhausted the administrative process of adjudications and appeals under the Act. Under that administrative process, it was not the task of the Federal Court in *Mueller* to interpret the word “decision” in subsection 67(1) of the Act. It was the C.I.T.T.’s task. Under subsection 67(1), the C.I.T.T. alone is to interpret the word “decision” and decide whether it can hear an appeal. After the C.I.T.T. has done that and has ruled on any appeal properly before it, an aggrieved party can ask this Court to review the C.I.T.T.’s decision by way of an application for judicial review under paragraph 28(1)(e) of the *Federal Courts Act*.

[50] In this case, if an appeal is brought to it, the C.I.T.T. should interpret the word “decision” in subsection 67(1) of the Act without regard to what was said in *Mueller*. After doing so, the C.I.T.T. might decide that the ruling of the President of the CBSA in this case was a “decision”; if so, it will go on to decide C.B. Powell’s appeal on the merits. Alternatively, the C.I.T.T. might decide that the ruling of the President of the CBSA was not a “decision”; if so, it will decline to hear C.B. Powell’s appeal on the merits. Either way, the

C.I.T.T.'s decision, accompanied by meaningful reasons for decision, will mark the end of the administrative process of adjudications and appeals under the Act. At that point, an aggrieved party will be able to come to this Court and ask it to review the C.I.T.T.'s decision under [paragraph 28\(1\)\(e\)](#) of the *Federal Courts Act*.

[51] It follows from the foregoing analysis that the Court below in this case should have dismissed C.B. Powell's application for judicial review as premature. The normal rule against judicial interference with ongoing administrative processes applies in this case, with full force. The record does not disclose any exceptional circumstances that would permit early recourse to the Federal Court, nor did the parties contend that there are any. Judicial involvement in the ongoing administrative process under the Act is not warranted at this time.

D. Conclusion

[52] Therefore, I would allow the appeal, set aside the judgment of the Federal Court and dismiss C.B. Powell's application for judicial review. As neither party objected to the jurisdiction of the Federal Court to determine the judicial review, I would order that there be no costs both here and below.

Nadon J.A.: I agree.

Evans J.A.: I agree.

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Tab 63

Lourenco v Hegedus, 2017 ONSC 3872 (CanLII)

Date: 2017-06-22
 File number: DC-17-165
 Citation: Lourenco v Hegedus, 2017 ONSC 3872 (CanLII),
 <<https://canlii.ca/t/h4h50>>, retrieved on 2025-10-28

CITATION: Lourenco v. Hegedus, 2017 ONSC 3872

COURT FILE NO.: DC-17-165

DATE: 20170622

**ONTARIO
 SUPERIOR COURT OF JUSTICE
 DIVISIONAL COURT**

B E T W E E N:

ADAM LOURENCO

Applicant

- and -

RICHARD HEGEDUS, CHIEF OF POLICE
 OF THE TORONTO POLICE SERVICE,
 BURAA ABDULKADIR, BURHAN
 ABDULKADIR, MUATHE MAHDI,
 YOHANNES BRHANU and SHARNIL PAIS

Defendant/Respondent

)
)
) *Peter Brauti*, for the Applicant
)
)
)
)
)
) *Scott Hutchison and Reem Zaia*, for Chief of Police
)
) *Jeff Carolin*, for Burhan Abdulkadir
)
) *Peter Rosenthal*, for the rest of the
) Respondents
)
) **Heard at Toronto: June 21, 2017**

DECISION

D.L. Corbett J.:

[1] The respondent Chief of Police moves to quash this application for judicial review on the grounds that it is premature. For the reasons that follow, the motion is granted and the application for judicial review is quashed.

[2] The applicant is a police officer. He faces allegations of misconduct under the *Police Services Act*.^[1] Those allegations will be heard in the Toronto Police Service Tribunal. The hearing was scheduled for 13 days starting in October 2016.

[3] The applicant moved to have the Hearing Officer, Inspector Richard Hegedus, recuse himself on the grounds of reasonable apprehension of bias and lack of jurisdiction because of defects in Inspector Hegedus' designation to hear the matter. The hearing dates were vacated and the recusal motion was heard. Inspector Hegedus released his decision on March 3, 2017, dismissing the recusal motion and finding that he was lawfully designated to hear the allegations against the applicant.

[4] The applicant commenced an application for judicial review to challenge the decision of Inspector Hegedus on the recusal and jurisdiction motion. The Chief of Police moves to quash that application on the basis of prematurity.

General Principles

[5] Generally, judicial review is not available until an administrative process has run its course, including any administrative appeals and reviews. This general approach conserves judicial resources and leads to more timely resolution of administrative proceedings.

[6] In rare cases this court will intervene on an application for judicial review in the midst of an administrative process where there are strong reasons to believe that the ongoing process is so deeply flawed that there is a strong likelihood that it will have to be run over again, usually on the basis of bias, reasonable apprehension of bias or want of jurisdiction. This does not mean that judicial review is available before the conclusion of administrative proceedings in any case where an allegation of this kind is made. It must be emphasized that early judicial review is the rare exception, not the rule, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion. Analogies can be drawn to criminal prosecutions where it is very rare indeed for a proceeding to be interrupted for judicial review or appeal prior to the conclusion of the proceeding.

Bias Allegations

[7] It is a very rare case in which this court will interrupt proceedings on this basis. This allegation is easily made, can be made multiple times during a proceeding, and seldom succeeds. If interlocutory appeals or judicial reviews on this ground were permitted generally, proceedings would be at risk of interruption at the instance of one party with inevitable delays of months or years before resumption of proceedings, with consequent risk to the integrity of the trial process itself.

[8] In this case the record does not establish a strong likelihood that the allegations of reasonable apprehension of bias will succeed. I consider that the prejudice to the general orderly processing of administrative proceedings far outweighs the prejudice from the risk that the 13 day disciplinary proceeding might have to be held again.

Designation of Inspector Hegedus

[9] Inspector Hegedus has been designated a police complaints officer, authorized by the Chief of Police to hear police complaints such as the allegations against the applicant. Inspector Hegedus works full-time in this capacity and generally hears complaints that are not expressly assigned to another person by the Chief of Police, subject to his scheduling constraints. When Inspector Hegedus is not available to hear a complaint that has not been assigned to a specific person, then that matter is assigned to a part-time complaints officer.

[10] The applicant argues that the *Police Services Act*, s.94(1), requires that the Chief of Police expressly assign each hearing to a particular person. Thus, the applicant argues, the administrative practice that is currently in place does not comply with the requirements of the *Act*. In the result, the applicant argues, Inspector Hegedus has not been designated lawfully to hear the complaint against the applicant, and, without that designation, has no jurisdiction to proceed.

[11] This challenge could be overcome, of course, if the Chief of Police specifically designated Inspector Hegedus to hear this case. He has not, to this point, done so. I infer from this circumstance that the Chief of Police stands by the current administrative framework.

[12] This situation is analogous to *MRS Sciences Inc. v. Ontario (Securities Commission)*, 2015 ONSC 6317, aff'd 2017 ONCA 279. In that case the Ontario Securities Commission scheduled a sanctions hearing before a differently constituted panel than the tribunal that had decided liability issues. Jurisdiction was challenged and the Commission ruled that the sanctions hearing panel was constituted properly. Challenge was brought to this court but was quashed as premature: *MRS Sciences Inc. v. Ontario (Securities Commission)*, 2012 ONSC 7198. The sanctions hearing then proceeded to a conclusion and the issue of the constitution of the sanctions hearing panel was raised again and decided on the merits by the Divisional Court. The Divisional Court concluded that the Commission's interpretation of its home statute was entitled to deference and that the constitution of the sanctions panel was reasonable. The Court of Appeal agreed.

[13] I appreciate that there is a legislative distinction between *MRS* and the instant case. The *Securities Act*, RSO 1990, c. S.5, s.9(1) provides only for appeals from "final orders". Swinton J., for the court in *MRS*, noted, however, that notwithstanding this provision, judicial review could be available in exceptional cases:

The application for judicial review is premature. This Court has repeatedly refused to hear an application for judicial review of an interlocutory decision of an administrative tribunal. It has exercised its discretion to do so in exceptional cases but none exist here.

[14] In my view the same principle applies in the case before me. This is not an exceptional case, and review in this court should not take place until the administrative process has run its course. The issue of the propriety of the system generally used to assign police complaint cases can be addressed on judicial review at the end of the administrative process if any party wishes to challenge the final result of that process. Further, like in *MRS*, the interpretation of the *Act* by the Chief of Police in this context is entitled to deference, and on its face seems reasonable: I do not consider there to be a strong likelihood that the process under which Inspector Hegedus has been designated will be found to result in the Inspector lacking jurisdiction to conduct the hearing in this case.

[15] The motion is granted; the application for judicial review is quashed. As agreed by counsel, there shall be no costs of this motion or this application.

[16] Parties are entitled to challenge a decision of a single judge of the Divisional Court to a full panel of the Divisional Court.

[17] Hearing dates are scheduled before Inspector Hegedus starting in early August 2017.

[18] There is one week left in the spring term of this court, and thereafter only one sitting week (in July 2017) before the August hearing dates.

[19] A motion seeking to review this decision will not serve as a stay of this decision pending a challenge motion before a full panel, and thus the hearing may proceed before Inspector Hegedus if a motion has been brought to review this decision but not yet heard by the court. Therefore, if any party wishes to challenge this decision before the full panel, that party should make arrangements immediately through the managing judge of the Divisional Court, Nordheimer J. for scheduling directions.

RELEASED : June 22, 2017

CITATION: Lourenco v. Hegedus, 2017 ONSC 3872
COURT FILE NO.: DC-17-165
DATE: 20170622

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

ADAM LOURENCO

Applicant

- and -

RICHARD HEGEDUS

Respondent

DECISION

D.L. Corbett J.

Released: June 22, 2017

^[1] *Police Services Act*, RSO 1990, c. P.15.

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Tab 64

Gage v. Ontario (Attorney General), 1992 CanLII 8517 (ON SCDC)

Date:	1992-04-06
File number:	32/92
Other citations:	90 DLR (4th) 537 — 32 ACWS (3d) 996 — 55 OAC 47 — [1992] CarswellOnt 11125 — [1992] OJ No 696 (QL)
Citation:	Gage v. Ontario (Attorney General), 1992 CanLII 8517 (ON SCDC), < https://canlii.ca/t/gbkgx >, retrieved on 2025-10-28

Ontario Court (General Division), Divisional Court

Citation: Gage v. Ontario (Attorney General)

Date: 1992-04-06

Callaghan C.J.O.C., Carruthers and A. Campbell JJ.

Counsel:

H.G. Black, and *Joanna Mulcahey*, for applicant.

M.M. Fleishman, for respondent.

BY THE COURT:—

The application

[1] Police Constable Thomas Gage applies pursuant to the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, for:

(a) an order quashing the decision of a panel of a board of inquiry under the *Metropolitan Toronto Police Force Complaints Act, 1984*,, S.O. 1984, c. 63, dismissing the constable's objection to its jurisdiction; and

(b) an order prohibiting the board from proceeding further with the inquiry.

The issue

[2] Did the failure of the Public Complaints Commissioner to give the constable notice in writing forthwith of the decision to hold a board of inquiry, as required by s. 19(4) of the Act, deprive the board of jurisdiction?

Procedural history

[3] The applicant, a member of the Metropolitan Toronto Police Force, appeared before the board pursuant to the provisions of the Act, on December 10, 1991. He was the subject of a statement of alleged misconduct dated October 9, 1990, set out below, relating to his conduct on February 14, 1988.

[4] The applicant at the board hearing on December 9, 1991, made a preliminary objection that the board was without jurisdiction by virtue of the Public Complaints Commissioner's failure to comply with s. 19(4) of the Act which provides that the commissioner upon ordering a hearing shall forthwith give the officer and other parties written notice of the decision to order a hearing.

[5] After hearing full evidence and argument on the jurisdictional facts, the board on December 12, 1991, ruled that the commissioner's failure to comply with the provisions of the Act did not deprive the panel of jurisdiction because the failure was only a failure to comply with a directory provision. The board dismissed the preliminary objection to its jurisdiction and adjourned the inquiry to continue on April 14, 1992.

[6] The applicant moved immediately for judicial review. There was no delay. The record was prepared and filed in January. The case was perfected for hearing in March and heard before the end of the month.

The statutory framework

[7] The Act is triggered by a public complaint about the conduct of a police officer.

[8] From that moment forward, the Act bristles with time-limits of varying intensity. Time is of the essence of the machinery of the Act.

[9] As this court said in *Ramsay v. Toronto (City) Commissioners of Police* (1988), 1988 CanLII 4706 (ON SC), 66 O.R. (2d) 99 at pp. 115-17, 12 A.C.W.S. (3d) 88:

A glance at the Act makes it clear that the legislature sought to impose an expeditious timetable for the processing of complaints ...

.....

... the Act contains guide-lines clearly intended to accomplish the expeditious resolution of complaints.

.....

The clear object is expedition. The objective of this legislation is defeated by a policy of delay.

[10] The machinery of the Act is very time sensitive. Many acts, such as the requirement in s. 12(2) that the person in charge of the bureau send a copy of a notice withdrawing a complaint to the commission and subject officer have no time-limit. Some have 30-day time-limits, for example, the commissioner's duty under s. 18(4) to send an interim report of a misconduct investigation within 30 days of the notice of intention to conduct an investigation.

[11] The Act treats time seriously. It discriminates carefully between various time lines depending on their significance in the overall scheme of the Act. For less important

matters, it prescribes no time-limits, and in proportion to the time sensitivity of each particular provision, the time standards become more and more demanding until they reach the most time-sensitive actions which attract the "forthwith" standard.

[12] The legislature obviously addressed itself to the time significance of each step in the machinery of the Act, examined a wide range of time criteria and standards, and consciously selected the particular time standard appropriate for each specific step in the entire process.

[13] The legislature applied, to the most time-sensitive steps in the statute, the "forthwith" standard. In a statute so entirely dependent on timing, which distinguishes so carefully among a wide range of time standards, the selection of the most rigorous standard must be taken as an express legislative requirement that it be followed and not ignored.

[14] This brings us to the provision in question, s. 19(4). It is part of the machinery triggered in this case when the complainant was dissatisfied with the decision of the chief of police that no action was warranted against Constable Gage. The entire provision reads as follows:

19(1) Where a complainant is dissatisfied with the decision made on a disciplinary proceeding arising out of his complaint that is not a decision of a board of inquiry or with action taken by the chief of police under clause 14(1)(d) or with a decision of the chief of police that no action is warranted, he may within thirty days of receipt of notification under subsection 14(6) or 15(2) request the Commissioner to review the matter.

(2) Notwithstanding subsection (1), where the Commissioner is satisfied that there are reasonable grounds for granting an extension the Commissioner may extend the time for requesting a review.

(3) Where the Commissioner receives a request under subsection (1), he shall review the matter and may, after such review, order a hearing by a board of inquiry if he believes that, in the public interest, such a hearing is required or he may decide to take no further action.

(4) The Commissioner shall give forthwith written notice to the chief of police, the complainant and the subject officer of his decision under subsection (3) and, where his decision is to take no further action, shall give his reasons therefor.

(5) Where a subject officer has appealed under section 16 a hearing ordered under subsection (3) shall be heard together with that appeal.

[15] The timing of the notice, required by s. 19(4) to be given forthwith, is crucial. It is the officer's first chance to know the exact case against him, to get legal advice in respect of it and to prepare to make his defence.

The facts

[16] The complainant, Mervyn M., lodged a complaint against the applicant on October 4, 1988, in respect of an incident that took place over seven months before, on February 14 1988, in relation to the arrest of his 14-year-old daughter by Constable Gage and another officer on a charge of assault causing bodily harm. The details of the original allegations and the allegations that were finally crystallized against the officer on October 9, 1990, and served upon him August 1, 1991, are set out below.

[17] Mervyn M.'s complaint was investigated and reviewed in the normal course, ultimately leading to a decision by the deputy chief of police that it was the position of the chief of police that no further action would be taken against the applicant. That decision was communicated to the complainant by a letter from the deputy chief dated April 24, 1989. That letter reads as follows:

Dear Mr. M[...]:

Your allegations against Police Constables Thomas Gage (7126) and Wayne Hartery (3381) of No. 14 Division have been investigated by a member of the Public Complaints Investigation Bureau.

In accordance with the governing Act, I have reviewed the file in my capacity as Complaint Review Officer. Following are my comments and findings.

Allegations

1. Your daughter was taken from your home when you were not present.
2. Your daughter was not allowed to phone you to advise that the police were taking her away.
3. You were not notified that your daughter was taken from your home, nor was any other member of your family or adult person.

Comments

Constables Hartery and Gage agree that your daughter was removed from your home in your absence.

Both officers state your daughter made no request to call you prior to leaving the house or enroute to No. 14 Division.

Your daughter's friend, who was arrested with her, states they both asked if they could contact their parents but were not allowed to do so.

Arrangements were undertaken immediately after arriving at 14 Division to have the parents notified.

I note you called the station and spoke with Constable Hartery at 5:05 p.m., only 20 minutes after your daughter had arrived.

Section 9(1) of the Young Offender's Act and Administrative Procedure 1(e)(1) of this Force, set out the requirements of notifying parents when young offenders are arrested and taken into custody.

I am satisfied that the aforementioned statutes and procedures were observed and there was no undue delay in trying to notify you.

Allegations

4. When you attended 14 Division, the police refused to release your daughter to you.
5. The police took your daughter to the Toronto Western Hospital where it was determined that she had the flu. Despite that, they held your daughter overnight for

a court appearance the following day.

7. When your daughter was at 14 Division, a Justice of the Peace arrived at about 2:20 a.m., and signed some papers following which she was transferred to a detention centre.

9. The police refused to release your daughter to you at the request of your lawyer.

Comments

Your daughter had been arrested and charged with two very serious offences.

The arresting officers acknowledge that they refused your demand to release your daughter to your custody. They did so in the public interest, specifically so there would be no continuation of the offence or further threats made against the victim.

The officers had previously consulted a Crown Attorney relative to the charges and the necessity to detain your daughter.

I am advised your daughter and her friend were both taken to hospital. Your daughter was diagnosed as having flu. She was not admitted and remained in the custody of the police.

When the investigation was concluded, a Justice of the Peace did attend 14 Division and upon the officers' application for a Show Cause Hearing, remanded your daughter into custody, whereupon she was transferred to a juvenile detention centre until her court appearance that same morning.

Again, it is acknowledged that your daughter was not released at your lawyer's request. Given the circumstances, your daughter was lawfully detained and there was no requirement on the officers to release her.

Allegation

6. Your daughter was strip-searched.

Comments

The authority to search a person in custody was established by case law. In *Gottschalk v. Hutton*, it was ruled that a police officer could search a prisoner, removing clothing if necessary to do so.

The female officer who conducted the search states she did not require your daughter to remove her underwear. This is confirmed by your daughter.

Allegation

8. The police were negligent in their investigation. Had they done a proper investigation you believe no charges would have resulted.

Comments

Constables Hartery and Gage deny this allegation.

A Crown Attorney with whom Constable Hartery consulted prior to your daughter's arrest, found the evidence to be supportive of that arrest.

A second Crown Attorney who prosecuted the charge against your daughter, also supports that Crown Attorney. He believed the case against your daughter was a strong one and certainly worth prosecuting. He found the investigation conducted by Constables Hartery and Gage to be very thorough and complete, and in particular, complimented Constable Hartery for the professional manner in which this case was prepared.

Allegation

10. You were caused embarrassment because of a newspaper publication of the incident.

Comments

The Young Offenders Act, and Force Procedures prohibit the release of the identity of young persons, be they young offenders who have been charged with an offence, or witnesses to an incident.

I note, the publications provided by you, do not identify your daughter by name, or anyone else involved in the incident.

The incident itself was common knowledge among the staff and students at the school attended by your daughter.

It is unfortunate that you suffered embarrassment; however, no fault can be levelled against this Force in that regard.

Finding

I have carefully examined this investigation and find there is no independent evidence that would support your allegations of misconduct against the officers.

I note the charges against your daughter and her friend were dismissed after a full trial. His Honour Judge J.P. Nevins had no criticism of the officers, or their decision to bring these charges against the accused.

In view of all the circumstances, I am satisfied that Constable Hartery and Gage conducted a lawful and highly professional investigation.

Therefore, it is my adjudication there will be no further action in this matter.

If you are not satisfied with my finding, you have the right to request a further review of your complaint by contacting Mr. Clare E. Lewis, the Public Complaints Commissioner. His office is located at 157 Bloor Street West, Toronto, Ontario M5S 1P7.

Should you decide to request a review by Mr. Lewis, I wish to advise you that you must do so within 30 days of your receipt of this letter.

Yours truly,

"P. Scott"
Deputy Chief of Police
Complaint Review Officer

Copy to: Public Complaints Commissioner

Staff Supt. D. Banks
P.C. T. Gage
P.C. W. Hartery

[18] The applicant got a copy of that letter and was aware that no action was intended against him. The next notification he got was over two years later in August of 1991. In the meantime, a great deal happened of which the officer was not informed.

[19] Pursuant to s. 19(1) of the Act, Mervyn M., on May 17, 1989, sought a review by the Public Complaints Commission of the decision of the chief of police that no action was warranted. The matter was then reviewed by the office of the Public Complaints Commissioner.

[20] Sixteen months later, on September 18, 1990, the complainant attended at the commissioner's office for a meeting with the commissioner, the legal director, and legal counsel to the commission. The investigator was advised that a board of inquiry would be called. It is common ground between counsel that the complainant, on September 18, 1990, was notified that a decision had been made to order a board of inquiry, that the decision was reduced to writing on October 9, 1990, and that Constable Gage, although the statute required that he be notified forthwith, was not notified until almost 10 months later.

[21] On October 9, 1990, the Public Complaints Commissioner issued and signed the following notice of decision pursuant to s. 19(3) of the Act:

Form 12

METROPOLITAN TORONTO POLICE FORCE COMPLAINTS ACT, 1984 Notice of Decision of the Public Complaints Commissioner

Date of Complaint: October 4, 1988

File No.: 8508 Board File No. 063

Complainant: Mervyn M[...]

Name(s) of Subject Officer(s): P.C. Thomas Gage, #7126 (Include Rank, No., Division) — No. 14 Division

TAKE NOTICE that in respect of the above-noted matter, it is my opinion that the complaint alleges misconduct of a serious nature. I believe that a hearing before a three-person Board of Inquiry is required in the public interest.

DATED at Toronto this 9th Day of October, 1990.

"C.E. Lewis"
Public Complaints Commissioner

TO: Chief Of Police
Complainant/Counsel
Subject Officer(s)/Counsel
Bureau
Complaint review
Staff Counselling
Registrar, Board of Inquiry

[22] The commissioner on the same date issued and signed the accompanying statement of alleged misconduct which reads as follows:

Form 11A

METROPOLITAN TORONTO POLICE FORCE COMPLAINTS ACT, 1984
STATEMENT OF ALLEGED MISCONDUCT

Date of Complaint: October 4, 1988

File No.: 8508

Complainant: Mervyn M[...]

Name(s) of Subject Officer(s): P.C. Thomas Gage, #7126

(Include Rank, No., Division) — No. 14 Division

TAKE NOTICE that the following allegation(s) is/are to be heard by a Board of Inquiry:

"On the evening of February 14, 1988, at 14 Division in the Municipality of Metropolitan Toronto, P.C. Thomas Gage wilfully misled the complainant by advising him there was nothing further he could do to secure the release of his 14 year old daughter, Karen M[...]. knowing that Karen M[...]. would appear that night before a Justice of the Peace for a bail hearing and that the complainant could attend at and participate in those proceedings, contrary to section 1(d)(ii) of the Code of Offences as set in Regulation 791 of the *Police Act*.

On the evening of February 14, 1988 at 14 Division in the Municipality of Metropolitan Toronto, P.C. Thomas Gage negligently misled the complainant by advising him there was nothing further he could do to secure the release of his 14 year old daughter, Karen M[...]. while he ought to have known, or ought to have inquired and thereby would have ascertained, that a Justice of the Peace would be available during the night to conduct a bail hearing for Karen M[...]. and that the complainant could attend at and participate in those proceedings, contrary to section 1(d) (ii) of the Code of Offences as set out in Regulation 791 of the *Police Act*.

In the early morning of February 15th, 1988 at 14 Division in the Municipality of Metropolitan Toronto, P.C. Thomas Gage acted in a manner likely to bring discredit upon the reputation of the police force in that he failed to make any effort to contact the complainant prior to Karen M[...].s bail hearing, having been earlier advised by the complainant that he wished to be involved in any proceedings affecting the release or detention of his daughter, contrary to section 1(a)(i) of the Code of Offences as set out in Regulation 791 of the *Police Act*"

DATED at Toronto, this 9th day of October, 1990.

"C.E. Lewis"

Public Complaints Commissioner

Subject Officer(s)

Complainant

Registrar, Boards of Inquiry

Chief of Police or Public Complaints Commissioner

[23] It was at this crucial point in the statutory machinery, on October 9, 1990, that the commissioner's statutory duty arose to notify Constable Gage forthwith in writing of that legal decision.

[24] Constable Gage however was not notified until 10 months later. The delay was partly the result of bureaucratic inertia and, more importantly, a deliberate decision by the commission to withhold the required notice during a period it considered its statute legally vulnerable.

[25] Between September 18, 1990 and February 4, 1991, the investigator retained possession of the brief for the purposes of having it photocopied and prepared.

[26] During this vital period of time, during which Constable Gage was deprived of his statutory right to notice of the legal step taken against him, he made inquiries of the commission about the status of the matter, because he was aware that the original complaint was under review by the commission.

[27] He was concerned about the length of time the review was taking and inquired of the investigator in late 1990, some time before November 30th. The investigator told him that the review was continuing and that they had gone to their legal counsel for some advice, but the investigator did not tell him that any decision had been made with respect to the review of the matter. The commission thus withheld from the officer the vital information that the commissioner had made a decision and had taken the unequivocal legal step on October 9, 1990, of issuing his notice of decision and statement of alleged misconduct against the officer.

[28] The investigator delivered the file on February 4, 1991, to senior counsel in the Attorney-General's department for the purposes of a review of the statement of alleged misconduct and for the assignment of Crown counsel to the file. The investigator's next involvement with the complaint was on March 13, 1991, when he received a letter from the Attorney-General's department indicating the assignment of Crown counsel to the case. On April 10, 1991, he attempted to telephone the applicant but did not reach him.

[29] On April 11, 1991, the investigator received information that a challenge had been made to the jurisdiction of the board at a prior hearing. He was advised that a directive had been issued that no further documents ought to be released to any parties pending the resolution of this jurisdictional matter.

[30] Legal counsel with the office of Public Complaints Commissioner, testified that the legal issues that concerned the Public Complaints Commissioner, as to the jurisdictional status of board members, had been discovered around January or February of 1991. She testified that she could not explain why the investigator would not have known about this legal issue until April, 1991. She said there was nothing in writing concerning any decision not to notify the subject officers of their hearings.

[31] The investigator was advised on July 17, 1991, that the jurisdictional matter had been settled.

[32] The commission's legal worry had to do with the repeal of the *Metropolitan Toronto Police Force Complaints Act, 1984* and its replacement on December 31, 1990, by Part 6 of the *Police Services Act*, R.S.O. 1990, c. P.15, which provided, in a transition provision [s. 112], that boards constituted under the 1984 Act were to be dealt with in accordance with the 1984 Act. The transition provision failed to address the continuing jurisdiction of board members appointed under the 1984 Act. This was considered by the board's legal advisers to be a very significant jurisdictional problem. They recommended

and secured the passage of a legislative amendment, Bill 66, which received Royal Assent on June 27, 1991, and cured the perceived problem about the jurisdiction of board members appointed under the previous statute.

[33] Although the record is not entirely satisfactory on this point, it appears that the commission made a decision, some time between January and March of 1991, to withhold the required notice from affected parties until the board's jurisdictional problem was resolved. Legal counsel to the commission testified:

Q. Again, was there any decision taken in the office as to how parties to existing proceedings, in particular this particular complaint was to be dealt with in light of this potential problem; that is, up until the time of the amendment?

A. A decision was taken not to advise the parties until the status of the Board members could be resolved. We felt we were better off not advising the parties until this particular issue could be resolved.

• • • • •

Q. What would be the reason, because of a potential problem with Boards of Inquiry, not to notify a subject officer that there was going to be a hearing?

A. I suppose we were simply unclear as to whether or not the challenge to the jurisdiction of the Board would be successful

[34] This decision, as noted above, filtered down to the investigator who noted, on April 11, 1991, that the registrar informed him there was a challenge to the jurisdiction of the board and that no documents could be released to any parties involved in the Gage matter until the jurisdictional challenge had been corrected or resolved.

[35] While it is far from clear that there was any real legal problem that would affect the Gage proceeding, the commission obviously considered that it was legally vulnerable until those concerns were resolved. It is clear that the commission made a tactical decision to withhold notice from Constable Gage, although notice forthwith was required by the statute, because it feared a jurisdictional challenge.

[36] The only way to characterize this evidence is that the commission, in order to prevent a legal challenge to its jurisdiction, made a deliberate decision not to comply with its own statute. It is unattractive for any public body to violate deliberately its own statute in order to avoid a legal challenge to its jurisdiction.

[37] On August 1, 1991, the applicant received a letter from the office of the Public Complaints Commissioner enclosing a copy of the notice of decision of the Public Complaints Commissioner dated October 9, 1990, and the statement of alleged misconduct dated October 9, 1990. The letter, dated July 31, 1991, reads as follows:

VIA POLICE COURIER
 July 31, 1991
 P.C. Thomas Gage
 Badge No. 7126
 Metropolitan Toronto Police Force
 No. 14 Division
 150 Harrison Street
 Toronto, Ontario

Dear P.C. Gage:

Re: Board of Inquiry Hearing —
Complainant: Mervyn M[...]

Enclosed please find a copy of the Notice of Decision of the Public Complaints Commissioner and a Statement of Alleged Misconduct with respect to the above-noted complaint.

Please note that a conference call will be held for the purpose of *setting a date for the hearing*. Accordingly, it will be necessary for you to participate in the conference call, unless you have counsel or an agent to represent you during the aforementioned conference call. You will be notified in writing as to the date and time of the conference call.

If you do have counsel, you should present this letter to him *as soon as possible* so that he may contact me at 963-3564 for the purpose of setting a date for the hearing.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

"Sameena Cyriac"
Board of Inquiry Registrar

[38] On August 2, 1991, the applicant spoke to the investigator at some length and expressed a concern that the documents he had received on August 1, 1991, were all dated October 9, 1990. He asked the investigator why it had taken so long for the applicant to be informed of the decision of the Public Complaints Commissioner. The investigator said that the Public Complaints Commission had been anticipating a change in the Act, and that there had apparently been some confusion as to the impact the change of government would have on changes in the procedure of the Public Complaints Commission.

[39] When the commission finally gave Constable Gage notice of its decision, the investigator agreed he should have been told much earlier, but the investigator did not do so because he was under directions not to release information about the proceedings "because of the jurisdictional challenge".

[40] There is some dispute about the effect of the delay on the applicant's promotion. He was a first class constable, a member of the force for about 16 years. He applied for promotion to sergeant in February, 1989, and appeared before the promotional board on November 30, 1990. He was unsuccessful in that bid but reappeared before the promotional board on May 15, 1991, and was advised by his unit commander in early June of 1991 that he was to be promoted when the space became available in the ranks.

[41] The applicant testified that after he received the documents on August 1st he advised his unit commander that he was to be the subject officer in a hearing before a board of inquiry. Several days later his unit commander called him into his office and advised him that due to the fact of the hearing, his promotion was on hold until such time as the outcome of the hearing was known.

[42] Constable Gage testified in cross-examination as follows:

Q. Now, had you got that notice immediately after [October 9] 1990, what would have happened with regards to your promotion consideration?

A. That's hard for me to say, sir. The only thing that I could say in response to that is, if I had been advised of the complaint, that there was going to be a hearing at that time, if I can use the terminology, if the ball was in motion at that time, it's my feeling that a hearing could have been held at a much earlier date than this particular date and, as a result, we may well have had a decision of the Board of Inquiry by now on this particular matter and my fate, if I can use that term, as far as my promotion, I would know what that would be.

Q. But you don't know about the exigencies of scheduling of this Board, do you?

A. No, sir, I don't. I am just ... the only thing I am assuming is that four or five months, I am only judging it on this particular incident.

.....

Q. So really, the delay in getting the notice to you didn't really have an effect on your promotional consideration, if, setting aside for the moment when the Board could have heard the matter?

A. There would have been no difference assuming the Board couldn't have heard the matter earlier.

[43] On January 16, 1992, the applicant was informed by Inspector Eklund, the officer in charge of the detective office at 14 Division, that effective January 23, 1992, the applicant was selected to be promoted to the rank of detective. Inspector Eklund informed the applicant that he regretted that as a result of the outstanding complaint and notice of hearing the promotion would be withheld.

[44] Although it is impossible to tell when a hearing would have been held had timely notice been given, it appears likely that the 10-month delay in notifying the applicant caused some corresponding delay in the hearing before the board and contributed to the delay in Constable Gage's promotion.

Non-issues

[45] There is no issue about the meaning of the word "forthwith" in s. 19(4).

[46] The commissioner made his order on October 9, 1990. It was almost 10 months later that the constable was informed of the decision, in August of 1991, although the complainant had been informed in September of 1990.

[47] Notwithstanding any jurisprudential controversy over the meaning of the word "forthwith", it is common ground that the commissioner, on any interpretation of the word, did not give notice in writing forthwith to Constable Gage as required by s. 19(4).

[48] The applicant makes no argument on the *Canadian Charter of Rights and Freedoms*.

[49] A great deal of argument was directed towards the word "shall" in s. 19(4). The applicant argues it is mandatory and the respondent argues it is directory only.

[50] Applying the test in cases such as *Re Carrae Estates Ltd. and Stavert* (1976), 1976 CanLII 731 (ON SC), 13 O.R. (2d) 537 (Div. Ct.), and *Howard v. Bodington* (1877), 2 P.D. 203, we are inclined to the view that the word "shall" in s. 19(4) is mandatory. The extremely time-sensitive nature of this particular provision in the overall structure of the Act, its critical nature as the trigger for a hearing with potentially drastic consequences for the reputation and career of the officer, its crucial importance as the officer's first notice of his potential jeopardy and first notice of the exact charge he is required to meet, its central relevance as the first opportunity to prepare to meet the actual case set up against him, its vital significance to the officer's counsel as the first legal crystallization of all the previous steps and the legal root of the entire case against the officer, all suggest that the word "shall" is mandatory and that it must, as suggested by the *Interpretation Act*, R.S.O. 1980, c. 219, s. 30(34), be construed as imperative.

The effect of statutory non-compliance

[51] It is, however, unnecessary to review the long line of cases that draw the line between mandatory provisions and directory provisions. It is unnecessary to compare and contrast s. 19(4) with the other 30-odd time provisions in the statute. This case does not turn on whether s. 19(4) is mandatory or directory.

[52] The case turns on a question of natural justice. In the circumstances of this case, did the commissioner's failure to comply with s. 19(4) result in a denial of natural justice and a consequent loss of jurisdiction?

[53] Notice is an essential component of natural justice. It is a question of mixed fact and law in each case whether or not notice is sufficient to meet the standard of procedural fairness.

[54] In the context of this case, when the incident occurred on February 18, 1988, timely notice in accordance with the statute was very important. To give notice of the charge almost three and a half years after the incident and 10 months after the decision to charge, in breach of a clear direction that the officer be notified forthwith after the decision, is simply not good enough.

[55] Quite apart from giving the complainant an unfair head start by notifying him there would be a hearing, it was unfair to deliberately withhold from the jeopardized officer the vital information that a charge was proceeding against him. The officer was actively, if unintentionally, misled when he inquired in November of 1990 about the status of the matter and was told that the review was continuing. That was very misleading. It actively concealed the fact that the commissioner had taken a serious and unequivocal legal step against the officer under s. 19(3) which profoundly affected his rights. The continuing failure to give notice denied the officer his right to seek timely legal advice and his right to prepare in a timely fashion to meet the case against him. This is particularly so when it appears that the gravamen of the charge which finally crystallized against the officer on October 9, 1990, appears significantly different from the original complaint which was rejected by the police force on April 24, 1989.

[56] To deliberately withhold such vital information from the officer, despite his statutory right to timely notice, and thus mislead him about the legal status of the case set up against him in order to prevent a jurisdictional challenge, is a denial of natural justice.

[57] It is suggested that the uncertainty caused by the defects in the legislation made it prudent to violate the statutory notice requirement of notice forthwith. If the statute was in fact as vulnerable to challenge as its administrators thought, it was even more important

to give the officer notice of his status so that his legal advisers could take whatever steps they might advise, before the legislature cured any defects by the amendment of June 27, 1991. It is no defence, to a failure to give notice under a statute, that the statutory machinery was considered to be legally vulnerable during the time notice was illegally withheld.

[58] A great deal has been said about prejudice. The officer frankly acknowledged in cross-examination before the board that the delay in getting notice would make no difference in his promotional chances, assuming the board could not have heard the matter earlier. Having regard to the legal right to secure timely compliance with the statutory machinery by bringing *mandamus*, which succeeded in a different situation in *Ramsay v. Toronto (City) Commissioners of Police*, *supra*, the officer's legal assumption seems overly generous to his opponent.

[59] Prejudice must be presumed where an unequivocal legal step with potentially disastrous consequences is taken against a serving officer performing a public duty, and he is actively misled into thinking that the opposite is true in order to prevent a jurisdictional challenge, and denied his statutory right to immediate notice, and thus prevented from seeking timely legal advice and deprived of a timely opportunity to prepare his defence, particularly when his adversary has been given an unfair head start by being informed almost 10 months earlier.

Prematurity

[60] The Act provides the applicant, if the board finds against him on the merits, with a full right of appeal. It is the practice of this court to discourage premature applications for judicial review where there is an adequate alternative remedy by way of appeal.

[61] If there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted: see, generally, *Bell v. Ontario Human Rights Commission* (1971), [1971 CanLII 195 \(SCC\)](#), 18 D.L.R. (3d) 1, [1971] S.C.R. 756; *Re Hayles and Sproule* (1980), [1980 CanLII 1595 \(ON SC\)](#), 29 O.R. (2d) 500 (Div. Ct.), *per* Callaghan J., at pp. 501-2.

[62] The board heard full evidence on the jurisdictional facts going to natural justice. That part of the record is complete and there is nothing to add. We are in as good a position to deal with that issue as we would be on an appeal from the board.

[63] The unfairness in this case is so obvious that it would be inappropriate to put the officer through a trial before a tribunal that lost jurisdiction through a denial of natural justice. Having regard to the prejudice noted above and the fundamental unfairness in the process of the commission, an appeal is not an adequate alternative remedy. This is one of those exceptional cases where the court should exercise its extraordinary jurisdiction at this stage to prevent a further denial of natural justice.

[64] The application is allowed and the order will go as asked, with costs to the applicant fixed at \$2,500.

[65] Application allowed.

1250

Tab 65

Unimac-United Management Corp. v St. Clare's-Monaco Place, 2015 ONSC 4760 (CanLII)

Date: 2015-07-22

File number: 110/15

Other citations: 257 ACWS (3d) 6 — [2015] OJ No 4134 (QL) — 53 CLR (4th) 63

Citation: Unimac-United Management Corp. v St. Clare's-Monaco Place, 2015 ONSC 4760 (CanLII), <<https://canlii.ca/t/gkh83>>, retrieved on 2025-10-28

CITATION: Unimac-United Management Corp. v. St. Clare's-Monaco Place, 2015 ONSC 4760
DIVISIONAL COURT FILE NO.: 110/15
DATE: 20150722

SUPERIOR COURT OF JUSTICE – ONTARIO DIVISIONAL COURT

RE: UNIMAC-UNITED MANAGEMENT CORP., Applicant

AND:

ST. CLARE'S-MONACO PLACE, 2295091 ONTARIO LTD. AND 2063889 ONTARIO LTD., Respondents

BEFORE: Then, Harvison Young, Lederer JJ.

COUNSEL: *Osborne G. Barnwell*, for the Moving Party Applicant

Robert A. Centa and Jodi J. Martin, for the Respondents, 2295091 Ontario Ltd. and 2063889 Ontario Ltd.

Priya Sarin, for the Respondent, St. Clare's-Monaco Place

HEARD at Toronto: July 22, 2015

ENDORSEMENT

HARVISON YOUNG J.: (ORALLY) ⁻

[1] This matter arises pursuant to claims made under the *Construction Lien Act*, RSO 1990, c. C.30, as amended. Master Albert was appointed as the case management judge in 2012 by order of

Stinson J. The applicant seeks judicial review of the Master's refusal to recuse herself from further hearing the matter on the grounds of bias as asserted by the applicant.

Background

[2] The *Construction Lien Act* directs that proceedings carried out under its ambit are to be dealt with in a summary fashion. Interlocutory steps other than those provided for by the legislation are not to be taken without leave of the court (or Master in this case) and only upon proof that the steps are necessary or would expedite the resolution of the issues in dispute: see the *Construction Lien Act*, s. 67.1.

[3] Further direction is provided by the *Rules of Civil Procedure*, RRO 1990, Reg 194. The Master is to take control of the reference in order that the process will move forward. The Master is directed to “devise and adopt the simplest least expensive and expeditious manner of conducting the reference”. The Master “may dispense with any procedure ordinarily taken that he or she considers to be unnecessary or adopt a procedure different from that ordinarily taken”. See Rule 55.01.

[4] The order referring the action to the Master was made on May 18, 2012, more than three years ago. It has not yet passed through the pre-trial stage and is not yet ready for trial. The applicant, Mr. Biachoo, says that this is because the Master is biased against him and has been throughout the process in the action. Counsel for the other parties blame Mr. Biachoo. They say he has failed to co-operate, has been disruptive and disrespectful to the court.

[5] In her reasons on the recusal motion, the Master states that the process of the reference was “stopped in its tracks” on May 14, 2014 when Mr. Biachoo wrote to her indicating his intention to request that she recuse herself. Apparently dates were available for the hearing of a recusal motion as early as August, 2014. It did not however, proceed until February 5, 2015, apparently to accommodate the applicant's schedule. The Master refused to recuse herself and counsel for Unimac seeks judicial review of that refusal.

The Prematurity Issue

[6] At the outset of the hearing before us, counsel were asked to consider and make submissions as to whether this application is premature. Having heard the submissions of counsel and carefully reviewed the materials submitted, we find that the application is premature for the following reasons.

[7] This is an interlocutory order. The court has consistently demonstrated that it is loath to interfere with ongoing administrative proceedings until they are completed. The rationale is that these matters are to proceed with expedition and not be interrupted and fragmented by appeals which, depending on the outcome, may not be necessary. See *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541; *Ontario College of Art v. Ontario (Human Rights Commission)*, [1983] OJ No 61 (Div Ct); *Coady v. Law Society of Upper Canada* (2003) 2003 CanLII 26435 (ON SCDC), 171 OAC 51 (Div Ct), *Haigh v. The College of Denturists of Ontario*, 2011 ONSC 2152 (Div Ct).

[8] The applicant submitted that this court should be governed by the decision of this Court in *Thyssenkrupp v. 1147335 Ontario Inc.*, 2011 ONSC 5073. In our view, that decision is of limited assistance in this case. It determines that the Divisional Court has *jurisdiction* to consider the issue of bias, a determination with which all parties to this motion, and this Court, agree. That case did not, however, address the question of when or whether a court should *exercise* its discretion to intervene “midstream” or before the underlying proceeding has run its course. Here, the respondent squarely submits that the issue is premature and that the Court should exercise its jurisdiction not to hear the matter at this stage. It submits that to do so would run counter to the well-established presumption that the court will not take jurisdiction with respect to applications

for judicial review until the underlying matter has been determined on its merits and other remedies exhausted. It further emphasizes that the *Construction Lien Act* and the case management scheme established thereunder reinforces this principle, for example, appeals from interlocutory orders are not permitted (see s. 71.3(b)).

[9] The central issue before the Court in considering the prematurity issue is thus whether this is a case which calls for the exercise of the court's discretion to hear the review application, notwithstanding the fact that the merits of the underlying construction lien proceeding had not been completed. In the case of *Air Canada v. Lorenz* 1999 CanLII 9373 (FC), [2000] 1 F.C. 494, (T.D.), Evans J. considered the factors to be considered by the court in determining whether the threshold for interlocutory intervention has been met in such circumstances. At paragraph 18 he stated as follows:

...the exercise ... turns principally on a weighing of two competing considerations. On the one hand are the possible hardships caused to Air Canada, and the time and resources that will have been wasted, if the bias question is not determined prior to the completion of the proceeding before the adjudicator. On the other hand, there are the adverse consequences of delaying the administrative process and of countenancing a multiplicity of litigation.

[10] Evans J. went on to set out a number of factors to be considered in determining whether or not to proceed. These include hardship to the applicant, waste, delay, fragmentation and strength of the case. I will address them in turn.

Hardship to the Applicant

[11] In paragraphs 19 and 20, Evans J. stated as follows:

[19] Counsel submitted that an allegation of bias casts a cloud over the legitimacy of the entire proceeding before the adjudicator, and to require Air Canada to push through to the end without having this question resolved would impose serious hardships. A party should not be subject to the exercise of legal powers by a tribunal whose very authority to hear the dispute the party has called into question.

[20] This factor cannot be determinative, however, because otherwise a reviewing court would always have to decide allegations of bias and to award relief when they are upheld, even though raised before the completion of the administrative process. This would mean, in effect, that a court would have no discretion to dismiss an application for judicial review for prematurity when bias is alleged or, putting it another way, an allegation of bias always constitutes "exceptional circumstances" justifying judicial intervention before the administrative process is complete. In my opinion this is not the law.

[12] This quotation applies in the case at bar. The applicant submits that it would be unfair to require him to continue in a toxic environment before the very Master who, in his submission, has failed to provide his client with a fair hearing consistent with the rules of natural justice. We acknowledge that returning to this proceeding before the Master may be difficult for the applicant but we note that this is not a factor that is to be considered in isolation of the other factors which we turn to now.

Waste

[13] The second consideration is waste. If the bias consideration is ultimately upheld, then it will have been a waste to require the proceeding to continue. However, this argument cuts both ways. Here, when the motion was brought, two years had elapsed from the beginning of the case management process and the evidentiary hearings had yet to commence. As the respondent

argues, an enormous amount of time will have been wasted if the allegation of bias is not ultimately made out. Such waste will be exacerbated in a construction lien case such as this where there are a number of parties involved, all of whom would have to start from scratch.

Delay

[14] The third consideration is delay. As in the *Lorenz* decision, (see paras. 24-25), the delay consideration extends beyond the parameters of this case. If the matter does not proceed, we are inviting other parties in other cases to seek delay by alleging bias or other breaches of natural justice. In such circumstances, we would thus run the risk of reducing fundamental concerns running to the heart of the administration of justice such as bias to an “off ramp” from a statutorily mandated process when the proceeding is not going well for one of those parties.

Fragmentation

[15] The issue with respect to fragmentation was put succinctly by Evans J. in *Lorenz* at paragraph 26:

[26] A determination of Air Canada's bias allegation at this time may also proliferate litigation. If the allegation were found to be misconceived then, when the ultimate decision is made by another adjudicator, an aggrieved party could make a second application for judicial review on other issues. Fragmentation of the issues raised by an administrative proceeding is wasteful of court resources and unduly burdens the administration of public programs.

The same is true in this case.

The Strength of the Case

[16] The final factor we consider is that of the strength of the case. At paragraph 27 of *Lorenz* Evans J. states:

[27] The potential harmful consequences of deciding or not deciding the merits of this application for judicial review prior to the determination of the administrative process are largely premised on the eventual success or failure of the allegation of bias. It is therefore appropriate to consider the strength of the case made by the applicant.

[17] There was considerable discussion of this factor during the hearing before this Court. Mr. Barnwell submits that a *prima facie* case is sufficient, while Evans J. suggests that any non-frivolous allegation of bias that falls short of a cast iron case does not meet the threshold. Evans J. clarified in *Lorenz* that by “cast iron” he meant “clear and obvious”. Mr. Barnwell submitted that the cumulative, if not individual, effect of the alleged twenty incidents, as itemized in his materials, meet such a standard. In addition, he argues that the proper test should be that of *prima facie* case analogous to the test for injunctive relief. There are few difficulties with this submission.

[18] First, Mr. Biachoo’s evidence regarding the alleged incidents are hotly contested on the record both by other counsel who filed affidavits on the refusal motion and by the Master herself. It is not possible or desirable on the consideration of the prematurity issue to resolve these disputes. That would be in effect, a determination of the application on its merits. It is enough that these issues are disputed on the record. That is not to say that the evidence on an interlocutory judicial review application will never be sufficient to justify the exercise of the court’s jurisdiction to hear such an application. For example, this is not a case where a decision maker was a recipient of gifts from one of the parties or was in a position of conflict *vis-a-vis* any of the parties by being a shareholder in a corporation who was party to a proceeding.

[19] Second, in this case, racism was raised. In the end, counsel for the applicant conceded that this was a subjective perception of his client and as such was insufficient to found an allegation of racism. He emphasized the concerns of systemic racism requiring the sensitivity of all judicial officers but pointed to the assertion of racism in this case, not as an allegation *per se* but as the best explanation his client could come up with to explain the Master's actions towards him as he perceived them.

[20] Third, we would also emphasize the statutory framework designed to provide speedy access to resolution of construction lien matters. This scheme also provides for robust case management. The factors set out above are arguably even more important in such a context because interlocutory judicial review risks undermining the very purpose of this legislative framework. In our view, as indicated earlier, the impact upon other participants in the process, particularly the lien claimants for small amounts of money, may be significant and this is another factor to be considered in the balance in the interests at issue.

[21] Finally, it must also be emphasized that the *Act* provides for full appeals on the merits as a corollary to the restrictive approach to interlocutory appeals. It will thus be open to the applicant to raise the issue of bias in any subsequent appeal. In this case, having considered the factors as set out in *Air Canada v. Lorenz*, we find that the adverse consequences of delay outweigh the possible hardship to the applicant by not determining the bias issue before the completion of the lien reference. For these reasons, the application is dismissed on the basis of prematurity.

Then J.

Harvison Young J.

Lederer J.

Date of Reasons for Judgment: July 22, 2015

Date of Release: August 6, 2015

1256

Tab 66

London District Catholic School Board v. Weilgosh, 2024 ONSC 3857 (CanLII)

Date: 2024-03-13
 File number: 610/22
 Citation: London District Catholic School Board v. Weilgosh, 2024 ONSC 3857 (CanLII), <<https://canlii.ca/t/k3gpr>>, retrieved on 2025-10-28

CITATION: London District Catholic School Board v. Weilgosh 2024 ONSC 3857
DIVISIONAL COURT FILE NO.: 610/22
DATE: 20240313

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, King, Krawchenko JJ.

B E T W E E N:

LONDON DISTRICT CATHOLIC SCHOOL BOARD and A.P. FERNANDES

Applicants

- and -

KAREN WEILGOSH

Respondent

- and -

HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondent

- and -

ONTARIO HUMAN RIGHTS COMMISSION

Respondent

- and -

*Christopher A. Sinal and
 Elizabeth M. Traynor, for the Applicant*

*Toby Young and Marisa Scotto di Luzio, for
 Karen Weilgosh*

Brian Blumenthal and Valerie Crystal, for Human Rights Tribunal of Ontario

Matthew Horner, for Ontario Human Rights Commission

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION (OECTA)	)	<i>Christopher Perri and Kylie Sier, for Ontario English Catholic Teachers' Association (OECTA)</i>
Intervenor	)	
- and -	)	
CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE)	)	<i>Devon Paul and Alex Hunsberger, for Canadian Union of Public Employees (CUPE)</i>
Intervenor	)	
- and -	)	
EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH	)	<i>Karen Spector, for Empowerment Council, Systemic Advocates in Addictions and Mental Health</i>
Intervenor	)	
- and -	)	
PEEL REGIONAL POLICE ASSOCIATION	)	<i>Katie Rowen and Emily Home, for Peel Regional Police Association of Ontario</i>
Intervenor	)	
- and -	)	
G. MCNULTY	)	<i>Gary Bennett and Sharon Yeboah, for G. McNulty</i>
Intervenor	)	
- and -	)	
REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD	)	<i>Sonia Regenbogen, for Regional Municipality of Peel Police Services Board</i>
Intervenor	)	
	)	
	)	
	)	
	)	HEARD: June 22, 2023, by videoconference in Toronto

BACKHOUSE J.

-

REASONS FOR DECISION

Overview

[1] The London District Catholic School Board (the “Applicant”) has brought an application for judicial review of an interim decision by the Human Rights Tribunal of Ontario (the “HRT”), dated October 4, 2022, reported at 2022 HRT 1194 (the “Decision”). In the Decision, the HRT held that it has concurrent jurisdiction to adjudicate an application commenced by Karen Weilgosh (“Weilgosh” or “the Respondent”). The Applicant seeks an order quashing the Decision on the grounds that the HRT lacks jurisdiction. The Applicant asks for a declaration that labour arbitrators appointed under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the “LRA”) have exclusive jurisdiction to decide human rights complaints arising from disputes under a collective agreement. The Respondent asks the court to dismiss the application.

[2] For the reasons set out below, the application is dismissed.

Background

[3] Karen Weilgosh filed an application with the HRTO against her employer, the Applicant, alleging discrimination and a failure to accommodate. Subsequently, the Supreme Court of Canada issued *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 [Horrocks]. There, the court held that labour arbitrators appointed under labour legislation in Manitoba have exclusive jurisdiction over human rights claims arising from disputes under a collective agreement. Following *Horrocks*, the Applicant raised a preliminary objection before the HRTO. It argued that the HRTO lacked jurisdiction to hear the application given that Ms. Weilgosh's union had filed grievances on her behalf relating to the same or similar allegations. The HRTO proceeded to a hearing on the interim issue, joining together another proceeding raising the same preliminary objection, *McNulty v. Regional Municipality of Peel Police Service Board* (the "McNulty application").

[4] The Supreme Court established a two-part test in *Horrocks* to resolve jurisdictional issues between labour arbitrators and competing statutory tribunals. Under Step 1, the relevant labour legislation should be examined to determine whether it grants a labour arbitrator exclusive jurisdiction, and if so, over what matters arising from a collective agreement. Legislation with a mandatory dispute resolution clause establishes exclusive jurisdiction, subject to clearly expressed legislative intent to the contrary. Under Step 2, the question is whether the dispute falls within the scope of the labour arbitrator's jurisdiction.[1]

Decision under Review

[5] In the Decision, the HRTO resolved the preliminary issue under Step 1 of the test. It determined that labour arbitrators appointed under both the *LRA* and the *Police Services Act*, R.S.O. 1990, c. P.15 (the "PSA") have exclusive jurisdiction to decide claims of discrimination and harassment falling within the scope of a collective agreement. It reached this conclusion based on the mandatory dispute resolution clause under s. 48 of the *LRA* and, in the absence of an analogous provision under the *PSA*, appellate case law.[2]

[6] The HRTO went on to find, as the Supreme Court indicated in *Horrocks*, that this exclusive jurisdiction under both statutes was displaced by a positive expression of legislative intent to establish a regime of concurrent jurisdiction over human rights claims.[3] Applying the Supreme Court's guidance at para. 33 of *Horrocks*, it pointed first to the broad provisions in s. 45 and 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Ontario Code" or "Code") empowering the HRTO to defer or dismiss complaints if another proceeding has appropriately dealt with it. The HRTO did note that these provisions were more ambiguous than federal human rights legislation and B.C.'s *Human Rights Code*, which the Supreme Court cited in *Horrocks* as examples of statutory schemes disclosing an intent to establish concurrent jurisdiction. Those statutes specifically provide for deferrals where complaints are capable of being dealt with by the grievance process.[4]

[7] The analysis did not end there. *Horrocks* then instructs that where the provisions of a statute may be more ambiguous, but the legislative history plainly shows that the legislature contemplated concurrency, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.[5] The HRTO determined that the "unique legislative history" of the *LRA* and the *Ontario Code* more clearly indicated a legislative intent to establish concurrent jurisdiction.

[8] In 2001, the Court of Appeal determined in *Ontario (Human Rights Commission) v. Naraine*, 2001 CanLII 21234 (Ont. C.A.) [Naraine] that, following amendments to the *LRA*

empowering labour arbitrators to apply the *Ontario Code*, the OHRC's deferral power under the *Ontario Code* signaled an intention to shift from exclusive to concurrent jurisdiction.^[6]

[9] The legislature passed major amending legislation to the *Ontario Code* ("Bill 107") that came into effect in 2008. Among other things, Bill 107 removed the gatekeeper role of the OHRC and instead permitted individuals to apply directly to the HRTO. The direct access model remains in place today. Applying the interpretive presumption that the legislature is aware of existing law when it enacts new laws, the HRTO reasoned in the Decision that the legislature knew of *Naraine* when it passed Bill 107. Therefore, it found that the lack of constraints on the HRTO's broad powers under ss. 45 and 45.1 to defer or dismiss complaints appropriately dealt with in other proceedings demonstrates an intent to maintain concurrent jurisdiction.^[7]

[10] In the Decision, the HRTO dismissed the requests of the Applicant and the Regional Municipality of Peel Police Services Board to dismiss the applications for lack of jurisdiction.

[11] The Regional Municipality of Peel Police Services Board did not seek judicial review of the Decision in respect of the McNulty application. It is participating as an intervenor.

Issues

[12] The application raises the following issues:

1. Is the application premature, and if so, should the court hear it?
2. What is the standard of review?
3. Was the HRTO's finding that it has concurrent jurisdiction correct or reasonable, as the case may be?

Court's Jurisdiction

[13] The Court has jurisdiction to hear this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

Analysis

Issue #1: Is the application premature, and if so, should the court hear it?

[14] The Applicant concedes the Decision is interlocutory in nature and that courts generally do not exercise their discretion to hear an application until the administrative proceeding is complete, absent exceptional circumstances.^[8] The parties submit that there are exceptional circumstances in this case.

Appropriate for court to exercise its discretion to hear this judicial review application

[15] In *Ontario (Community Safety and Correctional Services) v. De Lottinville*,^[9] this court exercised its discretion to judicially review an interim decision of the HRTO, finding that the HRTO treated the matter as a "test case" dealing with a significant legal issue, constituted a three-person tribunal and joined applications that raised the same issue.

[16] Similar circumstances arise here. The HRTO treated the preliminary issue as exceptional by:

- (a) joining Weilgosh's Application with the McNulty Application for the purposes only of the preliminary issue;

- (b) assigning case management of the preliminary issue to the HRTO's Chair; and,
- (c) granting intervenor status to four organizations, in addition to the OHRC being added as a party.

[17] The Decision has broad implications for human rights disputes arising between unionized employers and employees throughout the province. Delaying this application until the conclusion of the hearing on the merits, which does not depend on any evidence or law relevant to the jurisdictional issue, will result in uncertainty for employers, employees and unions. This is an appropriate case for this court to exercise its discretion to hear this judicial review.

Issue #2: What is the standard of review?

[18] The Applicant submits the presumptive standard of reasonableness is rebutted for two reasons. First, the application concerns a question of the jurisdictional boundaries between two administrative bodies. The Supreme Court applied a correctness standard in *Horrocks* for a virtually identical question. Second, the question raised is of central importance to a legal system as a whole, given its broad implications for any future applications to the HRTO brought by unionized employees.

[19] The Respondents Weilgosh and OHRC agree with the Applicant on the first point and submit that the presumption of reasonableness is rebutted. However, they disagree that the question raised is one of central importance to the legal system as a whole. They submit that while involving a dispute that is of “wider public concern, it does not rise to the level of having an impact on the administration of justice as a whole that requires safeguarding consistency in the fundamental legal order of Canada.”^[10]

[20] The HRTO submits that the standard of review is reasonableness. It argues that the presumption of reasonableness is not always rebutted for questions of jurisdiction between two or more administrative bodies unless there is an operational conflict. The HRTO argues that there is no conflict or incompatibility in this case since we are dealing with concurrent jurisdiction. It points out that in *Horrocks*, there was no legislated standard of review and therefore the Supreme Court's finding on standard of review is not dispositive on the issue for this application. The HRTO agrees with Weilgosh and OHRC that the question raised is not one of central importance to the legal system as a whole either since it is statute- and province-specific. Finally, the HRTO argues that something more is required than just the three rule of law questions in order to rebut a legislated (as opposed to a presumptive) standard of review, like the one under s. 45.8 of the *Ontario Code* (“patently unreasonable” which has been interpreted by the courts post-*Vavilov* as “reasonable”). It argues that to rule otherwise conflicts with *Vavilov*'s strong endorsement of respect for legislative intent.

Correctness is the appropriate standard of review

[21] In *Horrocks*, at paragraph 7 of the Majority Decision, the Court stated:

Decisions concerning the jurisdictional lines between two or more administrative bodies must be correct (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 53). This standard safeguards the rule of law, which “requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another” (para. 64). It also fosters predictability, finality and certainty in the law (*ibid.*).

[22] The Court in *Horrocks* gave no consideration to and did not rely on there being no legislated standard of review in *Manitoba's Human Rights Code*^[11]. Instead, it determined that

correctness was the appropriate standard of review based on the matter concerning the jurisdictional boundaries between two administrative bodies. In view of the Supreme Court's application of the correctness standard in *Horrocks* for a virtually identical question^[12], the correctness standard is the appropriate standard of review.

Issue #3: Is the HRTO's finding that it has concurrent jurisdiction incorrect?

Applicant's Position

[23] The Applicant submits that the HRTO erred in finding that it has concurrent jurisdiction. Given the mandatory dispute resolution clause of the *LRA*, the only way for labour arbitrators' exclusive jurisdiction to have been displaced by concurrent jurisdiction is where there is an "express displacement" in one of the three ways set out by the Supreme Court at para. 33 of *Horrocks*. The Applicant argues that the deferral and dismissal powers under s. 45 do not explicitly refer to the grievance process, unlike the *B.C. Code* and federal human rights legislation cited in *Horrocks*. Therefore, these provisions cannot be taken to be a statutory scheme disclosing an intention to displace labour arbitrators' exclusive jurisdiction. Neither does the legislative history of the *Code* plainly reveal a legislative intent to displace exclusive jurisdiction.

[24] The Applicant further submits that the HRTO's reliance on *Naraine* is misplaced as *Horrocks* undermines its reasoning with respect to the quasi-constitutional status of the *Ontario Code* and access to justice as a policy rationale for concurrent jurisdiction.

[25] The Applicant also argues that the HRTO inverted the test from *Horrocks*. Once the HRTO determined there was a mandatory dispute resolution clause, the labour arbitrator's exclusive jurisdiction was established, absent clear legislative intent to the contrary. Instead of looking for evidence of legislative intent to displace exclusive jurisdiction, the Applicant submits that the HRTO incorrectly treated its task as looking for evidence of an intent to displace concurrent jurisdiction.

Respondent Karen Weilgosh's Position

[26] Weilgosh submits that the Decision is both correct and reasonable. *Horrocks* only requires "some positive expression of the legislature's will"^[13] to find concurrent jurisdiction where labour legislation provides for a mandatory dispute resolution clause. The Supreme Court cited the deferral provisions in the *B.C. Code* and federal legislation as examples of statutory schemes disclosing an intent to displace exclusive jurisdiction. It did not, however, establish a rule that such provisions must specifically reference grievance proceedings or arbitrations. The Applicant's interpretation is thus unduly narrow.

[27] Weilgosh submits that in any case, the HRTO's rules, its past decisions and the modern principle of statutory interpretation dictate that the reference to "proceedings" under s. 45.1 of the *Code* includes grievance and arbitration proceedings. The HRTO's interpretation of the *Code*'s legislative history is sufficient on its own to demonstrate a legislative intent to displace exclusive jurisdiction. The continuity the HRTO highlighted in the human rights adjudication regime before and after Bill 107 was used to support its reasoning that the legislature deliberately chose not to remove concurrent jurisdiction.

[28] Weilgosh argues that the HRTO's reliance on *Naraine* as an intrinsic part of this analysis is not misplaced. Even if *Horrocks* requires abandoning certain indicia of concurrent jurisdiction examined in *Naraine*, the Court of Appeal's interpretation of the deferral powers under the *Ontario Code* as it existed at the time, in light of the amendments to the *LRA*, remains good law.

Position of the Respondent OHRC

[29] The OHRC submits that nothing in Bill 107 or the extrinsic evidence relating to it suggests a departure from the existing regime of concurrent jurisdiction identified in *Naraine*, which remains good law.

Position of the Intervenor

[30] The Intervenor, other than Regional Municipality of Peel Police Services Board, support the Decision for the reasons articulated by the Respondents. They submit that the HRTO's finding that it has concurrent jurisdiction is correct.

[31] The Regional Municipality of Peel Police Services Board supports the Applicant's position seeking to have the Decision quashed.

The HRTO's finding that it has concurrent jurisdiction is correct

[32] In *Horrocks*, the Supreme Court held that [Manitoba's Human Rights Code](#)^[14] (the "*Manitoba Code*") did not carve out concurrent jurisdiction for human rights adjudicators appointed under that statute and that only labour arbitrators have jurisdiction to adjudicate claims of discrimination falling within the scope of a collective agreement in Manitoba. The relevant sections of the *Manitoba Code* considered in *Horrocks* were s.22(1) and ss.26 and 29(3). Section 22(1) provides that any person may file a complaint alleging that another person has contravened the *Code* and ss.26 and 29(3) direct the Commission to investigate complaints and where appropriate, to request the designation of an adjudicator to hear the complaint. The *Manitoba Code* did not contain similar provisions to the *Ontario Code*'s ss. 45 and 45.1 to defer or dismiss complaints appropriately dealt with in other proceedings.

The Horrocks Legal Framework

[33] *Horrocks* requires that, first, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters. Here, there is no dispute that i) the *LRA* has a mandatory dispute resolution clause;^[15] ii) that an arbitrator empowered under that clause has exclusive jurisdiction to decide all disputes arising from the collective agreement;^[16] and iii) that the Weilgosh Application is a human rights claim of discrimination that arises from the collective agreement.

[34] *Horrocks* then instructs, and the Decision noted, that an arbitrator therefore has exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary^[17]. At paragraph 34 of its Decision, the HRTO quotes *Horrocks* at paragraph 33:

[33] [T]he mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for disputes arising from a collective agreement. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S.B.C. 1996, c. [210](#), s. [25](#); *Canada Labour Code*, ss. 16(1.1) and [98\(3\)](#); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. [41](#) and [42](#)). Such provisions necessarily

imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process. In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

[35] *Horrocks* is clear that concurrent jurisdiction over human rights matters between labour arbitrators and human rights adjudicators requires “some positive expression of the legislature’s will”. *Horrocks* is also clear that the use of the specific language of “concurrent jurisdiction” is not required and that a competing “statutory scheme may disclose that intention.”[18]

[36] Regarding “some positive expression of the legislature’s will”, the *Horrocks* majority provided examples of legislative schemes – including the *B.C. Code* and the *Canadian Human Rights Act* - that reflected a legislative intent for concurrent jurisdiction. In these two examples the statutory schemes explicitly contemplate that the deferral powers extend to disputes that could be subject to a grievance under a collective agreement.[19]

Ontario Code Legislative Framework

[37] The deferral and dismissal powers in the case of the *Ontario Code*, are in ss. 45 and 45.1:

45. The Tribunal may defer an application in accordance with the Tribunal rules.

45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

[38] The applicable Tribunal rules are:

Rule 14:

14.1 The Tribunal may defer consideration of an Application, on such terms as it may determine, on its own initiative or at the request of any party.

14.2 Where the Tribunal intends to defer consideration of an Application under Rule 14.1, it will first give the parties, any identified trade union or occupational or professional organization and any identified affected persons, notice of its intention to consider deferral of the Application and an opportunity to make submissions....

14.3 Where an Application was deferred pending the outcome of another legal proceeding, a request to proceed under Rule 14.3 must be filed no later than 60 days after the conclusion of the other proceeding, must set out the date the other legal proceeding concluded and include a copy of the decision or order in the other proceeding, if any. [Emphasis added]

In addition, Rule 8.2.1, which relates to a response to an application, provides:

Where a Respondent alleges the issues in dispute are the subject of an ongoing grievance or arbitration brought pursuant to a collective agreement, the Respondent need not respond to the allegations in the Application but must provide its contact information, attach a copy of the document which commenced the grievance, confirm that the grievance or arbitration is ongoing and include argument in support of its position that the Application should be deferred pending the conclusion of the grievance or arbitration. The Tribunal may direct a Respondent to file a complete Response where the Tribunal considers it appropriate. [emphasis added]

Finally, Rule 11 deals with requests to intervene in HRTO applications and sets out specific subrules to address interventions by bargaining agents:

11.14 The bargaining agent for an applicant who has filed an Application about his or her employment may intervene in the Application by filing a Notice of Intervention by Bargaining Agent in Form 28.

11.15 A request to remove a bargaining agent as an intervenor shall be made as a Request for Order During Proceedings in accordance with Rule 19.

Recent Decisions in other jurisdictions

[39] Two recent decisions in other jurisdictions interpreted their respective provincial human rights legislation with statutory language in their deferral and dismissal powers virtually identical to that in the *Ontario Code*. Both decisions found the requisite legislative intent for concurrent jurisdiction.

[40] In *Blackie v Chief of Police, Calgary Police Service*,^[20] the Alberta Human Rights Commission (the “AHRC”) held that the *Alberta Human Rights Act* signalled legislative intent for concurrent jurisdiction with labour arbitrators based exclusively on the AHRC’s authority to defer a human rights complaint pending another process:

[21] The Act demonstrates legislative intent for concurrent jurisdiction. Under the new sections 21(1)(a)(iv) and 21(2)(a)(iii), the Director may dismiss a complaint that “is being, has been, will be or should be more appropriately dealt with in another forum or under another Act”. If the Director can accept a complaint that may be addressed through a grievance process and then use her discretion to dismiss it, she must have concurrent jurisdiction. Similarly, in ss. 21(2)(b) the Director may accept a complaint pending the outcome of the matter in another forum. This is the deferral authority referenced in *Horrocks*. All three of these subsections suggest that there is concurrent jurisdiction. The deferral authority existed prior to the changes in the *Act* as well.

[41] In *Robson v University of New Brunswick*,^[21] the New Brunswick Human Rights Commission (“NBHRC”) argued that the *New Brunswick Human Rights Act* (“NBHRA”) expressed a legislative intent to confer concurrent jurisdiction over human rights matters. Paragraph 19(2)(d) of the *NBHRA*, stated:

19(2) The Commission may dismiss a complaint at any stage of the proceedings, in whole or in part, if the Commission in its discretion

determines

(d) the complaint has already been dealt with in another proceeding, . . .

[42] The New Brunswick Labour and Employment Board (“NBLEB”) agreed with the NBHRC:

101. The Board agrees. Subsection 55(1) of the *Industrial Relations Act* expressly gives arbitrators jurisdiction over human rights “disputes which expressly or inferentially arise out of the collective agreement” (*Horrocks*, paragraph 21).

102. In the Board’s view, this language is sufficiently similar with the language in the British Columbia and federal human rights statutes to come within paragraph 33 of *Horrocks*. Although paragraph 19(2)(d) does not expressly refer to grievances or collective agreements, the *Human Rights Act* does include definitions of “employers’ association” and “trade union” (section 2) which are entities also recognized under the *Industrial Relations Act*. Also, paragraph 4(3)(c) of the *Human Rights Act* prohibits a trade union or employer’s organization from discriminating “against any person in respect of his or her employment by an employer”. This would, in the Board’s view, encompass an allegation that a trade union negotiated with an employer to include a discriminatory term of employment in a collective agreement.

[43] Neither the AHRC nor the NBLEB substantively relied on the legislative history or evolution of their respective human rights statutes. Both of the interpretive exercises were exclusively anchored on their respective statutes’ deferral and dismissal powers, powers also contained in sections 45 and 45.1 of the *Ontario Code*.

[44] *Horrocks* requires a jurisdiction-specific interpretation of human rights legislation. The Court in *Horrocks* did not hold that a particular legislative phrase or wording was necessary to establish a human rights adjudicator’s concurrent jurisdiction, but found that in some cases, the provisions of a statute may be “more ambiguous”, but the legislative history will plainly show that the legislature contemplated concurrency.”[22]

[45] The Decision did not go so far as the *Blackie* and *Robson* decisions. It correctly found that the provisions of the *Ontario Code* are less clear than the examples given in *Horrocks* of British Columbia and federal statutes but then went on to consider the legislative history and found that it plainly shows that the Legislature contemplated concurrence.

[46] In reaching its conclusion that the Legislature contemplated concurrence, the HRTO relied on a number of principles of statutory interpretation. It is not argued that it was incorrect in any way in doing so. It went on to consider “Ontario’s scheme [which] has a unique legislative history which the Supreme Court signalled is important in discerning legislative intent with respect to concurrent versus exclusive arbitral jurisdiction.”[23]

[47] The Decision noted that concurrent jurisdiction has been upheld by the Ontario Court of Appeal. It referenced the leading such case, *Ontario (Human Rights Commission) v. Naraine*, 2001 CanLII 21234 (ON CA) [*Naraine*], citing the following paragraphs in relation to the *Ontario Code* as it read at the time:

[59] The Commission now has authority under s. 34(1)(a) of the *Code* to decide, in its discretion, not to deal with a complaint where

it is of the view that the complaint “could or should be more appropriately dealt with” under another Act. Labour arbitrators now have statutory authority under the *Labour Relations Act* to apply the *Code*. Since the Commission has statutory authority under the *Code* to defer to another forum, the legislative intent has clearly shifted from according exclusive jurisdiction to the Commission for *Code* violations to offering concurrent jurisdiction to labour arbitrators when complaints arise from disputes under a collective agreement. (Emphasis added in the Decision).

[60] The underlying goal of these symmetrical amendments is to avoid the gratuitous bifurcation or proliferation of proceedings, especially when the arbitrable grievance and the human rights complaint emerge seamlessly from the same factual matrix. That goal was also, I think, at the heart of *Weber*. In my view, *Weber* stands for the proposition that when several related issues emanate from a workplace dispute, they should all be heard by one adjudicator to the extent jurisdictionally possible, so that inconsistent results and remedies, such as those in Mr. Naraine’s case, may be avoided.

[48] In reaching its decision the Court in *Naraine* analyzed the legislative intent and history of the *LRA* and the *Ontario Code*. In setting out the legislative history of the *Ontario Code*, the Court highlighted the fact that prior to 1992, the law in Ontario conferred exclusive jurisdiction on human rights organizations (the OHRC and adjudicators named under the *Ontario Code*) to consider discrimination claims arising out of a collective agreement.[24] As the Court held, prior to 1992, there was:

...no legislative language providing labour arbitrators with any jurisdiction over violations of the *Code*. And the 1992 amendment, which permitted arbitrators to interpret and apply ‘human rights and other employment-related statutes’, did not provide that the arbitrator’s jurisdiction was exclusive or that the Commission’s jurisdiction was in any way limited.[25]

[49] The Court in *Naraine*, went on to consider the Ontario Legislature’s “symmetrical” amendments to the *LRA* and the *Ontario Code*. [26] Those amendments extended the jurisdiction of labour arbitrators to interpret and apply the *Ontario Code* and amended it to provide the OHRC with the power to not deal with complaints if they were more appropriately dealt with in another venue.[27]

[50] After analyzing the history and wording of those amendments, the Court in *Naraine* concluded that they reflected a legislative intention to create concurrent “synchronized” jurisdiction between the OHRC and labour arbitrators. The Court specifically linked its finding of this intent to the OHRC’s power to defer or not deal with complaints in certain circumstances.

[51] In reaching this conclusion, the Court in *Naraine* did not ground the OHRC’s concurrent jurisdiction in any specific *Ontario Code* language referring to labour arbitrators or the grievance process. S.34(a) (a) of the *Code* did not contain that specific language[28]. Instead, as later contemplated by the Supreme Court in *Horrocks*, the Court in *Naraine* relied on the specific legislative history of the *Ontario Code* including the history of OHRC jurisdiction over such matters and the “symmetrical amendments to the *LRA* and the *Code* conferring “synchronized” powers on the two statutory decision makers.[29]

[52] In support of its argument that the Decision was incorrect the Applicant alleges that the HRTO erred in relying on the Court of Appeal's decision in *Naraine* in assessing the legislative intent of the *Code* because its reasoning was undermined with respect to the quasi-constitutional status of the *Code* and access to justice as a policy rationale for concurrent jurisdiction.

[53] The *Horrocks* majority made two substantive references to *Naraine*. First the *Horrocks* majority held that a primacy provision in a human rights statute^[30] was ousted by the inclusion of a mandatory dispute resolution clause in a labour relations statute (e.g., section 48(1) of the *LRA*).^[31]

[54] Second, the *Horrocks* majority addressed an argument from the MHRC that an arbitrator's exclusive jurisdiction with respect to human rights issues raised a public policy access to justice concern - namely, that because access to labour arbitration is union controlled, an employee may be left without recourse to either arbitration or the MHRC. The *Horrocks* majority acknowledged that employees could be left without a forum for resolution. However, this state of affairs could be "...undone by clearly expressed legislative intent to the contrary."^[3 2] The question remains in this case whether the statutory scheme of the *Ontario Code* displaces the exclusive jurisdiction of a labour arbitrator under the *LRA*.

[55] To the extent that the Court of Appeal in *Naraine* may have relied on the primacy clause of the *Ontario Code* or access to justice concerns in its analysis, the fact remains that *Naraine* is legally anchored in its consideration of the section 34(1)(a) deferral power in the *Ontario Code* and the 1992 *LRA* amendments. The Court in *Naraine* found that the legislative history of the pre-Bill 107 *Ontario Code* demonstrates legislative intent for the OHRC to have concurrent jurisdiction with labour arbitrators over human right claims arising out of a collective agreement.

[56] At paragraphs 41 and 42 of its Decision, the HRTO found:

[41] In our view, the broad language used in the *Code* signals a legislative intent that the Tribunal maintains concurrent jurisdiction. Despite being presumptively aware of the decisions in *Weber* and *Naraine*, and the fact that the Tribunal had continued to hear cases arising from collective agreements, the Legislature did not take steps to limit or narrow the deferral and dismissal powers in sections 45 and 45.1. This signals a clear intent to permit Tribunal decision-makers the power to decide whether to defer applications that could be decided elsewhere, including by arbitration, by grievance, by review or otherwise. The broad discretion provided to Tribunal decision-makers indicates a positive expression of the Legislature to maintain concurrent jurisdiction, thereby displacing labour arbitration as the sole forum for disputes arising from a collective agreement.

[42] By way of contrast, where the Legislature chose to limit the scope of the Tribunal's jurisdiction with respect to other decision-makers, it did so expressly. For example, section 34(11) of the *Code* was enacted in order to expressly remove the jurisdiction of the Tribunal where a person has brought civil proceedings seeking an order under section 46.1. No such express removal of jurisdiction was enacted with respect to proceedings that could be heard by labour arbitrators.

[57] The Decision correctly placed no emphasis on access to justice considerations or the primacy clause in its reliance on *Naraine* as good law. Rather, the Decision referred to *Naraine* to find that the law in Ontario established concurrent jurisdiction prior to Bill 107 and in the context of determining the legislative intent of the 1992 amendments to the *LRA* and the section 34(1)(a) deferral power of the pre-Bill 107 *Ontario Code*.^[33] I find no error in the HRTO's reliance on *Naraine*.

No error in finding concurrent jurisdiction despite s.45 and 45.1 of the Ontario Code not specifically referencing grievance arbitrations

[58] The Applicant asserts that the HRTO erred in finding that concurrency existed notwithstanding the lack of any specific reference to grievance or arbitration proceedings in its deferral (s.45) and dismissal (s.45.1) powers.

[59] The *Horrocks* decision cannot be properly understood to preclude a finding of concurrent jurisdiction because the *Ontario Code* makes no specific reference to grievance or arbitration proceedings in its deferral (s.45) and dismissal (s.45.1) powers. This argument ignores the express direction of the Court in *Horrocks* that legislative intent to confer jurisdiction can be inferred from language that is more ambiguous than an express reference to grievance arbitrations.^[34]

[60] The Applicant provides no argument to suggest that the word “proceeding” should or could be interpreted to exclude a grievance arbitration. Referring to a grievance arbitration as a “proceeding” is common before human rights tribunals labour arbitrators, and this court.

[61] HRTO Rules 8.2.1, 11 and 14 all support an interpretation that the HRTO, in exercising its powers to make its *Rules of Procedure* under Rule 43(1) of the *Code*, itself understood that the law in Ontario included grievances and arbitrations as proceedings within the scope of its broad deferral and other procedural powers. There is nothing in section 45, Rule 14 or elsewhere that manifests any indication that grievance or arbitration proceedings are not subject to the HRTO's deferral powers. There are no express exceptions to the HRTO's deferral powers.

[62] Rule 14.4 refers to “other legal proceedings”. The HRTO has consistently interpreted section 45 to apply to many types of legal proceedings, including various administrative bodies,^[35] and criminal proceedings.^[36] The Divisional Court has also confirmed that a “proceeding” may apply to a wide range of administrative decision-making fora.^[37]

[63] The HRTO has also consistently recognized its concurrent jurisdiction over unionized applicants.^[38] As a general rule, the HRTO defers applications where there are ongoing grievance or arbitration proceedings. The HRTO jurisprudence confirms that various factors may apply in the exercise of its discretion to defer, including the nature of the other proceeding.^[39] The HRTO typically exercises its discretion to defer in light of arbitration proceedings in recognition of the well-established law that a grievance arbitrator has the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement.^[40]

The Decision did not invert the test under Horrocks

[64] The Applicant submits that instead of looking for evidence of legislative intent to displace the exclusive jurisdiction of labour arbitrators, the HRTO incorrectly treated its task as looking for evidence of an intent to displace concurrent jurisdiction.

[65] I am not persuaded by this argument. The continuity the HRTO highlighted in the human rights adjudication regime before and after Bill 107 supports its reasoning that the legislature

deliberately chose not to remove concurrent jurisdiction. The *Code*'s legislative history demonstrates a legislative intent to displace exclusive jurisdiction.

[66] In considering the broad language used in the *Ontario Code*, its statutory scheme and the broader legal context of the legislative and jurisprudential history of the *Ontario Code*, the HRTO correctly applied *Horrocks* to find concurrent jurisdiction. In the words of *Horrocks*, in these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.[41]

Conclusion

[67] The application is dismissed.

Costs

[68] The Applicant submits that given the public interest in this matter, there should be no costs or alternatively, costs in the range of \$2,000 to \$5,000.

[69] Counsel for Karen Weilgosh requests costs of \$5,000.

[70] The HRTO and OHRC do not request costs and ask that none be awarded against them.

[71] As the successful party, Karen Weilgosh is entitled to costs fixed in the amount of \$5,000.

Backhouse J.

I agree

King J.

I agree

Krawchenko J.

Released: March 13, 2024

CITATION: London District Catholic School Board v. Weilgosh, 2024 ONSC 3857
DIVISIONAL COURT FILE NO.: 610/22
DATE: 20240313

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Backhouse, King, Krawchenko JJ.

B E T W E E N:

**LONDON DISTRICT CATHOLIC SCHOOL BOAR
D AND A.P. FERNANDES**

and -

KAREN WEILGOSH

- and -

HUMAN RIGHTS TRIBUNAL OF ONTARIO

- and -

ONTARIO HUMAN RIGHTS COMMISSION

- and -

ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION (OECTA)

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE)

- and -

EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH

- and -

PEEL REGIONAL POLICE ASSOCIATION

- and -

G. MCNULTY

- and -

REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD

REASONS FOR DECISION

Backhouse J.

- [1] *Horrocks*, at para. 39.
- [2] Decision, at paras. 10-11 and 19-23.
- [3] Decision, at para. 24. See *Horrocks*, at paras. 32 and 39.
- [4] Decision, at paras. 35-36. See *Horrocks*, at para. 33, citing *Human Rights Code*, R.S.B.C. 1996, c. 210, at s. 25(1) [*B.C. Code*]; *Canada Labour Code*, R.S.C. 1985, c. L-2, at s. 16(1.1) and s. 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, at s. 41(1)(a).
- [5] *Horrocks* at para.33 cited in the Decision at para.34.
- [6] Decision, at para. 37, citing *Naraine*, at paras. 59-60.
- [7] Decision, at paras. 36-41.
- [8] See e.g., *Briggs v. Toronto Police Services Board*, 2017 ONSC 1591 (Div. Ct.), at para. 19.
- [9] *Ontario (Community Safety and Correctional Services) v. De Lottinville*, 2015 ONSC 3085 (Div. Ct.), at paras. 65-66.
- [10] *McLean v. British Columbia (Securities Commission)* 2013 SCC 67; *Canada Human Rights Commission v. Canada (AG)*, 2018 SCC 31, paras.42-43; *Canada (Canadian Human Rights Commission) v. Canada (AG)*, 2011 SCC 53, paras.23-27; *Canada (Minister of Citizenship and Immigration) v. Vavilov* (“Vavilov”), 2019 SCC 65, paras.17, 58-62.
- [11] The *Human Rights Code*, C.C.S.M., c.H175.
- [12] *Horrocks*, at paras.8-9.
- [13] *Horrocks* at para. 33.
- [14] The *Human Rights Code*, C.C.S.M., c.H175.
- [15] *LRA* 1995, s. 48(1).
- [16] HRTO Record of Proceedings, OECTA Collective Agreement.
- [17] Decision, para. 33 (emphasis added in the Decision).
- [18] *Horrocks*, para.34.
- [19] *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42.
- [20] *Blackie v Chief of Police, Calgary Police Service*, 2022 AHRC 52, [Blackie], paras. 18-25 (May 6, 2022).
- [21] *Robson v. University of New Brunswick*, 2022 CanLII 40804 (NB LEB), paras. 101-103 (April 25, 2022).
- [22] *Horrocks* at paragraph 33.
- [23] Decision at para. 36.
- [24] *Naraine*, at para.55.
- [25] *Naraine*, at para.52.
- [26] *Naraine*, at para.60.
- [27] *Labour Relations and Employment Statute Law Amendment Act*, 1992, SO 1992, c.21 (“Bill 40”), *An Act to Revise and Extend Protection of Human Rights in Ontario*, 1981, SO 1981, c.53 (“Bill 7”).
- [28] The OHRC had authority under then existing S.34(1)(a) not to deal with a complaint where it is of the view that the complaint “could or should be more appropriately dealt with” under another Act.)
- [29] *Naraine*, at para.60.
- [30] For example, *Ontario Code*, section 47(2).
- [31] *Horrocks*, para.34; *Naraine* at para.47, noted that human rights legislation could only be overridden by express and unequivocal legislative language.
- [32] *Horrocks*, at paras.36-38.
- [33] HRTO Decision, at paras.37,41.
- [34] *Horrocks*, at para.33.
- [35] *Shakir v. Kidron Valley Rehab*, 2010 HRTO 1310 (professional discipline proceeding); *Nagy v. University of Ottawa*, 2020 HRTO 544 (University senate committee proceeding); *Flanagan v. Workplace Safety and Insurance Board*, 2018 HRTO 154 (WSIB proceeding); *Khan v. 1742248 Ontario Inc.*, 2014 HRTO 1008 (Employment Insurance Act proceeding); *Ufoegbune v. Manza et al.*, 2019 HRTO 796 (Landlord and Tenant Board proceeding); *Freidin v. Ministry of Community and Social Services*, 2018 HRTO 29 (Social Benefits Tribunal proceeding); and *Howden v. Ontario (Transportation)*, 2010 HRTO 515 (License Appeal Tribunal proceeding).
- [36] *Miller v. Bernard*, 2010 HRTO 1488, at paras. 9-11; *MT v. Sohail Aslam Pharmacy Ltd.*, 2020 HRTO 419 (criminal court proceedings).
- [37] *De Lottinville*, 2015 ONSC 3085, at para. 71 (including labour arbitrators).
- [38] *Baghdassarians*, para. 20; *Blackman v. Ontario*, 2009 HRTO 970, paras.5-7; *Solcan v. Kitchener (City)*, 2011 HRTO 2205, para. 44; *Amorim v. Toronto Transit Commission*, 2023 HRTO 677, para. 7.
- [39] *Baghdassarians*, at para. 19; *SS v. Durham District School Board*, 2023 HRTO 404, at para. 12.

[40] *McKenzie v. Hamilton (City)*, [2020 HRTO 397](#), at [para. 5](#); *Elefteratos v. Toronto District School Board*, [2020 HRTO 313](#), at [para 19](#), *Risen v. Maple Leaf Sports and Entertainment Partnership*, [2020 HRTO 120](#), at [para. 7](#); *Melville*, [2012 HRTO 22](#), at para. 11. See also *Tessier v. North Bay (City)*, [2018 HRTO 1097](#), at [para. 13](#), *Clark- Lernout v. St. Mary's General Hospital*, [2018 HRTO 1030](#), at [para. 9](#).

[41] *Horrocks* at para 33.

Tab 67

Roosma v. Ford Motor Co. of Canada Ltd., 1988 CanLII 5633 (ON SCDC)

Date:	1988-08-22
File number:	1203/87
Other citations:	66 OR (2d) 18 — 53 DLR (4th) 90 — 29 OAC 84 — [1988] OJ No 3114 (QL)
Citation:	Roosma v. Ford Motor Co. of Canada Ltd., 1988 CanLII 5633 (ON SCDC), < https://canlii.ca/t/gc466 >, retrieved on 2025-10-28
Most recent unfavourable mention	Fox v. Registered Nurses' Assn. of Nova Scotia , 2002 NSCA 106 (CanLII) [...] [10] After carefully considering Roosma , I have concluded that it is distinguishable . [...]

Ontario High Court of Justice, Divisional Court

Citation: Roosma v. Ford Motor Co. of Canada Ltd.

Date: 1988-08-22

Reid, White and Bowlby JJ.

Counsel:

R.G. Juriansz, for appellant, Ford Motor Company of Canada Ltd.

L.A. MacLean, Q.C., for appellant, National Automobile and Agricultural Implement Workers of Canada (CAW-Canada), Local 707.

M.D. Lepofsky, for respondent, Ontario Human Rights Commission.

The judgment of the court was delivered by

[1] REID J.:—

The motion to quash

[2] We have before us a motion to quash two appeals. The appeals are brought by Ford and the union from preliminary rulings made by a board of inquiry appointed by the Ontario Human Rights Commission (the Commission) under the Ontario *Human Rights Code*, 1981, S.O. 1981, c. 53 (the Code), to hear and determine complaints of discrimination by Roosma and Weller. It is the position of the Commission that the court has no jurisdiction to entertain the appeals because the rulings are not final but merely

interlocutory, and s. 41 of the Ontario *Human Rights Code*, 1981, on which they are based provides for appeals against final decisions or orders only.

Background

[3] At the time, complainants were assembly-line workers employed by Ford at its Oakville plant who converted to the Worldwide Church of God which requires its members to refrain from work during a sabbath from sundown Friday to sundown Saturday. This posed a problem. The terms of their employment, as reflected in the collective agreement between the union and Ford, required employees to work day and night shifts alternating every two weeks. Thus, complainants would be required to work two Friday night shifts in each four-week period.

[4] Complainants objected, and discussions occurred with Ford and the Union. Complainants allege that they offered to work extra hours at different times than Friday evenings, but Ford had refused to alter its rotating work schedule to accommodate them, and the union had refused to support a grievance on the ground that that would be inconsistent with the collective agreement. The dispute was not resolved. It led to complaints to the Commission by Roosma and Weller in January, 1985, on the ground that they had suffered discrimination in employment because of their creed. That in turn led to the appointment of Professor Peter Mercer of the Faculty of Law, University of Western Ontario, as a board of inquiry, under s. 37 of the Code.

[5] A hearing was convened on August 18, 1987. At the outset, a number of preliminary objections were made by Ford and the union. Professor Mercer disposed immediately of two of them on consent. One was to recognize a change in the name of the union. The other was dismissal of the complaints against named individuals, officials of the union and Ford, on the ground that their acts done were their employer's.

[6] Three others, however, consumed two days of argument and ended in an adjournment. Professor Mercer's rulings were released on November 20, 1987. The resumption of the hearing was twice deferred thereafter to give Ford and the union time to consider appealing, and led to these appeals being launched in December, 1987.

Appeal stays the inquiry

[7] It was accepted by Professor Mercer and all parties that an appeal automatically stays the inquiry. That is the effect of s. 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, (the S.P.P.A.), which reads:

25(1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

[8] In contrast, s. 25(2) reads:

25(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2(1) of the Act is not an appeal within the meaning of subsection (1).

[9] Thus, had the appellants chosen to move for judicial review instead of appeal, the inquiry could have proceeded: see *Re Cedarvale Tree Services Ltd. and Labourers' Int'l*

The preliminary issues

[10] The three preliminary issues raised by Ford and the union were:

- (a) that s. 10(a) of the *Human Rights Code, 1981*, did not impose a duty of reasonable accommodation;
- (b) that the union could not be joined as a respondent allegedly in violation of ss. 4(a), 8, and 10 of the Code;
- (c) that the complaints did not adequately allege a violation of the Code by the union.

The rulings

[11] Professor Mercer's rulings were that:

- (a) s. 10 of the Code imposes a duty of reasonable accommodation, short of undue hardship, where a respondent has committed constructive discrimination;
- (b) ss. 4, 8, and 10 of the Code can allow for a complaint of employment discrimination against a union;
- (c) the complaints do disclose causes of action against the union.

[12] The effect of these rulings was to continue the inquiry, and the participation of both Ford and the union as respondents in it.

[13] The Commission moved without success in April to have the stay lifted. I shall return to this.

The Ontario Human Rights Code

[14] The basis for an appeal against a decision or order of a board of inquiry is s. 41 of the Code. The relevant parts read:

41(1) Any party to a proceeding before a board of inquiry may appeal from a decision or order of the board to the Divisional Court in accordance with the rules of court.

• • • • •

(3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board of inquiry or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

[15] The question is, should "decision or order" be read to mean "final", as the Commission contends? Or should it be read to mean "any" decision or order, which would include interlocutory decisions or orders, as appellants contend?

[16] It is a truism that words in a statute must be interpreted in the context of the whole statute. Broadly speaking, the Code is human rights legislation designed to effect the expeditious disposition of complaints of discrimination on various grounds including race and religion. Persons who believe their equality rights have been infringed may file a complaint with the Commission established under the Code: s. 31. Thereupon, the Commission is required to investigate the complaint and attempt to achieve a settlement, subject to its right to reject the complaint on one or another of such grounds as that it is frivolous or outside the Commission's jurisdiction: ss. 32 and 33. Should the Commission deem it appropriate and the evidence warrants one, the Commission may request the responsible Minister to appoint a board of inquiry: s. 35.

[17] On receipt of a request, the Minister shall appoint a board, which, according to s. 38, "shall hold a hearing to determine" whether a right of the complainant had been infringed, who infringed it, and what action is appropriate. The hearing must be commenced within 30 days of the appointment (s. 38(1)), and the board "shall make its finding and decision within thirty days after the conclusion of its hearing": s. 40(7). The Commission has carriage of the complaint in the hearing before the board: s. 38(2).

Powers of a board of inquiry

[18] The board is given a number of specific order-making powers, where it finds, after a hearing, that the Code has been infringed. They include the power (in s. 40) to direct a party found to have contravened the Code to comply with it, the power to order restitution for loss, or to make a monetary award for mental anguish. It may order a frivolous complainant to pay costs. A board is required to "make its finding and decision" within 30 days of the hearing: s. 40(7).

[19] I have stated the Commission's position. It is that the court has no jurisdiction to entertain an appeal from other than a final decision or order of the board. The position of the respondents is to the contrary, though their arguments differ somewhat. The union submits that s. 41 provides an appeal from any decision of a board of inquiry. No more than a moment's reflection is needed to reveal the startling consequences that would follow if this construction were adopted. Any decision, however trifling, could be appealed at any stage of the hearing by any party. Successive appeals could be launched without limit. Each appeal would bring the inquiry to a stop.

[20] If that were possible in trials in the courts, we would be presented with the spectacle of parties scuttling back and forth between trial courts and this court or the Court of Appeal, with the judge, and jury perhaps, left to twiddle their thumbs while counsel are at Osgoode Hall. It is an unattractive prospect.

[21] A respondent to an appeal may apply to have lifted the automatic stay imposed by the *Statutory Powers Procedure Act*. That would, however, involve delay and substantial expense not only for the moving party but for all parties. The mover could have no assurance that the effort would succeed. Courts are reluctant to lift statutory stays, in my opinion properly, for any other approach could render nugatory s. 25 of the S.P.A. An illustration of that attitude occurred in this case. A motion was made to the Divisional Court to lift the stay last March. It failed. The inquiry remained in limbo while the appeals wound their way up the list in this court.

[22] The chronology of this case is illustrative. Professor Mercer's rulings were published to the parties in November, 1987. The appeals by Weller and Roosma were launched on December 16th and 18th respectively. In accordance with the Rules of Civil Procedure, O. Reg. 560/84, appellants had 30 days from filing of the notice of appeal to

perfect an appeal. They were not, however, perfected by January 18, 1988. If they had been, they should have been heard by late April or early May, 1988. Instead, they hung fire, and were never perfected. Finally, the Commission launched a motion to quash by notice dated March 28, 1988. It bore a return date before a single judge of this court of April 18th, a date that must have been set by the registrar in accordance with the existing list. The motion was heard by the Honourable Mr. Justice Galligan. In reasons released on April 20th [summarized in [1988 CanLII 10284 \(FC\)](#), 9 A.C.W.S. (3d) 317], he decided that the appeals involved a question of such importance that they merited the consideration of a full panel of the court, ordered that the appeals be expedited, and that the motion before him be adjourned to be heard by the full panel on July 4th, the date it came on before us. In fact, no certificate of perfection had been issued by that date:

[23] Galligan J.'s reasons are noteworthy. He said, in part:

My first impression was that the appeals should be quashed because it does not seem to me that the right of appeal to the Divisional Court should encompass preliminary decisions or other decisions or orders made during the course of an inquiry. However, counsel brought to my attention the opinions expressed by my brother Barr in the case of *Bhadauria v. Toronto Board of Education* (December 9, 1987 [summarized in 7 A.C.W.S. (3d) 300], and February 9, 1988). In circumstances which appear to me to be indistinguishable from these motions, Barr J. refused to quash an appeal or grant a stay because he was of the opinion that the general policy of whether or not appeals from decisions such as these are authorized by s. 41(1) of the Code was of sufficient importance to be considered by a full panel of this court.

Sharing the view of Barr J., he directed that the appeals be expedited and adjourned the motion to quash to the court hearing the appeal.

[24] The appeals have thus consumed over six months to no purpose. The effect has been simply stalemate. Events, however, have not stood still. After the complaints were filed, complainants were subjected to progressive discipline for failing to work on the required Friday night shifts. During the adjournment while respondents pondered an appeal, Ford fired Roosma for failing to work on his sabbath. After the initiation of the appeals, Ford imposed a 28-day suspension on Weller for the same reason. As of March last, Weller had been warned by Ford that the next disciplinary step would be his dismissal. The lapse of time has thus not been to the advantage of the complainants. Whether the threat to fire Weller has been realized we were not told.

[25] There has certainly been undue delay here but even without it the time for the disposition of an appeal can be substantial. Under the Rules of Civil Procedure, a party has 30 days to serve a notice of appeal, 10 days thereafter to file it, and 30 days further to perfect it: rules 61.04 and 61.08. The present period between perfection and hearing in this court is about three months. It has been longer in the past, up to six months, and may be again. Thus, even in a case where the time requirements are observed, the delay may be easily four months. It is unfortunately the case that, as here, the time requirements are not always observed.

Delay is at odds with the rationale for the appointment of tribunals

[26] The traditional rationale for the establishment of administrative tribunal is cheapness, expedition, and expertise. The objectives are freedom from what is popularly seen as the undue delay and cost of court proceedings and the inexpertise of judges trained in the law but not in matters of social improvement. Why then, would the

legislature build into the procedure for an inquiry under the Ontario *Human Rights Code*, 1981, a stumbling block that could bring everything to a halt at any party's whim? If any party can appeal any ruling at any time, and freeze the inquiry until all appeals had been disposed of, the prospect of speedy and inexpensive resolution of human rights complaints becomes an illusion, if not a nightmare. I do not suggest that the appeals before us were launched simply for the purpose of achieving delay, but that has been their effect. The proposal of the union on this motion could have the effect of stultifying the Code. If one appeal failed a second could be launched when the, possibly forced, opportunity arose, and another thereafter, and so on. The result would be stalemate.

[27] Thus, even if there were nothing in the statute to reveal that the legislature had expedition in mind, it is a reasonable assumption from general considerations relevant to the appointment of tribunals.

The Code requires expedition

[28] The Code is, however, not bereft of evidence that the legislature had expedition in mind in the establishment of boards of inquiry. Section 38 explicitly requires a board to commence a hearing to determine a complaint within 30 days of its appointment. Section 10(7) requires that a board "make its finding and decision within thirty days after the conclusion of its hearing". If the legislature were not concerned with expedition, these provisions would not exist.

The context implies finality before appeal

[29] It is also significant that the orders a board is empowered to make may be made only after a hearing and finding that an infringement of the Code has occurred. Section 40(1) reads, in part, "Where the board of inquiry, after a hearing, finds that a right of the complainant under Part 1 has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order...", require compliance with the Code, direct restitution, prevent repetition of an infringement, and award costs where a complaint proves to be frivolous or has caused undue hardship. Thus, there may be no appeal from an order until after such a hearing and finding. That is a final order. It is difficult to understand why a "decision" should be interpreted differently. It is also worth observing that none of the three rulings could be classified as orders within the framework of s. 40. If they are appealable at all, it must be on the basis that they are decisions, but, if the foregoing conclusion is accepted, that would render them unappealable.

Only final decisions or orders are appealable

[30] In my opinion, the reasonable inference based on general premises, on explicit provisions of the Code setting time-limits, and investing the term "orders" with a necessity of finality, is that the legislature did not intend the proceedings of boards of inquiry to be unduly impeded, which would be the inevitable result of the interpretation proposed by the union. Thus, the only reasonable interpretation of s. 41(1) is, in my opinion, that only final decisions and orders may be appealed.

[31] Notwithstanding their reluctance to intervene in the proceedings of tribunals prior to their completion courts will do so in order to avoid wasting time and money. Thus, if it appears at the outset that a proceeding in a tribunal will be fatally flawed, a means exists by way of judicial review to challenge it. That is so even where an appeal is provided. The general rule that the court will not intervene on judicial review where an appeal is provided is inapplicable in such a case because it assumes the proceedings have been

completed. It was open to appellants to have challenged Professor Mercer's rulings by way of judicial review last November if they considered that they were infected with fatal jurisdictional defect. Had they done so, the proceedings both in this court and before Professor Mercer could have gone forward and been disposed of by now. While a judicial review application might take as long to be heard in this court as an appeal, the great difference is that a judicial review application does not automatically bring the tribunal's proceedings to a standstill. The fact that courts will intervene on judicial review where proceedings before a tribunal appear at the outset to be jurisdictionally defective does not permit a court to invent an appeal procedure for interlocutory rulings where none exists.

[32] Mr. MacLean submits that any misuse of the right of appeal may be controlled by the court, in the sense that an automatic stay may be lifted on a respondent's motion. The cases disclose an equal disinclination on the part of the courts to the lifting of a stay as to the grant of one. In my experience, requests for a stay in conjunction with an application for judicial review, and motions to lift an "automatic" stay on appeal commonly present difficulties. Logically, if the decision attacked is right its validity should not be diminished by a stay imposed to await the outcome of judicial review. Similarly, where the legislature has provided an automatic stay on the launching of certain appeals, a respectful deference to the will of the legislature is appropriate. The existence or absence of a stay can make a decision meaningful or meaningless. The imposition of a stay may empty a decision of force. The removal of one may, in the end, prove to have been unwise or unjust. Very compelling reasons must exist before either the decision of a tribunal or a legislative enactment should, in effect, be suspended. On such motions, difficult, delicate, and sometimes imponderable questions must be addressed in a summary way, such as the effect on the parties of a decision to grant or lift a stay, and the prospect of the attack on the decision ultimately failing. Inevitably, the soundness of the decision in question must be considered, for if it appears to be free of any defect no order for the grant or lift of a stay is appropriate. It is extremely difficult on a summary application to weigh the merit of a decision, in particular one that might have been reached after lengthy proceedings that may be difficult to comprehend properly without full and detailed contemplation. It is thus not surprising that courts are reluctant to intervene when asked to impose or lift a stay. Stays remain hard to get and hard to get rid of. The assumption that the court can easily curb the abuse of rights to appeal by lifting a stay because the abuse will be apparent is one that I wish were true. It may be justified where a series of unmeritorious appeals have been launched in respect, say, of one proceeding in a tribunal, but short of that it is not. Abuse of process, although always maddeningly obvious to opposing counsel, is, in my experience, unfortunately not always so easily apparent to judges. The ability to decide, for instance, simply from reading a notice of appeal that it is so lacking in merit that it amounts to an abuse of process is not one that in my experience is given to many lawyers or judges. Courts are generally reluctant to intervene in the business of tribunals, and with their decisions, and the fact that they can is no guarantee that they will. In any event, it is surely better to avoid misuse than to permit it in the hope of curbing it.

Is there an analogy to the rules of court?

[33] It was also submitted that where the legislature intended to differentiate between final and interlocutory orders it did so explicitly, as in the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, and the Rules of Civil Procedure of this court. Under the Act and the Rules, reference is explicitly made to appeals from "final" orders, and "interlocutory" orders. It is thus submitted that when the legislature desires to differentiate between the "final" and "interlocutory" decisions and orders it knows how to do so. It follows, so the argument goes, that where it does not use the epithets "final" and "interlocutory" to modify the terms "decision" and "order" it does not intend to differentiate between them. Thus, the term

"order" comprehends both final and interlocutory orders, and the same may be said for "decision".

[34] I disagree. The addition of the epithets is necessary because the procedure for appeal of a final order is different from the procedure for appeal from an interlocutory order. Coherence requires distinguishing explicitly between the two types, as is found in s. 15 of the Act, where reference is made to appeals to this court from "final" orders and "interlocutory" orders of judges, local judges and masters of the High Court, with different procedures for each. The Code, however, does not provide for different appeal procedures for final and interlocutory decisions and orders or in any explicit way recognize the difference between them, and thus any analogy between the Code and the *Courts of Justice Act, 1984* (and the Rules enacted under it), is in my opinion, not apt. It is not necessary for the Code to do so.

Are these final orders?

[35] The accepted test of a final decision or order depends on its effect, not on the proceedings by which it was achieved. It is final if it disposes finally of a claim or issue. An interlocutory decision does not: see Williston and Rolls, *The Law of Civil Procedure*, vol. 2 (Toronto, Butterworths, 1970), at pp. 1033-4.

[36] Thus, on an interlocutory motion a decision may be made to release a party from the proceedings. That is a final decision because it ends a party's involvement in the proceedings. It is quit of them. But a decision that a party may not be released is not a final one for that party is not quit of the proceedings. This is the accepted test. It should be applied here. None of Professor Mercer's rulings had a final effect. They are not therefore open to appeal, or, putting it another way, this court has no jurisdiction to entertain one.

[37] On behalf of Ford, Mr. Juriansz submitted that whether a decision or order was appealable depended on whether it was one of substance. That would meet the objection to Mr. MacLean's submission that any ruling, however trivial, could be a platform for an appeal but not confine appeals to final decisions or orders. The difficulty with this proposal, in my opinion, is that there is no basis for it in the words of the Code, and it would make it impossible for anyone to tell before an appeal is heard, or at least launched and thus exposed to the prospect of an application to quash, whether something was appealable. I would prefer not to read such uncertainty into the Code, or encourage the outlays of time and money on the proceedings in this court that would be necessary to resolve that uncertainty in individual proceedings in this court that would be necessary to resolve that uncertainty in individual cases.

Rule 61.04(1)

[38] We were asked to consider this rule, which requires that a notice of appeal be served "within thirty days after the date of the order appealed from". The concern was that in a case such as this, where an order was made at the outset of a hearing, an appeal might have to be initiated before a hearing was completed in order to preserve the right to appeal.

[39] In light of this decision, that need no longer be of concern, for a final, and thus appealable, decision or order may be made only after a hearing is complete. The final decision is subject to any infirmity affecting any earlier decision, ruling or order.

[40] I would allow the application and quash the appeals, with costs.

[41] Motion granted.

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Tab 68

Rowe v. College of Nurses of Ontario and al., 2023 ONSC 6414 (CanLII)

Date: 2023-11-17
 File number: DC-22-2755
 Citation: Rowe v. College of Nurses of Ontario and al., 2023 ONSC 6414 (CanLII), <<https://canlii.ca/t/k1579>>, retrieved on 2025-10-28

CITATION: Rowe v. College of Nurses of Ontario and al., 2023 ONSC 6414
DIVISIONAL COURT FILE NO.: DC-22-2755
DATE: 2023/11/17

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Ellies, R.S.J., J.A Ramsay and Leiper JJ.

BETWEEN:

Craig Rowe

Appellant

Self-represented

– and –

The College of Nurses of Ontario and Ministry of Attorney General

Respondent

Megan Shortreed, Douglas Montgomery for
The College of Nurses of Ontario

HEARD: at Ottawa (by videoconference):
November 14, 2023

BY THE COURT (orally):

REASONS FOR JUDGMENT

- [1] Before us today is the Applicant's application for judicial review of the refusal of the Executive Director of the College of Nurses of Ontario to remove the address of his non-nursing employment from the public register. The standard of review is reasonableness.
- [2] The Applicant is a member of the College. He is entitled to practise as a nurse, but he is employed as a security guard in a secure setting for mental health patients. His name and business address are included in the College's register, which is available to the public. He says that his concern is that his patients, upon seeing his employment address, which contains the company name on his uniform, will know that he is the Craig Rowe who is listed on the Register as a nurse. He tells us that the patients often have delusions that make them hostile to nurses.
- [3] The Register is kept under the authority of s.23 of the *Health Professions Procedural Code*, which is Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. Subsection 23(1) requires the Registrar, who in the case of the College of Nurses is the Executive Director, to maintain a register. Subsection 23(2) requires the register to contain the member's name and business address. Subsection 23(6) allows the Registrar to decline to publish the address if the Registrar has reasonable grounds to believe that disclosure may jeopardize the safety of an individual. Subsection 23(7) permits the Registrar to decline to publish the address if the Registrar has reasonable grounds to believe that the information is obsolete and no longer relevant to the member's suitability to practise.
- [4] The Applicant applied to the Registrar to remove his employment address from the register on the ground that he worked in a high security environment and publication of his address could endanger his safety. The Registrar replied that the request would be considered if the Applicant provided documentation to prove his assertion. The Applicant did not provide any such documentation. Instead, he brought this application, arguing that the Registrar acted unreasonably in that the statute does not permit the register to contain information that is irrelevant to the member's suitability to practise and that the College's policy on this issue is unreasonable.
- [5] This court has long taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion: *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 1993 CanLII 3430 (ON SCDC), 11 O.R. (3d) 798 (Div. Ct.), at paragraph 17. The same principle should apply to a decision-maker such as the Registrar. A court has the discretion to hear an application for judicial review while administrative proceedings are still ongoing. For example, judicial intervention may be warranted in situations where the tribunal clearly lacks jurisdiction to proceed, where the decision, although interlocutory in most respects, determines a particular issue, in which a subpoena would be dispositive of

the witnesses' privacy rights; or, where proceeding with the hearing would result in an unfair hearing or a breach of natural justice. Even in those extreme situations, the remedy is discretionary and will be exercised sparingly: *Ontario College of Art*, paragraph 18. No such circumstance obtains here, except perhaps the determination of an issue, but the record is insufficient for us to decide this question. The Applicant should submit documentation to the Registrar to support his request under subsection 23(6) or (7) of the Code. In the event of a refusal, a full record will exist.

[6] The Application is quashed.

[7] The Respondent seeks partial indemnity of \$12,000. The Applicant says that no costs should be awarded because our decision was not dispositive for either side. Taking that into account, we award costs to the Respondent, which was successful in having the Application quashed, in the amount of \$5,000.00, all-inclusive.

Ellies, R.S.J.

J.A Ramsay J.

Leiper J.

Released: 2023-11-17

CITATION: Rowe v. College of Nurses of Ontario and al. 2023 ONSC 6414
 DIVISIONAL COURT FILE NO.: DC-22-00002755-0000
 DATE: 2023/11/17

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Ellies, RSJ, J.A Ramsay and Leiper JJ.

BETWEEN:

Craig Rowe

Appellant

– and –

Respondent

REASONS FOR JUDGMENT

Released: 2023-11-17

Tab 69

Price v. Turnbull's Grove Inc., 2007 ONCA 408 (CanLII)

Date:	2007-06-05
File number:	C45943
Other citations:	85 OR (3d) 641 — 158 ACWS (3d) 825 — 225 OAC 1 — [2007] OJ No 2177 (QL) — 58 RPR (4th) 1
Citation:	Price v. Turnbull's Grove Inc., 2007 ONCA 408 (CanLII), < https://canlii.ca/t/1rpw5 >, retrieved on 2025-10-28
Most recent unfavourable mention	TST-83093-17-RV (Re) , 2018 CanLII 42667 (ON LTB) [...] 6. The Landlord's request for review says that the Member erred in relying on the decision in Price on the grounds that it is distinguishable from the present case, as the issue before the Court of Appeal was whether a landlord can continue to charge an increased rent based on a void rent increase and that the appeal court [...]

Price v. Turnbull's Grove Inc.**85 O.R. (3d) 641**

**Court of Appeal for Ontario,
Cronk, Armstrong and MacFarland JJ.A.
June 5, 2007**

Landlord and tenant -- Residential tenancies -- Rent -- Rent increase imposed without written notice to tenant in accordance with s. 127 of Tenant Protection Act void as opposed to merely unlawful -- Curative provisions of s. 141 of Act not applying to rent increase which is void for non-compliance with notice requirement -- [Tenant Protection Act, 1997](#), S.O. 1997, c. 24, ss. 127, 141.

The landlord imposed a rent increase on the tenant in October 2002 without providing written notice of the proposed rent increase, as required by s. 127(1) of the [Tenant Protection Act, 1997](#). The tenant paid the increased rent until August 2003, when she informed the landlord that she considered the rent to be illegal and that she intended to resume paying the former rent. In September 2004, the landlord filed an application with the Ontario Rental Housing Tribunal seeking to terminate the tenancy and to evict the tenant for non-payment of rent. The application

was granted. The Divisional Court dismissed the tenant's appeal. The tenant appealed to the Court of Appeal.

Held, the appeal should be allowed.

[Section 127\(1\)](#) of the [Act](#), in clear and mandatory language, prohibits a landlord from increasing the rent charged to a tenant unless the tenant has first been provided with at least 90 days written notice of the landlord's intention to effect such an increase. Under s. 127(4) of the Act, an increase in rent is "void" if the landlord has not given the notice required by s. 127(1). By the use of the word "void", the legislature expressed its intention, in plain language, that a rent increase imposed without at least 90 days advance written notice to the affected tenant is of no legal force or effect. Under ss. 141(1) and 141(2) of the Act, an otherwise unlawful rent or rent increase is rendered lawful from and after the first anniversary of the date of the imposition of the rent or rent increase if, by that date, no application has been brought challenging the lawfulness of the rent or rent increase. Thus, a tenant challenge to the unlawfulness of a rent increase is essentially precluded one year from the date that the rent charge or rent increase was first imposed. However, ss. 141(1) and (2) do not apply to a rent increase rendered "void" by virtue of s. 127(4). A rent increase rendered void under s. 127(4) for non-compliance with the mandatory notice requirement of s. 127(1) is not merely unlawful -- it is a nullity. It is as if the increase never occurred. Accordingly, there is nothing to be "saved" by the curative provisions of s. 141.

APPEAL from the order of the Divisional Court (Cunningham A.C.J., Chapnik and Ferrier JJ.), dated April 18, 2006, dismissing an appeal from the decision of the Ontario Rental Housing Tribunal.

Cases referred to *Wolkow v. Dunnell* (1998), [1998 CanLII 4124 \(ON CA\)](#), 40 O.R. (3d) 783, [1998] O.J. No. 3246, 165 D.L.R. (4th) 375, 23 R.P.R. (3d) 12 (C.A.), *consd* Other cases referred to *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 93 C.R.R. (2d) 189, 18 C.P.R. (4th) 289, [2002 SCC 42](#); *Canada Post Corp. v. Key Mail Canada Inc.* (2005), [2005 CanLII 30837 \(ON CA\)](#), 77 O.R. (3d) 294, [2005] O.J. No. 3653, 202 O.A.C. 158, 259 D.L.R. (4th) 309 (C.A.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 422]; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28, 226 D.L.R. (4th) 193, 304 N.R. 76, [2003 SCC 29](#); [page642] *Metropolitan Toronto Housing Authority v. Godwin*, [2002 CanLII 41961 \(ON CA\)](#), [2002] O.J. No. 2514, 161 O.A.C. 57 (C.A.); *North York General Hospital Foundation v. Armstrong*, [2005 CanLII 30699 \(ON CA\)](#), [2005] O.J. No. 3627, 258 D.L.R. (4th) 85 (C.A.), *affg* (2004), [2004 CanLII 13872 \(ON SCDC\)](#), 69 O.R. (3d) 603, [2004] O.J. No. 22, 15 R.P.R. (4th) 295 (Div. Ct.); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 C.L.L.C. Â210-006 (sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.*, *Adrien v. Ontario Ministry of Labour*); *Toronto (City) v. Goldlist Properties Inc.* (2003), [2003 CanLII 50084 \(ON CA\)](#), 67 O.R. (3d) 441, [2003] O.J. No. 3931, 232 D.L.R. (4th) 298, 44 M.P.L.R. (3d) 1 (C.A.) Statutes referred to [Interpretation Act](#), R.S.O. 1990, c. I.11, s. 10 [Rent Control Act](#), S.O. 1992, c. 11, s. 7(5) [Act rep.] [Residential Rent Regulation Act](#), R.S.O. 1990, c. R.29, s. 5(2) [Tenant Protection Act](#), 1997, S.O. 1997, c. 24, ss. 121, 122, 123, 124, 125, 126, 127, 128, 129 [as am.], 130, 131, 132, 133, 134, 135 [as am.], 136, 137, 138, 139, 139.1 [as am.], 140 [as am.], 141, 142, 143, 144 Authorities referred to *Driedger, E.A.*, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983)

Jamie Hildebrand, for appellant.

David Bruder, agent for respondent.

The judgment of the court was delivered by

[1] CRONK J.A.: -- The main question in this appeal concerns the legal effect of a rent increase purportedly imposed by a landlord in respect of a residential tenancy without written notice to the tenant. At issue is the interplay between ss. 127(1), 127(4) and 141 of the [Tenant Protection Act, 1997, S.O. 1997, c. 24](#) (the "Act").

I. Background

[2] Since 1994, the appellant, Marissa Price, has occupied a residential unit in a land lease park community known as Turnbull's Grove. She owns the unit, but pays rent for her occupancy of the land. The land is owned by the respondent, Turnbull's Grove Inc. ("TGI").

[3] The appellant initially lived in her unit part-time. In 2001 and again in the spring of 2002, the then principal of TGI -- Douglas Sheppard -- informed her that if she became a permanent resident at Turnbull's Grove, her rent would be \$179 per month. [page643]

[4] The appellant claims that she began to live in her unit on a permanent basis commencing in about March 2002. However, in a proceeding commenced by TGI for the payment of rent allegedly owing by the appellant, among other relief, the Ontario Rental Housing Tribunal (the "ORHT") found that the appellant's permanent residency began in November 2002.

[5] In May 2002, Sheppard sold TGI to George Land. In October 2002, Land demanded that the appellant pay rent in the amount of \$250 per month commencing November 1, 2002. This resulted in a rent increase of \$71 per month for the appellant.

[6] There is no dispute that Land did not provide any written notice of this proposed rent increase to the appellant.

[7] The appellant paid rent of \$250 per month from November 2002 until August 31, 2003.

[8] In August 2003, the Turnbull's Grove Tenant's Association purchased the shares of TGI from Land, with the goal of creating a not-for-profit community for the benefit of the Association's membership. The appellant initially signed an offer to purchase her unit with the Association, but subsequently withdrew it. At about the same time, she also informed TGI that she would no longer pay what she considered to be illegal rent and that, effective September 1, 2003, she would resume paying rent in the amount of \$179 per month.

[9] On April 16, 2004, the appellant filed an application with the ORHT for the return of rent moneys that she alleged had been collected illegally. The ORHT dismissed her application on the basis that it was statute barred by a one- year limitation period set out under the [Act](#). The appellant did not appeal this decision.

[10] On September 16, 2004, TGI filed an application with the ORHT seeking to terminate the appellant's tenancy and to evict her for non-payment of rent. It also sought to recover as arrears of rent the shortfall between the monthly rent that the appellant paid effective September 2003 and her alleged rent of \$250 per month.

[11] The ORHT granted TGI's application on February 7, 2005. It rejected the appellant's argument that TGI was barred, under s. 141 of the [Act](#), from claiming rent arrears after accepting a lesser amount of rent from the appellant for more than one year. The ORHT also held that the appellant's lawful rent was \$250 per month for the period November 1, 2002 to December 31, 2004 and ordered the appellant to pay rent arrears in the amount of \$1,227.02 in instalments over a period of six months, failing which TGI could apply to the ORHT for an order terminating the appellant's tenancy without notice and requiring her to pay the balance of all rent outstanding. [page644]

[12] The appellant appealed to the Divisional Court. On April 18, 2006, the Divisional Court dismissed her appeal. In a brief endorsement, the court held that:

- (1) there was "ample evidence" before the ORHT to enable it to determine the lawful rent owed by the appellant;
- (2) [section 141](#) of the [Act](#) does not establish a limitation period for landlords seeking to recover arrears of rent;
- (3) TGI's delay in bringing its application before the ORHT was due to the appellant's "misrepresentations about her wish to join the association"; and
- (4) the ORHT's order was "fair and balanced as it related to the interests of both parties".

[13] The appellant now appeals to this court. She argues that the Divisional Court erred: (i) in its interpretation of [s. 141](#) of the [Act](#); (ii) by holding that there was evidence before the ORHT establishing lawful rent in the amount of \$250 per month; and (iii) by finding that the appellant had misrepresented to the Association her intention to join the Association and to purchase her unit at Turnbull's Grove.

[14] TGI filed no admissible materials with this court in response to the appellant's appeal. Nonetheless, we heard oral submissions from its agent, David Bruder, the Treasurer and a director of TGI.

[15] For the following reasons, I would allow the appeal.

II. Relevant Statutory Provisions

[16] The following provisions of the [Act](#) are relevant to the issues in this appeal:

121(1) No landlord shall charge rent for a rental unit in an amount that is greater than the lawful rent permitted under this Part.

.....

122. No landlord shall increase the rent charged to a tenant for a rental unit, except in accordance with this Part.

.....

127(1) A landlord shall not increase the rent charged to a tenant for a rental unit without first giving the tenant at least 90 days written notice of the landlord's intention to do so.

.....

(3) The notice shall be in a form approved by the Tribunal and shall set out the landlord's intention to increase the rent and the amount of the new rent. [page645]

(4) An increase in rent is void if the landlord has not given the notice required by this section, and before the landlord can take the increase the landlord must give a new notice.

.....

129(1) No landlord may increase the rent charged to a tenant or to an assignee under section 17 during the term of their tenancy by more than the guideline except in accordance with sections

.....

141(1) Rent charged one or more years earlier shall be deemed to be lawful rent unless an application has been made within one year after the date that amount was first charged and the lawfulness of the rent charged is in issue in the application.

(2) An increase in rent shall be deemed to be lawful unless an application has been made within one year after the date the increase was first charged and the lawfulness of the rent increase is in issue in the application.

III. Issues

[17] I would frame the issues in this appeal in this fashion:

- (1) What is the interplay between ss. 127(1), 127(4) and 141 of the Act?
- (2) Did the Divisional Court err by concluding that there was an evidentiary foundation for the ORHT's finding that the appellant's lawful monthly rent was \$250 for the period in contention?
- (3) Did the Divisional Court err by making findings of fact that were neither made by the ORHT, nor supported by the evidence?

IV. Analysis

- (1) The statutory interpretation issue

[18] At the outset, I would make three preliminary observations. First, the reasons of the ORHT contain no reference to ss. 127(1) and 127(4) of the Act, nor any explicit mention of the statutory scheme for rent increases set out under the Act. In addition, although the ORHT relied on s. 141(1) of the Act to hold that the legal rent "charged" to the appellant was \$250 per month for the period November 1, 2002 to December 31, 2004 and \$253.75 per month effective January 1, 2005, [See Note 1 below] it made no mention of s. 141(2) [page646] of the Act. Nor did it explain the basis for its conclusion that s. 141(1) -- rather than s. 141(2) -- was engaged in this case.

[19] Second, like the ORHT, the Divisional Court did not refer to ss. 127(1) and 127(4), or to the statutory regime established by the Act for rent increases, in its reasons. In fairness to the Divisional Court, the record before this court does not permit us to discern whether these sections of the Act were drawn to the Divisional Court's attention. These sections, together with ss. 141(1) and (2) of the Act, were the focus of the appellant's argument before this court.

[20] Third, in respect of s. 141, the Divisional Court said only:

On a plain reading of s. 141 of the [Act] it is clear that the provision does not establish a limitation period for landlords seeking to recover arrears. The appellant wrongly asserts that landlords could simply impose unlawful rents then wait out the limitation period to have the rent deemed lawful. In fact a tenant has valid recourse to the [ORHT] subject to s. 141's 1 year limitation period.

.....

As to the issue of estoppel the misrepresentations made by the appellant, the Respondents' [sic] reliance upon them and the statutory amnesty in s. 141 defeat any such claim.

[21] As is apparent from these comments, the reasons of the Divisional Court do not differentiate between ss. 141(1) and (2) of the Act. Thus, it is unclear which of these sections anchored the Divisional Court's reasoning.

[22] Against this backdrop, the appellant makes three related submissions concerning the relevant provisions of the Act. She submits that, absent an express agreement between a tenant and a landlord regarding a rent increase, where a rent increase is implemented in non-compliance with the notice provisions of s. 127(1) of the Act, the increase is void at law by virtue of s. 127(4). Implicit in this submission is the contention that the Divisional Court erred by failing to consider the effect of ss. 127(1) and 127(4) in this case. The appellant next argues that the Divisional Court erred in its interpretation of s. 141 of the Act because s. 141(1) of the Act has no application here and s. 141(2) does not operate to render lawful a rent increase deemed to be void under s. 127(4). Finally, the appellant maintains that, absent a clear indication of a contrary legislative intention -- which the appellant says does not appear in the Act -- ss. 141(1) and (2) should not be construed so as to override s. 127(4) of the Act.

[23] I agree with the appellant that the challenged rent increase imposed by TGI in November 2002 was void by operation of s. 127(4) of the Act and, consequently, that it was of no [page647] legal force or effect. I also agree that ss. 141(1) and (2) of the Act do not operate in this case to render the void rent increase lawful. It follows, in my opinion, that the Divisional Court erred by failing to consider the effect of ss. 127(1) and 127(4) of the Act in the circumstances of this case and by holding, as it appears to have done, that the rent increase attacked by the appellant was deemed to be lawful by virtue of s. 141 of the Act. I reach these conclusions for the following reasons.

[24] The Supreme Court of Canada and this court have frequently cited with approval the following approach to statutory interpretation, as set out in Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at paras. 21 and 23; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29 (CanLII), [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28, at para. 106; *Canada Post Corp. v. Key Mail Canada Inc.* (2005), 2005 CanLII 30837 (ON CA), 77 O.R. (3d) 294, [2005] O.J. No. 3653 (C.A.), at para. 16, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 422.

[25] Under this interpretative approach, the import of ss. 127(1), 127(4) and 141 of the Act must be ascertained by reference to the context in which they appear in the Act, the language employed by the legislature, and the scheme and purpose of the Act.

Purpose of the Act

[26] The purpose of the Act was considered by this court in *Metropolitan Toronto Housing Authority v. Godwin*, 2002 CanLII 41961 (ON CA), [2002] O.J. No. 2514, 161 O.A.C. 57 (C.A.). At para. 19 of that decision, the court described the Act as remedial legislation having a "tenant protection focus". See also *Toronto (City) v. Goldlist Properties Inc.* (2003), 2003 CanLII 50084 (ON CA), 67 O.R. (3d) 441, [2003] O.J. No. 3931 (C.A.), at para. 62. As remedial legislation, the Act must receive "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit": see the *Interpretation Act*, R.S.O. 1990, c. I.11, s. 10. See also *North York General Hospital Foundation v. Armstrong* (2004), 2004 CanLII 13872 (ON SCDC), 69 O.R. (3d) 603, [2004] O.J.

Scheme of the Act

[27] The Act is divided into ten parts. Part VI, which is of particular significance to the issues in this appeal, establishes specific rules relating to rent. These include rules concerning the amount of rent charged (ss. 121 and 122) and lawful rent (ss. 123 to 128), a guideline regarding rent increases (s. 129), agreements to increase or decrease rent (ss. 130 to 134), rent increases or decreases based on statutory or municipal tax-related measures (ss. 135 to 137), applications by landlords or tenants to the ORHT with respect to rent (ss. 138 to 139.1 and 142 to 144), prohibited additional charges (s. 140) and deemed lawful rent (s. 141).

[28] The provisions of the Act, including Part VI, reflect the legislature's aim to balance the rights and obligations of tenants and landlords alike. In this overall context, Part VI of the Act establishes a rent control scheme that is designed to protect tenants from unfair or arbitrary rent charges or increases. Two central features of this scheme are the requirements that the quantum of any rent, including of any rent increase, not exceed amounts permitted under the Act (ss. 121(1), 122 and 129(1)) and that no rent increase be imposed without adequate advance written notice from the landlord to the affected tenant (s. 127(1)).

[29] In connection with the latter notice requirement, s. 127(1) of the Act, in clear and mandatory language, prohibits a landlord from increasing the rent "charged" to a tenant unless the tenant has first been provided with at least 90 days written notice of the landlord's intention to effect such an increase. The consequence of a landlord's failure to satisfy this notice requirement is set out in s. 127(4) of the Act, which provides that an increase in rent is "void" if the landlord has not given the notice required by s. 127(1). Like s. 127(1), s. 127(4) is precise and unambiguous.

Application of Part VI of the Act to this case

[30] In this case, the rent "charged" to the appellant prior to November 2002 was \$179 per month. The principal of TGI at that time, George Land, failed to comply with s. 127(1) of the Act when he neglected to provide the appellant with written notice that her rent was to be increased by \$71 per month to \$250 per month, effective November 1, 2002. In addition, Land failed to give the appellant 90 days notice of the rent increase, as required by s. 127(1). As a result, the November 2002 rent increase was rendered void by s. 127(4) of the Act. [page649]

[31] Sections 141(1) and (2) of the Act, however, deem certain rent to be lawful in specific circumstances. Under s. 141(1), rent "charged one or more years earlier" is deemed to be lawful rent unless an application, in which the lawfulness of the rent charged is in issue, is made within one year after the date that the amount of rent was first charged. In contrast, s. 141(2) is focused on rent increases, rather than rent "charged". It deems an increase in rent to be lawful unless an application, in which the lawfulness of the rent increase is in issue, is made within one year after the date the increase was first charged.

[32] The effect of these saving provisions is to render an otherwise unlawful rent or rent increase lawful from and after the first annual anniversary of the date of the imposition of the rent or rent increase if, by that date, no application has been brought challenging the lawfulness of the rent or rent increase. Thus, a tenant-challenge to the unlawfulness of a rent charge or rent increase is essentially precluded one year from the date that the rent charge or rent increase was first imposed.

[33] Given this statutory scheme regarding rent, the question is whether ss. 141(1) or (2) of the Act apply to a rent increase rendered "void" by virtue of s. 127(4), as in this case. In my opinion, the answer to this question is "no". I say this for several reasons.

[34] First, the word "void" has a well-established legal meaning: it imports a lack of validity or legal force. In *Wolkow v. Dunnell* (1998), 1998 CanLII 4124 (ON CA), 40 O.R. (3d) 783, [1998] O.J. No. 3246 (C.A.), this court considered the meaning of a predecessor section to s. 127(4) of the Act, set out in s. 7(5) of the Rent Control Act, S.O. 1992, c. 11. Like s. 127(4) of the Act, s. 7(5) of the Rent Control Act provided that an increase in rent by a landlord was "void" where the landlord had not given the tenant a notice of the proposed rent increase in the form prescribed by that statute. In considering the meaning of s. 7(5) and of a similar voiding provision contained in s. 5(2) of the Residential Rent Regulation Act, R.S.O. 1990, c. R.29, Austin J.A. stated at para. 12, "In my view, 'void' in those sections means empty, spent and of no effect." He elaborated, at para. 15:

The courts have held consistently that, without notice in accordance with statutory requirements, rent increases are void, in the sense that they are without legal effect and not merely postponed.

(Citations omitted and emphasis added)

[35] The following observations at para. 17 of *Wolkow* are also instructive:

In my view, a fundamental objective of both Acts is to clearly define the amount and the circumstances in which rents may be increased by a [page650] landlord. Consistent with this objective, the legislation provides that a tenant shall be given at least 90 days notice, in the prescribed form, of a landlord's intention to increase the rent. As the Divisional Court held in *Devitt v. Sarochyn*, supra, the purpose of the 90-day period is to allow a tenant sufficient time to accept the increase, or to serve the required 60-day notice to terminate the tenancy.

[36] In my view, by the use of the word "void" in s. 127(4) of the Act, the legislature expressed its intention, in plain language, that a rent increase imposed without "at least" 90 days advance written notice to the affected tenant is of no legal force or effect. This accords with a fundamental purpose of the Act, namely, to control the circumstances in which a landlord may effect a rent increase.

[37] Thus, a rent increase rendered void under s. 127(4) of the Act for non-compliance by the landlord with the mandatory notice requirement of s. 127(1) is not merely unlawful -- it is a nullity. It is as if the increase never occurred. Accordingly, in the case of a void rent increase, there is nothing to be 'saved' by the curative provisions of s. 141.

[38] Second, the conclusion that ss. 141(1) and (2) are not intended to apply to rent increases rendered void under s. 127(4) is reinforced by the fact that s. 127(4) admits of no exceptions. It is not expressed to be subject to s. 141. Likewise, ss. 141(1) and (2) contain no language evidencing an intention that they apply to rent increases affected by s. 127(4). If the legislature had intended that a void rent increase could acquire legal validity under ss. 141(1) or (2) by the mere passage of time it may be assumed that this intention would have been expressed clearly. The legislature did not do so.

[39] Third, the conclusion that ss. 141(1) and (2) have no application to void rent increases is consistent with the protectory goals of Part VI of the Act. As I have indicated, one of the primary aims of the rent control scheme established by the Act is to shelter tenants from arbitrary, peremptory, or unjust rent increases. For this reason, the Act emphasizes the need for advance written notice of a proposed rent increase. The purpose of this notice requirement is to ensure that tenants affected by a proposed rent increase are afforded sufficient time to make informed decisions about their housing circumstances where a landlord seeks to raise their rent.

[40] Section 127(4) of the Act underscores the fundamental importance of this notice requirement by rendering void rent increases imposed without such notice. The critical statutory purpose of the s. 127(1) notice requirement would be significantly undermined if ss. 141(1) or (2) of the Act were

construed so as to imbue otherwise void rent increases with legal validity notwithstanding non-compliance with s. 127(1). [page651]

[41] Fourth, on the view of the purpose and effect of ss. 127(1) and 127(4) that I hold, as described above, ss. 141(1) and (2) of the Act are not rendered meaningless. Part VI of the Act sets out various rules regarding rent, including, as I have stated, the requirement that the quantum of a rent charge or of a rent increase not exceed prescribed limits. Rent amounts that exceed those limits are unlawful. In my opinion, it is to these types of excessive or 'tainted' rents that ss. 141(1) and (2) are intended to apply. In other words, ss. 141(1) and (2) deem a rent charge or a rent increase to be lawful in certain circumstances where they would otherwise be unlawful. But an "unlawful" rent charge or rent increase is not the same as a "void" rent charge or rent increase. Section 141 is directed to the former, while s. 127(4) is concerned with the latter.

[42] Fifth, while Part VI of the Act prohibits various conduct in respect of rent and rent increases, only conduct concerning a rent increase that offends s. 127(1) renders the increase void under Part VI. This signifies the importance of the s. 127(1) notice requirement to the rent control scheme established by the Act. For example, rent charged in contravention of s. 121(1) of the Act -- rent in an amount that is greater than the lawful rent permitted under Part VI of the Act -- is not deemed to be void under Part VI of the Act. This type of 'tainted' rent charge, therefore, could be subject to the remedial effect of s. 141(1) of the Act in a proper case. Similarly, where proper notice of a proposed rent increase is given in conformity with s. 127(1) of the Act, but the amount of the proposed increase exceeds the permitted increase prescribed by the guideline under the Act -- in contravention of s. 129(1) of the Act -- s. 141(2) may be engaged.

[43] The Divisional Court indicated that s. 141 affords a "statutory amnesty" to landlords after the expiry of one year from the date of the imposition of a rent charge or a rent increase. I agree, subject to the following important caveat. This amnesty applies only to an unlawful rent charge or rent increase and only then where the conditions set out in ss. 141(1) or (2) are met. It does not apply to a rent increase rendered void under s. 127(4).

[44] Finally, to the extent that there is any ambiguity regarding the interplay between ss. 127(1) and 127(4) of the Act, on the one hand, and ss. 141(1) and 141(2), on the other hand, the tenant-centred focus of the Act requires that these sections be interpreted in a manner that furthers the protective objects of the Act. This both facilitates the achievement of the legislature's goals in enacting the Act and, in accordance with well-established rules of statutory interpretation, minimizes the potential for conflict between ss. 127(1), 127(4) and 141. [page652]

[45] I therefore conclude that the rent increase imposed by TGI in November 2002 was void by virtue of s. 127(4) of the Act for non-compliance with the mandatory written notice requirement of s. 127(1). This type of deficiency cannot be cured by the invocation of ss. 141(1) or (2). Importantly, before this court, no argument of laches or estoppel is put against the appellant. I do not wish to be taken as suggesting that such an argument could not arise in a proper case, arguably to preclude tenant reliance on s. 127(4) of the Act many years after an unchallenged imposition of a rent increase implemented in non-compliance with s. 127(1) of the Act. But that is not this case. Accordingly, in this case, the challenged rent increase was of no force or effect from the date of its imposition.

(2) Other issues

[46] Given my conclusion that the November 2002 rent increase at issue had no legal validity, I would allow the appeal on this ground alone. It follows that it is unnecessary to address the other grounds of appeal advanced by the appellant.

V. Disposition

[47] For the reasons given, I would allow the appeal. I do not regard this as an appropriate case for an award of the costs of the appeal.

Appeal allowed.

Notes -----

Note 1: The appellant's rent was increased to the monthly amount of \$253.75 effective January 1, 2005 in accordance with a written notice of a 1.5 per cent rent increase delivered by TGI to the appellant.

1300

Tab 70

Wilfrid Laurier University (Re), 2019 CanLII 104373 (ON IPC)

Date: 2019-10-28
File number: PO-4001-R; PA16-460; PO-3914
Citation: Wilfrid Laurier University (Re), 2019 CanLII 104373 (ON IPC), <<https://canlii.ca/t/j3769>>, retrieved on 2025-10-28

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

RECONSIDERATION ORDER PO-4001-R

Appeal PA16-460

Order PO-3914

Wilfrid Laurier University

October 28, 2019

Summary: This reconsideration order dismisses the appellant's request for reconsideration of Order PO-3914, in which the adjudicator partially granted the appellant's request for waiver of a fee estimate exceeding \$10,000. In that order, the adjudicator found that a 20% waiver of the fee estimate is fair and equitable in the circumstances. In this reconsideration order, the adjudicator finds that the appellant has not established any ground for reconsideration of Order PO-3914.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, as amended, sections 52(13) and 57(4).

OVERVIEW:

[1] This order addresses the appellant's request for reconsideration of Order PO-3914, in which I partially granted the appellant's request for waiver of a fee estimate issued by Wilfred Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the Act).

[2] The appellant, the president of a registered charitable organization, had filed a request under the *Act* on the charity's behalf for access to all records relating to a named project that was the subject of an agreement between the charity and the university. After locating a representative sample of records responsive to the appellant's request, the university issued a fee estimate of \$10,388.80 to process the request. The appellant appealed the university's denial of his request for a waiver of the fee. In Order PO-3914, I took into consideration various factors, including the breadth of the request, the large number of responsive records, and the appellant's evidence of financial hardship, in concluding that a small fee waiver would be fair and equitable in the circumstances. I ordered the university to reduce its fee estimate in accordance with my assessment that a 20% fee waiver would represent a reasonable allocation of the burden of the cost of the request between the appellant and the university.

[3] The appellant now asks for reconsideration of Order PO-3914 on the grounds that it did not have the opportunity to respond to the university's initial or subsequent representations, that I relied on evidence that was obtained from sources other than the parties to the appeal, and that no rationale was provided for the decision to reduce the amount of the fee by 20 per cent. The appellant also requests that the matter be transferred to another adjudicator for a new decision.

[4] For the reasons that follow, I conclude that the appellant has not established any of the grounds for reconsideration of Order PO-3914. I deny the reconsideration request.

DISCUSSION:

Does the request for reconsideration meet any of the grounds for reconsideration in section 18.01 of the *Code of Procedure*?

[5] Section 18 of the IPC's *Code of Procedure* sets out this office's reconsideration process. Sections 18.01 and 18.02 address the grounds for reconsideration of an order or decision of this office:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- a) a fundamental defect in the adjudication process;
- b) some other jurisdictional defect in the decision; or
- c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[6] This office has recognized that a fundamental defect in the adjudication process may include: a failure to notify an affected party;^[1] a failure to invite representations on the issue of invasion of privacy;^[2] and a failure to allow for sur-reply representations where new issues or evidence are provided in reply.^[3] These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[7] The reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision. Mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code*.^[4]

[8] I will first consider the appellant's request that the matter be transferred to another adjudicator for a new decision. The appellant submits that this is necessary in order for the appellant to have confidence in the decision and the decision-making process.

[9] Section 18.08 of the IPC's *Code of Procedure* states:

The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

[10] The appellant has not provided a reasonable basis for departing from the IPC's usual procedure for responding to reconsideration requests. To the extent the appellant may be alleging bias in decision-making, this may be a ground for finding that there was a fundamental defect in the adjudication process, or a jurisdictional defect that voids the decision.^[5] However, the appellant provides no evidence to displace the presumption that a tribunal member will act fairly and impartially.^[6] The test for disqualification of a decision-maker is whether there exists a "reasonable apprehension of bias." Actual bias need not be proven. However, the apprehension of bias must be a reasonable one, and the grounds for this apprehension must be substantial.^[7] The reasons given by the appellant fail to establish a reasonable apprehension of bias, or any other ground for a change of adjudicator.^[8]

[11] I will go on to consider the appellant's other arguments made in support of the reconsideration request.

That the adjudicator forwarded the appellant's submissions to the university but has not provided the appellant with similar opportunities to comment on the university's initial submissions or any subsequent submissions

[12] I understand the appellant to be alleging a denial of procedural fairness in not having had an opportunity to see or to respond to the university's initial or follow-up representations in this appeal. Such a breach could qualify as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*. In this case, however, I find no basis for the appellant's claim of procedural unfairness.

[13] The record before me establishes that the adjudicator who initially had carriage of the appeal commenced an inquiry into this matter by first seeking representations from the university on the issues under appeal. The adjudicator then sought the appellant's

representations on the issues by providing him with a Notice of Inquiry summarizing the facts and issues under appeal, and a complete copy of the university's representations. The appellant provided representations in response.

[14] During the inquiry process, the appeal file was transferred to me. I decided to seek reply representations from the university, and for this purpose provided the university with certain portions of the appellant's representations on consent of the appellant. I received reply representations from the university. Because the university's reply representations largely reiterated arguments made in its initial representations and did not raise new issues or evidence, I decided that it was unnecessary to share these with the appellant for a further reply.

[15] My decision not to share the university's reply representations with the appellant is not evidence of a breach of procedural fairness. While each party to an inquiry has a right to make representations to this office during the inquiry, there is no right to have access to or to comment on representations made by the other parties [section 52(13)]. Although this statutory provision must be read in the context of a common law right to procedural fairness, in this case, the appellant was given the opportunity during the inquiry process to make representations addressing both the issues under appeal and the university's evidence in support of its position on the issues, and he did. I am not satisfied that there was any prejudice to the appellant because he was not given an opportunity to see or to make further representations in response to reply representations that raised no new issues or evidence.

[16] I conclude that this argument does not disclose a fundamental defect in the adjudication process, or any other basis for reconsideration of Order PO-3914.

That information was used in making the decision that was obtained from sources other than the university or the appellant

[17] The appellant objects to my reference in the order to certain publicly available material without notice to the appellant. To place this reference in context, I reproduce the entirety of paragraph 44, in which the disputed sentence and footnote appears. The disputed portion of this paragraph is underlined below:

The appellant has not specified what proportion of its grant and donation revenue is received specifically for the purposes of the project (or received without directions about its use), and so is available for project-related uses. However, its recent financial statements show that the appellant spent nearly 80% of its charitable program expense budget that year on the project (over \$257,000 of its total program expenses of over \$322,000), with the remaining budget allocated between six other projects. This indicates that a significant proportion of the appellant's grant and donation revenue was available that year for the purposes of the project. I also find it reasonable to expect that the appellant will continue to receive grant and donation revenue for this purpose. The appellant has not suggested that its recent financial statements reflect an atypical pattern of income or spending. Publicly available information indicates that the appellant is continuing with the project without the university's involvement, and is currently soliciting donations for that purpose [footnote states: "This information appears on the appellant's profile on an online fundraising website."].

[18] Paragraph 44 sets out my findings on the appellant's claim that the appellant's charity is impecunious for the purposes of this appeal because, among other reasons, the charity is restricted in the way in which it can use its grant and donation revenue. The appellant stated that, for example, any funds obtained through a grant may only be used for the purposes set out in the grant application, and that donations received for specific purposes, such as for a particular project, cannot be used for any other purpose, activity or project.

[19] In paragraph 44, drawing from evidence supplied by the appellant, including a statement of revenue and expenses for the fiscal year ending June 2017, I observed that a significant proportion of the charity's reported revenue appears to be available for the purposes of the project that is the subject of the appellant's access request. I also observed that the appellant had not provided evidence to suggest that this pattern of income and spending has materially changed from that time. Ultimately, I was not persuaded by the appellant's claim that it has no funds with which to pay the fee estimate. I considered this factor, and others, in concluding that a small fee waiver (rather than a full fee waiver) would be fair and equitable in the circumstances.

[20] The appellant suggests that my decision was materially based on independently obtained information, and that my failure to notify the appellant of my independent research is a ground for reconsideration of the order. I do not agree.

[21] First, I do not agree that independent research was a material basis for my decision in Order PO-3914. The publicly available information to which I refer in paragraph 44 is taken from the profile of the appellant's charity hosted on the website of a registered public foundation that provides an online fundraising platform and other services for charities across Canada.^[9] The profile includes revenue and expenses information that the charity reported to the Canada Revenue Agency as part of its obligations as a registered charity, and includes more recent financial information than that provided with the appellant's representations. Based on information from this public source, I observed that the appellant's charity continues to solicit donations for the project. This was one consideration, but not a determinative one, in my finding it reasonable to expect that the appellant's charity would continue to have available to it a comparable level of funds for project purposes as that reflected in its financial statements from 2017.

[22] I also do not agree that I was required to notify the appellant before considering this publicly available information in this context. My taking notice of publicly available information from a reputable source is not in itself evidence of a fundamental defect in the adjudication process or other jurisdictional defect in the decision, particularly in these circumstances, where the publicly available information is similar to the information the appellant provided. The appellant has not shown why in this circumstance it amounts to one of these grounds (or other ground) for reconsideration of the order.

[23] I conclude that this argument fails to establish a ground for reconsideration of Order PO-3914.

That no rationale is provided for the decision to reduce the amount by 20 per cent, as opposed to a higher percentage

[24] The appellant argues that I failed to provide a rationale for the decision to reduce the fee estimate by 20 per cent, rather than by another number, such as 90 per cent or

100 per cent. I understand the appellant to be suggesting that the amount of the fee reduction is arbitrary and may be inappropriate.

[25] [Section 57\(4\)](#) of the *Act* makes it mandatory for the head of an institution to waive payment of “all or any part” of a fee if the head determines that it is fair and equitable to do so after consideration of certain prescribed matters.[\[10\]](#) The institution or this office (on review of a head’s decision on a fee waiver request) may decide that only a portion of the fee or fee estimate should be waived.[\[11\]](#)

[26] The *Act* does not prescribe a particular formula for arriving at a determination of what part of a fee ought to be waived. However, the user-pay principle reflected in the *Act*’s fee provisions provides guidance in this exercise. The user-pay principle is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so.

[27] In deciding whether it is fair and equitable in the circumstances to waive all or part of a fee (and, if part of a fee, how much), a decision-maker will have regard not only to the prescribed considerations, but also to the fairness of shifting some or all of the burden of the cost of the request from the requester to the institution—and, by extension, to the Ontario public. In every case, this is a contextual determination based on the particular facts before the decision-maker. In some cases, for example, this office has ordered a partial waiver of only certain components of the fee charged by an institution,[\[12\]](#) or imposed a maximum allowable cost as a component of the fee in ordering a partial fee waiver.[\[13\]](#) In other cases, this office has ordered a percentage reduction (of the total fee) that, in the decision-maker’s view, reflects a reasonable allocation of the costs of the request in the particular circumstances under review.[\[14\]](#)

[28] In this case, after consideration of all relevant factors, including the prescribed factors set out in the *Act*, I concluded that a small fee waiver would be fair and equitable in the circumstances. Specifically, after finding that payment of the fee estimate would cause some financial hardship for the appellant [[section 57\(4\)\(b\)](#) of the *Act*] and that the evidence did not support a fee waiver on the ground of benefit to public health or safety [[section 57\(4\)\(c\)](#)], I stated the following:

Any other relevant factors must also be considered when deciding whether a fee waiver is fair and equitable. I agree with the university that relevant factors in this case include the large number of responsive records and the university’s efforts to respond to the appellant’s broad request in a manner that would address the appellant’s concerns about the large fee estimate. I also accept the university’s submission that a full fee waiver would shift an unreasonable burden of the cost from the appellant to the university. The appellant argues that the university is better placed financially to assume the costs of its broad request, but it does not follow from this that it would be fair and equitable for the university to do so. The fee provisions in the *Act* establish a user-pay principle, and the appellant has not explained to my satisfaction why the university ought to bear the full costs of processing his request while he should bear none. These considerations weigh against finding that a full fee waiver would be fair and equitable in these circumstances.

Taking into consideration all applicable factors, including financial hardship to the appellant, the evidence of some public interest in this matter, the breadth of the request, and the manner in which the university responded

to the request, I conclude that it is fair and equitable in the circumstances to grant the appellant a small fee waiver. In my view, a 20% fee waiver represents a reasonable allocation of the burden of the cost of the request between the appellant and the institution. This results in a revised fee estimate of \$8,311.04 [at paragraphs 49-50].

[29] I do not agree with the appellant that I failed to provide any rationale or evidentiary basis in my order for the decision to grant a 20% waiver of the fee estimate, or with his implied argument that my reasoning in the order could have (or should have) supported a much larger fee waiver.

[30] I conclude that this argument also fails to establish a ground for reconsideration of the order.

[31] For all the foregoing reasons, I find that the appellant has not established any of the grounds for reconsideration of Order PO-3914. I deny the request.

ORDER:

I deny the reconsideration request.

Original Signed By: _____

Jenny Ryu
Adjudicator

October 28, 2019 _____

[1] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

[2] Orders M-774 and R-980023.

[3] Orders PO-2602-R and PO-2590.

[4] Orders PO-2538-R and PO-3062-R.

[5] Order M-1091.

[6] Sara Blake, *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.

[7] Adjudicator John Higgins canvassed the law in this area in Order MO-2227, and in that order applied the reasonable apprehension of bias test in considering an allegation of bias against this office. This office has applied this test in subsequent orders, including Orders MO-2464-R and MO-3642-R.

[8] The appellant also fails to establish that there was a fundamental defect in the adjudication process or some other jurisdictional defect in the decision because of bias on the part of the decision-maker.

[9] CanadaHelps.org.

[10] Sections 57(4) and section 8 of Regulation 460 under the [Act](#).

[11] Order MO-1243.

[12] See, for example, Orders PO-3602 and MO-3441 (partial fee waiver finding upheld on reconsideration in MO-3555-R).

[13] Order PO-3351.

[14] See, for example, Orders PO-3727 and MO-3627.

Tab 71

This is the 2nd declaration of the Appellant, Mr. Kevin A. McLean (BA, JD, CIM) and it was made on November 1, 2025

OIPC File Number: PA25-00294

BEFORE THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Re: The Licence Appeal Tribunal (Number 68 Institution in the Gen Reg.)

IN THE MATTER OF an Appeal, involving a Deemed Refusal Decision, under Appeal Number PA25-00294 under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*"FIPPA"*] and Associated Regulations (see: *Disposal of Personal Information*, RRO 1990, Reg 459 ("*Reg 459*") and *General*, RRO 1990, Reg 460 ("*Reg 460*" or "*Gen Reg*")

In the matter of an Expedited Process appeal before the OIPC under the OIPC's:

- a. Code of Procedure for appeals under MFIPPA and FIPPA (the "Code"), specifically Rule 9; and
- b. Practice Directions, specifically **Practice Direction #13**

In the matter of an Inquiry, authorized under *FIPPA*, Part IV, Appeal, specifically, section 52 of *FIPPA*, as of September 2025 by Case Lead Ms. Sherwood, a delegate of the esteemed Commissioner of the OIPC an expedited inquiry (the "Inquiry (Expedited) Process") (collectively, the "Inquiry Phase")

In the specific matter of an Inquiry that requires all issues to be decided in an Appeal after all evidence has been received pursuant to section 54 of *FIPPA*

DECLARATION #2 OF MR. KEVIN A. MCLEAN (BA, JD, CIM)

I, Kevin A. McLean, disabled, of Toronto, Ontario, declare the following under the penalty of perjury, pursuant to the *Evidence Act* (Ontario) and knowing any statement herein that is a false statement to be an offence:

1. I declare the following facts to be true. Where I have declared information on belief, I cite the source of my belief.

VOLUME #1: EVIDENTIARY MATTERS

2. Now produced and shown to me, appended hereto as **Exhibit "A"**, which is enumerated consecutively from pages 1 to 9, are authentic copies of the following documents:
 - a. Electronic correspondence (emails) directed to the LAT, specifically addressing the LAT Registrar and Ms. Lee, and encompassing subsequent communications within the said email thread to Mr. Weir, the Attorney General, and various representatives of the Attorney General's Office (AGO); and
 - b. My duly consummated submission form, provided to me by the LAT under the auspices of its secure "Sensitive Content Management" portal (the "SCM Portal") with the URL (see: <https://w.deliveryslip.com/>), and formally submitted to the LAT on Monday, October 27, 2025.
3. I affirm that as of Friday, October 31, 2025, I have not been furnished with, nor have I received access to, the "Two Undisclosed Motion Orders" via the SCM Portal or by any other electronic means. It is my profound belief that the LAT persists in a state of non-compliance with its statutory obligations pursuant to the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Tribunal Adjudicative Records Act (TARA)*. I

further depose that the fundamental question of the LAT's failure or neglect to provide a substantive institutional response—as distinct from any purported response from "Tribunals Ontario"—remains an exigent and unresolved jurisdictional issue in this Appeal, presently under the Inquiry (Expedited) Phase. Moreover, the specific issue of the mandatory disclosure of the Two Undisclosed Motion Orders remains, *in esse*, an undecided matter herein.

VOLUME #2: STATUS OF THE APPELLANT'S SUBMISSIONS

4. I am presently in the advanced stages of finalizing a comprehensive written submission, which will substantiate the relief sought in this Appeal. This submission relies axiomatically upon my previously filed documents, including, *inter alia*:
 - a. My Initial Submissions of May 23, 2025 (the “Initial Submissions”);
 - b. My Declaration #1 of September 15, 2025 (“Declaration #1”);
 - c. My Secondary Submissions of August 21, 2025 (the “Secondary Submissions”);
 - d. My then-draft order of September 14, 2025 (the “1st Draft Order”);
 - e. The *void ab initio* response of Tribunals Ontario of October 14, 2025 (the “Void FIPPA Response”); and
 - f. My Tertiary Submissions of October 17, 2025 (the “Tertiary Submissions”).
5. In substantiation of the relief I am seeking, I have prepared a comprehensive record of proceeding (hereinafter “Motion Record”) which, in its current iteration, comprises 72 indexed, tabulated, and consecutively enumerated Tabs. Tabs 8 through 71 contain the legal architecture for my position, referencing applicable statutes, regulations, the *OIPC Code of Procedure*, *Practice Direction #13*, and relevant jurisprudence. Tabs 1 through 6 contain the antecedent documents referenced in the preceding paragraph. Tab 7 contains my formal request form for copies of the Two Undisclosed Motion Orders. It is my conviction that a *lis viva* exists, involving the critical applicability and jurisdictional tension between *TARA* and *FIPPA* as they pertain to the Two Undisclosed Motion Orders, and that this matter encapsulates significant issues of public interest. I verily believe that all antecedent issues remain outstanding, compounded by new issues that have subsequently arisen.
6. I acknowledge that the entirety of the evidence may not yet have been received by the OIPC. From my standpoint, however, all evidence requisite to my position will have been tendered subsequent to the filing of this Declaration #2, the Motion Record, and my comprehensive submissions. To the extent that further evidence is forthcoming to the OIPC, I undertake to provide prompt notification to the OIPC and the Respondent Institution.

VOLUME #3: ALLEGATIONS OF STATUTORY DEFAULT AND *MALA FIDES*

7. As of the date of this declaration, the Respondent Institution, the LAT, has failed to disclose a single record encompassed by my Access Request of March 19, 2025.
8. I allege that the LAT is acting in bad faith (*mala fides*). It is my considered position that the LAT has engaged in a pattern of conduct characterized by, *inter alia*, obfuscation, material omissions, and disingenuous representations.
9. I verily believe that the majority of the records sought within my Access Request, as particularized in the 13 Record Classes, are records essential to my personal health and security. Consequently, it is my belief that compelling circumstances and supervening reasons exist that would mandate their disclosure, notwithstanding the potential invocation of *section 21* of *FIPPA*.

10. I hereby adopt and incorporate the facts articulated in my previously filed submissions as my evidence, where relevant to the matters herein.
11. I do not believe that the persistent non-disclosure of the records sought in my Access Request by the LAT has been an act, or omission, undertaken in good faith.
12. Should the LAT intend to provide any evidence to the OIPC, I shall be seeking a peremptory order compelling it to do so within a strictly stipulated timeframe. Approximately eight months have now elapsed since the Access Request was initiated and the requisite fees remitted to the LAT. It is my profound belief that this OIPC Appeal has not been conducted in the expedited fashion originally contemplated. Furthermore, I believe that had the OIPC granted the relief sought in my Initial Submissions, Secondary Submissions, and the 1st Draft Order, the resultant procedural delays would have been obviated.

VOLUME #4: ANALYSIS OF THE PROCEDURAL HISTORY

12. In my assessment, the chronology of the LAT's claims and representations—gleaned by me only indirectly through Ms. Sherwood's Designation of this Appeal as an Inquiry (Expedited)—is facially problematic and gives rise to serious questions regarding the Respondent Institution's conduct:
 - a. On April 23, 2025, the appellant appealed to the Information and Privacy Commissioner of Ontario (the IPC) when the tribunal failed to issue a decision to the appellant within 30 days of the access request. File PA25-00294 was opened;
 - b. On July 21, 2025, 2025 [sic], the IPC asked the tribunal whether a final decision had been issued and for a response by August 1, 2025. i. The tribunal required assistance from the IPC to identify the appellant's access request;
 - c. On August 8, 2025, the IPC asked the tribunal for a status update, requesting a response by August 15, 2025. i. No response was received;
 - d. On August 20, 2025, the IPC requested a status update from the tribunal on when a final decision could be expected. i. No response was received;
 - e. On August 25, 2025, the IPC asked the tribunal to respond to the IPC's request for a status update by September 2, 2025. i. The tribunal responded that it needed more time to respond to the appellant's access request; f. On September 5, 2025, the IPC asked the tribunal to issue a decision by September 19, 2025. i. On that date, the tribunal advised that it required more time; g. To prevent any further delays, I have decided to conduct an inquiry and issue this Notice of Expedited Inquiry.
13. I observe that on July 21, 2025, I had already filed and served the Initial Submissions, and that the LAT and its head were served with the same via multiple electronic communications. I was, at that juncture, unaware of the communications transpiring between the OIPC and the LAT. It is a matter of significant concern that this OIPC Appeal, despite its designation as "Expedited," was permitted to languish for approximately three months before the OIPC formally inquired of the LAT whether a final decision had been issued. I do not accept the proposition that the LAT required assistance to identify my Access Request, considering it was submitted with payment on March 20, 2025, and subsequently served upon all relevant parties, including those acting *in lieu* of Mr. Weir during his absence in July 2025.
14. I further note that the LAT failed to respond to the OIPC's status requests of August 8 and 20, 2025, during which period there was ostensibly no issue identifying my Access Request. Concurrently, the LAT has neither responded to, nor provided any submissions in contravention of, my Initial Submissions and Secondary Submissions. I note that the statutory time limit for an institutional response, pursuant to *sections 26 and 29 of FIPPA*, is 30 calendar days. A full 30-day period elapsed between July 21, 2025 (the OIPC's first inquiry) and August 20, 2025. A subsequent 30-day period elapsed between August 20, 2025, and September 19, 2025. By September 19, 2025, the LAT had twice requested extensions of time, despite never having invoked its statutory right to a time extension within the initial 30-day period prescribed by *FIPPA* (commencing March 20, 2025). At no material time did the LAT transfer the Access Request to another Institution under

FIPPA or the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, nor did it invoke its statutory right to notify any third party of potential privacy implications arising from disclosure.

15. Notwithstanding the OIPC's designation of this Appeal as an Inquiry (Expedited) on September 29, 2025, which binds both myself and the LAT, we are now in November 2025, and not a single record sought has been produced by the Respondent Institution.

VOLUME #5: CONTEMPLATED RELIEF AND THE COMMISSIONER'S POWERS

17. I observe that the Commissioner's legislative mandate to decide all issues [*plural*] commences only *after* all evidence has been received by the OIPC.
18. I shall be seeking, during this Inquiry Phase, an order that the Commissioner exercise her inquisitorial powers pursuant to *section 52(4)* of *FIPPA* to enter the premises occupied by the LAT for the purposes of this investigation.
19. I acknowledge that the Commissioner must provide statutory notice to the head of the LAT prior to exercising this power of entry.
20. It is my profound belief that the Commissioner should exercise her concomitant powers to summon and examine, under oath, various individuals whom I shall particularize in my forthcoming submissions, entitled "Comprehensive Factum".
21. I note that my Tertiary Submissions constitute "representations" within the meaning of *section 52(13)* of *FIPPA*, and I anticipate receiving the formal representations of the LAT, duly authorized by the LAT or its representative, pursuant to *section 52(14)* of *FIPPA*. Given that the Head of the LAT remains in a state of deemed refusal under *FIPPA*, I submit that the *onus probandi* rests squarely with the Head of the LAT to prove that each and every record sought is subject to one of the specified exemptions. To date, I have not been provided with a single document from the LAT, let alone a decision letter that relies upon a singular statutory exemption to justify its refusal to provide the records sought in my Access Request (encompassing the 13 Record Classes). I note and verily believe that the OIPC must ultimately determine, after all evidence has been received, whether the LAT has discharged its burden on a balance of probabilities. This determination requires assessing whether the LAT has presented clear, cogent, and convincing evidence to a probabilistic standard demonstrating that a specific exemption applies to each record within the 13 Record Classes.

VOLUME #6: DECLARATION

22. I make this Declaration #2 for no improper purpose, on this date of November 1, 2025, and in support of a comprehensive adjudication of all outstanding issues in this Appeal, which has been designated, sequentially, under the Expedited Process, the Inquiry (Expedited) Process, and the current Inquiry Phase.

Digitally signed by
Kevin McLean

Mr. Kevin A. McLean (F.A.D., C.M.) Date: 2025.11.01

DOB: March 25, 1983 16:42:08 -04'00'

Driver's Licence: M165145318363 Adobe Acrobat version:

2025.001.20756

EXHIBIT “A”



Kevin McLean <mrkevinaalexandermcleanbajdcim@gmail.com>

RE: 23-015662/AABS - Kevin McLean - Action Required: Invitation to the Sensitive Content Management (SCM) Service

Kevin McLean <mrkevinaalexandermcleanbajdcim@gmail.com>

Fri, Oct 31, 2025 at 5:07 PM

To: "LATRegistrar (MAG)" <LATRegistrar@ontario.ca>, hannah.lee@ontario.ca

Cc: sean.weir@ontario.ca, david.corbett2@ontario.ca, ryan.freeston@ontario.ca, attorneygeneral@ontario.ca, Tanya.Buraglia@ontario.ca

Dear Sirs/Mesdames/Other Gender-Neutral Pronouns

I write to confirm that it is now past five p.m. and I have not had a response or production in the SCM portal. I confirm the sole auto-reply of Ms. Buraglia. Thank you.

On Fri, Oct 31, 2025 at 11:42 AM Kevin McLean <mrkevinaalexandermcleanbajdcim@gmail.com> wrote:

CLASSIFICATION: Private and Confidential

SENDING METHOD: Via Electronic Transmission

CREATION METHOD: Dictated with Voice Recognition Software (Subject to reserved rights for the correction of any deficiencies in grammar, syntax, salient qualifiers, or improper double negatives.)

Date: Friday, October 31, 2025

To:

The Registrar, Licence Appeal Tribunal (LAT)

Attention: Ms. Hannah Lee, Case Management Officer

Copy to: Mr. Sean Weir, Head of the LAT

Copy to: The Ministry of the Attorney General (MAG)

Copy to: Deputy Attorney General ("DAG" or "DMO") email: david.corbett2@ontario.ca

Copy to: Chief counsel to the DAG or DMO email: ryan.freeston@ontario.ca

Subject I: Follow up regarding the above

Dear Sirs/Mesdames/Other Gender-Neutral Pronouns:

I. Formal Introduction and Adoption of Precedent Definitions

I cordially write regarding the aforementioned Subjects of this correspondence. Grateful acknowledgment is extended *in limine* for the judicious allocation of time and considered attention to this official communication and its appended evidentiary documentation (whether cited by mere reference or physical inclusion, hereinafter collectively referred to as the "**Instrument Set**"). The profound appreciation for the constraints imposed upon finite, yet invaluable, institutional resources serves as the *raison d'être* for the immense preparatory expenditure dedicated to the profound research of the legal issues herein and their scrupulous application to the extant factual matrix.

All definitions, stipulatory pronouncements, and operative terms derived from previously, either indirectly or directly, cited correspondence and instruments are hereby formally adopted *in toto* (hereinafter, the "**Adopted Definitions**").

II. Institutional Precepts, Supervisory Mandates, and the Pursuit of Administrative Resolution

This highly formal missive is respectfully tendered to the Honourable Tribunal concerning an immediate **administrative exigency** predicated upon the required conveyance of essential adjudicative instruments (hereinafter, the "**Motion Orders**"). The substantive necessity for this communication is exclusively

derived from the Tribunal's antecedent, **binding institutional undertaking** (*pacta sunt servanda*) to furnish the aforementioned documentary records.

The present requisition is executed with the **paramount objective** of rigorously conserving the exiguous administrative resources incumbent upon both the Applicant and the Licence Appeal Tribunal, thereby assiduously promoting the fundamental tenet of procedural efficacy. **The inclusion of the Ministry of the Attorney General in this distribution is a regrettable but necessary measure** undertaken to secure comprehensive supervisory accountability and ensure the unimpeded, immediate resolution of this outstanding matter, *pursuant to the General Regulation under the Freedom of Information and Protection of Privacy Act* and the overarching principles of administrative due diligence.

III. Substantiation of Secure Document Repository Status and Administrative Lacuna

Exacting scrutiny has been applied to the dedicated client interface of the Secure Document Transmission Repository, which is formally denominated as the **“W Delivery Slip Account.”** Notwithstanding this meticulous investigative exercise, the Repository's operative module currently manifests a **complete absence of documentary propagation** regarding the instruments in question.

- Sub-Section A: Validation of Account Operability and Precedent

The affirmation of the account's operational integrity is necessitated, *pro tanto*, for the purpose of absolute clarity. This viability is unequivocally substantiated by the antecedent reception of official administrative instruments originating from various Ontario ministries, alongside the Tribunal's own preparatory correspondence, formally styled as the “Welcome Letter with the Checklist for Electronic Submission,” the stipulated requirements of which were duly and timeously satisfied by the Applicant during the current administrative cycle.

IV. Formal Requisition for Adjudicative Instruments and Extrapolation of Legal Principle (*Ab Initio* Requisite)

A **binding institutional commitment**, amounting to a formal legal admission, was previously affirmed by the Tribunal to effectuate the transmission of the two specific Motion Orders conditional upon the Applicant's presentation of the formal Electronic Submission, which has been duly deposited via the designated electronic mail modality. The Applicant notes that this requisition is further substantiated by the *Court Transcripts Practices Standards Manual*, issued by the Ontario Government, effective October 2024 (Enclosure 2), which outlines governmental standards for document dissemination.

- Sub-Section A: Advanced Syllogistic Extrapolation of Binding Legal Principle

The imperative for the immediate production of these two judicial instruments is manifestly self-evident, constituting an *ab initio* requisite that is fundamental to the principled management of the ensuing proceeding. A core syllogism dictates that where a Tribunal is judicially obliged to furnish an Order, and the recipient is procedurally prepared to receive it, any systemic failure to effectuate transmission constitutes a demonstrable administrative lacuna (hereinafter, the “Administrative Lacuna”), which operates *ipso jure* to impair the Applicant's capacity to prosecute the matter effectively. The only conceivable conclusion is that the Tribunal is formally entreated to remit authenticated facsimiles of the two referenced Motion Orders forthwith. The unduly rudimentary and simplistic nature of the delay in providing only two essential records has necessitated this extraordinary and formal level of procedural escalation.

V. Conclusion and Proposition for Administrative Economy

The Applicant respectfully solicits notification regarding the **precise temporal parameters** anticipated for the successful and complete upload of the aforementioned adjudicative instruments to the designated Secure Document Transmission Repository. The prompt provision of the Motion Orders, evidenced by the **Instrument Set** (including *Transcript Order Form*, Enclosure 1) is now paramount.

Such prospective advisement shall operate as a preclusion against the necessity of recurrent, **supererogatory inquiry** and subsequent procedural follow-up, thereby fostering a judicious allocation of administrative resources and ensuring mutual deference for the professional commitments of all involved parties, in strict alignment with the **foundational tenets of administrative and judicial economy**. The Tribunal's prompt and unequivocal compliance with this fundamental administrative demand is anticipated and gratefully appreciated.

Yours most appreciatively and gratefully,

/s/Mr. Kevin A. McLean (BA, JD, CIM)

Mr. Kevin A. McLean (BA, JD, CIM) (he/him)

Enclosures

On Thu, Oct 30, 2025 at 1:15 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:
Dear LAT (Ms. Lee) et al:

Have you provided the requested two motion orders to the SCM portal? Thank you

On Wed, Oct 29, 2025 at 12:20 PM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:
October 29, 2025

To the Honourable Licence Appeal Tribunal

(Attention: Ms. Lee, Registrar's Office)

Subject: Formal Requisition for Two Motion Orders denoted in the attachment pursuant to Case Number 23-015662/AABS

I. Introduction and Procedural Context

This formal correspondence is respectfully tendered in reference to the aforementioned matter, the particulars of which are explicitly denoted in the caption above. The Applicant seeks to compel the immediate production of two specific judicial instruments.

II. Institutional Compliance and Statutory Entitlement

The Applicant observes, *prima facie*, that the transmission of the two specifically requisitioned records—the two Motion Orders—involves a minimal quantum of administrative effort; assuredly, the process of uploading and subsequent dissemination via electronic mail, or via the prospective Strategic Case Management (SCM) Portal (the latter of which remains presently inchoate), should not necessitate a temporal span exceeding a few minutes.

Consequently, to ensure due diligence and secure compliance with the Applicant's inherent entitlements, particularly those enshrined within the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the institutional Head, Mr. Weir, has been included in the distribution roster. This measure is effectuated to guarantee the timely procurement of the aforementioned instruments.

While I note the language in *TARA* regarding the definition of "adjudicative records" (i.e. orders that have been issued), the provision of the Two Undisclosed Motion Orders are by your index provided in February 2025 subject to, *prima facie*, immediate provision and by the law of admissions et al.

III. Requisition for Judicial Instruments and Comity

Notwithstanding any putative administrative expectation or requirement that the Applicant furnish antecedent submissions in a specific *pro forma*, such preliminary correspondence was nonetheless tendered *ex gratia* and in the spirit of procedural comity. The Applicant maintains that the necessity for the production of judicial orders is self-evident, being fundamental to the principled management of the proceeding.

This Honourable Tribunal is thus formally entreated to effectuate the **forthwith** provision of authenticated facsimiles of the two judicial Motion Orders, which were duly promulgated by the Tribunal on the dates expressly designated in the prior indices provided to the Applicant.

IV. Prerogative of Institutional Escalation

In the regrettable and unforeseen event that a definitive communication is not promptly furnished, specifically one that unequivocally addresses the intended mechanism of conveyance—whether by immediate electronic transmission or by subsequent upload to the SCM portal—the Applicant shall, *a fortiori*, proceed to exercise his undisputed and permissible prerogative to engage the appropriate institutional escalation protocols to ensure administrative accountability and prompt resolution of this matter.

I will check the SCM account in the next few hours to see if they have been delivered therein.

The Applicant appreciates the Tribunal's immediate attention to this pressing administrative exigency.

On Mon, Oct 27, 2025 at 11:04 AM Kevin McLean <mrkevinalexandermcleanbajdcim@gmail.com> wrote:

PRIVATE AND CONFIDENTIAL

Date: October 27, 2025

Sending Method: **Via Electronic Transmission ONLY**

Creation Method: Dictated with Voice Recognition Software (Reservation of rights to correct any grammar, syntax, important qualifiers, or improper double negatives)

To: The Licence Appeal Tribunal

25 Grosvenor Street

Toronto, Ontario

Subject I: Requisition for Tribunal Motion Orders Integral to *FIPPA* Appeal

Subject II: Insistence Upon Electronic Modality of Conveyance Due to Privacy Concerns

(the "Subjects")

Dear Sirs/Mesdames/Other Gender-Neutral Pronouns:

I. Formal Commencement and Adoption of Definitions

I cordially write regarding the above **Subjects** of this correspondence. I thank you in advance for your finite yet valuable resources which is why I have taken immense time to research the legal issues herein and apply them to the facts herein. I appreciate your time and consideration of this correspondence and its attachments (by reference or inclusion). I adopt all definitions from previously, indirectly or directly, cited correspondence.

II. Clarification Regarding Modality of Document Transmission

It is incumbent upon me to respectfully controvert the premise, as allegedly posited by the Licence Appeal Tribunal ("**LAT**") in prior discourse, that I explicitly solicited transmission of documentation pertaining to the within matter via the **Tribunals Automated Records Access ("TARA")** system utilizing a physical courier or standard postal delivery method. Furthermore, I must affirm that I have received no tangible documentation subsequent to any alleged dispatch via said modalities.

This clarification is proffered out of an abundance of caution and in a spirit of *bona fides* (good faith), with the objective of ensuring that the factual matrix underpinning our respective positions remains unequivocally accurate and honestly depicted for current or future forensic or administrative exigencies.

III. Requisition for Specific Adjudicative Orders

Pursuant to the foregoing, I have subsequently furnished a formal and unequivocal **Requisition** (the "**Requisition**") for two specific adjudicative **Motion Orders** which I have never seen or received (the "**Orders**"). These **Orders** are germane and integral to my pre-existing application and appeal under the *Freedom of Information and Protection of Privacy Act ("FIPPA")* but nonetheless adjudicative records by your binding admission.

The particulars of the requested **Orders** are formally itemized and enumerated within the attached document, styled as **McLean TARA Request - Two Motion Orders - Applicant - July 24 2025 - August 16 2024 - Mr McLean - 27-Oct-2025.pdf** (the "**Attachment**"), which is hereby incorporated by specific reference.

Upon the prompt and efficacious provision of these **Orders**, the necessity for their continued inclusion on the current roster of outstanding documentation will be *pro tanto* (to that extent) extinguished. I will confirm a safe receipt when they are delivered to me via SCM which casts much doubt on why they were sent via email with a complete absence of email confirmation.

IV. Preclusive, Agreed and Required Preference for Electronic Conveyance

Given the inherent risks associated with physical document transmission to multi-unit dwelling addresses, particularly regarding the potential for the unintended or unauthorized disclosure of **Sensitive Personal Information** (the “SPI”) to a third-party intermediary, such as a concierge, I respectfully implore that you effectuate their transmission **solely** via electronic mail.

This insistence upon electronic conveyance mitigates the substantial privacy risks that would otherwise arise, as the absence of my authenticated signature and physical **(Receipt of Document)** upon delivery via courier or post renders the chain of custody tenuous. The elevated vocabulary and intricate sentence structure herein serve to underscore the gravity of the privacy concerns, which, *res ipsa loquitur* (the thing speaks for itself), demand the most scrupulous adherence to security protocols.

Courtesy and Reservation of Rights

I proffer this correspondence as a courtesy and out of an abundance of caution to ensure that all documents are truly, accurately, and honestly depicted and referenced for current or future purposes.

I reserve the right to rely on this correspondence for any lawful purpose.

Thank you in advance for your anticipated compliance.

Sincerely and Cognitively,

Mr. Kevin A. McLean (BA, JD, CIM)

On Tue, Oct 14, 2025 at 5:02 PM LATregistrar (MAG) <LATregistrar@ontario.ca> wrote:

Good afternoon,

The size and volume of documents filed on 23-015662/AABS are too large to share using email. For this reason, the Tribunal sent an email invitation for you to join the Secure Content Management Service. This application allows the Tribunal to send large files that cannot be sent by email. Please confirm once registration is complete.

This email is to confirm that an invitation to the new Sensitive Content Management (SCM) service will be sent to you shortly. Attached to this e-mail is the registration steps for the new SCM service and if you have not received the SCM invitation by the end of day please check your junk or spam folder before requesting another invitation.

SCM serves as an alternative method for submitting large electronic materials up to 100 GB in size containing confidential, personal, health and financial information. Please note the Tribunal continues to accept submissions through e-file and regular email.

LAT-AABS (Automobile Accident Benefits Service) e-File is the simpler and preferred method to file applications, responses, and other documents up to 35 MB.

Should you have any questions or need assistance, please don't hesitate to reach out to latregistrar@ontario.ca. We are here to support you throughout this transition.

We appreciate your cooperation and understanding during this transition.

Thank you for your continued partnership with us.

Best Regards,

Hannah Lee (Pronouns: she/her) ([learn more](#))

Case Management Officer

Licence Appeal Tribunal

Phone: 647-463-8220

Local 416-326-1356 / Toll free 1-888-444-0240

LATregistrar@ontario.ca

tribunalsontario.ca



Tribunals Ontario

Tribunaux décisionnels Ontario

Confidential message which may be privileged. If received in error, please delete the message and advise me by return email.

Message confidentiel dont le contenu peut être privilégié. Si reçu par erreur, veuillez supprimer ce message et aviser l'expéditeur par retour de courriel.

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

DISCLAIMER

1. *The content of this email is confidential and intended for the recipient specified in message only. It is strictly forbidden to share any part of this message with any third party, without a written consent of the sender. If you received this message by mistake, please reply to this message and follow with its deletion, so that we can ensure such a mistake does not occur in the future.*
2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

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My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

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2. *Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

--

My best regards to you,

Kevin A. McLean (B.A., J.D., CIM)

Chartered Investment Manager

E (personal and confidential): mrkevinalexandermcleanbajdcim@gmail.com

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- 2. Due to being an accident, this email may be dictated in part or full with voice recognition software. Kindly excuse any errors for grammar, syntax or spelling.*

*Required field

Electronic Submission Checklist

*Submitting To: Automobile Accident Benefits Service (AABS)

*Submission Date: 10/27/2025

*Case Title: McLean v. Security National Insurance Company (forme

Case Number: 23-015662/AABS

Contact Information

*Submission By: ApplicantIf Other, please specify:

Address:

Phone #: (647) 370-9354Fax #:

Email : mrkevinalexandermcleanbajdcim@gmail.com

Submissions

*File Name(s)	*Brief Description(s)
2M_-_Motion_Order_20190710	Final.2024-07-24_15_04_56.docx
2M_-_Motion_Order_....	2M_-_Motion_Order-20190710_-Final.2024-08-16_13-26-16.docx

Requirements (Please review Requirements Guideline)	Yes	No	N/A
1. Combine copies of submissions and evidence into a single PDF document	☐	☒	
2. Include page numbers , hyperlinks and bookmarks within PDF document	☐	☐	
3. OCR PDF to make text searchable	☐	☒	
4. If applicable, combine photos into the PDF document	☐	☐	☒
5. If applicable, convert videos to .AVI format	☐	☐	☒

Send confirmation to other party before submitting with SCM

Additional Information

The first document was referenced in an index provided by the LAT which referenced a time of 2024-072-24 at 3:04 p.m.

The second document was referenced in an index provided by the LAT which referenced a time of 2024-08-16 at 1:26 p.m.

Please provide via email or the SCM portal as I already have an account prior to your invitation but thank you nonetheless.

Tab 72

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

NOTICE OF EXPEDITED INQUIRY

Freedom of Information and Protection of Privacy Act
(*FIPPA* or the *Act*)

Appeal Number:	PA25-00294
From Decision of:	License Appeal Tribunal
Date of This Notice:	September 29, 2025
Response Due:	October 14, 2025

This is to confirm that pursuant to section 29(4) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), an appeal has been filed by Kevin McLean (the appellant), who claims that the License Appeal Tribunal (the tribunal or LAT) is in a deemed refusal by not issuing a decision letter within the time period set out in section 26 of the *Act*.

BACKGROUND:

On March 17, 2025, the appellant asked the License Appeal Tribunal (the tribunal) for access under the *Act* to records from the License Appeal Tribunal/Automobile Accident Benefits Service (LAT/AABS) division from December 24, 2023, to January 31, 2025.

On April 23, 2025, the appellant appealed to the Information and Privacy Commissioner of Ontario (the IPC) when the tribunal failed to issue a decision to the appellant within 30 days of the access request. File PA25-00294 was opened.

On July 21, 2025, the IPC asked the tribunal whether a final decision had been issued and for a response by August 1, 2025. The tribunal required assistance from the IPC to identify the appellant's access request.

On August 8, 2025, the IPC asked the tribunal for a status update, requesting a response by August 15, 2025. No response was received.

On August 20, 2025, the IPC requested a status update from the tribunal on when a final decision could be expected. No response was received.

On August 25, 2025, the IPC asked the tribunal to respond to the IPC's request for a status update by September 2, 2025. The tribunal responded that it needed more time to respond to the appellant's access request.

On September 5, 2025, the IPC asked the tribunal to issue a decision by September 19, 2025. On that date, the tribunal advised that it required more time.

To prevent any further delays, I have decided to conduct an inquiry and issue this Notice of Expedited Inquiry.

BURDEN OF PROOF:

Under section 53 of the *Act*, if an institution refuses or is deemed to have refused an access request, the burden of proof in respect of the refusal lies on the institution.

ISSUE:

Is the tribunal in a deemed refusal?

Section 26 of the *Act* outlines the time parameters for an institution to respond to an access request:

Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 25, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof, and where necessary for the purpose cause the record to be produced.

Section 29(4) of the *Act* outlines the circumstances giving rise to a deemed refusal:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

Previous IPC orders have found that a decision to extend the time for responding to a request¹ should be issued within the initial 30-day time limit for responding to a request.

Where a time extension is not claimed, it is expected that, prior to the expiry of the 30-day time limit in section 26 of the *Act*, subject to sections 28 and 57 of the *Act*, written notice will be given to the requester as to whether access to the record or a part thereof will be given and for access to the record to then be given to the requester. This is referred to as a final access decision. If a final access decision is not issued prior to the expiry of this 30-day time limit, the institution would be in a “deemed refusal” pursuant to section 29(4) of the *Act*.

Previous IPC orders have found that issuing a time extension² or an interim decision/fee estimate³ once the 30-day time limit has expired does not cure a deemed refusal.

Based on the information before me, no decision was issued to the appellant within 30 days of the access request, and no decision has been issued to date. Accordingly, it is my preliminary assessment that the tribunal is deemed to have refused the access request.

NEXT STEPS:

The tribunal is asked to issue a final access decision letter to the appellant by October 14, 2025, if it has not already done so.

If the tribunal does not issue a decision letter by **October 14, 2025**, the case lead may issue an order requiring the tribunal to issue a decision letter to the appellant.

Once the tribunal issues a decision letter or an order disposing of the issue raised by the appeal is issued, **this appeal will be closed.**

If the appellant is not satisfied with the tribunal’s decision and decides to appeal, the appellant **must** file a new appeal with the IPC, and a new appeal file will be opened to address any issues raised by this new appeal.

¹ Orders MO-1520-I and PO-2634.

² Orders MO-1777, PO-2595, and PO-2634.

³ Orders PO-2595 and PO-2634.

REFERENCES TO PAST ORDERS:

References to past orders in this Notice of Expedited Inquiry do not reflect any decision of any active issue in this appeal, including the interpretation of sections of the *Act* that may be at issue. Order references are provided to assist you. These past orders reflect determinations based on the facts that were before the decision-makers.