ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J. WILSON, KARAKATSANIS, AND BRYANT JJ.

B E T W E E N:	
MINISTRY OF THE ATTORNEY GENERAL Applicant	*Kim Twohig*, *Heather Mackay* and *Thomas Schreiter*, for the Applicant
- and -	
TORONTO STAR Respondent	No one appear for the Respondent
- and -	
INFORMATION AND PRIVACY COMMISSIONER Respondent	*William Challis*, for the Commissioner
	HEARD at Toronto: December 8, 2009

BRYANT J.:

I. The application for judicial review

[1] Ms. Tracy Tyler, a Toronto Star reporter ("Tyler" or "Requestor"), seeks access to records of communications among the Minister, Deputy Minister and other officials of the Ministry of the Attorney General ("Ministry") about a highly publicized criminal case and the case's movement through the justice system pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA" or "Act"). The criminal proceedings are still before the courts.

[2] The Ministry of the Attorney General brings this application for judicial review of the January 12, 2009 order of John Higgins ("Adjudicator") of the Information and Privacy Commission of Ontario ("IPC"). The order requires the Ministry to produce records, an affidavit and an index to the IPC in order for the IPC to conduct an inquiry under s. 52(4) to determine whether these records are excluded from disclosure under s. 65(5.2) of the Act, and whether other exemptions pursuant to the Act may apply.

II. Background of Proceedings for which Records are Requested

[3] In 1998, members of the Central Field Command ("CFC") drug squad of the Toronto Police Service ("TPS") were investigated concerning alleged misconduct in their capacity as members of the CFC drug squad. In 2001, a Special Task Force was organized to continue the investigation of the officers. By 2003, the Task Force informed the Ministry that the investigation had reached the one-million-page mark. In January 2004, six Central Field Command drug squad officers of the TPS were charged with serious *Criminal Code*, R.S.C. 1985, c. C-46 offences which arose out of investigations conducted by these officers into drug offences while they were members of the CFC drug squad.

[4] On January 31, 2008, Justice Nordheimer of the Superior Court of Justice stayed the prosecution of six officers pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Sch. B to the *Canada Act* 1982 (U.K.), 1982, c. 11: Nordheimer J. found that there had been an inordinate delay in bringing the prosecution to trial (*R. v. Schertzer*, [2008] O.J. No. 330 (S.C.J.)). On October 28, 2009, the Ontario Court of Appeal set aside the stay of the proceedings and ordered a new trial with respect to five officers (*R. v. Schertzer*, 2009 ONCA 742, [2009] O.J. No. 4425) ("*Schertzer*, 2009").

[5] This case has received extensive coverage in the media. As a result, the prosecution has become a matter of considerable public interest.

[6] Tyler requested access to records of communications about the movement of the case through the justice system from 1998 to date.

III. The Relevant Legislation

[7] Section 52(4) of the Act provides as follows:

> 52(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.

[8] Section 65(5.2) of the provides as follows:

> 65(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.

IV. A Statement of the Issues

[9] The issues raised are as follows:

1. Is the application for judicial review premature?

2. What is the appropriate standard of review of the Adjudicator's interpretation and application of s. 65(5.2) of the Act?

3. Did the Adjudicator err in his interpretation and application of s. 65(5.2)?

4. What is the appropriate standard of review of the Adjudicator's order made pursuant to s. 52(4) of the Act?

5. Was the Adjudicator's discretionary order pursuant to s. 52(4) reasonable in the factual and legal context of this request?

V. Position of the Parties

[10] Counsel disagreed on the proper standard of review, the purpose, interpretation and application of s. 65(5.2), the type of records excluded by s. 65(5.2), the relationship between the statutory exemptions and exclusions and the appropriate remedy.

[11] The Ministry's position is as follows:

1. The judicial review application is not premature;

2. the appropriate standard of review to be applied to the Adjudicator's interpretation of s. 65(5.2) is correctness;

3. the Adjudicator was incorrect in his interpretation of s. 65(5.2);

4. the appropriate standard of review to be applied to the Adjudicator's exercise of discretion pursuant to s. 52(4) is reasonableness; and

5. the Adjudicator's exercise of discretion pursuant to s. 52(4) was unreasonable.

[12] The IPC's position is as follows:

1. The judicial review application is premature because the Adjudicator did not decide any issue concerning the interpretation and application of s. 65(5.2). The standard of review applicable to a decision under s. 65(5.2) is not at issue and need not be decided by this court;

2. in the alternative, the standard of review applicable to a decision of the Adjudicator under s. 65(5.2) is reasonableness;

3. the Adjudicator committed no reviewable error in relation to s. 65(5.2);

4. the standard of review applicable to the Adjudicator's order for production pursuant to s. 52(4) is reasonableness; and

5. the Adjudicator's order for production pursuant to s. 52(4) was reasonable.

VI. The Administrative History

[13] On February 12, 2008, Tyler requested access to records of communication about the movement of the case through the justice system from 1998 onwards, including "all letters, memos, faxes, e-mail correspondence, meeting minutes, consulting reports and ministerial briefing notes concerning the handling and progress of the prosecution" of the Toronto Police Service's Central Field Command drug squad officers . . . specifically, access to "records of communications made between, to, or from the Minister, the Deputy Minister and other officials of the Ministry of the Attorney-General" from 1998 to 2008.

[14] On March 14, 2008, the Ministry responded to the request and advised that records were not available until the prosecution was completed, in accordance with s. 65(5.2) of the Act. Subsection 65(5.2) states that the Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[15] On April 14, 2008, the Requestor appealed the Ministry's decision to the IPC pursuant to s. 50(1) of the Act.

[16] On April 21, 2008, the IPC requested that the Ministry produce a copy of the records requested for inspection by the IPC, together with an index.

[17] On May 13, 2008, the Ministry responded to the IPC request and confirmed its position that s. 65(5.2) of the Act applies to the requested records since "all proceedings in respect of the prosecution have not been completed".

[18] On September 12, 2008, the Requestor clarified and narrowed her request to the IPC. Tyler specified that she wanted access to the following:

- ministerial briefing notes and other political correspondence concerning the progress of the case, not the evidence the Crown is relying upon in its prosecution of the officers;

- records of Ministry communications about the movement of the case through the justice system from 1998 onwards.

[19] On October 16, 2008, the Ministry responded to the clarified request and repeated that it relies on the s. 65(5.2) exclusion, stating the following:

> As you know, this matter continues to be before the courts. The records relevant to the clarified request exist in the Crown Brief, in addition to other locations, as well as the offices of various individuals who are currently engaged in the appeal. The Ministry takes the position that the records relate to the prosecution that is currently before the courts. Therefore, the Ministry continues to rely on s. 65(5.2) of FIPPA.

[20] On October 30, 2008, the IPC issued a Notice of Inquiry and requested copies of records responsive to the clarified request together with an index for each record for which there is a claim for solicitor-client privilege or a claim for an exemption. The Notice of Inquiry required the Ministry to provide either a copy of the records to the IPC, with severances highlighted, or an unsevered copy of the records together with a severed copy.

[21] The Notice of Inquiry stated that the issues to be determined on the inquiry were

> (1) whether the Ministry consented to its representations being shared with the Requester;
>
> (2) whether s. 65(5.2) applied to exclude the records from the application of the Act; and,
>
> (3) what exemptions applied to the requested records in the event the Adjudicator found they were not excluded under s. 65(5.2).

[22] On November 24, 2008, the Ministry filed its submissions responding to the Notice of Inquiry confirming its reliance upon the s. 65(5.2) exclusion.

VII. The Order

[23] On January 12, 2009, the Adjudicator issued an order compelling the Ministry to produce to the IPC copies of the records. The order, made pursuant to s. 52(4), compelled the Ministry to take the following actions by February 2, 2009:

> • produce copies of the responsive records, subject to an exception for records "clearly" subject to a solicitor-client privilege claim;
>
> • identify any exemptions it relies upon in the alternative to the s. 65(5.2). The order requires that the Ministry's representations on its alternative exemptions "will be due on the ordered production date";
>
> • prepare and produce an index of the responsive records "(a) where this is reasonably necessary to permit the IPC to carry out its functions efficiently and effectively, or (b) where this is reasonably necessary to enable an appellant or affected party to make meaningful representations and the index will not disclose information that may be contained in the records or that is otherwise exempt under

the *Act*". This index of records includes those records that the Ministry claims are subject to solicitor-client privilege. The index must refer to the records by number; indicate the number of pages in the record; include a description of the record; and identify the records that the Ministry claims are excluded under s. 65(5.2) and any exemptions that it claims in the alternative.

- provide an affidavit in relation to any records not produced on the basis of the solicitor-client privilege, explaining why this is the case for each such record and why it is excluded pursuant to s. 65(5.2). This affidavit must "identify each of the records by reference to: its date; the type, nature and length of each document, including attachments; the name of the author(s) and recipient(s) of each document and the functions and capacities which they performed and were acting in; the context in which the document as created, including the connection between the preparation of the document and the conduct of the criminal proceedings; the nature of the privilege claimed; any question relating to the issue of waiver of the privilege including whether and in what circumstances a document was forwarded subsequent to its original communication; and whether parts of the record could be severed to protect any privilege while providing for disclosure".

[24] Additionally, the order informs the Ministry that "the affiant may be subject to cross-examination by the Commissioner and directed to answer appropriate questions that may be provided by other parties . . . representations, affidavit materials, and the transcripts of the cross-examinations may be shared, in whole or part, with other parties to the appeal at the appropriate juncture". The Adjudicator reserved the right to order production of the documents to substantiate the claim for a s. 65(5.2) exemption or solicitor-client privilege (under s. 19 of the Act), where there was doubt about the application of these exemptions.

[25] The Ministry claimed that the records were exempt under s. 65(5.2) of the Act and seeks judicial review of the order. The Adjudicator stayed the order on March 18, 2009 pending the outcome of this application for judicial review.

VIII. Issue 1: Is the Application Premature?

[26] The Order under s. 52(4) is an interlocutory order. The IPC has not yet determined if the records are excluded or exempt under the Act. Rather, the IPC ordered the records to be produced to determine whether the records fall within the s. 65(5.2) exclusion or one of the exemptions in ss. 12 to 19. Once the IPC determines whether the records are subject to exclusion or exemption, it will decide whether to disclose the records to the Requestor.

[27] The Divisional Court has consistently held as a general rule that proceedings before administrative tribunals should not be fragmented through judicial review of interlocutory orders and that it is preferable to allow the proceedings to be completed before the tribunal, save in extraordinary circumstances (*Ontario College of Art v. Ontario (Human Rights Commission*) (1993), 11 O.R. (3d) 798 (Div. Ct.) at pp. 799-800 O.R.; *Gore v. College of Physicians & Surgeons of Ontario* (2008), 92 O.R. (3d) 195 (Div. Ct.) at para. 66).

[28] Prior jurisprudence supports that the Adjudicator has authority to make an interlocutory order pursuant to s. 52(4) for the purpose of determining if the IPC has jurisdiction over the records that a party claims are excluded from the Act. In *Ontario (Minister of Health) v. Big Canoe*, [1995] O.J. No. 1277 (C.A.), the Court of Appeal held that the IPC may invoke the provisions of s. 52(4) of the Act to require the production and examination of medical records for the purpose of determining whether the IPC has jurisdiction to continue the inquiry.

[29] However, in this case, the Ministry's application for judicial review raises a fundamental question of the IPC's jurisdiction over records relating to an ongoing complex criminal prosecution and engages the question of the meaning of s. 65(5.2) of the Act. Subsection 65(5.2) was proclaimed into force on April 1, 2007 and has not been judicially considered. In our view, this is an extraordinary circumstance that warrants determination of the issues raised. It is apparent that the documents requested under s. 52(4) relate to the investigation, preliminary inquiry, stay proceedings and upcoming trial of the CFC officers. Therefore, the order defeats the purpose of this temporary exclusion. It is our view that the issues raised on this application can be determined on the record without the need to remit the matter to the IPC.

[30] In *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), the Court of Appeal, in reference to s. 65(6) (a provision excluding certain records related to labour relations), found that "the legislature has distinguished exclusions from exemptions" in the FIPPA. The Court of Appeal found that the words "this Act does not apply" "signifies the legislature's intention that the Privacy Commissioner not have a determinative say in the interpretation of the section" (at para. 30).

[31] Similarly, subsection 65(5.2) is an exclusion limiting the IPC's jurisdiction, rather than an exemption. The statutory exclusion operates independently from the statutory exemptions set out in ss. 12 to 19 of the Act. Thus, subsection 65(5.2) excludes the jurisdiction of the IPC for records relating to an ongoing prosecution. The IPC first acquires jurisdiction over a record relating to a prosecution once all proceedings in respect of the prosecution have been completed. When the IPC acquires jurisdiction over a record relating to a prosecution after a prosecution has been completed, a head of an institution may refuse to disclose classes of records based on one or more of the exemptions set out in ss. 12 to 19. Accordingly, a record of a prosecution may subsequently become exempt under one of the listed exemptions.

IX. Issue 2: What is the Standard of Review for the IPC's Interpretation of S. 65(5.2)?

We confirm that the standard of correctness applies to the interpretation of the meaning of s. 65(5.2) of the Act. We do not accept the suggestion of the IPC that the standard of reasonableness applies to this issue.

[32] The Ontario Court of Appeal in the pre-*Dunsmuir* decision of *Big Canoe* considered whether records sought by a requestor fell within the scope of s. 65(2) of the Act. The court held that the Commissioner's determination of this preliminary jurisdictional issue is subject to review on a standard of correctness (para. 1).

[33] The interpretation and application of s. 65(5.2) is a matter of general law and is a matter of significant importance to the administration of criminal justice in the Province of Ontario. The Supreme Court in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, at paras. 55 and 60, held that the correctness standard applies where the question at issue is one of general law that is both a matter of general importance to the legal system as a whole and is outside of the Adjudicator's specialized area of expertise. The interpretation of s. 65(5.2) does not fall within the Adjudicator's specialized area of expertise (*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner*), at para. 30). The court is in a better position to deal with issues impacting the integrity of the criminal justice system. As a result, whether or not the interpretation of s. 65(5.2) raises a true question of jurisdiction in the narrow sense, we are satisfi ed that the standard of review is correctness.

[34] We agree with the position of the parties that the appropriate standard of review is reasonableness with respect to the Adjudicator's exercise of his discretion under s. 52(4) of the Act.

X. Issue 3: Did the Adjudicator Err in his Interpretation and Application of S. 65(5.2)?

[35] Section 65 of the Act excludes the IPC's jurisdiction over specified classes of records. Subsection 65(5.2) states as follows:

> 65(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.

[36] Subsection 65(5.2) is the only "time-limited" exclusion under the Act.

[37] Even though it is common ground that the Act does not apply to a record relating to an ongoing prosecution, the parties disagree on the scope, interpretation and application of s. 65(5.2) in relation to the requested records.

[38] The IPC streamed the appeal to the adjudication stage and assigned the Adjudicator to the file. On October 30, 2008, the Adjudicator issued a Notice of Inquiry. The purpose of the inquiry was to determine the following: "Does section 65(5.2) apply to exclude the records from the application of the Act?"

[39] We conclude that the Adjudicator misinterpreted the plain meaning of the words of s. 65(5.2) by reading in qualifications that had the effect of misconstruing and subverting the purpose of the statutory exclusion.

i. The plain language interpretation of s. 65(5.2)

[40] In the Notice of Inquiry, the Adjudicator, relying on his own order from a different proceeding (Order PO-2703), stipulated the principles for the interpretation and application of the words "relating to" s. 65(5.2) that do not appear in the words of the statute. He found that

- "relating to" should be interpreted in the same manner as "in relation to", that is it means "for the purpose of, as the result of, or substantially connected to";

- there must be a substantial connection between the records and the prosecution, and the connection must not be merely superficial; and

- the purpose of the provision must be taken into account in deciding whether the connection is sufficient to justify the application of this exclusion. [emphasis added]

[41] The meaning of the phrase "relating to" must be determined by applying the modern approach to statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*,[1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, the Supreme Court stated the following:

> 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. [citation omitted]

[42] Section 65(5.2) contains the phrases "relating to" and "in respect of". The Supreme Court of Canada has interpreted these phrases: *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, [2003] 1 S.C.R. 66, [2003] S.C.J. No. 7, 2003 SCC 8, at para. 25; *Markevich v. Canada*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9. In *Markevich*, the court held the following, at para. 26:

> The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, *per* Dickson J. (as he then was):
>
> > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
>
> In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.

[43] Accordingly, the words "relating to" in s. 65(5.2) require some connection between "a record" and "a prosecution". The words "in respect of" require some connection between "a proceeding" and "a prosecution".

[44] The Adjudicator erred when he interpreted the words "relating to" in s. 65(5.2) to mean "for the purpose of, as the result of, or substantially connected to". The Adjudicator erred when he read-in a "substantial connection" requirement between the record and the prosecution. The Adjudicator further erred when he relied upon a restricted purpose for the provision in deciding whether the connection is sufficient to justify the application of this exclusion.

[45] The meaning of the statutory words "relating to" is clear when the words are read in their grammatical and ordinary sense. There is no need to incorporate complex requirements for its application, which are inconsistent with the plain, unambiguous meaning of the words of the statute.

[46] The Adjudicator's interpretation of the phrase "relating to" is also discordant with the intention of the legislature. There are no pragmatic or policy reasons to impute a substantial connection requirement and depart from reading the words in their grammatical and ordinary sense in the context of the Act.

[47] We conclude that the Adjudicator erred in his interpretation and application of the phrase "relating to" and as a result he incorrectly limited the scope and application of s. 65(5.2).

ii. Purposive interpretation of s. 65(5.2) and the FIPPA

[48] Section 1 of the FIPPA states:

> 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.

[49] The Adjudicator's order for production, dated January 12, 2009, stated that the identified purpose of s. 65(5.2) is "protecting prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing, (as discussed in my previous Order PO-2703)".

[50] We agree with the Ministry's submissions that there are additional important purposes underlying s. 65(5.2), including the following:

> 1) to ensure that the accused, the Crown and the public's right to a fair trial is not jeopardized by the premature production of prosecution materials to third parties; and
>
> 2) to ensure that the protection of solicitor-client and litigation privilege is not unduly jeopardized by the production of prosecution materials.

[51] The purposes of s. 65(5.2) are far broader than the purpose suggested by the Adjudicator and include maintaining the integrity of [the] criminal justice system and ensuring that the accused and the Crown's right to a fair trial is not infringed, protecting solicitor-client and litigation privilege and controlling the dissemination and publication of records relating to an ongoing prosecution (for a discussion of the court's obligation to balance privacy and other interests in disclosure applications, see *R. v. McNeil*, [2009] 1 S.C.R. 66, [2009] S.C.J. No. 3, 2009 SCC 3, at paras. 43-46; Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charges, Screening, Disclosure and Resolution Discussions* (1993), at 175, 180-81) ("Martin Report").

iii. The Adjudicator's interpretation of the exclusion to include documents contained in the "Crown Brief"

[52] The Adjudicator narrowly interprets the scope of the exclusion to include only documents contained in the Crown Brief. We conclude that this narrow interpretation of the exclusion is contrary to the purpose of the exclusion and the application of this interpretation could cause serious interference with an ongoing criminal prosecution.

[53] The Adjudicator states as follows (Order PO-2703):

> In assessing whether a record found outside the prosecution materials "relates to" a prosecution where the original purpose is not clear, it is necessary to consider: (a) the original purpose for preparing the record, (b) when the intent to prosecute had crystallized; and (c) the date the record was originally prepared or created.
>
> If the purpose of preparing records found outside the court brief and other prosecution materials was to assist or to be used in a prosecution, and the intent to prosecute had already crystallized when the records were created, such records clearly "relate to" the prosecution for the purposes of section 65(5.2).
>
> Records found outside prosecution materials such as a Crown Brief or prosecution brief, and which were not originally created for the purpose of a prosecution, are not excluded by this provision. [Order PO-2703]

[54] We disagree with this analysis and agree with the submissions of the Ministry that the Adjudicator erred in the order by differentiating between records that were part of the Crown Brief used in the prosecution from those that were outside the prosecution materials.

[55] Subsection 65(5.2) does not distinguish between a record found inside the Crown Brief and a record that is not part of the Crown Brief. During the course of a complex prosecution, it may be difficult to accurately state what records are within or outside the Crown Brief. In *Schertzer*, 2009 (in which the Court of Appeal lifted the stay in the criminal proceedings at issue in the request), the court referred to the complicated nature of disclosure demands, and noted that some of the Crown briefs requested by the defence were held by the TPS, whereas "others were in the possession of other police forces and related to convictions that were entered many years earlier" (para. 125).

[56] The Adjudicator erred because he limited the application of s. 65(5.2) to records that were part of the Crown Brief or prosecution materials. The Crown Brief and prosecution materials are not static. Documents that are not yet part of the Crown Brief may become part of the Crown Brief later and prosecution materials may relate or become integral to the prosecution over the course of the proceedings.

[57] In summary, we conclude that the Adjudicator erred and seriously misconstrued the scope and intention of the s. 65(5.2) exclusion. First, he incorrectly interpreted the meaning of the phrase "relating to"; second, he incorrectly interpreted the purpose of s. 65(5.2); and finally, he incorrectly differentiated among types of documents to differentiate the Crown Brief from a record outside of the Crown Brief. Each of these errors incorrectly limited the scope and application of the s. 65(5.2) exclusion.

XI. Issue 4: Was the Adjudicator's Order under S. 52(4) Reasonable?

[58] The Adjudicator concluded that ordering the production of records in accordance with the terms of the order was not "inconsistent with the identified purpose of section 65(5.2), of protecting prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing (as discussed in my previous Order PO-2703)". The Adjudicator assumed that the staff of the individuals named in the request could conduct the search of the records in various offices and produce them without involving the prosecutors of the CFC officers. He also assumed that it was unnecessary for the Ministry to examine the Crown Brief to respond to the order. He held that the responsive records should be found in the offices of the named individuals and that staff in these offices could conduct a search of these records "without interfering in any way with the progress of the litigation".

[59] We disagree. These conclusions are unreasonable and unrealistic and potentially may seriously undermine the ongoing criminal prosecution.

[60] As a result of the Adjudicator's jurisdictional errors, he made an unreasonable order that does not fall within a range of possible acceptable outcomes in the particular factual and legal context of this request.

XII. The Court's Order

[61] Section 65(5.2) states that "this Act does not apply" to records in relation to an ongoing prosecution. We conclude that the request for records containing information about the progress of the prosecution or the movement of the case through the justice system from 1998 onwards is a request for records relating to the outstanding criminal prosecution.

[62] Therefore, the order is set aside in its entirety. The Requestor may apply for records relating to the prosecution of the CFC drug squad officers when all proceedings in respect of the prosecution have been completed.

XIII. Costs

[63] The parties agreed there should be no order for costs.

Bryant J.
Wilson J.
Karakatsanis J.

Date: March 26, 2010

Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner of Ontario, 2010 ONSC 991
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- and -

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Respondent

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Respondent

BRYANT J.

Released: March 26, 2010