DATE: December 2, 1999
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COURT OF APPEAL FOR ONTARIO

CARTHY, AUSTIN and MACPHERSON JJ.A.

B E T W E E N:	)	
	)	
BIG CANOE, INQUIRY OFFICER	)	William S. Challis and John Higgins
	)	for the appellant
Respondent	)	
(Appellant in Appeal)	)	
	)	
- and -	)	
	)	
MINISTER OF LABOUR (OFFICE OF THE WORKER ADVISOR)	)	Leslie M. McIntosh
	)	for the respondent
	)	Minister of Labour.
Applicant	)	
(Respondent in Appeal)	)	
	)	
- and -	)	
	)	
"JOHN DOE", REQUESTER	)	
	)	
Respondent	)	
(Respondent in Appeal)	)	Heard: October 20 and 22, 1999

On appeal from the order of Divisional Court (Farley, Chapnik and Karam JJ.) dated June 2, 1998.

MACPHERSON J.A.:

Introduction

[1] This appeal was heard on October 20 and 22, 1999. It was dismissed from the bench with reasons to follow, which are provided here.

[2] The *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FOI*") provides a broad right of access to information under the control of government institutions. The legislation also creates exemptions from this general disclosure obligation, including in circumstances where disclosure could reasonably be expected to pose a threat to the personal safety of an individual. This appeal requires the court to assess whether the Divisional Court applied the

appropriate principles of judicial review to a decision of an Inquiry Officer appointed under the *FOI* who was asked to determine the applicability of the personal safety exemption provisions in the legislation.

Factual Background

[3] An individual ("requester") made a request under the *FOI* to the Office of the Worker Advisor of the respondent Minister of Labour ("Ministry") for access to all records relating to himself. The Office of the Worker Advisor ("OWA") is an agency of the Ministry established to represent workers in proceedings under the *Workers' Compensation Act*, R.S.O. 1990, c. W.11 ("*WCA*"). The requester was seeking records held by the OWA in furtherance of an injury claim he was pursuing under the *WCA*. The OWA had refused to continue to represent him in these proceedings.

[4] In a letter to the requester dated July 3, 1997, the Ministry granted access to all of the records responsive to his request except for three brief internal memoranda totalling four pages. It withheld these records, citing the exemptions to disclosure found in ss. 14(1)(e) and 20 of the *FOI*.[1] These provisions state:

> 14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person
> >
> > . . .
>
> 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.

[5] This was the first occasion on which the Ministry had claimed an exemption from disclosure under either ss. 14(1)(e) or 20. At the time of this refusal, the Ministry had processed almost 6,000 requests under the *FOI*.

[6] The requester appealed the Ministry's decision to the Information and Privacy Commissioner. The Ministry provided a two-page affidavit in support of its position that the records were exempt from disclosure because the deponent could reasonably be expected to be threatened or endangered thereby.

[7] The three records in issue are between employees of the OWA and discuss disturbing contacts with the requester as well as strategies for dealing with future contacts with that individual. The deponent of the affidavit was the author of two of the three memos and the recipient of the third. He/she deposed that the requester had used threatening and profane language in past dealings with

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[1] The Ministry also indicated that s. 21(1) applied to one record and that s. 13(1) applied to a second record; however, it did not rely on these grounds of exemption before the Divisional Court and does not invoke them in this appeal.

staff of the OWA and the Workers' Compensation Board ("WCB"). He/she also deposed that psychiatric and medical reports in the requester's WCB file (which had been returned to the requester) expressed concern that the requester would act out past threats of violence against WCB staff. The deponent further swore that he/she had ". . . real concern that disclosure of the three records that have been withheld would inflame [the requester's] relationship with this office and, in particular, with me personally . . . I feel that I have good reason to think that disclosure of these documents could reasonably be expected to threaten my personal safety."

[8] In a decision dated January 5, 1998 (Order P-1510), the Inquiry Officer of the Office of the Information and Privacy Commissioner, Holly Big Canoe, ordered the Ministry to disclose the three records to the requester. She interpreted ss. 14(1) (e) and 20 as follows:

> Without discounting the real and valid concerns many public officials may have concerning their personal safety which may result from their employment, both sections 14(1)(e) and 20 of the Act require me to objectively assess the connection between the disclosure of the records at issue and the endangerment or threat that is contemplated. The Act requires me to determine if the disclosure of the record could reasonably be expected to endanger the life or safety of a person in the case of section 14(1)(e) or in the case of section 20 to seriously threaten the health or safety of the individual.

[9] The Inquiry Officer then concluded as follows:

> Having considered the Ministry's representations and the other circumstances of this appeal, including the nature of these particular records, I am not convinced that there is a reasonable expectation of probable harm to the individuals whom the Ministry has identified as being at risk.

She thus determined that the records did not qualify for exemption.

[10] The Ministry sought judicial review of the Inquiry Officer's order directing disclosure of the records. In an unreported endorsement dated June 2, 1998, the Divisional Court unanimously allowed the Ministry's application and quashed the order. The court held that, contrary to the Inquiry Officer's conclusion, there need not be evidence of probable harm for the exemptions from disclosure in ss. 14(1)(e) and 20 to apply:

> There was direct knowledge affidavit evidence put forward to the Officer on a sealed basis as to the psychiatric and other medical reports concerning the Requester (which reports are in the possession of the Requester) which express concern that the Requester would act out his threats of violence against Ministry staff. Endangerment or the serious threatening as to the safety of a person does not mean that there must be probable harm. As well, a reasonable expectation in the

> context of these two sections does not import a requirement that there is likely to be a "bad result" based on a balance of probabilities. Even considering the French version of the relevant provisions (which must be viewed on an overall basis for comparison with the English and not on a word for word basis), the test used by the Officer of a "reasonable expectation of probable harm" does not in our view conform to the purposes of the sections, their substance or the overall context of the Act.

[11] The court concluded that the Inquiry Officer had interpreted ss. 14(1)(e) and 20 in a patently unreasonable manner:

> To interpret the provisions of these two sections as the Officer has, is in our view at least patently unreasonable. Thus it is not necessary to deal with the specific standard of review. It would seem to us that the reports referred to above are a sufficient and rational basis to found a reasonable expectation of endangerment to or a serious threatening as to the safety of staff at the Applicant.

[12] The Inquiry Officer sought and received leave to appeal the Divisional Court's decision overturning her order to this court.

Issues

[13] The appellant received leave to appeal on the following issues:

1. Did the Divisional Court err in applying the wrong standard of review by substituting its own view of the interpretation and application of the *Act* and of the evidence in place of the Inquiry Officer's reasonable determinations?

2. Did the Divisional Court err in finding that the Inquiry Officer was patently unreasonable in interpreting the words "could reasonably be expected to" in ss. 14(1)(e) and 20 as requiring proof of a reasonable expectation of probable harm?

3. Did the Divisional Court err in finding that the Inquiry Officer misapplied the exemptions and that medical reports not before the Inquiry Officer were a "sufficient and rational basis" on which to conclude that ss. 14(1)(e) and 20 of the *Act* applied?

[14] These issues overlap to a significant degree. They may be reduced to the following questions: what standard of review applies to the Inquiry Officer's decision, and does the Inquiry Officer's interpretation of the safety exemption provisions in the *FOI* satisfy that standard?

Analysis

(a) What is the applicable standard of review?

[15] This court has held that the standard of review that applies to the Assistant Information and Privacy Commissioner's decision on the availability of exemptions from disclosure under s. 17(1) and (2) of the *FOI* is "simple reasonableness": *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at p. 473, 164 D.L.R. (4th) 129 at p. 139 (C.A.).[2] Section 17(1) of the FOI protects from disclosure a record that reveals a trade secret, scientific, technical, commercial, financial or labour relations material that is supplied in confidence, where disclosure might reasonably be expected to prejudice an individual's competitive position or cause undue loss or gain. Section 17(2) exempts from disclosure information gathered for the purpose of determining tax liability or tax collection.

[16] In that case, Labrosse J.A., speaking for the court, balanced the factors for and against applying either of the two extremes of the correctness or the patent unreasonableness standards of review. Factors in favour of limited deference identified by Labrosse J.A. included the absence of a privative or finality clause in the *FOI*, the limited fact-finding function of the Commissioner and the absence of a policy-making function on the part of the Commissioner. The factors identified as tending towards greater deference were the absence of a right of appeal and the fact that the Commissioner was applying expertise in balancing the need for access and the right to protection of privacy in interpreting the exemption provisions at issue. Taking these factors together, the court concluded that the intermediate standard of reasonableness simpliciter should be applied to the Commissioner's decision.

[17] In the present case, the Divisional Court chose not to decide the issue of the specific standard of review, concluding that the Inquiry Officer's decision was patently unreasonable. The court gave its decision prior to the release of *Ontario (Workers' Compensation Board), supra*. Counsel for the Inquiry Officer argued that the appropriate standard of review is simple reasonableness, invoking *Ontario (Workers' Compensation Board)* in support of this argument. In contrast, counsel for the respondent Ministry seeks to distinguish this decision on the theory that a question involving the ordinary meaning of words of common usage such as those in ss. 14(1)(e) and 20 does not engage the Commission's specialized expertise. According to counsel for the respondent, the appropriate standard of review is correctness.

[18] The submission on behalf of the respondent is not persuasive. The Inquiry Officer's specialized expertise was engaged by the question raised before her in the sense described by this court in *Ontario (Workers' Compensation Board)*. In determining whether the records at issue came within ss. 14(1)(e) and 20, the Inquiry Officer was called upon to apply her expertise in balancing the need for access and the right to protection of privacy. In addition, the determination of the applicability of the statutory exemptions was a question squarely within her jurisdiction as conferred by the *FOI*. This case is thus distinguishable from *Simcoe Court Reporting (Barrie) Inc. v. Hale*, an

[2] An Inquiry Officer is a delegated decision-maker pursuant to s. 56 of the *FOI* and exercises the same authority on appeal as the Assistant Commissioner.

unreported decision of this court dated November 1, 1999. O'Connor J.A. for the court held that an Inquiry Officer's decision on whether a record was "under the control" of a provincial government institution within the meaning of s. 10 of the *FOI* was reviewable on a correctness standard. This question went to jurisdiction in the sense that records under the control of an institution are subject to the *FOI* whereas those that are not fall outside the Act. In contrast, in the instant case there was no issue that the documents in question were subject to the provisions of the *FOI*.

b) Is the Inquiry Officer's interpretation of the exemption provisions in ss. 14(1)(e) and 20 of the FOI reasonable?

[19] As noted, the Divisional Court concluded that the Inquiry Officer's decision was patently unreasonable. In determining whether the Divisional Court's decision overturning the Inquiry Officer's order should be upheld, this court will apply the less deferential standard of reasonableness *simpliciter* to the Inquiry Officer's decision.

[20] In defining the content of the reasonableness *simpliciter* standard, the court in *Ontario (Workers' Compensation Board), supra*, stated at p. 142 D.L.R. that, ". . . to conclude that a decision is unreasonable the court must find that it is irrational or not in accordance with reason. It need not find that the decision is clearly irrational or patently unreasonable." The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration) (1999)*, 174 D.L.R. (4th) 193 at p. 228 recently described the reasonableness *simpliciter* standard in terms of the following language of Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam* Inc., [1997] 1 S.C.R. 748 at pp. 776-77, 144 D.L.R. (4th) 1:

> [a]n unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

[21] The Inquiry Officer concluded that ss. 14(1)(e) and 20 were inapplicable because she was not convinced that there was a reasonable expectation of probable harm to the individuals identified as being at risk. The reasonable expectation of probable harm test was developed by the Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47, 53 D.L.R. (4th) 246. That case involved the interpretation of an exemption from disclosure provision in the federal freedom of information legislation. The court noted that the purpose of the federal legislation set out in s. 2 of the *Access to Information Act*, R.S.C. 1985, c. A-1, is that government information should be made available to the public and exemptions from that right of access should be limited and specific. Having regard to this legislative purpose, the court concluded at p. 255 that the phrase "could reasonably be expected to" should be interpreted as imposing a requirement of an expectation of probable rather than possible harm: see also *Re Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services* (1990), 67 D.L.R. (4th) 315, 107 N.R. 89 (F.C.A.).

[22] Like s. 2 of the federal *Access to Information Act*, the purpose provision in s. 1 of the provincial *FOI* states that the right of access to information should be in accordance with the principles that information should be available to the public and that exemptions from the right of access should be limited and specific.

[23] To date, there is no reported judicial authority on the proper interpretation of ss. 14(1)(e) and 20 of the *FOI*. The Divisional Court in this case concluded that endangerment or the serious threatening of the safety of a person does not mean that there must be probable harm to an individual in the context of ss. 14(1)(e) and 20. The court held that the Inquiry Officer's construction of the provisions as requiring a "reasonable expectation of probable harm" does not conform to the purposes of the sections or the *FOI* as a whole.

[24] I agree with the Divisional Court's conclusion that harm to an individual need not be probable for a government institution to successfully rely on the exemption provisions in ss. 14(1)(e) and 20 of the *FOI*. The expectation of probable harm test was developed in a context where personal safety was not in issue. *Canada Packers, supra*, involved the interpretation of a provision exempting disclosure of the requested information in circumstances where disclosure could reasonably be expected to result in material financial loss or interfere with contractual negotiations. The interests at stake in that case were less compelling than those of personal safety and bodily integrity. It is unreasonable to require a government institution to show an expectation of probable harm to an individual in order to rely on the personal safety exemption provisions in the *FOI*.

[25] The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reason for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly, s. 20 calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

[26] The Divisional Court did not err in concluding that the Inquiry Officer's construction of ss. 14(1)(e) and 20 was unreasonable. In addition to articulating the wrong test for the applicability of ss. 14(1)(e) and 20, the Inquiry Officer failed to provide reasons for concluding that the Ministry had not demonstrated a reasonable concern for the safety of the identified individual in the circumstances. The exemption claimed by the Ministry was in respect of three brief internal memoranda that were of no relevance to the requester's claim before the Workers' Compensation Appeals Tribunal. Moreover, this was the first time in almost 6,000 requests that the Ministry had claimed an exemption from disclosure under either ss. 14(1)(e) or 20 of the *FOI*. The Ministry provided a sworn affidavit indicating that the requester had threatened persons in the OWA,

including the deponent, and that the requester had been legally restrained from entering certain premises of the WCB. The deponent was also familiar with the medical portion of the requester's WCB file, which included reports expressing concern that the requester would act out his/her threats of violence against WCB staff. The evidence provided by the Ministry was uncontroverted.

[27] Having considered the uncontradicted evidence proffered by the Ministry, the Inquiry Officer concluded that she was not convinced that there was a reasonable expectation of harm to the individuals identified at risk. She did not explain why she dismissed the Ministry's concerns. The important principle of judicial deference to decisions of administrative bodies does not protect the Inquiry Officer's conclusion that the exemption provisions of the *FOI* were inapplicable where the evidence pointed towards the opposite result and where there was no explanation of how or why she came to her conclusion. The words of Strayer J.A. in *Williams v. Canada*, [1997] 2 F.C. 646 at p. 673, 147 D.L.R. (4th) 93 (C.A.) are germane in this regard:

> In such cases the tribunal decision is set aside not because of a lack of reasons per se but because in the absence of reasons it is not possible to overcome the inference of perversity or error derived from the result or the surrounding circumstances of the decision.

[28] The applicable standard of review in this case is reasonableness simpliciter. The Inquiry Officer's decision cannot be said to be reasonable where it is not supported by either reasons or by the evidence and where the basis of the decision is not evident from the circumstances: *Baker v. Canada, supra*, at p. 228.

Disposition

[28] The appeal is dismissed. The parties agreed that there should be no order concerning costs.

MACPHERSON J.A.
I agree. — CARTHY J.A.
I agree. — AUSTIN J.A.

Judgment Rendered: October 22, 1999
Written Reasons Released: December 2, 1999