

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

IN THE MATTER OF the *Judicial Review Procedure Act*,
R.S.O. 1990, c. J.1

AND IN THE MATTER OF a decision of May 27, 1996 of
Tom Mitchinson, Assistant Information and Privacy
Commissioner/Ontario, Order P-1190, Appeal Number
P-9500760 and the *Freedom of Information and Privacy Act*,
R.S.O. 1990, c. F. 31

B E T W E E N:

ONTARIO HYDRO

- and -

TOM MITCHINSON, ASSISTANT
INFORMATION AND PRIVACY
COMMISSIONER/ONTARIO and JOHN DOE

Applicant

Respondents

)
)
) *Eric R. Finn*
) for the Applicant
)
)
)
) *Peter M. Jacobsen*
) for the Respondent, John Doe.
)
) *David S. Goodis*
) for the Respondent, Tom Mitchinson,
) Assistant Information and Privacy
) Commissioner/Ontario
)
)
) **HEARD: November 25, 1996**

THEN J. (orally):

[1] The respondents on the application for judicial review, which is scheduled to be heard on December 3, 1996, seek to strike an affidavit filed on November 19th of this year on the basis that it constitutes new evidence, that the contents are irrelevant and that it is in any event untimely.

[2] In his able argument before me, Mr. Finn has candidly advised that the representations made to the Commissioner, as to the issue of confidentiality amongst others, were based on the material found in Mr. Kindley's affidavit. The Commissioner adverted to these representations and rejected them. The Commissioner found the records before him qualified for exemption under s. 18(1)(c) of the *Act* but nevertheless found that the "public interest override" in section 23 of the *Act* applied. A major issue on the judicial review will be whether there is any evidence upon which s. 23 could be applied. It is common ground that the Requester made no representations to the Commissioner on this issue.

[3] However, the respondents submits that there was evidence upon which s. 23 could be applied. In my view, the affidavit of Mr. Kindley is not relevant to a determination of the issue of whether there was any evidence to support the Commissioner's application of s. 23.

[4] I accept the principle that the record that goes before the court hearing an application for judicial review should essentially be the material that was before the Commissioner. This proposition was stated by White J. in *Lincoln (County) Board of Education v. Ontario (Information and Privacy Commissioner)* (1994), 30 Admin. L.R. (2d) 116 at 118-9 a decision of the Ontario Divisional Court. This material was not before the Commissioner although, as I have stated, representations were made on the basis of this material. Further this is not a case such as *Great Lakes Power Ltd. v. Wright*, [1996] O.J. No. 2186 (Div. Ct.) where this court admitted affidavit evidence to supplement the record of the Commissioner in circumstances where abuse of process were alleged, or to demonstrate jurisdictional error such as in the case of *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 at 170 (Ont. C.A.). I agree with the respondent's submission that the affidavit of Mr. Kindley is not being introduced to demonstrate jurisdictional error in the sense of a complete absence of evidence or an abuse of process, but rather to supplement representations already made before the Commissioner or to elaborate the arguments and positions already made. In my view, this is evident from the concession fairly made by Mr. Finn that the representations made to the Commissioner were based at least in part on this affidavit material.

[5] For these reasons the affidavit will be excluded from the material to be filed on judicial review. In these circumstances it is not necessary for me to deal with the arguments of the respondents based on late filing. An order will go striking the affidavit of William R. Kindley sworn November 18, 1996 from Divisional Court file #357/96. There shall also be an order abridging the time for service of this Notice of Motion. It remains therefore to deal with the matter of costs. There shall be costs assessed against the applicant on the judicial review in the amount of \$500 in respect of each of the respondents payable forthwith.

THEN J.

RELEASED: December 2, 1996

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

IN THE MATTER OF the *Judicial Review*
Procedure Act, R.S.O. 1990, c. J.1

AND IN THE MATTER OF a decision of May 27,
1996 of Tom Mitchinson, Assistant Information and
Privacy Commissioner/Ontario, Order P-1190,
Appeal Number P-9500760 and the *Freedom of*
Information and Privacy Act, R.S.O. 1990, c. F. 31

B E T W E E N:

ONTARIO HYDRO

Applicant

- and -

TOM MITCHINSON, ASSISTANT
INFORMATION AND PRIVACY
COMMISSIONER/ONTARIO and JOHN DOE

Respondents

ORAL JUDGMENT

THEN J.

RELEASED: December 2, 1996