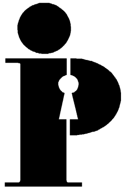

Reconsideration Order PO-2074-R

Appeal PA-990017-1

Order PO-1718

Criminal Injuries Compensation Board

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NATURE OF THE APPEAL:

This order sets out my decision on the reconsideration of Order PO-1718 issued September 27, 1999.

The appellant submitted a request to the Criminal Injuries Compensation Board (the Board) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an audit report.

The Board denied access to the record on the basis that it is excluded from the scope of the *Act* under section 65(6)3 of the *Act*.

The appellant appealed the Board's decision to this office.

In Order PO-1718 (the order), Adjudicator Holly Big Canoe found that the record did not fall within the scope of the section 65(6)3 exclusion. As a result, she ordered the Board to issue a decision letter with respect to the record.

The Board later applied to the Divisional Court for judicial review of the order.

The application for judicial review of the order was placed on hold pending the outcome of the judicial review of three other orders of the Information and Privacy Commissioner (IPC) that raised similar issues.

On August 8, 2001, the Court of Appeal for Ontario issued a ruling quashing the three orders that were under review on the basis that the IPC's interpretation of section 65(6) was incorrect [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355]. The IPC brought a motion for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On June 13, 2002, the Supreme Court denied this motion ([2001] S.C.C.A. No. 509). As a result, the judgment of the Court of Appeal now stands.

On October 17, 2002, I wrote to the Board and the appellant and advised that I had formed the preliminary view that I should reconsider the order in light of the Court of Appeal decision in *Ontario (Solicitor General)*. I sought representations from both parties on (1) whether there are grounds for reconsideration; and (2) if so, what the appropriate remedy should be. Only the Board submitted representations, in which it agrees with my preliminary view.

SHOULD THE ORDER BE RECONSIDERED?

Introduction

The IPC's reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, sections 18.01 and 18.03 of the *Code* state:

> 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.

18.03 The IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

The Adjudicator's interpretation and application of section 65(6)3 in the order

Section 65(6)3 of the *Act* reads:

> 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:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

For a record to qualify under section 65(6)3, an institution must establish that:

1. it was collected, prepared, maintained or used by the institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

In the order, Adjudicator Big Canoe found that the Board had established the first two parts of the three-part test for section 65(6)3 for all three records. I agree with these findings. However, she found that the third part of the test was not met for these records, for the following reasons:

> At this point, the only issue is whether the records are subject to the *Act*, and a finding that they are does not mean that the records would be disclosed automatically. Further, having reviewed the record and based on the other material before me, there are no apparent grounds for an action for breach of contract, wrongful dismissal or employer wrongdoing stemming from the audits.
>
> The [Board] refers to the possibility of some legal action being taken as a result of the audit or disclosure of the audit, and relies on the due performance of its ongoing responsibilities to establish that its legal interests are engaged. In my view, the mere possibility of future legal action, which may be said to arise out of many kinds of audit or regulatory activities of government, is insufficient to

> engage a reasonable anticipation of such action actually occurring or, therefore, to engage an active legal interest. Further, the due performance of supervisory activities in setting clear standards and procedures, even with a view to avoiding exposure in possible future legal proceedings, is also insufficient to engage an active legal interest. In my view, unless there is something that arises to give reality to the prospect or anticipation of such action, government's "interest" in the record relates to the normal course of its affairs, and the requisite legal interest is not established.
>
> The only relevant evidence before me in this appeal establishes that there is no reasonable prospect that the institution's legal interest will be engaged. Accordingly, I find that there is no ongoing dispute or other employment-related matter involving the Board that has the capacity to affect the Board's legal rights or obligations, and the Board has failed to establish a "legal interest" in the employment-related matters reflected in the records (see also Order M-1164).

The Court of Appeal decision in *Ontario (Solicitor General)*

In *Ontario (Solicitor General)*, the Court of Appeal stated the following with respect to the "time sensitive" element under section 65(6):

> In my view, the time sensitive element of subsection 65(6) is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of subclauses 1 to 3 are present when the relevant action described in the preamble takes place, *i.e.* when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of subclauses 1 to 3 cease to apply.
>
> . . . . .
>
> In my view, therefore, [Assistant Commissioner Mitchinson] was wrong to limit the scope of the exclusions in the way that he did.

In addition, in *Ontario (Solicitor General)*, the Court of Appeal stated the following with respect to the words "in which the institution has an interest" in section 65(6)3:

> In arriving at the conclusion that the words "in which the institution has an interest" in s. 65(6) 3 must be referring to "a legal interest" in the sense of having the capacity to affect an institution's "legal rights or obligations", the Assistant Privacy Commissioner stated that various authorities support the proposition that an interest must refer to more than mere curiosity or concern. I have no difficulty with the latter proposition. It does not however lead to the inevitable conclusion that "interest" means "legal interest" as defined by the Assistant Privacy Commissioner.
>
> As already noted, section 65 of the *Act* contains a miscellaneous list of records to which the *Act* does not apply. Subsection 6 deals exclusively with labour relations and employment related matters. Subsection 7 provides certain

> exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Sub clause 1 deals with records relating to "proceedings or anticipated proceedings relating to labour relations or to the employment of a person by the institution". Sub clause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person "by the institution". Sub clause 3 deals with records relating to a miscellaneous category of events "about labour-relations or employment related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, and the wording of the subsection as a whole, the words "in which the institution has an interest" in sub clause 3 operate simply to restrict the categories of excluded records to those records relating to the institution's own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the sub clause when it does not appear, introduces a concept there is no indication the legislature intended.

Is there a jurisdictional defect in the order in light of the Court of Appeal decision?

Applying a "correctness" standard of review to the IPC's interpretation of section 65(6), the Court of Appeal thus determined that this office's interpretation of the time sensitive element of section 65(6), as well as the words "in which the institution has an interest" to mean a "legal interest", were incorrect.

The finding in the order that section 65(6)3 does not apply to the record is based on the previous "time sensitive" interpretation, as well as the interpretation of "in which the institution has an interest" described above. Because these interpretations were explicitly rejected by the Court of Appeal, I conclude that the order contains a jurisdictional defect, and that it should be reconsidered for this reason.

The Board submits:

> The Court of Appeal stated that the words "in which the institution has an interest" in subsection 6 appear on their face to relate simply to matters involving the institution's own work force. Subsection 3 deals with records relating to miscellaneous categories of events "about labour relations or employee related matters in which the institution has an interest".
>
> It is submitted that the meaning of the word "interest" in the context of section 65(6)(3) (as defined in the Shorter Oxford Dictionary) is "the relation of being involved or concerned as regards to potential detriment or advantage" or "the fact or relation of having a share or concern in or a right to something".
>
> Having regard to the purpose for which this section was enacted (to ensure confidentiality of labour relation information) the wording in subclause 3 operate simply to restrict categories of excluded records to those records relating to the

> institutions own workforce where the focus is shifted from an employment of a person to an employment related matter.
>
> . . . . .
>
> The Board respectfully submits that the records at issue in this reconsideration fall squarely within the ambit of the words "in which the institution has an interest" as that phrase was interpreted by the Court of Appeal. The Board, as an employer, has an interest in matters which form the subject of the Audit Report, since they concern the employment-related activities of its own employees. In other words, the Board has an interest in the proper management of its workforce. In particular:
>
> 1. The Board has an obligation to ensure that its employees do not engage in any illegal or criminal activity;
>
> 2. The Board has an obligation to investigate any such allegations and take appropriate measures to correct problems which are identified;
>
> 3. The Board has the obligations to set clear work standards and employment procedures in order to properly carry out is mandate under the *Compensation for Victims of Crime Act*; and
>
> 4. The Board has an obligation to seek recommendations to carry out its mandate and to further good relations between it and its employees.
>
> Consequently, since the records do relate to communications about employment-related matters in which the Board had an interest at the point in time when the records were prepared or use, the Act does not apply to them. Once it is established that the criteria of subclause 3 are present when the relevant action in the preamble takes place, the Act "does not apply". As the Court of Appeal explained, once effectively excluded, the records "remain excluded".

In my view, based on the material before me in this appeal, it is clear that the Board's interest in the record at issue is more than "a mere curiosity or concern", and that the matter giving rise to the record relates to the Board's own workforce where the focus has shifted from "employment of a person" to "employment-related matters". In addition, the fact that the employment-related matters are not longer current does not preclude the operation of section 65(6)3. Therefore, Adjudicator Big Canoe's finding in the order that the record is not subject to section 65(6)3 is in error.

To conclude, section 65(6)3 of the *Act* applies to the record and therefore the *Act* does not apply to it.

WHAT IS THE APPROPRIATE REMEDY?

The operational provisions of the order read:

> 1. I order the Board to issue a decision letter to the appellant in accordance with the provisions of sections 26, 27 and 28 of the *Act*, regarding access

to the requested records, treating the date of this order as the date of the request.

2. I order the Board to provide me with a copy of the correspondence referred to in Provision 1 by sending a copy to me when it sends this correspondence to the appellant.

I understand the Ministry has not complied with provisions 1 and 2 because it seeks an order of the Divisional Court quashing those provisions in its application for judicial review. In the circumstances, the appropriate remedy is to permanently stay provisions 1 and 2 of the order, on the basis that the *Act* does not apply to the relevant record due to the operation of section 65(6)3.

ORDER:

I hereby permanently stay provisions 1 and 2 of Order PO-1718.

Original Signed By: November 27, 2002
David Goodis
Senior Adjudicator