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

ORDER PO-2501

Appeal PA-050015-1

Ministry of the Attorney General

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*Act*) for access to:

> … a copy of all information and documents including electronic and paper, drafts, finals, notes, records, text messages, voicemails and emails, related to meetings between government officials and the Ontario Deputy Judges Association and/or representatives.

By way of background, Deputy Judges hear and decide the majority of cases before the Small Claims Court, a branch of the Superior Court of Justice. Section 53(1)(b.1) of the *Courts of Justice Act* provides that the Lieutenant Governor in Council may make regulations to fix the remuneration of Deputy Judges. The per diem rate paid to Deputy Judges is paid by the Ministry. Matters involving the remuneration and administrative support of the Deputy Judges are dealt with by their association, known as the Ontario Deputy Judges Association (the ODJA) (see *Ontario Deputy Judges Assn. v. Ontario* (2005), 78 O.R. (3d) 504 (S.C.J.), aff'd [2006] O.J. No. 2057 (C.A.)).

The Ministry located several responsive records and claimed that they are not subject to the *Act* pursuant to section 65(6) (labour relations and employment records). Counsel for the requester appealed the Ministry's decision to this office. For the remainder of this order, I will refer to the requester as "the appellant."

During mediation of the appeal, the Ministry indicated that the responsive records comprise a total of 17 pages. The appellant expressed the view that the Ministry's interpretation of the request was too narrow. For its part, the Ministry indicated that it views the appellant's interpretation as an expanded request. The parties agreed to treat the clarified or expanded request as a new request. Accordingly, only the 17 pages originally identified are being treated as responsive records in this appeal.

While mediation was ongoing, the Ministry conducted a further search for additional records but advised that it was not prepared to add any additional records to this appeal. Upon completion of a further search, the Ministry issued a decision to the appellant claiming, as it does in the appeal before me, that the additional records are outside the scope of the *Act* by virtue of section 65(6). This decision is the subject of another appeal.

Also during mediation, the appellant indicated that it did not require copies of pages 7-15 as it already had copies of these. Accordingly, the only pages remaining at issue in this appeal are pages 1-6 and 16-17.

The appeal moved on to the adjudication stage. To begin my adjudication of this appeal, I issued a Notice of Inquiry to the Ministry outlining the background, the nature of the records at issue, and the issues in the appeal, and invited the Ministry to provide representations. The Ministry responded with representations. I then sent the Notice of Inquiry to the appellant, and enclosed a complete copy of the Ministry's representations. The appellant responded with representations. I decided that the Ministry should be given an opportunity to reply to the appellant's representations, and provided them, in full, to the Ministry for that purpose. The Ministry

provided reply representations. The complete reply representations of the Ministry were then shared with the appellant, who was invited to provide sur-reply representations. The appellant did so.

One of the issues canvassed in the representations of both parties was the fact that, in its representations, the Ministry sought to claim (in the alternative to section 65(6)) the discretionary exemption at section 19 of the *Act* (solicitor-client privilege). This claim fell outside the 35 day period, after notification of an appeal, during which new discretionary exemptions may be claimed under section 11 of this office's *Code of Procedure*. This raises the issue of whether the Ministry should be permitted to claim this discretionary exemption in the circumstances. Because of my decision in relation to section 65(6), it is not necessary for me to decide this issue.

RECORDS:

There are two records at issue in this case, as follows:

Record 1 (pages 1-6 of the records): Briefing note including descriptive "routing form".
Record 2 (pages 17-18 of the records): Recommendation Form.

Record 2 is an attachment to Record 1.

DISCUSSION:

LABOUR RELATIONS AND EMPLOYMENT RECORDS

General Principles

Section 65(6) states:

> 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.

If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 65(6) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

If section 65(6) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The Ministry relies on sections 65(6)1 and 65(6)3 of the *Act* to deny access to the records. In the circumstances of this appeal, it is only necessary to consider section 65(6)3.

Section 65(6)3: matters in which the institution has an interest

For section 65(6)3 to apply, the institution must establish that:

> 1. the records were collected, prepared, maintained or used by an institution or on its behalf;
>
> 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.

Requirements 1 and 2

The Ministry submits that the records were prepared by Ministry counsel to provide advice to the Attorney General regarding a request by the ODJA for a meeting. The appellant agrees. Having reviewed the records, I find that they were prepared by the Ministry in relation to a meeting, namely the meeting proposed by the ODJA. As well, because they consist of a briefing note attached to a descriptive "routing form", and a "recommendation form" setting out

recommendations about the proposed meeting, I also find that they were prepared in relation to communications. Accordingly, the first two requirements set out above for the application of section 65(6) are met.

Requirement 3

Turning to requirement 3, the parties agree that Deputy Judges are not employees of the Ministry. They disagree as to whether the meetings or communications in question are about "labour relations" in which the Ministry has an interest.

Representations of the Parties

The Ministry submits that the subject matter of the requested meeting included requests for improvements in remuneration and working conditions. On this basis, the Ministry submits that the proposed meeting and the communications in that regard are about labour relations.

In support of its position, the Ministry relies on the scope of "labour relations" as defined by the Ontario Court of Appeal in *Ontario (Minister of Health and Long-Term Care)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (which I will refer to as "*Minister of Health and Long-Term Care*"). In this decision, the Court of Appeal reversed Order PO-1721.

In Order PO-1721, former Assistant Commissioner Tom Mitchinson held that records relating to the Physician Services Committee, an ongoing advisory body that dealt with the relationship between the province's physicians and the Ministry of Health and Long-Term Care, were not about labour relations. His decision was based on the lack of an employer-employee relationship between the Government of Ontario and physicians. Order PO-1721 was upheld at the Divisional Court ([2002] O.J. No. 4769) but set aside by the Ontario Court of Appeal in *Minister of Health and Long-Term Care*. In making its determination, the Court of Appeal stated:

> It is common ground that physicians are not "employees" of the provincial government. In our view, however, in reaching the conclusion they did, the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("the Act"), too narrowly. The phrase is not defined in that Act, and its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relations; to do so would render the phrase "employment-related matters" redundant.
>
> The relationship between the government and physicians, and the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, falls within the phrase

> "labour relations", and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. The result is that the Act does not apply to the records the production of which was ordered by the respondent.

On the basis of this decision, the Ministry submits that labour relations can extend to relations, remuneration and conditions of work issues beyond those relating to collective bargaining. Accordingly, the Ministry's position is that the Court of Appeal decision instructs that the phrase, "labour relations" can include collective bargaining with representatives of persons who are not employees. The Ministry states:

> Although, the Ministry is not the "employer" of deputy judges, the Ministry, through per diem payment, is the sole source of their income as deputy judges. The amounts paid for their services, together with other human resources issues such as the creation and maintenance of facilities to be used, are central to those concerns expressed by counsel to the Ontario Deputy Judges Association, on whose behalf he purported to speak in his letters to the Attorney General. These letters, and the direct threat of other measures if an appropriate response was not received within a certain time frame, represent an attempt to negotiate these issues with the Attorney General to the advantage of these members of the deputy judges' association. Accordingly, this is a labour relations-related matter in which the Ministry has an interest pursuant to the Court of Appeal's decision in [*Minister of Health and Long-Term Care*].

In further support of its position, the Ministry refers to litigation commenced by the ODJA, and a related Notice of Constitutional Question served by it, as proof that the ODJA sought to negotiate remuneration and conditions of work issues with the Ministry. The Ministry submits that ODJA's efforts to negotiate such issues establish:

> … that the appellant was communicating with the Ministry in order to bargain with the Attorney General in order to obtain improvement in its members' salary and working conditions. This brings the matter squarely within the context considered and decided in the Ministry's favour by the Court of Appeal in [*Minister of Health and Long-Term Care*].
>
> It is submitted that in view of the above-cited decision, paragraph 3 of section 65(6) should receive a fair, large and liberal interpretation as will best ensure the attainment of its objects according to its true intent and object. The purpose of this provision is to ensure confidentiality of labour relations information. This object is best achieved by interpreting paragraph 3 of section 65(6) to ensure confidentiality in all situations involving the government as a party with an interest in "labour-related matters". In the words of the Court of Appeal, the ordinary meaning of the section can extend to relations and conditions of work beyond those relating to collective bargaining.

In its responding representations, the appellant submits that the *Minister of Health and Long-Term Care* decision does not apply here because Deputy Judges are independent judicial officers, and should not be considered in the same light as physicians or other professions. According to the appellant, including Deputy Judges within the scope of this decision "… would be erroneous and an egregious violation of the constitutional guarantee of judicial independence." The appellant refers me to a number of court decisions confirming the principle of judicial independence, including *R. v. Valente*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 and *Independence of the Provincial Court of British Columbia Justices of the Peace (Re)*, [2000] B.C.J. No. 2003. The appellant states:

> These cases illustrate the principle that Judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; Judges, by definition, are independent of the executive. …

The appellant goes on to submit that:

> … these cases support the position that Judges, including Deputy Judges, cannot simply be classified according to the standards applied to others who are not considered traditional "employees" of government simply because they are paid from the 'public purse', but that in fact, Judges are to be considered an independent body and should therefore be treated as such.
>
> While the judgement in [*Minister of Health and Long-Term Care*] is admittedly significant with respect to the fact that it extends the definition of "labour relations" and conditions of work beyond those relating to collective bargaining, it is the [appellant]'s submission that the Court did not intend for the definition to be extended to Judges, including Deputy Judges, as unlike doctors, they are required by law to be fully independent.
>
> The [appellant] submits that, even though that case provided a broad interpretation of the phrase "labour relations" in s. 65(6)3, the Court acknowledged that limits exist as to its application in that its ordinary meaning *can* extend to relations and conditions of work beyond those relating to collective bargaining, not that it *shall* or *must* extend. This interpretation provides an opportunity for the IPC to exercise discretion in deciding when the phrase "labour relations" applies, and it is the [appellant]'s submission that it should not be applied to Deputy Judges.

In reply representations, the Ministry states that its position was never that Deputy Judges are employees or civil servants, but rather:

> "… that deputy judge remuneration and conditions of work involve a financial impact, and are paid for from the "public purse", in the same manner as others who would not be considered "employees" in the traditional sense, such as doctors, tribunal chairs and judges. The Ministry also submits that the Commissioner need not address the questions of "judicial independence" raised by the appellant – this question has been put to the Superior Court [in *Ontario Deputy Judges Assn. v. Ontario* (2005), 78 O.R. 504 (S.C.J.), aff'd [2006] O.J. No. 2057].
>
> …
>
> The appellant suggests that by making a decision that the [records] should be excluded due to the operation of s. 65(6), the Commissioner would be deciding the issue of judicial independence and impartiality. The Ministry submits that this is just not the case. The decision by the Commissioner is not a decision with respect to judicial independence, either directly or by implication.

In its sur-reply representations, the appellant essentially reiterates its earlier submissions to the effect that Deputy Judges, like all judges, are not "employees", and that judges are unique because of the constitutional guarantee of judicial independence. For that reason, the appellant submits, they should "… never be thrown into an 'open-ended class of professionals.'" The appellant concludes by submitting that Deputy Judges are "… not included in the class of professionals discussed in [*Minister of Health and Long-Term Care*]", citing judicial independence as the basis for this view.

Analysis

In order to assess the representations and evidence in relation to requirement 3 under section 65(6)3, I have decided to address the issues in two steps, as follows:

(1) Apart from the appellant's arguments about judicial independence, would the records otherwise meet requirement 3?

(2) If they would, what is the impact of the appellant's arguments about judicial independence?

In my view, the first question must be answered in the affirmative. The parties both submit, and I agree, that Deputy Judges are not "employees" of the Ministry or the government, because the independent nature of their work precludes such a conclusion. In those circumstances, in order for section 65(6)3 to apply, I must be satisfied that the meetings or communications referred to in my findings under the first two requirements were about "labour relations" in which the Ministry has an interest.

Based on a review of *Ontario Deputy Judges Assn. v. Ontario* (cited above), in which the Superior Court of Justice (later affirmed by the Court of Appeal) ruled on an application brought by the ODJA, it is evident that the ODJA acts on behalf of Deputy Judges in matters relating to their remuneration and working conditions. The Superior Court described the ODJA's application as follows (at 505-506):

> The Deputy Judges of the Ontario Small Claims Court are paid $232 per day. This rate has not been increased since 1982. They are concerned that they lack sufficient financial security and sufficient administrative support and services to ensure their judicial independence. As a result, through their association ("ODJA"), they bring this application, seeking an order requiring the respondents to establish an independent remuneration commission and to establish suitable standards for their administrative support.

The Court of Appeal's judgment in *Minster of Health and Long-Term Care* indicates that finding a group of professionals not to be involved in "labour relations" with the government, because they are not its employees, is reading section 65(6)3 too narrowly. The Court also indicates that "labour relations" has a meaning that goes beyond the confines of collective bargaining. The Court's comments on this point bear repeating:

> … the Assistant Information and Privacy Commissioner and the Divisional Court read the phrase "labour relations" in s. 65(6)3 of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 ("the Act"), too narrowly. The phrase is not defined in that Act, and *its ordinary meaning can extend to relations and conditions of work beyond those relating to collective bargaining. Nor is there any reason to restrict the meaning of "labour relations" to employer/employee relations*; to do so would render the phrase "employment-related matters" redundant. [Emphasis added.]

In my view, this part of the judgment strongly suggests that the correspondence and proposed meeting between the ODJA and the Ministry, both of which relate to the Deputy Judges' collective concerns about remuneration and working conditions, are about "labour relations" as that phrase is interpreted by the Court of Appeal. These concerns were expressed on the Deputy Judges' behalf by the ODJA. The records themselves consist of communications about the concerns expressed by the ODJA, and they are about a proposed meeting on this subject. I therefore find that these communications and the proposed meeting were about "labour relations" within the meaning of section 65(6)3. Because the Ministry is the source of the Deputy Judges' income as such, and changes to their remuneration would have impact on the Ministry and the financial underpinnings of Ontario's Small Claims Court system, and in view of the Ministry's obvious involvement in the administration of justice in Ontario, it is evident that this is also a matter in which the Ministry "has an interest" within the meaning of section 65(6)3.

These conclusions are reinforced by the fact that, in *Minister of Health and Long-Term Care*, the Court was also considering the role of a committee that represented non-employees with respect to issues such as remuneration. Again, the Court's conclusion bears repeating:

> The relationship between the government and physicians, and *the work of the Physician Services Committee in discharging its mandate on their behalf, including provisions for the remuneration of physicians, falls within the phrase of "labour relations"*, and the meetings, consultations, discussions and communications that take place in the discharge of that mandate fall within that phrase as it appears in s. 65(6)3. [Emphasis added.]

In my view, the parallel between the two cases is exact. Absent the appellant's arguments about judicial independence, therefore, my preliminary conclusion is that requirement 3 is met, and as all three requirements for the application of section 65(6)3 are met, the records are excluded from the scope of the *Act* under this section.

I now turn to the impact of the appellant's arguments about judicial independence. The appellant places repeated emphasis on the fact that Deputy Judges cannot be considered to be employees or civil servants because of judicial independence, and seeks to distinguish the finding in *Minister of Health and Long-Term Care* on that basis. On the facts, this is a distinction without a difference. The doctors in that case were also not civil servants or employees of the government, and although not protected by the cloak of judicial independence, they were themselves "independent" of the institution and the government, but section 65(6)3 nevertheless applied to exclude information about negotiations on their behalf from the scope of the *Act*.

The main thrust of the appellant's position on judicial independence is, in effect, that section 65(6) is constitutionally inoperative as regards members of the judiciary, including Deputy Judges. Section 109 of the *Courts of Justice Act* requires a Notice of Constitutional Question where "[t]he constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature … is in question." A Notice of Constitutional Question would therefore be required before the appellant's arguments in this regard could be upheld. In any event, I have concluded that the appellant's position on this issue is not sustainable, for the reasons that follow.

As noted, the appellant states that it would be "erroneous and an egregious violation of the constitutional guarantee of judicial independence" to find that the communications contained in the records, and the meeting proposed by the ODJA, are about a labour relations matter. I agree with the appellant that the independence of the judiciary from the executive branch of government is a well-established constitutional principle of great importance. The fundamental flaw in the appellant's argument is that it entirely fails to explain how the principle of judicial independence would be impacted in *any* way by a decision that excludes the records at issue from the scope of an access-to-information scheme such as the one found in the *Act*. I am not in possession of any evidence or argument to suggest that such a result would impede judicial independence.

The principle of judicial independence has been described in a significant number of judicial decisions.

In *Valente* (cited above), the question was whether the independence of judges of Ontario's Provincial Court (Criminal Division) (as it was then called) was compromised by the fact that their salaries were determined by the executive branch, or was compromised by matters relating to the security of their tenure and other related issues. The argument was advanced in the context of section 11(d) of the *Canadian Charter of Rights and Freedoms*, which provides several guaranteed rights to accused persons, including the right to be tried by an independent tribunal. The Supreme Court of Canada articulated the test for judicial independence as follows (at 689):

> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. *The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence*, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. [Emphasis added.]

The Supreme Court of Canada described the principle of judicial independence in the following manner in *R. v. Beauregard*, [1986] 2 S.C.R. 56 (at 69):

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider - be it government, pressure group, individual or even another judge - should interfere in fact, or attempt to interfere with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.
>
> Of recent years the general understanding of the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies. The ability of individual judges to make decisions in discrete cases free from external interference or influence

> continues, of course, to be an important and necessary component of the principle. Today, however, the principle is far broader. In the words of a leading academic authority on judicial independence, Professor Shimon Shetreet: 'The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community"....

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (cited above) dealt with section 11(d) of the *Charter* as it relates to judicial independence. At para. 83, the majority of the Supreme Court of Canada recognized the broad basis of judicial independence as a constitutional principle. Former Chief Justice Lamer, writing for the majority, found it to be broader than the provisions of sections 96-100 of the *Constitution Act, 1867* (which refer to Superior, District and County Courts) or section 11(d) of the *Charter,* (which refers to the rights of "accused persons"):

> Notwithstanding the presence of s. 11(d) of the Charter, and ss. 96-100 of the Constitution Act, 1867, *I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts*. The existence of that principle, whose origins can be traced to the Act of Settlement of 1701, is recognized and affirmed by the preamble to the Constitution Act, 1867. The specific provisions of the Constitution Acts, 1867 to 1982, merely "elaborate that principle in the institutional apparatus which they create or contemplate": Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, per Rand J.

Chief Justice Lamer framed the issues in this case as follows (at paras. 2 and 3):

> The question of judicial independence, not only under s. 11(d) of the *Charter*, but also under ss. 96-100 of the *Constitution Act, 1867*, has been the subject of previous decisions of this Court. However, the aspect of judicial independence which is engaged by the impugned reductions in salary -- financial security -- has only been dealt with in any depth by *Valente v. The Queen*, [1985] 2 S.C.R. 673, and *Beauregard v. Canada*, [1986] 2 S.C.R. 56. The facts of the current appeals require that we address questions which were left unanswered by those earlier decisions.
>
> *Valente* was the first decision in which this Court gave meaning to s. 11(d)'s guarantee of judicial independence and impartiality. In that judgment, this Court held that s. 11(d) encompassed a guarantee, inter alia, of financial security for the courts and tribunals which come within the scope of that provision. This Court, however, only turned its mind to the nature of financial security which is required for individual judges to enjoy judicial independence. It held that for individual judges to be independent, their salaries must be secured by law, and not be subject to arbitrary interference by the executive. The question which arises in these

> appeals, by contrast, is the content of the *collective or institutional dimension of financial security* for judges of provincial courts, which was not at issue in *Valente*. In particular, I will address the institutional arrangements which are comprehended by the guarantee of collective financial security. [Emphasis added.]

In my view, the issue of "collective" independence referred to by the former Chief Justice is at the heart of the concerns expressed by the appellant in his submissions, that Deputy Judges *as a group*, in their relations with the government concerning remuneration and working conditions, should not be added to a group that includes other professionals to whom the constitutional guarantee of independence does not apply.

At para. 118 of this same decision, Chief Justice Lamer elaborates on the three core *concepts* of independence and the two *dimensions* of independence that were previously discussed in *Valente*:

> The three core characteristics of judicial independence -- security of tenure, financial security, and administrative independence -- should be contrasted with what I have termed the two dimensions of judicial independence. In Valente, Le Dain J. drew a distinction between two dimensions of judicial independence, the *individual independence* of a judge and the *institutional or collective independence of the court or tribunal* of which that judge is a member. In other words, while individual independence attaches to individual judges, institutional or collective independence attaches to the court or tribunal as an institutional entity. The two different dimensions of judicial independence are related in the following way (Valente, supra, at p. 687):
>
> > The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but *if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.* [Emphases added.]

The Chief Justice also stated (at para. 287):

> Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial remuneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.

…

> Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature. However, that does not preclude chief justices or judges, or bodies representing judges, from expressing concerns or making representations to governments regarding judicial remuneration.

As discussed above, the focus of the appellant's submissions on this issue is the collective relationship between the Deputy Judges and the provincial government. As noted in *Valente*, judicial independence requires that judges be "perceived as independent". The Court's articulation of this requirement (which was repeated at para. 112 of *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, cited above), bears repeating:

> The perception must, however, as I have suggested, be a perception of *whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence*, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

With respect to the Deputy Judges, this precise objective was addressed by the Superior Court of Justice and the Court of Appeal in *Ontario Deputy Judges Assn. v. Ontario* (cited above). The Superior Court, upheld by the Court of Appeal, held that an independent remuneration commission must be established for Deputy Judges, and recommended that their concerns about administrative and support services be addressed as well. The Superior Court stated (at pp. 519-520 O.R.):

> For the reasons I have outlined, I conclude that the salaries of the deputy judges of the Small Claims Court have fallen below a minimum acceptable level, and that those salaries have been maintained without recourse to an independent commission. As a result, I am of the view that they do not have sufficient financial security to meet the legal test for judicial independence.
>
> Without in any way intending to denigrate the serious concerns raised by the applicant in relation to administrative support and services, I am not satisfied that the shortcomings in this area lead to the conclusion that judicial independence is sufficiently undermined to raise any constitutional issue. I would urge the respondents to address this issue, but I will not order them to do so.
>
> For the reasons already stated, I conclude that the deputy judges are entitled to the creation of an independent remuneration commission. I agree with the respondents, however, that I should not dictate with precision the form that the commission should take, the powers that it should have or its precise role in the determination of judicial remuneration. It is sufficient for me to order that the

> respondents shall, within six months of the release of this judgment, provide recourse to the deputy judges of the Small Claims Court to a commission for determining judicial remuneration that is independent, efficient and objective. While the recommendations of such commission need not be binding, they should not be set aside lightly. …

The Court of Appeal essentially affirmed this decision, agreeing that the Superior Court was correct in finding that an independent body is "necessary to avoid the politicization of the relationships between the three branches of government," (para. 29) and that the current process "does not satisfy the requirements of independence, effectiveness and objectivity" (para. 35). The Court of Appeal differed from the Superior Court by taking the position that it was not necessary to "... decide whether the current rate of compensation for Deputy Judges meets a minimum acceptable level," and set aside this aspect of the judgment. Nevertheless, these two judgments fully address the institutional or collective independence of Deputy Judges, and the test articulated in *Valente* requiring that the Small Claims Court, and the Deputy Judges, enjoy "the essential objective conditions or guarantees of judicial independence".

The appellant advances no basis for concluding otherwise, and in any event, I am satisfied that excluding the records at issue from the scope of the *Act* under section 65(6) has no impact on judicial independence.

ORDER:

I uphold the decision of the Ministry that the *Act* does not apply to the records.

Original signed by: August 31, 2006
John Higgins
Senior Adjudicator