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

ORDER PO-2696

Appeal PA-050275-1

Workplace Safety and Insurance Board

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:

A request was submitted to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> [Translation] … I request access to my information on audiotape and in French on the basis of my disabilities.
>
> I request access to my aforementioned file from the beginning of 1989 to Ms. Hocko's decision on January 28, 1998.
>
> I am not satisfied that Ms. Hocko used all my information to make her decision nor that the information she used is all mine.

In response, the WSIB issued a decision letter that stated:

> [Translation] I cannot accept your request for access for the period in question for the following reasons:
>
> 1. On February 11, 1999, in order to settle your complaint to the Ontario Human Rights Commission, you signed an agreement under which the WSIB provides you with access on audiotape to the written records created by the WSIB from February 11, 1999, relating to your appeals and which are in your file. The WSIB entered into this agreement with you in good faith. Your request for access for the years 1989 to 1998 is therefore contrary to our agreement.
>
> 2. I can confirm that all the information in your file belongs to you. Your constant requests and complaints to the WSIB and other government agencies require your claims officer to review your file on a regular basis. Ms. E. Baldari is very familiar with your file and is certain that all the decisions handed down with respect to your file have been based on information concerning you.
>
> 3. I believe that you are not acting in good faith, for several reasons including the following:
>
>   - During one of our telephone conversations, you said that the real reason for this request is to wear out the WSIB so that we hire a lawyer to represent you, as the WSIAT [the Workplace Safety and Insurance Appeals Tribunal] has done, and appeal Ms. Hocko's decision, which the WSIB and the WSIAT have refused to do.
>
>   - You continue to make the same requests, complaints and appeals to various government offices and agencies, to your MPP and so on, but without giving them the necessary information. For instance, on August 16, 2005, three representatives of the WSIB – two directors and a lawyer – met

> with you at the office of the Human Rights Commission in Ottawa. In that meeting, you admitted that you had been given access to your file in French and on audiotape in accordance with the [*Act*], contrary to the statement you made in your complaint. During the meeting, you conversed in English with ease and did not need the interpreter you had requested. In fact, you are in the habit of discussing your file in English with your claims officer and, more recently, reading documents in English during a telephone conversation. It also appears that you do not ask to receive your communications from all the other government agencies on audiotape.
>
> - Lastly, you have refused to give us back a record that does not belong to you.
>
> The WSIB has provided you and your representatives with copies of your file …

The requester (now the appellant) appealed the WSIB's decision to this office, which appointed a mediator to assist the parties in resolving the matters under appeal.

This appeal was not settled in mediation and was transferred to the adjudication stage of the appeal process. Initially, I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the WSIB and invited it to submit written representations. In response, the WSIB submitted written representations in English to this office.

The appellant has asked that any correspondence or decisions of this office with respect to this appeal be sent to him on audiotape and in French. This office translated the WSIB's representations into French and recorded both these representations and the Notice of Inquiry on an audiotape. I then sent this audiotape to the appellant and invited him to submit representations on all issues in the Notice of Inquiry and to respond to the WSIB's representations.

In response, the appellant submitted representations to this office that consist of a one-page letter, several attached documents, and an audiotape. In his letter, the appellant states that his response to the issues in the Notice of Inquiry is on the audiotape.

I attempted to listen to the audiotape submitted by the appellant and found that it was inaudible. Consequently, I asked an adjudication review officer with this office to contact the appellant by telephone to offer him the opportunity to resubmit an audible version of the audiotape or the written script that was used by the person who recorded the appellant's representations on the audiotape.

In response, the appellant informed the adjudication review officer that he had already made his point, and that he would not be resubmitting the audiotape. Later that day, he left a message on the adjudication review officer's voicemail, reiterating that he had no intention of submitting anything further.

In the interests of procedural fairness, I decided to provide the appellant with a further opportunity to resubmit the inaudible audiotape. I sent him a letter on audiotape and in French explaining that the audiotape that he had submitted in response to the Notice of Inquiry was inaudible. This letter further informed him that if he wished to submit replacement representations, either on audiotape or in writing, he should submit them to this office within two weeks.

In response, the appellant faxed two letters to this office that stated, amongst other things, that he had listened to a copy of the audiotape that he submitted to this office, and that this audiotape worked properly. The appellant did not send this office a copy of this functional audiotape. However, his second fax included a four-page letter that sets out his position on some of the issues in this appeal. This letter was not previously included with the documents that the appellant submitted in response to the Notice of Inquiry that was issued to him. Consequently, I will treat this four-page letter, and the other documents that the appellant previously sent to this office, as his representations in this appeal.

In its decision letter, the WSIB claims that the appellant's request was not made in good faith and was made for a purpose other than to obtain access. Section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. Moreover, section 5.1(b) of Regulation 460 requires a head to conclude that a request for access to a record or personal information is frivolous or vexatious if the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

It was not clear to me whether the WSIB was claiming that the appellant's request was frivolous or vexatious. Although the wording in the WSIB's decision letter is similar to the grounds in section 5.1(b) of Regulation 460, it did not expressly cite this provision or section 10(1)(b) of the *Act*. Consequently, I issued a supplementary Notice of Inquiry to the WSIB that invited it to submit representations as to whether the appellant's request is frivolous or vexatious, and whether his appeal to this office is an abuse of process. In response, the WSIB submitted supplementary representations stating that it did not consider the appellant's request to be frivolous or vexatious or his appeal to be an abuse of process. In view of these submissions, I will not address this issue further.

RECORDS:

The records at issue in this appeal are those that were compiled in the appellant's WSIB file from the beginning of 1989 to January 28, 1998.

DISCUSSION:

MANNER OF ACCESS/COMPREHENSIBLE FORM

General principles

Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Once it has been determined that a requester is to be given access to his or her own personal information, sections 48(3) and (4) of the *Act* prescribe the manner and form in which the institution must provide access. These sections state:

> **Manner of access**
>
> (3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,
>
> (a) permit the individual to examine the personal information; or
>
> *(b) provide the individual with a copy thereof.*
>
> **Comprehensible form**
>
> (4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual *in a comprehensible form* and in a manner which indicates the general terms and conditions under which the personal information is stored and used. [Emphasis added.]

Consequently, I must determine whether sections 48(3) and/or (4) of the *Act* require the WSIB to provide the appellant with the personal information in his file in audiotape format and in French, for the time period specified in his request.

Previous orders

This office has issued several orders over the years that have grappled with the interpretation of sections 48(3) and (4) in the context of requests by persons with disabilities for access to their personal information in a format that accommodates their disability. In particular, Orders P-540 and PO-2424 both dealt with requests from individuals with disabilities who sought access to records containing their personal information held by an institution. In my view, it is useful to summarize the different approaches taken in these two orders, because they may assist in providing guidance in resolving the issues in the present appeal.

Order P-540

The Ministry of Community and Social Services (the Ministry) received a request under the *Act* from an individual for two copies of his Vocational Rehabilitation file for the period from November 22, 1982 to November 6, 1992. The requester, who had a visual disability, asked that one copy be sent to him in regular format and that the other be provided in 24-point type (enlarged) bold print.

The Ministry provided the requester with a copy of his file in regular print, but refused to supply him with a second copy in an enlarged format. The requester appealed the Ministry's decision to this office.

Former Assistant Commissioner Irwin Glasberg found that the relevant provision that applied was section 48(4) of the *Act*, which requires an institution to ensure that personal information is provided to the individual in a comprehensible form. Consequently, he first assessed whether section 48(4) required the Ministry to provide the appellant with his personal information in 24-point bold type font.

In his analysis, former Assistant Commissioner Glasberg referred to a previous order issued by former Commissioner Sidney Linden that addressed the meaning of the term "comprehensible form" in section 48(4). In Order 19, Commissioner Linden found that section 48(4) creates a duty to ensure that the average person can comprehend the records. However, it does not create a further duty on the institution to assess a specific requester's ability to comprehend a particular record.

Former Assistant Commissioner Glasberg stated that he agreed that the term "comprehensible" must be interpreted according to an objective standard, and he then applied this principle to the appeal before him:

> When the Ministry provided the appellant with a copy of his file in an ordinary print format, the information would have been comprehensible to an average person. Based, therefore, on the application of an objective interpretative standard, the result is that the Ministry provided the information in a comprehensible format for the purposes of section 48(4) of the *Act*. The corollary of this proposition is that the Ministry (or any other institution) would have no obligation under the *Act* to provide personal information to a visually impaired person in a format which he/she found more appropriate.

Former Assistant Commissioner Glasberg then proceeded to examine whether this office was required to interpret the provisions of section 48(4) of the *Act* according to the principles set out in section 11(1)(a) of the Ontario *Human Rights Code* (the *Code*):

> The threshold question for me to determine is whether the Commissioner's office has the authority to apply section 11 of the *Code* to the interpretation of section

> 48(4) of the *Act*. My thinking on this subject has been guided by two considerations. First, the *Code* is a piece of remedial legislation which is intended to apply broadly to the laws of this province. Second, other administrative bodies within the province (e.g. labour boards of arbitration) have determined that they have the requisite authority to apply the *Code* to the legislation that they interpret.
>
> Based on these considerations, and in the absence of any specific representations on this point from the Ministry, I find that the Commissioner's office has an obligation to interpret section 48(4) of the *Act* according to the principles set out in section 11(1)(a) of the *Code*.

Former Assistant Commissioner Glasberg then examined whether the Ministry's decision not to provide the personal information to the appellant in enlarged format infringed that individual's rights under section 11(1)(a) of the *Code*. He found that the Ministry recognized the appellant's special needs and took steps to assist the appellant to comprehend his file. He concluded that the Ministry's decision not to transcribe the appellant's entire file into 24-point type bold print did not represent a contravention of section 11(1)(a) of the *Code*.

Order PO-2424

The Workplace Safety and Insurance Appeals Tribunal (the WSIAT) received a request under the *Act* from the same requester as in the present appeal. In his request, this individual, who is disabled, asked a series of questions arising with respect to a benefits decision that the WSIAT had issued.

The WSIAT issued a decision letter to the requester that stated, amongst other things, that it had already sent him a copy of its benefits decisions relating to him. In his appeal letter to this office, the requester (now the appellant) explained that he was seeking access to his file at WSIAT, but in a format that was accessible to him.

At the conclusion of the mediation stage of the appeal process, this office determined that the only issue remaining in dispute related to WSIAT's decision not to provide the appellant with copies of two French-language benefits decisions in audiotape format.

In his decision, Adjudicator Donald Hale took a different approach than former Assistant Commissioner Glasberg in Order P-540. In particular, he considered whether section 48(3)(b) of the *Act* required the WSIAT to provide the appellant with access to the two French-language decisions in audiotape format. Section 48(3)(b) requires that institutions provide requesters with a "copy" of a record when the individual is being given access to personal information.

Adjudicator Hale examined three dictionary definitions of the word "copy" and concluded that they support a broad interpretation of the term that would include within its ambit an audiotaped version of a paper record. He found further support for this interpretation in the Ontario Court of

Appeal's decision in *Regina v. McMullen* (1979), 25 O.R. (2d) 301 and in an Australian decision, *Bailey v. Hinch* [1989] V.R. 79:

> … I specifically find that the term "copy" in section 48(3) must be read to include various versions of the written record, including a transcribed or audiotaped copy since it simply represents a "reproduction of the original", albeit in a different format from the original version.
>
> This interpretation of the term "copy" is also consistent with the purposes of the *Act*. One of the purposes of the *Act*, set out in section 1(a), is to grant the public a right of access to information, subject only to limited and specific exemptions, which are not claimed in the current appeal.

Consequently, he concluded that the WSIAT was required to provide the appellant with the two French-language decisions in audiotape format:

> In my view, a requester is entitled under the *Act* to request access to information in whatever reasonably practicable format he or she wishes, subject to the fee provisions in section 57(1). In the present situation, I find that the appellant is entitled to request access to information in the format sought and WSIAT is obliged to provide them to him in that manner in accordance with section 48(3)(b).

Adjudicator Hale also addressed an additional issue raised by the WSIAT in its representations. The WSIAT pointed out that the appellant had filed a complaint with the OHRC, alleging a breach of the *Code*, because the WSIAT had not provided him with audiotaped versions of several records, including the two French-language decisions at issue in the appeal before Adjudicator Hale. It asserted that the appeal should be dismissed because the OHRC was a more appropriate forum for resolving the appellant's complaint.

Adjudicator Hale disagreed with the WSIAT's submission on this point:

> In the present appeal … the essential nature of the dispute is access to personal information and the interpretation of section 48(3) of the *Act*. The interpretation of section 48(3) of the *Act* is not dependent on whether or not the appellant has a disability; section 48(3) is applicable to any requester seeking access to personal information in the custody or control of an institution regardless of whether or not the requester has a disability.

As a result, Adjudicator Hale ordered the WSIAT to provide the appellant with audiotape copies of the two French-language decisions or to provide the appellant with a fee decision for accessing these records.

Analysis and findings

The modern principle of statutory interpretation

In considering the issues in this appeal, it is important to bear in mind the modern principle of statutory interpretation, which was formulated by Elmer Driedger in the 2nd edition of his book, *Construction of Statutes*, and has been adopted and applied by the Supreme Court of Canada in numerous cases. (See, for example, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). Driedger described this principle in the following way:

> 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.

Which provision is applicable: Section 48(3) or 48(4)?

The first issue that must be resolved in this appeal is whether the appellant's request for his personal information on audiotape and in French should be considered under section 48(3) or section 48(4) of the *Act*. As noted above, similar requests from persons with disabilities were considered under section 48(3)(b) in Order PO-2424 but under section 48(4) in Order P-540.

In its representations, the WSIB submits that section 48(3) does not apply in the circumstances of this appeal. It takes issue with Order PO-2424, which found that the term "copy" in section 48(3)(b) must be read to include various versions of a written document, including an audiotape copy of a record containing a requester's personal information.

The WSIB submits that the conversion of a written document into audiotape format amounts to the creation of a new record. It submits that the *Act* does not require an institution to create new records in response to an access request and cites Orders 196, PO-2151 and P-820 to support its position.

In his representations, the appellant submits that he is not asking the WSIB to create new records. He further submits that Order PO-2424 is applicable in the circumstances of this appeal.

In my view, the appellant's request should be considered under section 48(4) of the *Act*, not section 48(3), for the following reasons.

First, the wording of section 48(3), when read in its grammatical and ordinary sense, simply requires an institution to either permit the individual to examine the personal information or provide the individual with a "copy" of it. In contrast, section 48(4) specifically requires an institution to ensure that the personal information is provided to the individual in a "comprehensible form." In my view, this latter wording strongly suggests that section 48(4) applies in situations in which a requester seeks access to his or her personal information from an

institution but asks that it be provided in a form (e.g., format or language) that can be understood by that individual.

Second, the words of the *Act* must be read in their entire context, which may include consulting external aids, such as other access and privacy statutes, to determine their meaning. A comparison to the statutory formula in analogous but more detailed provisions in the federal *Privacy Act* supports the principle that an individual's request for personal information in a different format and language should be considered under section 48(4) of the *Act*, not section 48(3).

Section 17(1) of the federal *Privacy Act* is nearly identical in wording to section 48(3) of the provincial *Act*. However, sections 17(2) and (3), which are essentially more detailed versions of section 48(4) of the provincial *Act*, then provide specific rules that address how federal institutions must address requests from individuals who are seeking their personal information in one of Canada's official languages or in a different format because they have a "sensory" disability.

I have provided a comparison between the provisions in the provincial *Act* and the federal *Privacy Act* in the following chart:

Ontario *Freedom of Information and Protection of Privacy Act*	**Federal *Privacy Act***
48. (3) Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall, (a) permit the individual to examine the personal information; or (b) provide the individual with a copy thereof.	17. (1) Subject to any regulations made under paragraph 77(1)(o), where an individual is to be given access to personal information requested under subsection 12(1), the government institution shall (a) permit the individual to examine the information in accordance with the regulations; or (b) provide the individual with a copy thereof.
48. (4) Where access to personal information is to be given, the head shall ensure that the personal information is provided to the individual *in a comprehensible form* and in a manner which indicates the general terms and conditions under which the personal	17. (2) Where access to personal information is to be given under this Act and the individual to whom access is to be given requests that access be given in a particular one of the official languages of Canada,

information is stored and used. [Emphasis added.]	(a) access shall be given in that language, if the personal information already exists under the control of a government institution in that language; and (b) where the personal information does not exist in that language, the head of the government institution that has control of the personal information shall cause it to be translated or interpreted for the individual if the head of the institution considers a translation or interpretation to be necessary to enable the individual to understand the information. 17. (3) Where access to personal information is to be given under this Act and the individual to whom access is to be given has a sensory disability and requests that access be given in an alternative format, access shall be given in an alternative format if (a) the personal information already exists under the control of a government institution in an alternative format that is acceptable to the individual; or (b) the head of the government institution that has control of the personal information considers the giving of access in an alternative format to be necessary to enable the individual to exercise the individual's right of access under this Act and considers it reasonable to cause the personal information to be converted.

In my view, this comparison illustrates that the issue of whether an individual should be provided with his or her personal information in a different format and language than that maintained by the institution should be considered under section 48(4) of the *Act*, not section 48(3).

Third, the wording in sections 48(3) and 48(4) of the *Act* must be read harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Ontario legislature. The purposes of the *Act*, which are set out in section 1, include providing individuals with a right of access to their personal information. The scheme for seeking access to one's own personal

information is set out in Part III of the *Act*. As noted above, section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Once it has been determined that a requester is to be given access to his or her own personal information, either in whole or in part, sections 48(3) and (4) of the *Act* prescribe the manner and form in which the institution must provide access. The presumed intention of the legislature in setting up the scheme in Part III of the *Act* is to provide all requesters, including persons with disabilities and francophones, with the right to access their personal information.

In my view, the wording in sections 48(3) and 48(4) reads harmoniously with the scheme of the *Act*, the purpose of the *Act* and the intention of the legislature in the following manner. If an institution decides to provide a requester with access to his or her personal information, section 48(3) simply requires that institution to either permit the requester to examine the personal information or provide the individual with a "copy" of it in its existing form. However, if a requester then goes on to ask for his or her personal information in a different format and/or language, the institution would be required to respond to this portion of the request under section 48(4).

It may be asked whether the term, "comprehensible form," in section 48(4) is sufficiently broad to include a requested change in both format and language. In my view, requesters with disabilities and francophone requesters cannot meaningfully exercise their right to access their personal information, in accordance with the purposes of the *Act*, unless the information is provided in a form that is comprehensible to them. It could not have been the legislature's intent, in drafting section 48(4) of the *Act*, to allow institutions to provide disabled requesters with their personal information in a format that does not enable them to process and understand that information. Similarly, it could not have been the legislature's intent to allow institutions to provide francophone requesters with their personal information in English if they only understand French or have a poor understanding of English.

Moreover, in the context of requests from persons with disabilities and francophones, the meaning of the term, "comprehensible form," in section 48(4) cannot be interpreted according to an "objective standard," as former Assistant Commissioner Glasberg found in Order P-540. Requesters with visual disabilities, for example, may have difficulty (depending on the extent of a particular individual's disability) understanding their personal information if it is in paper format with a standard font size. Consequently, it does not make sense to assess whether personal information in this format is comprehensible or intelligible to the "average person," in determining whether a requester with a visual disability has a right to access his or her personal information in a "comprehensible form" under section 48(4) of the *Act*. Clearly, a subjective standard must be used that takes that person's disability into account.

In short, I find that section 48(4) of the *Act* requires institutions to provide disabled requesters with their personal information in a format that is comprehensible or intelligible to them. In addition, I find that section 48(4) requires institutions to provide francophone requesters with their personal information in French. However, as will be explained below, these obligations are

not absolute and must be interpreted in accordance with the principles in the *Code* and the *French Language Services Act* (the *FLSA*).

The extent of an institution's obligations under section 48(4)

In the circumstances of this appeal, the WSIB states that it has provided the appellant and his representatives with photocopies of the 2,705 documents in his file that cover the time period specified in his request. Consequently, I find that the WSIB has, in fact, already complied with section 48(3)(b) of the *Act*, which requires an institution to provide requesters with a "copy" of their personal information when providing access.

However, the appellant has requested access to the personal information in his WSIB file in a different format (on audiotape) and in French, covering the period from the beginning of 1989 to January 28, 1998. Consequently, it must be determined to what extent section 48(4) of the *Act* requires the WSIB to provide the appellant with the personal information in his file in the format and language he has requested, for the time period specified in his request.

Format

I will start by examining the issue of format. For the reasons that follow, I find that this office must apply the principles of the *Code* in interpreting the extent of an institution's obligation in section 48(4) of the *Act* to provide disabled requesters with their personal information in a format that is comprehensible or intelligible to them.

Unlike section 17(3) of the federal *Privacy Act*, which sets out detailed rules that federal government institutions must follow when responding to access requests for personal information from persons with "sensory disabilities," section 48(4) of the *Act* provides little guidance for provincial government institutions as to the extent of their duty to provide disabled requesters with their personal information in a "comprehensible form." This raises the question as to whether any external aids (e.g., the *Code*) may be used to assist in interpreting the extent of an institution's duty to provide disabled requesters with access to their personal information in a format that is comprehensible or intelligible to them.

Two recent decisions of the Supreme Court of Canada provide guidance on the issue of whether administrative tribunals must consider and apply the principles in the *Code* when interpreting their enabling legislation. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, two individuals had applied for benefits to the Director of the Ontario Disability Support Program. The Director determined that the appellants were not entitled to benefits under the *Ontario Disability Support Program Act* because a provision of that legislation stated that benefits would not be provided to applicants whose condition resulted from substance abuse.

The two individuals appealed the Director's decision to the Social Benefits Tribunal (SBT) and argued that this exclusionary provision was a violation of the *Code*, which prohibits discrimination on a number of grounds, including disability, and has primacy over other legislation. However, the SBT dismissed the appeal on the basis that it did not have the jurisdiction to consider the application of the *Code* to the impugned provision in the *Ontario Disability Support Program Act*.

The SBT's decision was appealed to the courts and ultimately reached the Supreme Court of Canada. Speaking for the majority, Justice Bastarache found that there were two issues before the Court:

> (1) Does the SBT have the jurisdiction to consider the *Code* in rendering its decisions?
>
> (2) If the answer to the first question is "yes", should the SBT have declined to exercise its jurisdiction in the present cases?

With respect to the first issue, Justice Bastarache noted that it is settled law that statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law to a matter properly in front of them. However, this presumption can be rebutted if a tribunal's enabling statute precludes it from considering an external source of law. He then examined the enabling statutes governing the SBT and found that they did not preclude it from applying the *Code*. Consequently, he concluded that the SBT had the jurisdiction to consider the *Code* in rendering its decisions.

With respect to the second issue, he found that because the SBT's enabling legislation did not grant it the authority to decline jurisdiction, it could not avoid considering the *Code* issues in the appeals before it.

In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, the Supreme Court upheld a decision of the Canadian Transportation Agency (the Agency) that had ordered VIA Rail to implement remedial measures to make its new Renaissance cars accessible to persons using wheelchairs. Under the *Canadian Transportation Act* (the *CTA*) and its accompanying regulations, the Agency has a mandate to address "undue obstacles" to the mobility of persons with disabilities in the transportation context.

Speaking for the majority, Justice Abella found that the Agency has an obligation to apply the principles of the federal *Human Rights Act* in interpreting the meaning of the term, "undue obstacles" in the *CTA*:

> In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, at para. 26, a majority of this Court affirmed the presumption that a tribunal can look to external statutes to assist in the interpretation of provisions in its enabling legislation "because it is undesirable

> for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute." Both *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156, and *Tranchemontagne* make clear that human rights legislation, as a declaration of "public policy regarding matters of general concern", forms part of the body of relevant law necessary to assist a tribunal in interpreting its enabling legislation.
>
> In *Winnipeg School Division*, McIntyre J. confirmed that where there is a conflict between human rights law and other specific legislation, unless an exception is created, the human rights legislation, as a collective statement of public policy, must govern. It follows as a natural corollary that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles. The Agency is therefore obliged to apply the principles of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, when defining and identifying "undue obstacles" in the transportation context.

In my view, these two Supreme Court decisions raise two questions that are relevant in this appeal:

(1) Does this office have the jurisdiction to consider the *Code* in rendering its decisions?

(2) If the answer to the first question is "yes", is this office required to interpret section 48(4) of the *Act* in accordance with the principles in the *Code*?

With respect to the first question, the *Act* empowers this office to decide questions of law in resolving access appeals. As a result, this office is presumed to have the power to look beyond the *Act* in order to apply the whole law in rendering its decisions. This presumption can be rebutted if the *Act* precludes this office from considering an external source of law, such as the *Code*. However, the *Act* does not preclude this office from considering the *Code*. Consequently, I find that this office has the jurisdiction to consider the *Code* in rendering its decisions.

With respect to the second question, in *Tranchemontagne*, the Supreme Court held that if an administrative tribunal's enabling legislation does not grant it the authority to decline applying the *Code*, it must consider the *Code* in the appeals before it. Moreover, in *Council of Canadians with Disabilities*, the Supreme Court held that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles.

I find, therefore, that this office must apply the principles of the *Code* in interpreting the extent of an institution's obligation in section 48(4) of the *Act* to provide disabled requesters with their personal information in a format that is comprehensible or intelligible to them. The *Code*

provisions that are particularly relevant in this context are those that require the accommodation of persons with disabilities.

Language

I will now examine the extent of an institution's obligations under section 48(4) to provide francophone requesters with their personal information in French. At the outset, I would point out that if the personal information of a francophone requester held by an institution is already in French, that information would be in a "comprehensible form," pursuant to section 48(4) of the *Act*. Consequently, an institution would have a duty under section 47(1) (subject to any exemptions in section 49) to disclose that information to the requester in response to an access request.

In some situations, however, the personal information of a francophone requester held by an institution will be in English, not French. This raises the question as to whether the requirement in section 48(4) that institutions provide requesters with their personal information in a "comprehensible form" also includes a duty to translate an individual's personal information into French. For the reasons that follow, I find that this office must apply the principles of the *FLSA* in interpreting the extent of an institution's obligation in section 48(4) of the *Act* to provide a requester with his or her personal information in French.

In my view, there are two questions that must be asked with respect to language:

(1) Does this office have the jurisdiction to consider the *FLSA* in rendering its decisions?

(2) If the answer to the first question is "yes", is this office required to interpret section 48(4) of the *Act* in accordance with the principles in the *FLSA*?

As noted above, this office is presumed to have the power to look beyond the *Act* in order to apply the whole law in rendering its decisions. This presumption can be rebutted if the *Act* precludes this office from considering an external source of law, such as the *FLSA*. However, the *Act* does not preclude this office from considering the *FLSA*. Consequently, with respect to the first question, I find that this office has the jurisdiction to consider the *FLSA* in rendering its decisions.

With respect to the second question, in *Tranchemontagne*, the Supreme Court held that if an administrative tribunal's enabling legislation does not grant it the authority to decline applying the *Code*, it must consider the *Code* in the appeals before it. Moreover, in *Council of Canadians with Disabilities*, the Supreme Court held that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles. This raises the question as to whether this office must consider the *FLSA* in interpreting section 48(4) of the *Act*.

A decision of the Ontario Court of Appeal provides some guidance on this issue. In *Lalonde v. Commission de restructuration des services de santé*, [2001] 56 O.R. (3d) 505, the Court upheld a judgment of the Divisional Court that had quashed certain directions given by the Health Services Restructuring Commission with respect to the Hôpital Montfort. Speaking for the majority, Justices Weiler and Sharpe suggested that the *FLSA* is akin to human rights legislation:

> At one time, the Supreme Court of Canada adopted a restrictive approach to the interpretation of language rights. In *Société des Acadiens*, supra, at p. 578 S.C.R., Beetz J., writing for the majority, held that language rights, which were the result of "political compromise", should be approached with judicial restraint in contrast to human rights, which are "seminal in nature because they are rooted in principle". It is now clear, however, that this narrow and restrictive approach has been abandoned and that *language rights are to be treated as fundamental human rights and accorded a generous interpretation by the courts*. [Emphasis added.]

Unlike the *Code*, the *FLSA* does not contain a clause that gives it primacy over other legislation. However, given that the Court of Appeal has clearly stated that "language rights are to be treated as fundamental human rights," it logically follows that if an administrative tribunal's enabling legislation does not grant it the authority to decline applying the *FLSA*, it must consider the *FLSA* in the appeals before it. The *Act* does not preclude this office from applying the *FLSA*. I find, therefore, that this office has an obligation to consider the *FLSA* in interpreting the provisions of the *Act*.

The Supreme Court of Canada has repeatedly stressed that a broad, liberal and purposive approach must be taken when interpreting human rights legislation. For example, in *C.N.R. v. Canada (Human Rights Commission)* [1987] 1. S.C.R. 1114, Chief Justice Dickson stated the following:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation, the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

Given that the Court of Appeal in *Lalonde* stated that language rights must be treated as "fundamental human rights," and generously interpreted by the court, I find this office must take a broad, liberal and purposive approach when interpreting the French language rights set out in the *FLSA*. The words of the *FLSA* must be given their plain meaning, but it is equally important that the rights enunciated in this legislation be given their full recognition and effect.

The *FLSA* provides individuals with the right to receive provincial government "services" in French in 25 designated areas of the province. In particular, section 2 of the *FLSA* requires the Ontario government "to ensure that services are provided in French." Moreover, under section 5 of the *FLSA*, "a person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature …"

The term "service" is defined in section 1 as "any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose." Section 7 of the *FLSA* states that the right to receive services in French may be limited "as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made."

For the reasons that follow, I find that if an institution under the *Act* is covered by the *FLSA*, it is required to provide francophone requesters with their personal information in French, in response to access requests, subject to the limitations set out in section 7 of the *FLSA*.

In Order P-562, former Inquiry Officer Anita Fineberg addressed the issue of whether the Ministry of Housing had an obligation to translate into French a list of the job titles for all positions in the Metro Toronto Housing Authority. She found that the *Act* does not require an institution to translate responsive records into French:

> It is my view that, pursuant to the *French Language Services Act*, the Ministry is obliged to respond, in French, to requests made in French under the *Act*. This is what the Ministry did in this case. However, it is not obliged to provide a translation of any responsive records. This would result in an institution having to create a record in circumstances in which it is not required to do so. Accordingly, I am of the opinion that there is no statutory obligation on the Ministry to respond to this part of the requests in any way different from the way it did.

In my view, this finding does not apply to requests for one's own personal information. I agree that the *FLSA* requires an institution to respond, in French, to requests made in French under the *Act*, because responding to access requests under the *Act* is clearly a "service" provided to the public, as that term is defined in section 1 of the *FLSA*. However, I do not agree with former Inquiry Officer's Fineberg's finding that an institution has absolutely no obligation to translate any responsive records into French.

Although the *Act* does not generally require an institution to create a record in response to an access request, the *Act* must also be interpreted in a manner that is consistent with the *FLSA*. In my view, a broad, liberal and purposive approach to the definition of "service" in section 1, would include the disclosure of personal information to a francophone individual, in response to an access request.

As noted above, the term "service" is defined in the *FLSA* as "any service or procedure that is provided to the public by a government agency or institution of the Legislature and includes all communications for the purpose." In my view, responding to access requests is a "service" provided to the public by government agencies, and providing requesters with their own personal information would fall within "all communications" for that purpose. I find support for the latter part of this interpretation in the wording of section 48(4) in the French version of the *Act*, which requires the head of an institution to ensure that, "les renseignements personnels soient *communiqués*, le cas échéant, au particulier sous une forme intelligible…" [Emphasis added.]

Given that section 2 of the *FLSA* requires the Ontario government "to ensure that services are provided in French," I find that if an institution under the *Act* is covered by the *FLSA*, it is required to translate a francophone requester's personal information into French when responding to an access request. In my view, this finding is not only consistent with the requirements of the *FLSA*, it also enhances one of the major purposes of the *Act*, which is to provide individuals with access to their personal information. It cannot be said that francophone requesters have been provided with meaningful access to their personal information if an institution makes no effort to provide the information in French.

However, an institution's obligation to translate a francophone requester's personal information into French, in response to an access request, is not absolute. As noted above, section 7 of the *FLSA* states that the right to receive services in French may be limited "as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made." In the *Lalonde* case, cited above, the Court of Appeal made the following comments about the meaning of the limitations set out in section 7:

> … The definition of "necessary" implies "une chose absolument indispensable, ce dont on ne peut rigoureusement pas se passer. En somme, une nécessité ineluctable": L.-P. Pigeon, *Rédaction et interprétation des lois*, 3e éd. (Québec: Gouvernement du Québec, Ministère des Communications, 1986) at p. 36. The word "necessary" in this context would appear to mean that existing services can only be limited when this is the only course of action that can be taken.
>
> Before limiting Montfort's services as a community hospital, Ontario must also have taken "all reasonable measures" to comply with the Act. It is possible to state with greater precision what falls short of "all reasonable measures". "All reasonable measures" does not simply mean giving a direction to the transferee hospital to attain F.L.S.A. designation and then transferring the French services before that designation has been attained. Nor does "all reasonable measures" mean creating a seemingly insurmountable problem for the training of healthcare professionals in French and leaving the affected community to solve the problem itself. The Commission's directions do not comply with s. 7 of the Act.

The Court then goes on to state that although the limitations set out in section 7 are difficult to define, there is a minimum standard that must be met by government bodies that decide to limit services provided to francophones:

> Although it is impossible to specify precisely what is encompassed by the words "reasonable and necessary" and "all reasonable measures", at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit from Montfort as a community hospital.

In short, I find that if an institution covered by the *FLSA* decides not to translate a francophone requester's personal information into French, either in whole or in part, in response to an access request under the *Act*, it must demonstrate that this limitation on providing services in French is in accordance with section 7 of the *FLSA*. In particular, it must show that it has taken all "reasonable measures and plans" for compliance with the *FLSA* and that the particular circumstances of the access request make its decision "reasonable and necessary." Moreover, in accordance with the Court of Appeal's findings in *Lalonde*, an institution must, at a minimum, provide some justification or explanation for its decision.

The present appeal

I will now apply the above principles in the appeal before me. The appellant is seeking, in audiotape format and in French, records containing his personal information that were created in his WSIB file from the beginning of 1989 to January 28, 1998. I do not have a copy of the appellant's WSIB file before me. However, based on the representations provided by the parties, it appears that the appellant's WSIB file contains paper records that are in both English and French.

In its representations, the WSIB states that it has provided the appellant and his representatives with photocopies of the 2,705 documents in his file that cover the time period specified in his request. Consequently, I find that the WSIB has complied with section 48(3)(b) of the *Act*, which requires an institution to provide requesters with a "copy" of their personal information when providing access.

However, the appellant has requested access to the personal information in his WSIB file in a different format (audiotape) and in French, from the beginning of 1989 to January 28, 1998. Consequently, it must be determined whether section 48(4) of the *Act* requires the WSIB to provide the appellant with the personal information in his file in the format and language he has requested, for the time period specified in his request.

Format

I will start by addressing the portion of the appellant's request which asks that the WSIB provide him with the personal information in his file in a different format (audiotape). I have found that section 48(4) of the *Act* requires an institution to provide disabled requesters with their personal

information in a format that is comprehensible or intelligible to them. However, I have also found that this obligation is not absolute and that this office must apply the principles of the *Code* in interpreting the extent of that obligation.

In its decision letter, the WSIB refused to provide the appellant with the personal information in his file on audiotape for the time period specified in his request because it submits that his request runs contrary to a settlement agreement reached between the parties before the OHRC. This agreement, which was reached under the provisions of the *Code*, only requires the WSIB to provide the appellant with audiotape versions of any written material created in his file from the date of the agreement (February 11, 1999) onward. The agreement does not require the WSIB to provide the appellant with audiotape versions of written material created in his file before February 11, 1999.

The WSIB submits that this office should decline to apply section 48(4) of the *Act*, because this same matter has already been addressed before the OHRC:

> Rulings by the Information and Privacy Commissioner ("IPC") indicate that the IPC will decline to apply section 48(4) and defer to the OHRC as the appropriate forum to address the question of accommodation under the *Code* [Orders P-540 and PO-1775]. The WSIB asks the IPC to so exercise its jurisdiction in this case.

I do not agree with the WSIB's submission that I should decline to apply section 48(4) of the *Act*. However, I find that the settlement agreement reached between the parties before the OHRC provides me with significant guidance as to whether section 48(4) of the *Act*, when interpreted in accordance with the *Code*, requires the WSIB to provide the appellant with the personal information in his WSIB file in audiotape format for the time period specified in his request.

In particular, the following provisions of the settlement agreement reached between the parties are applicable:

> [Translated version provided by the WSIB.]
>
> 1. The "WSIB" reaffirms its commitment to accommodate the restrictions of its clients with visual handicaps, pursuant to sections one (1) and seventeen (17) of the Code.
>
> 2. The "WSIB" and the complainant agree that at this time, the best possible type of accommodation for him is to receive recorded audio cassettes of the written material created by the "WSIB" from this day forward, regarding his appeals and which are part and parcel of his files.
>
> 3. The complainant agrees that this settlement is a full, complete and final resolution of all the complaints which have to date been included in the

> complaint against the "WSIB" or which are connected to the "WSIB" in one way or another, as per the attached Waiver.

In the attached waiver, the appellant agreed to "forever release" the WSIB from "any present or future complaint, or any causes for complaint pursuant to the [*Code*] and abandon any grievances, actions, causes of action, rights and claims of any nature, which exist to date and which constitute the purpose of my complaint … or which are in one way or another connected thereto."

In his representations, the appellant submits that the WSIB has not complied with the terms of the settlement agreement:

> [Translation] The [WSIB] has violated the agreement it signed with the OHRC because to date, I have obtained access to only about 100 pages on audiotape in approximately six years. I have never received any updates of my files.

The appellant filed a further human rights complaint with the OHRC, alleging that the WSIB was not complying with the settlement agreement. However, the WSIB has provided me with an OHRC decision that dismissed the appellant's new complaint on the grounds that it was "vexatious," and that stated that the appellant could file an access request under the *Act* for documents in his file.

I have carefully considered the parties' representations. In applying the *Code*, as mandated by the Supreme Court of Canada's decisions in *Tranchemontagne* and *Council of Canadians with Disabilities*, I find that the extent of the WSIB's obligation under section 48(4) of the *Act*, to provide the appellant with his personal information in a format that is comprehensible or intelligible to him, is set out in the settlement agreement. This agreement, which was reached under the provisions of the *Code*, only requires the WSIB to provide the appellant with audiotape versions of any written material created in his file from the date of the agreement (February 11, 1999) onward. Although the appellant is essentially asking me to circumvent this agreement by ordering the WSIB to provide him with audiotape versions of written material that was created in his file before February 11, 1999, I find that there are no grounds for doing so.

In short, I am satisfied that the WSIB has met the extent of its obligation under section 48(4) of the *Act* with respect to format. I find that the WSIB is not required to provide the appellant with the personal information in his file on audiotape for the time period specified in his request.

Language

The settlement agreement between the WSIB and the appellant before the OHRC only addresses the WSIB's obligation to provide the appellant with the documents in his file in audiotape format. It does not specifically address whether the WSIB is required to provide the appellant with the personal information in his file in French. However, in the appeal before me, the appellant is seeking the personal information that was created in his WSIB file from the

beginning of 1989 to January 28, 1998 not simply in audiotape format, but also in French. Consequently, I will now determine whether the WSIB is required under section 48(4) of the *Act* to provide the appellant with this personal information in French.

Given that I have found that the WSIB is not required to provide the appellant with the personal information in his file on audiotape for the time period specified in his request, the issue that remains is whether the WSIB is required to provide him with the paper records in his file in French that were created from the beginning of 1989 to January 28, 1998.

Based on the representations provided by the parties, it appears that the appellant's WSIB file contains paper records that are in both English and French. In its representations, the WSIB states that it has provided the appellant and his representatives with photocopies of the 2,705 documents in his file that cover the time period specified in his request. I have found that if the personal information of a francophone requester held by an institution is already in French, that information would be in a "comprehensible form," pursuant to section 48(4) of the *Act*. Consequently, I find that the WSIB has met its obligation to provide the requester with any personal information in his file that is already in French, for the time period specified in his request.

However, the appellant's WSIB file also appears to contain records in English containing his personal information that were created from the beginning of 1989 to January 28, 1998. Consequently, I must determine the extent of the WSIB's obligations under section 48(4) of the *Act* to provide him with this personal information in French, which would require translation.

As noted above, I have found that if an institution covered by the *FLSA* decides not to translate a francophone requester's personal information into French, either in whole or in part, in response to an access request under the *Act*, it must demonstrate that this limitation on providing services in French is in accordance with section 7 of the *FLSA*. In particular, it must show that it has taken all "reasonable measures and plans" for compliance with the *FLSA* and that the particular circumstances of the access request make its decision "reasonable and necessary." Moreover, in accordance with the Court of Appeal's findings in *Lalonde*, an institution must, at a minimum, provide some justification or explanation for its decision.

In his representations, the appellant submits that the WSIB has not complied with his longstanding request that it provide him with the documents in his file in French:

> [Translation] On December 10, 1991, the Royal Ottawa Hospital informed the [WSIB] that I wished to be accommodated with French language services on the basis of my disabilities. To date, the [WSIB] has not given me access to my files in French.

He further suggests that the WSIB has an ulterior motive for refusing to provide him with the documents in his file in French:

> [Translation] I have had an appeal pending from Ms. Hocko since 1998 which is upheld by Decision 325-95R of the Tribunal. I still have not received access to my information in French or on audiotape.
>
> When the [WSIB] handed down this decision the officer was not bilingual. She translated my information, which had been submitted in French, into English to her advantage. She mixed up my file with another file and another person, which is why the [WSIB] will not give me access to my information.

The appellant also submits that the reason he has filed an appeal with this office is because the other bodies to which he has filed complaints (the OHRC, the Office of the Ombudsman and the Office of Francophone Affairs) have not done their work properly and have been "intimidated" by the WSIB.

In its decision letter, the WSIB stated the following with respect to the appellant's allegations:

> [Translation] I can confirm that all the information in your file belongs to you. Your constant requests and complaints to the WSIB and other government agencies require your claims officer to review your file on a regular basis. Ms. E. Baldari is very familiar with your file and is certain that all the decisions handed down with respect to your file have been based on information concerning you.
>
> … You continue to make the same requests, complaints and appeals to various government offices and agencies, to your MPP and so on, but without giving them the necessary information. For instance, on August 16, 2005, three representatives of the WSIB – two directors and a lawyer – met with you at the office of the Human Rights Commission in Ottawa. In that meeting, you admitted that you had been given access to your file in French and on audiotape in accordance with the [*Act*], contrary to the statement you made in your complaint. During the meeting, you conversed in English with ease and did not need the interpreter you had requested. In fact, you are in the habit of discussing your file in English with your claims officer and, more recently, reading documents in English during a telephone conversation …

Moreover, in its representations, the WSIB states that the Office of Francophone Affairs (the OFA) "has repeatedly concluded that the WSIB is in compliance with its obligations under [the *FLSA*] vis-à-vis the Appellant." It also provided this office with a letter that the OFA sent to the appellant, dated February 25, 1993. In this letter, the OFA's executive director informed the appellant that he was satisfied that both the WSIB and the WSIAT had complied with their obligations under the *FLSA*, and that the OFA would not respond to any further complaint letters from him:

> [Translation] Ever since your file was created, [the OFA] has followed its procedures and conducted the necessary investigations into your complaints

> concerning French language services to the public delivered by the [WSIB] and the Tribunal, and the results of the investigations indicate that the [WSIB] and the Tribunal are providing the French language services prescribed by the [*FLSA*].
>
> I wish to inform you that I am satisfied with the efforts made by the [WSIB] and the Tribunal to accommodate you and [the OFA] will conduct no further investigations.
>
> I therefore wish to advise you that, henceforth, [the OFA] will not respond to your letters. The letters will be placed in your file. Enclosed you will find the unsolicited documentation you have included in your recent letters. We have marked each document with the date on which you wrote to us. In future, we will continue to return all unsolicited documentation to you.

I have carefully considered the parties' representations. Although the appellant claims that the WSIB has not provided him with the documents in his file in French, the WSIB has provided me with evidence that demonstrates that it has made substantial efforts over the years to provide the appellant with the personal information in his file in a "comprehensible form," including in French. It has provided the appellant and his representatives with photocopies of the 2,705 documents in his file (including French documents) that cover the time period specified in his request. Moreover, it has been providing the appellant, both in audiotape format and in French, with written material created in his file, as of the date of the settlement agreement reached before the OHRC (February 11, 1999). Finally, the WSIB has provided me with the OFA decision cited above that found that the WSIB was complying with its obligations under the *FLSA* with respect to the appellant, and that further stated that the OFA would not respond to any further complaints from him.

There appear to be documents in the appellant's file, covering the time period specified in his request, which the WSIB has not translated into French. However, based on the totality of the evidence before me, I find that the WSIB has demonstrated, in accordance with section 7 of the *FLSA*, that it has taken all "reasonable measures and plans" for compliance with the *FLSA*, and that the particular circumstances of the appellant's access request make the WSIB's decision not to translate his entire file into French "reasonable and necessary." In addition, I find that the WSIB has, in accordance with the Court of Appeal's findings in *Lalonde*, met the minimum requirement of providing some justification or explanation for its decision.

In short, I am satisfied that the WSIB has met the extent of its obligation under section 48(4) of the *Act* to provide the appellant with the personal information in his file in French, for the time period specified in his request.

ORDER:

I uphold the decision of the WSIB. The appeal is dismissed.

Original Signed By: July 25, 2008
Colin Bhattacharjee
Adjudicator