Citation: MacNeill v Privacy Comm.
2004 PESCTD 69

Date: 20041123
Docket: S-1-GS-19975
Registry: Charlottetown

PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION

Between:

Paul MacNeill, on behalf of Island Press Limited

Applicant

And:

Prince Edward Island Information and
Privacy Commissioner

Respondent

And:

The Attorney General of Prince Edward Island,
the Prince Edward Island Workers Compensation Board,
and the Prince Edward Island Union of Public Sector Employees

Intervenors

Before: Her Ladyship Chief Justice Jacqueline R. Matheson

Appearances:
David Coles, David J. Doyle, for Applicant, Paul MacNeill, on behalf of Island Press Limited
Tanya Robertson, for Intervenor, PEI Workers Compensation Board
Ruth M. DeMone, for Intervenor, Attorney General of PEI
Kimberley H.W. Turner, for Intervenor, PEI Union of Public Sector Employees

Place and Date of Hearing — Charlottetown, Prince Edward Island
March 23, 2004

Place and Date of Judgment — Charlottetown, Prince Edward Island
November 23, 2004

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Supreme Court of Prince Edward Island - Trial Division
Matheson CJ
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ADMINISTRATIVE LAW - Judicial Review - Access to Information - Whether Commissioner erred in interpreting the Act - Effect of prior release of information by the Legislative Assembly on application of the Act

Cases Referred to: ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 SCR 982; ***Law Society of New Brunswick v. Ryan***, [2003] SCC 20; ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] SCC 19; ***Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)***, [2003] 1 SCC 8; ***Alberta (Attorney General) v. Kausheel***, [2003] AJ No. 358; ***University of Alberta v. Pylypiuk***, [2002] AJ No. 445; ***Dickie v Nova Scotia (Department of Health)***, [1999] NSJ 116 (NSCA); ***Dagg v Canada (Minister of Finance)*** [1997] SCJ No.63 (QL); ***French v. Dalhousie University*** [2003] NSJ No. 44 (N.S.C.A.); ***Alberta Order 98-020*** Review Number 1377 ***; Alberta Order 2001-01***, Review Number 1789

Statutes Referred to: ***Freedom of Information and Protection of Privacy Act*** R.S.P.E.I. 1988 C. F-15.01; ***Access to Information Act*** R.S. 1985 c. A-1 (as amended)

Matheson J.:

[1] The applicant, the publisher of the Eastern Graphic newspaper, requested that the Workers Compensation Board (WCB) of Prince Edward Island provide a list of its employees, including names, position/title and salary for each employee. The head of the WCB refused to provide the names or exact salaries, providing in its place a list of each position at the Board by classification, the number of persons employed and the salary range for each position, in accordance with clause 15(4)(e) of the Act. The WCB advised the applicant that it would not release the information requested as the disclosure would constitute an unreasonable invasion of a third person's (the employee's) personal privacy under the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988 C. F-15.01 (the Act). The applicant requested a review by the Information and Privacy Commissioner (the Commissioner) of the WCB's decision based on the public's right to know, the accountability of government and a traditional practice of accessing and publishing this type of information in the Eastern Graphic.

[2] On May 2, 2003, the Commissioner wrote to the head of the WCB to request the records which are the subject of this application. She received written submissions from the applicant on June 24, 2003, and the WCB on June 27, 2003. The applicant responded to the WCB's submissions on July 2, 2003 and reply submissions were received from the WCB on July 29, 2003. The applicant sought a reversal of the WCB's decision and an order that the requested information be released. The Commissioner reviewed the submissions and the law and held that the release of names and specific salaries represented an unreasonable invasion of the employees' privacy interests. In her ruling, the Commissioner found that an individual's name constitutes personal information the disclosure of which represents an unreasonable invasion of the employee's privacy, when combined with actual salary earned and job title.

[3] The applicant seeks judicial review for:

(a) a determination that the Prince Edward Island Information and Privacy Commissioner's decision not to disclose the names, job titles and salary rates of the employees of the Workers Compensation Board from January 1st, 2001 to present was wrong in law; and

(b) an order quashing the decision of the Prince Edward Island Information and Privacy Commissioner and obligating the Workers Compensation Board to disclose the names, job titles and salaries of its employees from January 1st, 2001 to present, on the grounds that:

    (i) the Prince Edward Island Information and Privacy Commissioner erred in finding that job title and salary information form part of an individual's "employment history" under Section 1(i) of the *Freedom of Information and Protection of Privacy Act*.

    (ii) the Prince Edward Island Information and Privacy Commissioner erred in interpreting section 15(4) of the ***Freedom of Information***

and Protection of Privacy Act.

(iii) the Prince Edward Island Information and Privacy Commissioner erred in interpreting section 15(2) of the ***Freedom of Information and Protection of Privacy Act*** by presuming that the disclosure of the name of an employee of the Workers Compensation Board, when combined with the job title and salary range, is an unreasonable invasion of privacy.

(iv) the Prince Edward Island Information and Privacy Commissioner erred in finding that the applicant failed to overcome the presumption set out in section 15(2) and failed to properly consider and apply the relevant circumstances listed in 15(3) in making her decision.

(v) the Prince Edward Island Information and Privacy Commissioner erred in finding that only salary ranges, and not exact salaries, should be released.

Issues

(A) What is the standard for judicial review?

(B) Did the privacy commissioner err in her decision not to release the names and salaries of the employees of the Workers Compensation Board?

(C) Has precedent been set on public access to this information through the previous practice of tabling of the names and salaries of public servants in the PEI Legislature?

(A) Standard of Review

[4] The position and office of the Commissioner are recent creations under the ***Freedom of Information and Protection of Privacy Act***. As such, there is no jurisprudence in this jurisdiction specific to the standard of review to be adopted in reviewing the Commissioner's decisions, nor on the interpretation of the Act's provisions. PEI's legislation is modelled after the Alberta legislation which came into force in 1995, for which there is jurisprudence which establishes the standard of judicial review. There is also jurisprudence from the federal jurisdiction which is informative as to the standard to be adopted and the interpretation to be given.

[5] In ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, the Supreme Court ruled that in determining the standard of review a functional and pragmatic approach was required. It outlined four factors to be considered in determining the standard of review of the Commissioner's decision.

1. The existence or absence of a privative clause in the tribunal's constituent legislation.

2. The expertise of the tribunal about the matters at issue.
3. The purpose of the legislation as a whole and of the particular provision.
4. Whether the nature of the problem is a question of fact or law.
(paras 29-33)

[6] In ***Law Society of New Brunswick v. Ryan***, [2003] SCC 20, the Supreme Court qualified the standards of judicial review to be used in considering a decision from an administrative body. Using the functional and pragmatic approach a court can determine the level of deference required, which in turn, determines which of the three standards are to be applied: correctness, reasonableness simplicitor or patent unreasonableness. At paras. 50 to 51 Iacobucci J. made the following distinction between a standard of reasonableness and that of correctness.

> 50. ...When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives the effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process for its own reasons...
>
> 51. ...Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to the objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. ...

[7] In ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] SCC 19, at para. 34, McLachlin C.J., considering the fourth factor of the functional and pragmatic test for determining the level of deference to be accorded, stated:

> 34. When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards a tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration*, [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

[8] The legislation in question, the ***Freedom of Information and Protection of Privacy Act***, has two general functions: (a) to protect the privacy of individual personal information through control of the collection, disclosure and use of this information by public bodies; and (b) to permit persons to have access to records controlled by or in the custody of a public body, subject to exceptions contained in the Act. The Act also provides for independent reviews of decisions made by public bodies under the Act

and for resolution of complainants under the Act.

[9] If a request for information is denied by the public body, and s. 15(1) requires the head of a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy, the applicant may ask the Commissioner to review any decision, act or failure to act by the public body dealing with the information request.

[10] Upon receipt of the request the Commissioner, unless the matter is settled by a mediation or has been dealt with in a prior order, shall conduct an inquiry and "may decide all questions of fact and law arising during the course of the inquiry" (s.64(1)), and shall dispose of all issues by making an order (s. 66(1)). An order made by the Commissioner under the Act is final (s.67), but is stayed if an application for judicial review is made and is dealt with by the court (s.68(2)).

[11] Under the federal ***Access to Information Act***, R.S. 1985, c. A-1 (as amended), the information commissioner may only report his findings and if no access is given by the public body, the Information Commissioner shall inform the applicant of his right to apply to the court for a review of the matter investigated (s.37). The federal Information Commissioner is not empowered to make an order upon completion of his investigation nor is he empowered to determine all questions of fact and law arising from the inquiry. The Supreme Court of Canada in ***Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)***, [2003] 1 SCR 8, determined that given the purpose of the federal act and the fact that information requests are not reviewed by a tribunal independent of the executive, the less deferential standard of review of correctness applied to decisions of the federal Information Commissioner.

[12] Under the PEI statute, the Commissioner is appointed by the Legislative Assembly, following a resolution supported by at least two-thirds of the members present, for a period of five years. The Commissioner may only be removed for cause or incapacity by a resolution of the Legislative Assembly. The PEI Commissioner is a more independent entity with wider powers than her federal counterpart. However, the fact the PEI Commissioner is more independent does not necessarily mean that the standard of review will be different.

[13] The Commissioner's expertise in the area is the primary issue to be considered in this case. In this province, the legislation is relatively recent as is the Commissioner's appointment. To my knowledge, this application is the first opportunity this court has had to interpret the legislation. The Prince Edward Island Information and Privacy Commissioner has not had the opportunity build up a body of experience or jurisprudence upon which she can rely to guide her in her decisions. The Alberta Court of Queen's Bench in ***Alberta (Attorney General) v. Kausheel***, [2003] A.J.

No. 358 (Bielby J.) and ***University of Alberta v. Pylypiuk***, [2002] A.J. No. 445 (Gallant J.) found the standard of review under a statute similar to the PEI statute to be correctness on issues of law.

[14] The PEI statute contains a partial privative clause, but also provides for judicial review with an automatic stay of the Commissioner's decision until the judicial review has been completed. A review of the relief sought and the grounds for review reveal the issues raised are primarily questions of law, involving an interpretation of the Act. Considering all of these factors, particularly the fact the Commissioner has not yet had the opportunity to develop expertise in the area , I find the proper standard of review is correctness on the law, but reasonableness simplicitor on the facts.

(B) Did the Commissioner Err?

[15] The Commissioner stated the issue on her review as follows:

> Did the head of the public body properly apply s. 15 of the Act in her decision to refuse to disclose personal information to an applicant because it would be an unreasonable invasion of a third person's personal privacy?

In determining this issue, the Commissioner looked at a number of areas, including the burden of proof, the proper application of s.15 of the Act and the arguments of the parties.

[16] The applicant set out five grounds as basis for his claim that the Commissioner's decision should be quashed. I will deal with them in turn.

(i) that the Commissioner erred in finding that job title and salary information form part of an individual's employment history under s. 1(i) of the *Freedom of Information and Privacy Act.*

[17] "Personal information" is defined in s-s.1(i) (vii) of the Act as meaning recorded information about an identifiable individual, including information about the individual's education, financial, employment or criminal history, including criminal records where pardon has been given.

[18] In her decision the Commissioner stated:

> I agreed with the public body that both job title and salary information form a part of an individual's employment history and therefor satisfy the definition of personal information under the Act. I find that job title and salary are obvious basic tenets of one's employment history in accordance with the ordinary meaning of the term.

[19] In ***Dickie v Nova Scotia (Minister of Health)***, [1999] NSJ 116 (NSCA) Justice

Cromwell found that in the employment context, employment history is used as a broad and general term to cover an individual's work record (para 45). If job title and salary information did not form part of an individual's employment history, it begs the question as to what exactly would form part of an individual's employment history. It would seem to be a commonsense interpretation of the term "employment history" to look at an individual's work experience, titles and the amount of remuneration paid as an integral part of that work experience. Actual salary is information which relates to an individual employee. (***Dagg v Canada (Minister of Finance)*** [1997] SCJ No. 63(QL)).

[20] The applicant argues that the name, position and exact salary of WCB employees is not "personal information" for the purpose of the Act, because it is not information "collected" by the public body pursuant to s-s. 2(1)(b) pf the Act. However, s-s. 2(1)(a) reads:

> 2(1) The purposes of this Act are
>
> > (a) to allow the person a right of access to the records in the custody and control of a public body subject to limited and "specific" exceptions as set out in this Act; ...

Personal information is defined as "recorded information about an identifiable individual, ..." s-s. 1(i). It is not limited to "collected" information.

[21] The WCB is a public body and the information the applicant seeks is part of the permanent financial records in the custody and control of the public body. The fact the WCB generates some of the information as opposed to collecting it does not take the information outside the definition of personal information in the Act. At the very least it must "collect" the employees' name from the employee and the balance is "recorded" in its records.

[22] Accordingly, I find that the Commissioner has not erred in finding that name, job title and salary information form part of an individual's employment history under s-s.1(i) of the Act.

ii) the Commissioner erred in interpreting s.15 of the Act.

[23] The applicant states the Commissioner erred in interpreting s.15(2) of the Act, by presuming that the disclosure of the name of the employee of the WCB, when combined with job title and salary range, is an unreasonable invasion of privacy, and that she also erred in finding that the applicant failed to overcome the presumption set out in s-s.15(2) and failed to properly consider and apply the relevant circumstances listed in s-s.15(3) in making her decision. As the subsections of s.15 are interrelated I will consider all of these grounds together.

[24] Section 15(1) states that the head of a public body *shall refuse* to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of the third person's personal privacy.

[25] Subsection 15(2) creates a presumption that the disclosure of personal information is an unreasonable invasion of a third person's personal privacy, if it falls within a listed series of circumstances. Two of those circumstances are personal information relating to employment or educational history (s-s. 15(2)(d); and where a third party's name it appears with other personal information about the third party. (s-s. 15(2)(g).

[26] Subsection 15(3) of the Act sets out a series of circumstances which the head of the public body must consider in determining whether disclosure of personal information constitutes an unreasonable invasion of a third party's privacy and s-s. 15(4) of the Act sets out a list of information, the disclosure of which would not be an unreasonable invasion of the third person's privacy.

[27] The burden of proof under s. 65 shifts depending on the stage of the inquiry. Section 65 states:

> 65(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.
>
> (2) Notwithstanding subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[28] Accordingly, under s-s. 65(2), once it is determined that the record contains personal information of a third party, the onus shifts to the applicant to show that the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. The applicant may do so by relying on all or some of the factors set out in s-s. 15(3) and other relevant factors not listed in s-s.15(3). If there is no presumption because s. 15(2) does not apply, the public body must balance all of the factors considered in 15(3) and other relevant factors to determine whether or not the matter should be disclosed.

[29] In determining the appropriate approach to interpretation of the Act, the Commissioner relied on two decisions of the Nova Scotia Court of Appeal: ***French v. Dalhousie University*** [2003] NSJ No. 44 (N.S.C.A.) and ***Dickie,*** supra to support her analysis. In ***Dickie,*** Justice Cromwell discussed the analysis to be taken when considering whether or not information should be disclosed. He stated at para. 5:

> 5. The application of the Act in this case involves a three step analysis. Under the Act, personal information (a defined term) is not to be disclosed if its disclosure would be an unreasonable invasion of a third party's personal privacy. The first step in the analysis is, therefore, to determine whether the disputed material is personal information within the meaning of the Act. Disclosure of personal information relating to employment history is presumed to be an unreasonable invasion of personal privacy. (s. 20(3)(d). The second step, therefore, is to determine whether this assumption applies to the disputed material. The presumption, however, is only that. It may be rebutted if, taking into account all of the relevant circumstances, including the matters specified in s. 20(2), it is concluded that the disclosure is not an unreasonable invasion of a third party's personal privacy. The third step is to make that determination.

[30] This is the procedure followed by the Commissioner in this case in applying s. 15 and analysing the steps taken by the public body. Based on the wording of the Act, I find no error in following this procedure.

[31] Having established the correct procedure, the issue becomes one of whether the Commissioner applied it correctly. Having determined that the requested information is personal information within the meaning of the Act, the Commissioner must then determine whether disclosure of the personal information would constitute an unreasonable invasion of privacy.

> 17. ...If the information falls into one of those categories, there should be no disclosure unless the presumption of unreasonable invasion set up by that sub-section is rebutted having regard to all the relevant circumstances including those set out in s. 20(2). On the other side of coin, the list of situations which do not constitute unreasonable invasions may also come into play at the second step. As noted, s. 20(4) sets out a list of such circumstances. This subsection does not set up a rebuttable presumption but is instead a deeming provision. In other words, if it applies, the case is governed by its operation without regard to countervailing arguments under s. 20(2). The third step is reached if a s. 20(3) presumption operates and s. 20(4) does not apply. In those situations, it must be determined if the presumption is rebutted. (Dickie, para 17)

[32] Justice Cromwell discussed the definition of personal information that includes a set of examples and found the listed examples illustrate, but do not limit, the breadth of the definition, set out in the opening words. At paragraph 36 of the judgment, Justice Cromwell discussed the correct way to analyze the issue:

> 36. In my view, the correct way of analysing the issue is to apply the definition of personal information as it appears in the Statute and then consider the question of disclosure under other provisions of the Act. Generally speaking, disclosure will be denied where the release of personal information is an unreasonable invasion of a third person's privacy...

[33] He continued:

> 52. The disputed information, generally, is personal information in relation to employment history. Disclosure of it is presumed to be an unreasonable invasion of the third party's personal privacy under s. 20(3)(d) of the Act. The question of disclosure therefor turns on whether the presumption is rebutted having regard to the factors set out in s. 20(2). I note that s. 20(2) makes it clear that the presumption in s. 20(3) may be rebutted having regard to all the relevant circumstances. (*Dickie*, para 52)
>
> . . .
>
> 55. ...The Judge held, in effect, that the citizen's right to know trumps the third party employee's right to privacy, saying that if an employee "...apparently or actually misuses the power vested in that employee as a consequence of employment, an aggrieved citizen has a right to be adequately advised of the nature and results of an investigation into the alleged wrongdoing.." I think the judge erred in reaching this conclusion when the explicit presumption of the Act is the opposite. The error was not in failing to do the balancing but in failing to start the balancing with the presumption in favour of privacy of this type of information.

[34] With regard to the interpretation of whether or not the provider of information expected it to be given in confidence, Justice Cromwell stated that the trial judge erred in interpreting the provision to mean that in order to be confidential the provider of information must believe the information will never be revealed.

> 59. ...The fact that information may have to be revealed does not, of itself, make the information any less confidential ...
>
> 60. I agree with the respondent that simply labelling documents "confidential" or "without prejudice" does not, of itself, make the documents confidential. ...

[35] In discussing whether the presumption of privacy is rebutted and the burden on the applicant to do so, Justice Cromwell stated:

> 67. The question is whether this presumption of privacy is rebutted and the burden of Ms. Dickie under s. 45 is discharged having regard to all the relevant circumstances. In considering this question, the identity of the applicant and the material already disclosed are significant factors.

[36] In ***Dickie*** the applicant was seeking information about the investigation of a complaint she had made against a fellow employee. The documents in dispute related to the investigation and decision making by management respecting the allegation of work-related misconduct by the employee. One group contained witness statements, file summaries, etc and the other group were case assessments containing material evaluating the evidence, opinions concerning appropriate conclusions and advice or

recommendations for action. The court made a detailed order based on each individual document in this disputed material.

[37] Similarly in ***French***, the applicant sought documented views and opinions expressed by his colleagues to a review committee, reviewing the applicant's term as department head. The court held the opinions were personal information of the applicant and not of the authors and should be released to him.

[38] In this case, the Commissioner considered the applicant's argument that she should follow the practise of Alberta and Nova Scotia regarding the release of salary information. She looked at the wording of the statutes in those jurisdictions and compared the wording to the PEI statute. The Nova Scotia Act uses the word 'remuneration' as opposed to "salary range" in s-s. 29(4)(e), the equivalent to our s-s. 15(4)(e).

[39] The Alberta legislation is identical to the wording of s-s.15(4)(e) of the PEI Act. The Commissioner reviewed ***Alberta Order 98-020[52]*** where the Alberta Commissioner considered whether the names and job titles of government employees should be disclosed. He concluded that a job title or position would be considered 'employment responsibilities' for the purposes of s-s.16(4)(e) and consequently the disclosure of job titles or positions of government employees would not be an unreasonable invasion of their personal privacy. However, he found that disclosure of the employee's name in conjunction with job title or position would be an unreasonable invasion of personal privacy. This finding was also held in ***Alberta Order 2001-01[40]***.

[40] Applying the reasoning in those two orders, the Commissioner concluded that salary range and job title could be disclosed as they are deemed not to be an unreasonable invasion of personal privacy under s-s. 15(4) of the Act. She next considered whether actual salary and employees names should also be disclosed. She concluded that a disclosure of name and specific salary, which are personal information, in combination would satisfy the presumption in s-s.15(2)(g)(i) and therefore the disclosure of employees' names in conjunction with salary would be presumed to be an unreasonable invasion of personal privacy. She then considered whether or not this presumption has been rebutted when one considers any or all of the factors in s-s.15(3).

[41] In determining whether the s. 15(2) presumption is rebutted, the Commissioner considered the applicant's argument that this information had been released by the Prince Edward Island legislature in the past and should continue to be released. The Commissioner concluded that past practice does not take priority over the provisions of the Act and that the provisions of the Act must be followed. She did point out, however, that evidence of past practice indicated the government in the past associated some degree of accountability with the employees' salary information. The

Commissioner also considered that the classification level of a particular position dictated the salary paid to the incumbent in that position regardless of who that person was, and the method by which salaries were assigned to positions – some by union collective agreements and others under the senior compensation plan – which are within the terms and conditions of employment for excluded and supervisory and confidential employees of the Province of Prince Edward Island. She concluded that such a system insures some consistency and transparency of the salary-setting mechanisms of employees of the public body.

[42] The Commissioner recognized that one of the purposes of s. 15(4)(e) is to allow the release of information about employment benefits and responsibilities of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees and she concluded that the applicant had not met the burden of proving that disclosure of the employee names and specific salaries are not an unreasonable invasion of the employees' personal privacy, because the level of transparency and accountability achieved by the public body in disclosing the employees' job titles and salary range are sufficient to promote the objectives of the Act, while still maintaining some privacy of the employees.

[43] The applicant argues the intent of the Act is that government records are intended to be in the public domain, unless subject to limited and specific exemption. The purposes of the Act are set out in s. 2 which reads as follows:

> The purposes of this Act are
>
> > (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act;
> >
> > (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information;
> >
> > (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body;
> >
> > (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body; and
> >
> > (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act. 2001, c. 37, s.2.

[44] The applicant argues that the privacy purpose of the Act is secondary to the

release purpose of the Act, but he did not point to any provisions in the Act to support this contention. The purposes of the Act set out in s. 2 qualify the right of access to information, by reference to the exceptions set out in the Act. The Act clearly sets as one of its objectives the control of the collection and use of personal information by public bodies. This falls into the protection of privacy role as opposed to the access role. The purposes of the Act as set out in s. 2 balance the access and privacy interests as do the specific provisions of the Act. The reference to specific and limited exceptions does not create a presumption in favour of access.(***Canada (Information Commissioner) v Canada (Commissioner of the RCMP***) para 21). As Justice Cromwell noted in ***Dickie***, one must start the balancing in favour of privacy of personal information not in favour of disclosure of personal information.

[45] At the Judicial Review hearing two affidavits were filed with the consent of the parties, providing additional information to the court. One was submitted by Carol Ann Duffy, the Chief Executive Officer of the Workers Compensation Board of Prince Edward Island and the other by Paul MacNeill, the applicant. Neither of these affidavits were filed with the Commissioner, nor was she aware of past practices of the WCB.

[46] The applicant argues because names, position titles and salaries were tabled in the Legislative Assembly in the past and thus became part of the public record, the third party cannot now deny access to this information. He states the Act does not replace this past practice but was put in place to provide a procedure to acquire information, in addition to past practice. However, the affidavit of Carol Ann Duffy states that the Board has not released employee salary information over the past thirty years. There was one occasion in June, 1999, where in response to a question from the Leader of the Opposition, staff names and current salaries were tabled in the Legislative Assembly. Subsequent requests for employee salary information have been denied.

[47] Ms. Duffy also states that on or about September, 2003, the Workers Compensation Board set up a website which includes a list of Board staff and their position, telephone number and email address. This website reflects the information as of that date. However the positions listed on the website do not completely match the position titles provided to the applicant. This is because of the time lag between the applicant’s request for information, which was for the period January 1, 2001 to December 6, 2002, and the establishment of the web site which reflects the staff compliment from September, 2003 onward. The position titles provided to the applicant came from the Board’s organizational chart and official position descriptions which are used to classify positions. The website is used to communicate information to stake holders and position titles are provided by division directors, to allow those using the website to identify which individual they want to contact.

[48] The issue becomes whether the past practice of the Legislative Assembly or the publication of names on the Workers Compensation Board website constitute "procedures" for providing access to information or records. Section 3 of the Act states in para (a):

> 3. This Act
>
> > (a), is in addition to and does not replace existing procedures for access to information or records;

[49] The release of names and salaries via the Legislative Assembly arose when a Minister tabled the information in the Legislative Assembly in response to a question from a member of the Legislative Assembly. This was entirely discretionary on the Minister's part and constituted a discretionary practice as opposed to a mandatory procedure. Procedure is defined in Black's Law Dictionary as "The mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right, and which by means of the proceeding, the court is to administer."

[50] Prior to the enactment of the Act, the applicant had no legal right to the information he seeks. Accordingly there was no procedure in place to permit access to the records. The only mechanism to release the information was the voluntary tabling of the information in the Legislature by the Minister. This is not an "existing procedure" within the meaning of s-s. 3(a) of the Act which would accrue to the applicant. Even if this past practice is a procedure under the Act, any rights attached to it only accrue to the Legislative Assembly, not to the applicant. The Act does not convey the Legislature's right to an individual.

[51] The WCB's prior actions and establishment of a website do not set a precedent for the release of the sought-after information. The WCB released information to the Legislative Assembly on only one occasion. The web site was set up after the Act came into effect, so it is not a pre-existing procedure, under s. 3(a). It was also set up after the applicant's request for information and the Commissioner's decision was released.

[52] The web site reveals the WCB employees' names and title. Under s-s. 36(1)(a) of the Act, a public body may use personal information only (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose.

[53] Section 38 provides that:

> ...for the purpose of clauses 36 (1)(a)... a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

> (a) has a reasonable and direct connection to that purpose; and
>
> (b) is necessary for performing the statutory duties of, or for operating a legally authorized program of the public body that uses or discloses the information.

[54] In my view, revealing the name and title of employees on the WCB web site meets these criteria as it identifies service providers to those who wish to utilize the WCB services, thus allowing the WCB to better pursue its mandate of assessing and providing compensation to injured workers.

[55] The onus is on the applicant to rebut the presumption of unreasonable invasion of a third party's personal privacy. He stated in argument that public servants lose the right to be protected from embarrassment because they are employed by government. If this was true prior to the passage of the Act, it no longer is. The Act covers public employees and they are entitled to the same protection of personal information as any other resident of this province.

[56] The applicant argued that disclosure of individual salary information is necessary for the purpose of subjecting the activities of the public body to scrutiny specifically, for their expenditures. The Commissioner considered this argument and rejected it. I find she was not in error in so doing. The information released allows for scrutiny of the Board's employment practices. This is not the same as requiring individual employees to be accountable for their specific salaries. If more specific information is desired, for example about gender salary levels, questions can be tailored to elicit that information without revealing the identify of particular employees in relation to the information. The Act specifically states that salary ranges as opposed to exact salaries are not protected from release. Obviously, the legislators made a determination in this regard, so s.15(4) cannot be disregarded in determining whether release of the requested information is an unreasonable invasion of privacy. Under s. 15(3) the head of the public body is to consider all of the relevant circumstances. The provisions of the Act which deem disclosure of certain information as not being an unreasonable invasion of a third party's personal privacy would be highly relevant to this type of determination. In addition, while the WCB is a public body, it is a corporation not funded by tax dollars but by employer assessments. The total amount of its salaries are revealed in its annual report. The information supplied by the Board, classification and salary ranges, the employee's name and title on its website, and the information in its annual report all promote scrutiny. Release of actual salaries in conjunction with name does not promote scrutiny, it promotes an invasion of privacy.

[57] One of the factors to be considered under s. 15(3) is whether the personal information is relevant to a fair determination of the applicant's rights. The applicant's request is not tied to his personal rights. He simply wants to publish the information in

his newspaper.

[58] For all these reasons I find the Commissioner was correct in her application of s. 15, of the Act, and she did not err in finding that the release of personal information to the Legislative Assembly, prior to the enactment of the Act, was not a pre-existing procedure under s-s. 3(a) of the Act.

[59] In his factum, the applicant stated that s. 2(b) of the ***Canadian Charter of Rights and Freedoms*** protects an individual's right to information about public institutions. He is not suggesting that the legislation is unconstitutional, only that Charter principles are to be considered and to guide the decision of the commissioner and the court. This is not disputed and I have borne the ***Charter*** principles in mind when assessing the Commissioner's ruling and the interpretation of the Act. The Act does not attempt to prohibit public scrutiny of government expenditures or accountability. In fact it encourages scrutiny because it provides a means to obtain information which did not heretofore exist. It simply limits the information released to that relating to the public body's behaviour, rather than to personal information about individuals who are employed by the public body.

[60] For all of the above reasons, I find that the commissioner did not err and this application is dismissed.

[61] As this is the first time that provisions of the Act have come before the Court for review, there will be no award of costs and each party shall bear their own.

November 23, 2004

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Matheson CJ