Date: 20071005

Docket: T-531-06

Citation: 2007 FC 1024

Ottawa, Ontario, October 5th 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

INFORMATION COMMISSIONER OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This matter deals with the relationship between the Information Commissioner of Canada (the Commissioner) and the Attorney General of Canada (the Attorney General) when Crown servants, represented by lawyers from the Department of Justice, are compelled to give evidence before the Commissioner in the course of an investigation of a complaint made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (the *Act*). It raises questions about the scope of the Commissioner's authority – particularly, whether the Commissioner improperly ordered confidentiality orders against government witnesses and their Department of Justice counsel.

[2] The Commissioner is named as respondent as it is his decision (or that of his delegate) that is under review and, in these circumstances, there is no other reasonable respondent. The alternative would be to name the Attorney General of Canada as the respondent pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the *Rules*). However, as noted by this Court in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431 [the *Hartley* decision], that would lead to the absurd result of having the Attorney General as both applicant and respondent. To avoid that result, and as both parties are in agreement as to the standing of the Commissioner, I therefore grant leave as requested in the notice of application for the Commissioner to be the respondent in this application.

BACKGROUND

[3] The facts underlying this application are not in dispute. The Commissioner commenced an investigation against the Department of Indian and Northern Affairs Development (DIAND) in respect of a request made under the *Act*. The person making the request sought a copy of a report by a management consulting firm that was to be provided to DIAND. Upon the refusal of DIAND to provide the report, the person who made the request lodged a complaint with the Commissioner, pursuant to section 30(1) of the *Act*. The Deputy Information Commissioner (the Deputy Commissioner), Mr. Alan Leadbeater, began an *in camera* investigation.

[4] During the course of his investigation, the Deputy Commissioner subpoenaed a number of government employees to provide evidence under oath. Counsel from the Department of Justice accompanied the individuals to the examinations. At the beginning of the first hearing, on February

7, 2006, Mr. Leadbeater raised his concern with respect to the fact that counsel for the Department of Justice were representing both the witness and the Crown. He made the following comment:

> This is an in camera process and it causes some bit of difficulty when we have a Justice counsel representing a witness because we feel that there are two people in the room then; there's the witness and then there's the witness's employer is in the room. Also it's compounded a bit by the fact that the Justice counsel represents multiple witnesses.
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> (Transcript of Hearing of Andrew Lieff, Applicant's Record, p. 26)

[5] As a result of this concern, the Deputy Commissioner issued two sets of Confidentiality Orders. The first set was directed at individual witnesses (Orders (Witnesses)) and provided that each witness:

> […] shall not disclose the questions asked, answers given and exhibits used during his/her appearance before the Deputy Information Commissioner on [date], in any manner to anyone until the taking of evidence by the Deputy Information Commissioner from other employees of Indian and Northern Affairs Canada is complete, except to his/her counsel …
>
> (Applicant's Record, pp. 12-15)

[6] The second set of Confidentiality Orders was directed at counsel representing these individual witnesses (Orders (Counsel)) and provided that each counsel:

> […] shall not disclose the questions asked, answers given and exhibits used … during [the witness] testimony before the Deputy Information Commissioner on [date], in any manner to anyone, except on the lawful instruction of [the witness].
>
> (Applicant's Record, pp. 16-20)

[7] Counsel representing the first witness immediately raised an objection to the Confidentiality Orders, and drew to the attention of the Deputy Commissioner the *Hartley* decision of this Court. Counsel read to the Deputy Commissioner numerous excerpts from that decision, and conclude that there was no need for these Confidentiality Orders since his clients were professionals prepared to give an honest and full account, and that they had already discussed this issue at length in a preliminary manner: Applicant's Record, pp. 30-38. The same objection was made by counsel at the commencement of the examination of all four witnesses.

[8] At the end of these submissions, the Deputy Commissioner indicated that he would reserve and give a written decision later. In the meantime, his Confidentiality Orders were to remain in effect: Applicant's Record, p. 39.

THE IMPUGNED DECISION

[9] In his written reasons dated February 21, 2006 concerning the objection to the confidentiality restrictions imposed on the witnesses (the Decision (Witnesses)), the Deputy Commissioner essentially confirmed the Orders (Witnesses) but considering that the oral evidence of the associated witnesses had been completed, rescinded the Orders. He stated:

> Having taken this matter under advisement, it is my conclusion that the attached orders are necessary to protect the integrity of the investigation and are minimally invasive of the **Charter** right of free expression. I conclude from the nature of this complaint and investigative evidence received prior to the issuance of the orders that the investigation process should take into account the possibility of tailoring of evidence. The orders are of limited duration and were made in the context of gathering evidence from witnesses associated, or formerly associated, in the same workplace.

> Given the purpose for which the orders were made, and given that the oral evidence of the associated witnesses has been given, the orders attached of confidentiality issued on February 7 and 8, 2006, with respect to Ms. C. Davis, Ms. M.D. Chartrand, Mr. A. Lieff and Ms. M. Pesant, are hereby rescinded and, from this date, are of no further force and effect.

[10] In another set of reasons, also dated February 21, 2006, concerning the objection to the confidentiality restrictions imposed on counsel for the witnesses (the Decision (Counsel)), the Deputy Commissioner denied the motion to rescind the Orders. He wrote:

> Having taken this matter under advisement, it is my conclusion that the orders are necessary, appropriate and lawful. In particular, in light of the requirements of section 35 of the **Access to Information Act**, I consider it necessary by these orders to establish the primacy of the individual solicitor-client relationship between a witness and his counsel on the one hand, over the solicitor-client relationship between the counsel and the Attorney General of Canada in his role as representative of the Crown, and over the relationship between the counsel and their other witness clients, on the other hand. This distinction is vital to ensuring that witnesses are not put in the position of giving their evidence in the presence of their employer's representative or in the presence of other witnesses also represented by their counsel. Moreover, the witness clients are free at any time, from this date, to waive solicitor-client privilege and, thus, authorize their counsel to disclose their evidence, in whole or in part, to others.
>
> For these reasons, I deny the motion to rescind the attached orders.

[11] On March 23, 2006, the applicant applied for judicial review of these decisions and sought an order setting them aside as being in excess of the Commissioner's jurisdiction. The Attorney General also requested, pursuant to Rule 317 of the *Rules*, that the Commissioner send a certified copy of the following material:

> 1. All material which the Information Commissioner's delegate considered in issuing the decisions of February 21, 2006, including, but without limiting the full and general request above, all

> correspondence, internal briefing notes, emails and other related documents, records, impressions, advice or communications; and,
>
> 2. All portions of the transcripts of the proceedings before the Information Commissioner's delegate of February 7, 2006, February 8, 2006 or any other date relating to the issuing of the decisions of February 21, 2006.

[12] The Commissioner objected to the applicant's request, pursuant to Rule 318 of the *Rules*, except for portions of these transcripts of proceedings relating to representations made and reasons given with respect to the originating confidentiality orders and which are relevant to the decisions made on February 21, 2006. It was alleged that the remaining portions of the transcripts requested by the applicant are irrelevant or otherwise privileged under the *Act* by a statutory duty of secrecy and privilege relating to: a) the secrecy of the investigation of these complaints (section 35); b) the confidentiality and the inadmissibility of any evidence, information and representations received or made during the investigation of this matter and of their existence (sections 36-37); c) the fact that the Commissioner is not a competent or compellable witness with respect to the information requested by the applicant (sections 63 and 65); d) the statutory prohibition for the Commissioner to disclose any information and material as requested by the applicants, except when it is necessary for the conduct of his investigations (sections 61, 62 and 64); e) the common law "deliberative secrecy" privilege; and f) the solicitor-client privilege. These claims of privilege by the Commissioner were not challenged by the applicant.

[13] A few days before the hearing, the Commissioner filed a motion for an order granting leave to file a supplementary affidavit and directing that affidavit to be filed on a confidential basis, with a public version (with the exhibits redacted) for the public record. The additional documentation

appended as exhibits to this supplementary affidavit consists of letters between main counsel for the witnesses and the Deputy Commissioner generated in the course of the Commissioner's investigation. This correspondence postdates the filing of the parties' respective memoranda of fact and law. According to the respondent, this additional documentation would illustrate whether the witnesses' counsel have been authorized to disclose the witnesses' evidence. The Commissioner claims the letters, to the extent that they may have been protected by solicitor-client privilege, have been communicated to him by the Attorney General. He further argues that they are directly relevant to determining whether or not this application is moot. In light of the confidentiality requirements imposed by the *Act*, the Commissioner nevertheless submits that the material sought to be filed should be made subject to an order that seals it from the public record.

THE ISSUES

[14] This application for judicial review raises three preliminary questions as well as two substantive issues. They can be framed as follows:

a. Are the affidavit and supplementary affidavit of Ms. Poirier filed by the respondent admissible?
b. Is this judicial review application time barred?
c. Is the relief sought moot?
d. Was the Commissioner empowered to issue the impugned Orders and Decisions? More specifically, do they impermissibly interfere with the solicitor-client privilege?
e. Do the impugned Orders and Decisions violate the right to freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and if so, is this restriction justified pursuant to section 1 of the *Charter*?

ANALYSIS

a) The admissibility of Ms. Poirier's affidavits

[15] The two affidavits sworn by Ms. Poirier, a paralegal with the Office of the Commissioner, raise different issues and I shall therefore deal with them separately. Starting with the first affidavit, it is essentially a means to introduce correspondence between counsels which postdates the application for judicial review, as well as to introduce an affidavit and cross-examination in earlier legal proceedings. The respondent contends that the correspondence is filed to show that, although given the opportunity to do so, the applicant opted not to put any evidence before this Court as to whether or not the witnesses had authorized their counsel to disclose their *in camera* evidence. As for the affidavit and cross-examination, the respondent submits that they would be relevant to circumscribe the *Hartley* decision and to show that the matter of multiple representations by lawyers of the Department of Justice representing the Crown interests and Crown servants and the mutual sharing of information is a controversial issue even within the Department of Justice. In short, counsel for the respondent argues that all the documents appended to the affidavit are general background information and should therefore be admissible.

[16] This argument is flawed in more than one respect. First of all, it is well established that judicial review of a decision maker's order or decision is based on the record before the decision maker at the time the impugned decision was made. The Attorney General made a request pursuant to Rule 317 of the *Rules* for the material before the Deputy Commissioner when the decisions of February 21, 2006 were made. Some material was provided in response to that request. If any of the

exhibits in the Poirier affidavit were before the decision maker, they should have been included in the Rule 317 material filed by the Commissioner.

[17] It is true that general background information or evidence that goes to the jurisdiction of the decision maker should be admissible. I do not think, however, that any of the exhibits in the first Poirier affidavit fit within this exception. First of all, the correspondence between counsels has no bearing on the jurisdictional issue and could at best demonstrate that the Orders (Counsel) and Decision (Counsel) are not of any practical effect anymore. But that evidence, *per se*, would not be determinative of the mootness issue. More importantly, the applicant cannot be compelled to answer counsel for the respondent's letter, as the information sought (i.e. whether the witnesses have authorized their counsel to disclose or use their testimonies) is protected by solicitor-client privilege. I therefore fail to see the relevance or usefulness of this correspondence.

[18] As to the affidavit of Mr. Saunders and his cross-examination, they were generated in the context of a different proceeding dealing with different orders issued by the Deputy Commissioner in 2001. I am not convinced that they are essential to properly circumscribe the proper scope of the *Hartley* decision; the reasons of my colleague Justice Dawson are quite elaborate and thorough, and do not require extrinsic material to be understood both in terms of the findings and of the underlying rationale. The fact that there may be different views within the Department of Justice as to the matter of multiple representations is equally irrelevant for the purpose of determining whether the Commissioner could validly make the Orders and Decisions that are the subject of this judicial

review. For all of these reasons, I am therefore of the opinion that the first affidavit of Ms. Poirier should be struck and disregarded.

[19] The second affidavit of Ms. Poirier, brought on motion by the respondent on April 23, 2007, raises similar issues. At the hearing, I indicated that I would grant the motion, not so much because I was convinced the documents were clearly relevant, but in order to make sure the record was as comprehensive as possible. I came to that conclusion after counsel for the Attorney General conceded that he would not be taken by surprise, and after having explicitly stated that the applicant was under no obligation to file this material. Having now had a chance to review more closely these documents as well as the parties' submissions, I am definitely of the view that this material is at best of marginal relevance to the issues raised in this proceeding.

[20] As previously mentioned, the additional documentation sought to be introduced in evidence consists of correspondence between counsel generated in the course of the Commissioner's ongoing investigation and which postdates the application for judicial review by the applicant. To the extent that these letters purported to demonstrate what instructions have been provided to counsel in respect of the decisions at issue, they are quite clearly inadmissible as they would interfere with the solicitor-privilege between the witnesses and their counsel.

[21] Furthermore, I find the timing of this motion curious. The respondent has been aware of the letters for many months yet has waited until mere days before the hearing of the application to bring the motion. A motion pursuant to Rule 312 of the *Rules* should not deal with material that could

have been made available at an earlier date: *Mazhero v. Canada Industrial Relations Board*, 2002 FCA 295, at para. 5.

[22] Finally, I agree with the applicant that the letters the respondent wishes to file in the Court record are at best of marginal relevance. As already indicated, they cannot be determinative of the mootness issue. Moreover, the Confidentiality Orders and Decisions against counsel who represented the witnesses before the Deputy Commissioner has not been rescinded. Since it is the jurisdiction to make these Confidentiality Orders and Decision and to make them contingent on a waiver of the solicitor-client privilege by the witnesses that is at stake, the issue necessarily survives the subsequent actions of the parties; even if the parties were to waive the privilege, the jurisdiction of the Deputy Commissioner to make the Orders and Decision in the first place would still be very much alive. Indeed, the effectiveness of the Deputy Commissioner decision would be spent as a result of the fulfillment of a condition the imposition of which is itself challenged. For all of these reasons, I would therefore dismiss the applicant's motion and exclude the second affidavit of Ms. Poirier from the record if I were to look at it afresh. But having granted the motion at the hearing, I am not prepared to vary my decision, if only because I made it clear from the outset that the additional documentation was at best of marginal relevance. In any event, it does not make much difference whether the motion is granted or not, as the documentation adduced can only have a minimal impact on the result of this application for judicial review.

b) Is this application for judicial review time-barred?

[23] The respondent argues that the true purpose of the judicial review application is to quash the Confidentiality Orders issued by the Deputy Commissioner on February 7th and 8th, as it is these Orders which impose the alleged undue interference or restrictions. The Decisions of February 21st, 2006 are merely the written reasons or confirmation of the Orders, according to this argument. Since judicial review applications must be commenced within 30 days after the time the "decision or order was first communicated," pursuant to subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Court Act*), the application should be dismissed as it was filed on March 23, 2006.

[24] Having considered the Orders and the Decisions, I do not think the latter can be characterized as mere confirmations of the February 7th and 8th Orders. Rather, it appears from the transcript of the hearing (Applicant's Record, p. 39) that the Deputy Commissioner was asked to decide whether or not to rescind the original Orders. Even if he eventually confirmed his original orders in his February 21st Decisions, I believe the Orders and the Decisions are separate "decisions" for the purpose of subsection 18.1 of the *Federal Courts Act.*

[25] This Court dealt at length with this question in *Dumbrava v. Canada (Minister of Citizenship and Immigration)* (1995), 101 F.T.R. 230. After reviewing the case law, Justice Noël (as he then was) wrote:

> [15] […] Whenever a decision maker who is empowered to do so agrees to reconsider a decision on the basis of new facts, a fresh decision will result whether or not the original decision is changed, varied or maintained.…What is relevant is that there be a fresh exercise of discretion, and such will always be the case when a decision maker agrees to reconsider his or her decision by reference

> to facts and submissions which were not on the record when the original decision was reached.
>
> See also: *Taylor v. Canada (Public Service Commission)*, 2003 FCT 566 (C.F.)

[26] Accordingly, I am not prepared to dismiss this application for judicial review on the basis that it was filed too late. The Orders and the Decisions may have been related, but they were separate even if the Decisions eventually confirmed the previous Orders.

c) Is the application for judicial review moot?

[27] Counsel for the respondent contended that this Court should refuse to entertain this application for judicial review because it is moot, unnecessary and improper. While this may be so with respect to the Orders (Witnesses) and the Decision (Witnesses), it is clearly not the case as for the Orders (Counsel) and Decision (Counsel).

[28] It will be recalled that in his decision of February 21, 2006 the Deputy Commissioner rescinded the Confidentiality Orders imposing confidentiality restrictions on the witnesses. In light of the fact that these Orders were made in the context of gathering evidence from witnesses associated, or formerly associated, in the same workplace, the Deputy Commissioner was of the view that the Orders were no more necessary once the oral evidence of the associated witnesses had been given. I would therefore agree with the respondent that there cannot possibly be any useful purpose, practical effect of benefit to pursuing the judicial review application in this respect.

[29] The same cannot be said, however, of the Orders and Decision pertaining to counsel. In his February 21, 2006 Decision, the Deputy Commissioner maintained his Orders and refuse to rescind them as he believed they were essential to ensure the witnesses would not be put in the position of giving their evidence in the presence of their employer's representative or in the presence of other witnesses also represented by the same counsel. To be furthered, this objective called for the permanent nature of his previous Orders, unless the witnesses were prepared to waive solicitor-client privilege.

[30] It is true that there is no evidence on the record as to whether counsel has or has not been authorized by the witnesses to disclose the evidence. Contrary to the respondent's contention, this is not material to the resolution of the issue raised by the applicant. If the Deputy Commissioner does not have the jurisdiction to subject counsel to such a restriction, the fact that it has been complied with does not cure the potential defect of the Orders. Had it not been for those Orders, counsel would have been able to share the evidence with other witnesses and with their employer without the consent of their clients. Even if counsel were eventually able to share the evidence as a result of the witnesses waiving the solicitor-client privilege, one could argue that counsel was still governed by the Orders in securing the waiver.

[31] I am therefore of the opinion that this issue is far from being moot, as the Orders are of an ongoing nature. Even if counsel were eventually authorized to share the information, it would still be in furtherance of the Orders. Moreover, the jurisdiction of the Deputy Commissioner to make such an order has been fully debated by counsel, both orally and in writing. It is certainly not an

inappropriate use of judicial resources to decide the issue in that context, to the extent that it will most likely arise again in other cases involving a Department of Justice counsel representing one or more employees in an investigation conducted pursuant to the *Act*.

d) Do the Orders (counsel) and Decision (counsel) impermissibly impinge on the solicitor-client privilege?

[32] Before embarking upon an analysis of the Deputy Commissioner's power and of the validity of the impugned Orders and Decision, the Court must determine the applicable standard of review. Counsel for both parties appropriately agreed that correctness is the appropriate standard, at least with respect to the jurisdictional issue. My colleague Justice Dawson came to the same conclusion in the *Hartley* decision, after having applied the four factors of the pragmatic and functional approach. While the issue in that case was the jurisdiction of the Deputy Commissioner to issue confidentiality orders directed at the witnesses, I can see no reason why her reasoning would not be equally applicable to the question at bar, that is, whether the Commissioner was empowered to issue Confidentiality Orders directed at counsel.

[33] In his written submissions, counsel for the respondent argued that the Commissioner and his delegates nevertheless should be entitled to considerable deference with respect to the conduct of the investigation, and that his conclusions respecting the concerns raised by the multiple representations of counsel for the Department of Justice and their impact on his decision to issue Confidentiality Orders should be reviewed on the patently unreasonable standard. This is no doubt true, assuming the Commissioner has the authority to make the Orders in the first place. But if the Orders are of such a nature as to unnecessarily infringe on the solicitor-client privilege, or if it

contravenes the *Charter*, no deference will be owed to the Commissioner. This is precisely the issue in the case at bar.

[34] Both parties agree on the importance of preserving solicitor-client privilege. Not surprisingly, however, they don't see eye to eye on the consequences to be drawn from this recognition and come to a different interpretation of the Deputy Commissioner's Orders. Counsel for the applicant repeatedly stress the fundamental nature of this privilege and relied on a number of Supreme Court cases for the proposition that solicitor-client privilege can be infringed only when it is "absolutely necessary" to do so to achieve the ends of the enabling legislation: see, for example, *R. v. McClure*, [2001] 1 S.C.R. 445; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 [*Descôteaux*]; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 [*Lavallee, Rackel & Heintz*]; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809.

[35] According to the applicant's submission, the Deputy Commissioner has interfered with the solicitor-client relationship of the individuals (and of the federal Crown) and their counsel by setting the terms of a solicitor-client relationship of another party, by interfering with the communications that may pass between counsel and client, and by making a link between the order that constrains solicitor-client privilege and the waiver of that privilege. As a result, the privilege would no longer be absolute, but rather be in the hands of a party who is a stranger to the relationship. Yet, there is nothing in the common law nor in the *Act* authorizing the Commissioner or his delegates to create such an exception to the privilege. Nor is there any evidence to support the presumption that

Department of Justice counsel would be in a conflict of interest, torn between their loyalty to the individual witnesses and the Crown.

[36] Counsel for the respondent, on the other hand, placed a lot of emphasis on the public policy underlying the *Act*, on the role of the Commissioner in carrying out his mandate, and on the private and *ex parte* nature of the investigations. In that context, it was argued that the Commissioner can impose a confidentiality order to ensure that the rights of the witnesses are protected and that the Attorney General is excluded from the proceeding. If the Attorney General had a *de facto* right to attend all hearings simply by providing a counsel to the witnesses compelled to give evidence, it was submitted, the investigatory process would simply be unworkable and profoundly undermined.

[37] Considering this potential conflict of interest between Crown servants and the Attorney General, and to ensure that witnesses will remain in control of the disclosure of their testimonies notwithstanding the fact they are represented by counsel who also represent the Attorney General and the head of the government institution whose decision to refuse disclosure is being investigated, the Commissioner must therefore be empowered to make the impugned Confidentiality Orders, so the argument goes. Indeed, counsel for the Commissioner submitted that the effect of the Orders was simply to reiterate the basic principle of solicitor-client privilege given the many hats worn by counsel from the Department of Justice.

[38] Many of the arguments raised by the parties have been canvassed at length by Justice Dawson in the *Hartley* decision (reversed on appeal, 2005 FCA 199, but not on this ground), and

counsel referred extensively to that ruling in their oral and written submissions. At issue in that case were, among other things, confidentiality orders prohibiting persons who had given evidence before the Commissioner from revealing any information disclosed during his or her testimony. All of these persons were represented by the same four lawyers of the same law firm, which also represented the Government of Canada, the Attorney General and the Prime Minister.

[39] Each of these confidentiality orders 1) required the witnesses "not to reveal "any information disclosed during my confidential testimony in this matter including the evidence given by me""; 2) "authorized each [witness] to disclose to [their lawyers] information disclosed during his or her confidential testimony, once each of those lawyers had executed an undertaking not to reveal to any person information disclosed during that particular witness' confidential testimony"; and 3) "required each [witness] to acknowledge that the confidentiality order would apply until such time as the [witness] was released from the terms of the order by the Commissioner". When issuing these confidentiality orders, the Deputy Commissioner also ordered that the witnesses' counsel undertake not to reveal information disclosed during the individual witness' testimony with other individuals who counsel also represented.

[40] Interestingly, the reasons provided by the Deputy Commissioner for issuing the confidentiality orders are quite similar to those advanced in the present case. Justice Dawson, in the *Hartley* decision, summarized those reasons in the following way:

> [138] […] (a) The Commissioner has a statutory obligation to insure the privacy of his investigations.

> b) The Commissioner is obliged to protect the integrity of his investigations by encouraging the candour of witnesses. In order to encourage candour the Commissioner must provide an environment which assures privacy so as to prevent the possible tainting of evidence, whether that tainting is conscious or unconscious.
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> (c) The Commissioner's ongoing investigations would be compromised if witnesses were permitted to communicate questions asked and answers given during the course of the Commissioner's private investigation to other persons, including persons who were potential witnesses in the same investigations.
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> (d) The Commissioner must be mindful of the potential implications of witnesses' reporting relationships. The integrity of the Commissioner's investigations are potentially compromised where witnesses are represented by counsel who simultaneously represent the witnesses' superiors and ultimate employer. Crown employees may feel embarrassed, reluctant, inhibited or intimidated when a representative of their employer is present to hear their evidence. Employees may fear recrimination and reprisal, particularly where their counsel also represents the Crown.

[41] In the case at bar, counsel for the respondent once again relied extensively on sections 35, 36 and 62 to 65 of the *Act*. These provisions read as follows:

Investigations in private	Secret des enquêtes
35. (1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.	35. (1) Les enquêtes menées sur les plaintes par le Commissaire à l'information sont secrètes.
Right to make representations	Droit de présenter des observations
(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to (a) the person who made the complaint,	(2) Au cours de l'enquête, les personnes suivantes doivent avoir la possibilité de présenter leurs observations au Commissaire à l'information, nul n'ayant toutefois le droit absolu d'être présent lorsqu'une autre personne présente des

(b) the head of the government institution concerned, and

(c) a third party if

(i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of the third party, and

(ii) the third party can reasonably be located.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person.

observations au Commissaire à l'information, ni d'en recevoir communication ou de faire des commentaires à leur sujet :

a) la personne qui a déposé la plainte;

b) le responsable de l'institution fédérale concernée;

c) un tiers, s'il est possible de le joindre sans difficultés, dans le cas où le Commissaire à l'information a l'intention de recommander, aux termes du paragraphe 37(1), la communication de tout ou partie d'un document qui contient ou est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

Inadmissibilité de la preuve dans d'autres procédures

36. (3) Sauf dans les cas de poursuites pour infraction à l'article 131 du Code criminel (parjure) se rapportant à une déclaration faite en vertu de la présente loi ou pour infraction à

Evidence in other proceedings

36. (3) Except in a prosecution of a person for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, in a prosecution for an offence under section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Confidentiality

62. Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

Disclosure authorized

63. (1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(a) that, in the opinion of the Commissioner, is necessary to

l'article 67, ou sauf dans les cas de recours en révision prévus par la présente loi devant la Cour ou les cas d'appel de la décision rendue par la Cour, les dépositions faites au cours de toute procédure prévue par la présente loi ou le fait de l'existence de telle procédure ne sont pas admissibles contre le déposant devant les tribunaux ni dans aucune autre procédure.

Secret

62. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des pouvoirs et fonctions que leur confère la présente loi.

Divulgation autorisée

63. (1) Le Commissaire à l'information peut divulguer, ou autoriser les personnes agissant en son nom ou sous son autorité à divulguer, les renseignements:

a) qui, à son avis, sont nécessaires pour :

(i) mener une enquête prévue par la présente loi,

(ii) motiver les conclusions et

(i) carry out an investigation under this Act, or

(ii) establish the grounds for findings and recommendations contained in any report under this Act; or

(b) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appel therefrom.

recommandations contenues dans les rapports et comptes rendus prévus par la présente loi;

b) dont la divulgation est nécessaire, soit dans le cadre des procédures intentées pour infraction à la présente loi ou pour une infraction à l'article 131 du Code criminel (parjure) se rapportant à une déclaration faite en vertu de la présente loi, soit lors d'un recours en révision prévu par la présente loi devant la Cour ou lors de l'appel de la décision rendue par celle-ci.

Disclosure of offence authorized

(2) The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

Dénonciation autorisée

(2) Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, le Commissaire à l'information peut faire part au procureur général du Canada des renseignements qu'il détient à cet égard.

Information not to be disclosed

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or

Précautions à prendre

64. Lors des enquêtes prévues par la présente loi et dans la préparation des rapports au Parlement prévus aux articles 38 ou 39, le Commissaire à

under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

No summons

65. The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, a review before

l'information et les personnes agissant en son nom ou sous son autorité ne peuvent divulguer et prennent toutes les précautions pour éviter que ne soient divulgués :

a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

Non-assignation

65. En ce qui concerne les questions venues à leur connaissance dans l'exercice, au cours d'une enquête, des pouvoirs et fonctions qui leur sont conférés en vertu de la présente loi, le Commissaire à l'information et les personnes qui agissent en son nom ou sur son ordre n'ont qualité pour témoigner ou ne peuvent y être contraints que dans les procédures intentées pour infraction à la présente loi ou pour une infraction à l'article 131 du Code criminel (parjure) se rapportant à une déclaration faite en vertu de la présente loi, ou que lors d'un recours en

the Court under this Act or an appeal therefrom.	révision prévu par la présente loi devant la Cour ou lors de l'appel de la décision rendue par celle-ci.

[42] Contrary to the Commissioner's submission, these provisions do not empower him to make confidentiality orders. It does not follow from the fact that every investigation must be conducted in private that the Commissioner may determine the rights and obligations of witnesses appearing before him or his delegates. The confidentiality requirements found in the *Act* are no more than a *quid pro quo* for the broad right of access given to the Commissioner. Justice Dawson explicitly dealt with this contention in the *Hartley* decision and stated:

> [149] […] The Act does not expressly impose confidentiality requirements upon persons other than the Commissioner and his staff, presumably because those in government with access to confidential information are subject to an already existing government regime for the keeping of its confidences (for example, the oath of office required under the *Public Service Employment Act*, R.S.C. 1985, c. P-33, fiduciary or contractual obligations and legislation such as the *Security of Information Act*, R.S.C. 1985, c. O-5).
>
> [150] Put another way, the confidentiality regime required by the Act is a regime that will ensure that information communicated to the Commissioner remains protected to the same extent as if not disclosed to the Commissioner. It is consistent with that scheme that the confidentiality requirements are requirements imposed only upon the Commissioner.
>
> [151] I believe that Parliament manifested this intention in section 62 of the Act where it wrote "[S]ubject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act"… The confidentiality obligation is only directed to the Commissioner and his delegates. Parliament could

> have expressly enacted a confidentiality provision which applied to witnesses, but did not.

[43] In addition, the Federal Court of Appeal has confirmed that section 35 of the *Act* must be read together with section 62 and that the obligation of confidentiality under section 35 is imposed on the Commissioner. As noted by the Court of Appeal, the rationale for this is simply to promote the objective of full disclosure by the government during the investigation by the Commissioner. This interpretation of section 35 of the *Act* undermines the rationale of the Deputy Commissioner that section 35 can serve as a basis for making a confidentiality order. Such an order would impose obligations beyond those inherent in section 35 of the *Act*.

[44] That being said, does it necessarily follow that the Commissioner is without jurisdiction to make a confidentiality order? Not necessarily. The *Act* provides the Commissioner with broad and effective discretionary powers to investigate complaints and determine the procedure to be followed in the performance of any of his duties or functions. In other words, the Commissioner is to be master of his own procedure:

Regulation of procedure	Procédure
34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.	34. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.

[45] I agree with the respondent that the Commissioner is invested with a broad discretion when determining the process of an investigation. In order to enable the Commissioner to fulfill his mandate, Parliament has clearly and unequivocally conferred upon the Commissioner almost unlimited powers. Considering the object of the *Act*, the wording of that section and the need to give that quasi-constitutional statute a liberal and purposive construction, I am prepared to accept (as did Justice Dawson in the *Hartley* decision, at para. 172) that section 34 of the *Act* authorizes the Commissioner to issue confidentiality orders directed both at witnesses and counsel, subject to some restrictions to ensure that they are appropriately tailored to the specific circumstances of each case.

[46] In the context of a confidentiality order imposed on counsel, one of the constraints the Commissioner must obviously take into account in framing it is the solicitor-client privilege. The importance of solicitor-client privilege and the need to guard against its infringement have been recognized numerous times by the Supreme Court of Canada, and both parties are in agreement that the upholding of this privilege is essential for the functioning of an effective legal system. In *Lavallee, Rackel & Heintz*¸ *supra,* Justice Arbour noted that this privilege is to remain as absolute as possible in order to maintain relevance and to ensure confidence in the privilege. The most recent statement about solicitor-client privilege was made by the Supreme Court in *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] 2 S.C.R. 32, where Justice Rothstein, for the Court, held that solicitor-client privilege can be infringed only when it is "absolutely necessary" to do so to achieve the ends of the enabling legislation.

[47] This privilege, which has evolved into a fundamental and substantive rule of law, has been described in the following way by Justice Lamer in *Descôteaux, supra*, at p. 875:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[48] Can it be said, in the present instance, that interference with solicitor-client privilege is absolutely necessary to achieve the ends sought by the legislation? Or, to put it another way, is the public interest in limiting the privilege greater than that of maintaining the privilege? Considering the public policy goals sought to be achieved by Parliament in adopting the *Act*, I believe the answer to both of these questions is positive.

[49] Subsection 2(1) enunciates the purpose of the *Act* in the following terms:

2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to	2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le

information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

[50] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para, 61, Justice LaForest held that:

> The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry…

[51] The role of the Commissioner in achieving these objectives is central. As an officer of Parliament, the Commissioner is charged with the duties to receive and investigate any complaint made to him pursuant to subsection 30(1) of the *Act* and to report thereon to the complainant and the appropriate government institution pursuant to section 37 of the *Act*. Parliament has provided that the final decision of a head of a government institution to refuse to disclose information is to be made only after that person has had the opportunity to review the Commissioner's findings and recommendations. The importance of the Commissioner's investigation was highlighted by the Federal Court of Appeal as follows:

> The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in sections 41 and 42 of the Act.
>
> *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (1999), 166 F.T.R. 277; [1999] F.C.J. No. 522 (QL), at para. 27.

[52] One of the rationales underlying the Deputy Commissioner's Confidentiality Orders vis-à-vis counsel is the potential conflict of interests arising from the fact that counsel representing the witnesses also represent both the Attorney General and the head of the government institution whose decision is being investigated. The investigation being held in private and *ex parte*, the Commissioner felt that it was necessary to ensure the candour of witnesses so as to give precedence to the individual solicitor-client relationship over the Crown solicitor-client relationship.

[53] Counsel for the applicant countered that there is absolutely no factual or evidentiary foundation for the proposition that such a conflict of interest exists or is even likely to come up in the present circumstances, and that the Decision and Orders are therefore founded on speculation and unsubstantiated assumptions. The only reason that the individuals were subpoenaed by the Deputy Commissioner was on account of their activities on behalf of the Crown. Since they were not examined in their personal capacity but rather in their professional capacity as Crown servants and employees, there can be no conflict of interest in this proceeding between the individuals and the Crown, according to the applicant's argument.

[54] I must confess that I am somewhat troubled by this automatic and necessary assimilation of the Crown's and the employees' interests. As a general rule, I am prepared to concede that it is unlikely the employees' views with respect to the disclosure of a document will differ from those of the senior management of the Department involved. But the possibility cannot be ruled out entirely, especially when the employees subpoenaed by the Commissioner are not in the higher ranks of the Department but rather at the lower level. Similarly, I can easily envisage situations where there is no conflict at the outset but conflict develops as the questioning proceeds and the investigation unfolds. It is in those kinds of circumstances that employees must have the assurance that they will remain in control of the disclosure of their testimonies notwithstanding the fact that their counsel play a dual role.

[55] I agree with the respondent that the investigatory process would simply be unworkable and profoundly undermined if the Attorney General had a *de facto* right to attend all hearings simply by providing a counsel to the witnesses compelled to give evidence. This would clearly circumvent Parliament's intent that the investigations be conducted in private and the Commissioner's decision that it be held *ex parte*. After all, the investigation conducted by the Commissioner is meant to be independent of the government.

[56] In the *Hartley* decision, Justice Dawson acknowledged that the existence of multiple representations by the same lawyer was a relevant consideration in assessing whether the confidentiality order infringed the *Charter*. She wrote:

> [204] Finally, the fact that almost all of the government actors were represented by the same lawyers is a further contextual factor. This is

> so because counsel who represent multiple entities in the same matter are generally required to share information amongst their clients. To the extent some witnesses were represented by counsel with the Department of Justice, Crown servants are generally required to waive solicitor-client privilege in favour of the Crown.

[57] Contrary to the applicant's allegation, Justice Dawson did not reject the "employer in the room" argument, but merely found this argument to be insufficient to justify the unlimited time duration of the confidentiality orders at issue in that case. This decision is consistent with a previous decision from this Court in the same file, refusing the Commissioner's motion to remove counsel. The Commissioner had sought to remove counsel as solicitors of record for the Attorney General and for the individual applicants on the basis that they were represented by the same lawyers. In that case, it was mainly because of the safeguards which were provided by the confidentiality orders directed at counsel and the parallel undertakings of confidentiality of counsel that Justice McKeown decided that counsel for the Attorney General and for the individual applicants was allowed to remain as solicitors of record, notwithstanding its multiple representations: *Canada (Attorney General) v. Canada (Information Commissioner) (T.D.)*, [2002] 3 F.C. 630 at paras. 20, 26 and 32.

[58] As it also appears from that same case, confidentiality orders are required in the context of multiple representations considering Rule 2.04(6) of the *Rules of Professional Conduct* of the Law Society of Upper Canada. This rule provides that, absent a confidentiality order, in the case of a joint retainer, no information received in connection with the matter from one client can be treated as confidential so far as any of the other clients are concerned.

[59] If this was not sufficient, and to remove any remaining ambiguity, the *Policy on the Indemnification of and Legal Assistance for Crown Servants* of the Treasury Board of Canada explicitly refers to the possibility that Crown servants represented by Crown counsel be required to waive solicitor-client privilege in favour of the Crown. This Policy specifically acknowledges the potential for conflict of interest between Crown servants and the Attorney General and provides that counsel's obligation towards the Crown is paramount.

[60] In light of all this, I am inclined to think that it was perfectly legitimate for the Commissioner to issue the impugned Confidentiality Orders. If the spirit of the *Act* is to be upheld, and if the Commissioner's investigations are to ensure openness and accountability in the management of information collected and generated by government, the solicitor-client relationship between the employee and his counsel must prevail over the solicitor-client relationship between counsel and the Crown and between counsel and other employees. The employee testifying before the Commissioner must have the last word as to who will have access to what he said. He or she may decide to waive privilege; but it should be his or her decision, not that of the government.

[61] For all of the foregoing reasons, I find that the impugned Orders interfere with the solicitor-client privilege of the Crown no more than is necessary, and is perfectly consistent with the objectives of the *Act*. If, as the applicant submits, there is no conflict of interest, the employee can always waive his or her privilege. This requirement is a small price to pay in order to ensure that the employee is fully protected and that his or her testimony will be as candid and transparent as possible.

e) Do the Decision (Counsel) and Orders (Counsel) violate the *Charter*?

[62] I do not think it can seriously be disputed that an order from an officer who exercises statutory powers falls within the ambit of the *Charter*. Similarly, it is equally beyond dispute that such an order limits the freedom of expression guaranteed by section 2(b) of the *Charter* to the extent that it prevents counsel appearing on behalf of witnesses before the Commissioner to disclose "the questions asked, the answers given and exhibits used" during their clients' testimony. The only real issue is whether such a limit can be justified pursuant to section 1 of the *Charter*.

[63] Courts are generally reluctant to embark on a Charter enquiry in the absence of a sufficient evidentiary record. Contrary to the situation in the *Hartley* decision, the parties in the present instance have filed very little evidence. There is nothing before this Court, for example, with respect to the investigation that prompted the impugned Deputy Commissioner's Orders and Decision, nor was this Court provided with any background information as to how and on what terms the Justice counsel were representing the witnesses. It is therefore with these *caveats* in mind that I proceed with an assessment of the reasonableness of the limit imposed on counsel's freedom of expression by the Orders and Decision issued by the Deputy Commissioner.

[64] In the *Hartley* decision, Madam Justice Dawson mentioned a number of relevant contextual considerations before determining the conformity of the confidentiality orders with section 1 of the *Charter*. I believe many of these factors are equally applicable here, and I therefore adopt the following ones:

> [194] First, the investigation is conducted in furtherance of the quasi-constitutional right of access that has as its purpose the facilitation of democracy.
>
> [195] Second, the investigation conducted by the Commissioner is an investigation that is to be independent of government.
>
> [196] Third, the investigation is to be conducted in private.
>
> […]
>
> [200] The fifth contextual factor is that there have been instances where members of a government department have taken steps to frustrate the right of access under the Act…
>
> […]
>
> [204] Finally, the fact that almost all of the government actors were represented by the same lawyers is a further contextual factor. This is so because counsel who represent multiple entities in the same matter are generally required to share information amongst their clients. To the extent some witnesses were represented by counsel with the Department of Justice, Crown servants are generally required to waive solicitor-client privilege in favour of the Crown.

[65] I would only add to these the fact that the witnesses involved in the investigation underlying this application for judicial review were not high-ranking officials or senior exempt staff people like the Prime Minister's chief of staff, but four Crown servants who have been involved in one capacity or another with the initial request made under the *Act*.

[66] Taking into account the contextual factors that she had identified as being relevant to her section 1 analysis, Justice Dawson had no difficulty concluding that the objective sought to be achieved by the confidentiality order at stake in the *Hartley* decision (i.e., protecting the integrity of the investigations and ensuring that confidential information is not improperly disclosed) related to pressing and substantial concerns in a free and democratic society. As a result, she was prepared to

accept that the objectives were of sufficient importance as to warrant a limit to freedom of expression.

[67] She was similarly satisfied that the first step in establishing the proportionality of the measure vis-à-vis the objective to be pursued was successfully met. I recognize that the confidentiality order in that case was directed to the witnesses themselves and affected counsel only indirectly, to the extent that the witnesses were authorized to reveal to their four lawyers information disclosed during their confidential testimony, once each of those lawyers had executed an undertaking not to reveal to any person information disclosed during each particular applicant's confidential testimony. I nevertheless find that her reasons for accepting that there is a rational connection between the imposition of a confidentiality order and the protection of both the integrity of the investigations and the confidentiality of the information which might otherwise not be protected, holds true in the case at bar. Here is what she had to say in that respect:

> [211] The reasons of the Commissioner's delegate shed light on how the orders are viewed to function in order to protect the integrity of the investigations. First, if witnesses could communicate questions asked and answers given on their examination before the Commissioner's delegate, the delegate is less likely to obtain a witness' own independent recollection of events. Second, the orders ensure that a witness may speak freely without fear of employment repercussions. Third, the automatic imposition of a confidentiality order is said to prevent any stigma attaching to a witness who is bound by such an order. The Commissioner says that there would exist a possibility of suspicion attaching to a witness who requested a confidentiality order.
>
> [212] With respect to the object of protecting the confidentiality of government information, the confidentiality orders are said to reflect the Commissioner's obligation to take every reasonable precaution to avoid the disclosure of exempt information. The orders also allow

> some portion of one witness' evidence to be put to another witness for the purpose of advancing the investigation.

[68] Having found that the confidentiality order met the rational connection test, Justice Dawson nevertheless quashed it on the ground that it did not impair the witnesses' freedom of expression as little as possible. After noting that it is always more difficult to justify a complete ban on a form of expression than a partial ban, and that confidentiality orders are to be restricted as much as possible, she opined that the Commissioner's Delegate had failed to justify the breadth of his order. A careful reading of her reasons shows that the unlimited duration of the confidentiality order was a key factor in her assessment that it was overbroad and unjustified.

[69] In the present case, the Confidentiality Orders and Decision are of a more limited extent. First, they are somewhat limited in scope, as the restrictions imposed relate solely to "questions asked," "answers given," and "exhibits used". More importantly, the witnesses are free at any time to authorize their counsel to disclose the information at issue. As a result, the Confidentiality Orders can not be assimilated to a "blanket regime which precludes a person from communicating for all time any information touching upon their testimony and appearance before the Commissioner" (*Hartley*, *supra*, at para. 154).

[70] I am prepared to accept that other factors, in addition to the duration factor, led Justice Dawson to the conclusion that the orders were overly broad. She mentioned, for example, the lack of evidence that witnesses would be tainted, that a stigma would attach to witnesses not subject to a confidentiality order, or that the release of information such as the manner in which the proceedings

were conducted, the role of counsel, objections to questions and rulings, would impair the integrity of the investigation. She also noted that the level of seniority of at least some of the witnesses dictated that it was virtually impossible to presume they would be susceptible to coercion.

[71] However, once again, many of these considerations do not apply with equal strength here. Not only are the Decision and the Orders in the present instance much less absolute than they were in the *Hartley* decision, but they also aim at protecting public officials of a much lower rank. While there is no hard evidence that these officials' interests diverge from those of the government, or that they might feel pressured to go along with the stated position of their Department, it is not a great leap of logic or common sense to acknowledge that they could be more vulnerable and less prone to be fully transparent were they not protected from the divulgation of their testimony to their employer via their counsel.

[72] It is revealing and even disturbing that, although the individual witnesses are the main beneficiaries of the protection afforded by the solicitor-client privilege, none of these individual witnesses are a party to the application. Similarly, the fact that the applicant is complaining that counsel cannot unilaterally decide to disclose information gained solely in their capacity as counsel for the witnesses, as if not subject to the same loyalty and confidentiality obligations as any other solicitor towards his/her clients, goes a long way in showing that the rights of the individual witnesses indeed required fostering.

[73] At the end of the day, the Deputy Commissioner chose to uphold the solicitor-client privilege between the witness and his or her counsel, and to give it precedence over the privilege between counsel and the Attorney General. Indeed, counsel appeared with the individual witnesses before the Commissioner only after it was made clear that such appearance was solely as legal counsel for the witness in question, and not as legal counsel for any other party, and more particularly, for the Attorney General. Considering the limited scope of the Orders and of the Decision, and the possibility for the witnesses to waive the privilege and to authorize at any time their counsel to disclose the information at issue, I am of the view that they meet the minimal impairment requirement and that the limit on freedom of expression is therefore justified pursuant to section 1 of the *Charter*.

[74] More particularly, I agree with counsel for the respondent that the Orders and the Decision directed at counsel go no further than required to 1) enhance the truth finding function of the Commissioner's investigation, which investigation is conducted in furtherance of the quasi-constitutional right of access; 2) maintain the integrity of the investigation; 3) ensure that a witness's testimony would not be tainted by knowledge of the evidence given by another witness; 4) maintain the *ex parte* nature of the investigation, which investigation has to be independent of government pursuant to Parliament's specific intent prescribed in the *Act*; 5) address the uniqueness of the multiple representations by counsel from the Department of Justice, and 6) maintain the private nature of the investigation and ensure the protection of any specific confidential information.

[75] For all of the foregoing reasons, this application for judicial review is therefore dismissed, with costs.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed, with costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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