SUPREME COURT OF NOVA SCOTIA
Citation: *Monkman v. Serious Incident Response Team,* 2015 NSSC 325

Date: 2015-11-13
Docket: Hfx No. 430152
Registry: Halifax

Between:

Helen Monkman

Appellant

v.

Director of SIRT (Serious Incident Response Team)

Respondent

DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: March 16, 2015, in Halifax, Nova Scotia

Written Decision: November 13, 2015

Counsel: Dillon Trider, for the Appellant
Debbie Brown, for the Respondent

Introduction

[1] The appellant's father died while in the custody of the Cape Breton Regional Police on December 9, 2012. The Serious Incident Response Team (SiRT), established by the **Police Act** SNS 2004, c. 31, as amended, investigated the circumstances surrounding the detention of the deceased and his death.

[2] The SiRT primary investigator's report was submitted to the Team Director who concluded that the police conduct was appropriate and that no further action was warranted. A Summary of Investigation was posted on the SiRT website on May 15, 2013.

[3] The appellant brought an application under the **Freedom of Information and Protection of Privacy Act** SNS 1993, c. 5**,** as amended (**FOIPOP Act**) seeking the release to her of a copy of the investigator's report. In response, the Director of SiRT provided a redacted copy of the report. This was not satisfactory to the appellant, who sought a review by the **FOIPOP Act** Review Officer.

[4] In a report of June 12, 2014, the Review Officer recommended, pursuant to section 39 of the **FOIPOP Act** that information redacted by the Director, in

reliance upon exemptions set out in sections 15(1)(a) and (f) of the Act, be disclosed.

[5] The Director did not accept the Review Officer's recommendation and refused to disclose the redacted information. In consequence of that decision, the appellant brought an appeal under section 41 of the **FOIPOP Act.**

The Investigator's Report

[6] The redacted report sets out the sequence of events leading up to and including the detention of the deceased.

[7] As a result of a Crime Stoppers' tip, members of the Cape Breton Regional Police attended at the parking lot used by vehicles waiting to board the North Sydney to Newfoundland ferry. The tip provided "a description [redacted] of a vehicle" suspected to have a "large amount of marijuana hidden [redacted] in the back of the truck."

[8] A drug sniffing dog indicated on two occasions the presence of drugs in the suspect vehicle. A check of the police computerized data base indicated that the registered owner of the vehicle had a previous criminal record for drug related offences. Based on the totality of this information, the police seized the vehicle,

obtained a search warrant for the vehicle, and took the suspect into custody. The suspect was provided his rights. He was transported in a police vehicle to the police headquarters.

[9] The suspect was unresponsive upon arrival at the police station. CPR was unsuccessful and he was pronounced dead. A subsequent forensic autopsy and toxicology tests concluded that death was from natural causes. The deceased was a 69 year old man suffering from several pre-existing medical conditions. There was no evidence of a struggle or injury to the deceased.

[10] No drugs or alcohol were found in the deceased's system. No drugs were found in the search of the vehicle.

[11] The investigator's report is 28 pages long. The most frequent redactions are the names of the deceased and of various witnesses, both civilian and those who were involved in the arrest and attempts to resuscitate the deceased. Information tending to identify those persons is redacted. There are "Can Say" statements which generally follow the same pattern of redacting names and identifying information of the witnesses, and of information contained in the tip.

[12] The Investigator's "Findings" and approximately half of his "Conclusion" paragraphs have been redacted.

Summary of Investigation

[13] The public Summary of Investigation summarizes the steps taken in the investigation, and sets out the facts. It follows this with an analysis of the "Relevant Legal Issues" and provides a conclusion that the deceased "lost his life due to his severe heart disease" and that there were "no grounds to consider any charges against any police officer in this matter". It commends the officers' attempts to save the life of the deceased person.

[14] The Summary contains all facts relevant to an assessment of the police action and the conclusion not to take action against any member. The investigator's opinions are not part of the Summary.

Request to Director for Access

[15] The appellant sought disclosure of the investigator's report from the Director. The Report was released but redacted. The reasons for redactions were set out on each page of the report. They included:

- Opinions of Investigator removed under Section 15(1)(a) of the **FOIPOP Act**;
- Names and identifying information removed under Section 20(1) and 20(3)(b) of the **FOIPOP Act**;
- Details regarding the Crime Stoppers' Tip excluded under Section 15(1) of the **Act**.

FOIPOP Review Officer Decision

[16] The Review Officer identified the issues to be decided as:

1. Whether SiRT is authorized to withhold information under section 15(1) (a) of the **Act** because disclosure could reasonably be expected to harm "law enforcement"; and

2. Whether SiRT is authorized to withhold information under section 15(1) (f) of the **Act** because disclosure could reasonably be expected to reveal any information in relation to, or used in, the exercise of prosecutorial discretion.

The Officer answered both questions in the negative.

[17] As to the first question the Officer concluded that there was no law enforcement matter identified; that the exemption cannot apply once an investigation is completed; and that any apprehended harm was speculative and would be merely a hindrance or minimal interference with law enforcement. The Director's argument did not establish a probability of "damage or harm".

[18] As to the second question, the Review Officer concluded that section 15(1)(f) did not apply because no prosecution was recommended or pursued. Therefore the disclosure of the information could not "reveal any information relating to or used in the exercise of prosecutorial discretion".

[19] As to the exemptions claimed under section 20, it was noted that the appellant agreed that they were appropriate and so did not form a part of the Review.

[20] Following this decision, the Director of SiRT issued a written response to the Review Officer setting out his reasons for refusing to accept the recommendations. A further letter went out to the appellant confirming the Director's view that all information that was relevant and material to his decision was disclosed in the redacted report.

[21] The appellant subsequently commenced this appeal.

Position of the Appellant

[22] The Appellant seeks the disclosure of the SiRT Investigator's opinions, withheld on the basis of the exemption under section 15(1) (a) of the Act.

[23] Counsel for the appellant observes that section 42 of the **FOIPOP Act** directs this court to determine the matter *de novo*, which he submits amounts to a standard of correctness. He refers to section 45 as support for the proposition that the Director bears the burden of proving that the information sought is properly exempted from disclosure.

[24] The appellant takes the position that the purpose of **FOIPOP** is to ensure that public bodies such as SiRT are accountable to the public and that access to records is favored over secrecy.

[25] In relation to section 15(1) (a), which exempts disclosure where it could "reasonably be expected to … harm law enforcement", the appellant says that the "harm" alleged to result if disclosure is ordered in this case is not "considerably

more than a mere possibility" as discussed in the case of *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 SCC 3. Counsel submits that the Review Officer's conclusion that the harm alleged - that it would interfere with the investigator's expression of candid opinions in future investigations - is speculative only.

[26] The appellant also seeks costs.

Position of the Respondent

[27] The Director submits that the investigator's report falls within the law enforcement exemption contained in section 15(1) (a) of the FOIPOP Act; and further that the Director exercised a discretion afforded him under the Act.

[28] The Respondent submits that the court is to apply a standard of reasonableness in assessing the exercise of discretion in this case, and that deference is owed to the Director's decision. In applying this approach the respondent says that there are two steps to follow in determining the appeal:

1. Decide whether the record falls within the claimed exemption; and

2. Decide whether the Director exercised his discretion in good faith and for reasons which are rationally connected to the purpose for which the discretion is granted.

[29] The Director says that the redacted information is not necessary to the public understanding of the decision reached; that some of it could tend to identify the Crime Stoppers' tipster; and that release of the investigator's opinions would be contrary to the public interest by generating a reduced willingness to express opinions that might otherwise benefit the Director in his overall assessment of whether to charge a police officer who is under investigation.

Standard of Review

[30] The powers of the Supreme Court in an appeal under the **FOIPOP Act** are set out in section 42, which reads, in part:

> **42 (1)** On an appeal, the Supreme Court may
> (a) determine the matter *de novo*; …
>
> **(5)** Where the head of the public body has refused to give access to a record or part of it, the Supreme Court, if it determines that the head of the public body is not authorized to refuse to give access to the record or part of it, shall
> (a) order the head of the public body to give the applicant access to the record or part of it, subject to any conditions that the Supreme Court considers appropriate; or
> (b) make any other order that the Supreme Court considers appropriate.

> **(6)** Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or authorizes the head of the public body to refuse to give access to the record.

[31] The parties have made submissions that are consistent with their view that the role of this court in considering an appeal under section 42(1)(a) is akin to a judicial review. Whether this is correct was canvassed by Justice Chipman of this Court in *Fitzgerald v. Public Prosecution Service* 2014 NSSC 183. He reviewed authorities dealing with the Federal **Privacy Act,** Ontario's FOIPOP legislation and cases arising in this Court. He concluded:

> [45] However, section 41 of the Act provides for an appeal and s. 42(1) provides that the Court may determine the matter *de novo* and, for that purpose, may examine any record in camera to "…determine on the merits whether the information within the record may be withheld pursuant to this Act."
>
> [46] By reason of the express wording of s. 42(1), and PPS' acknowledgement at the hearing of this appeal that the Court is free to determine the matter *de novo*, I adopt the position that this Court is in the same position as the PPS in interpreting the legislation and, in particular, the claims for exemption pursuant to s. 20 and s. 15(1) (f).

I agree with this conclusion.

[32] I note that in the decision of Gruchy J. in *Keating v Nova Scotia (Attorney General)* 2001 NSSC 85 writing at paras. 35-38, he concluded that a *"de novo"* appeal is one where the case is, in effect, being "retried", and even permitted new evidence on the hearing. While not an issue in the matter before me, Justice

Gruchy decided that he "… would proceed by considering all information that was before the coordinator at the time of his final decision *and such further evidence produced to me whether by affidavit or by oral testimony."*

Analysis

[33] There is no presumptive statutorily required release of the Investigative file to the public set out in the **Police Act**. Section 26L dictates that it is to be given to the "disciplinary authority for the agency in which the police officer under investigation is employed". Section 26M (1) mandates the delivery of a Summary, in a form prescribed by Regulation, to the Minister and to the police officer's employer. Section 26M (2) requires that either of the Minister or the Director shall make the Summary public. That was complied with in this case. The **Police Act** does not prohibit the release of SiRT documents and so does not attempt to exclude the provisions of the **FOIPOP Act.**

[34] SiRT is a "public body" within the meaning of Section 3(j) of the **FOIPOP Act**. It is subject to the presumption set out in section 5(1) that the public has a right of access to its "records", as defined in section 3(k)). The investigator's report is such a "record".

[35] The right of public access is not absolute. Such access may be refused in whole, or in part, to information that is exempted from disclosure pursuant to the **Act**. *See,* section 5(2).

[36] One such exemption is found in section 20 which mandates that the head of the public body, in this case the Director of SiRT, "shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." The section then sets out a lengthy list of circumstances that are deemed to be relevant, that are deemed to be presumptively unreasonable, or that are deemed to be not unreasonable, when making this determination.

[37] This section was relied upon by the Director to redact personal identification information in the report. No challenge is being taken to the Director's decision in this regard.

[38] In this case the claimed exemption at issue is set out in section 15 (1) (a):

> 15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm law enforcement; …

[39] The burden, in this appeal, of proving that a particular exemption is justified rests with the Director of SiRT:

> 45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

Is a SiRT investigator's report a record created in relation to "law enforcement"?

[40] Section 3 (e) of the **FOIPOP Act** says that "law enforcement" means:

> (i) policing, including criminal-intelligence operations,
>
> (ii) investigations that lead or could lead to a penalty or sanction being imposed, and
>
> (iii) proceedings that lead or could lead to a penalty or sanction being imposed;

[41] A review of the **Police Act** makes it clear that SiRT is a statutorily created body engaged in "law enforcement". It is a policing agency and one whose investigations can lead to a penalty or sanction being imposed.

[42] The overall mandate of SiRT is described in section 26A of the **Police Act:**

> 26A There is hereby established a Serious Incident Response Team to provide oversight of policing by providing independent investigation of serious incidents involving police in the Province.

[43] Section 2(l) states that a:

> "serious incident" means a death, serious injury or sexual assault or any matter that is determined under this Act to be in the public interest to be investigated;

[44] Section 26G stipulates that the Director and the investigators are "peace officers and have all the powers, authority, privileges immunities set out in subsection 42(1)."

[45] Section 42(1) sets out the far reaching powers of police officers, naming SiRT Team members specifically:

> Powers of police officers
>
> 42 (1) A member of the…Serious Incident Response Team is a peace officer and has
>
> (a) all the powers, authority, privileges, rights and immunities of a peace officer and constable under the common law, the Criminal Code (Canada) and any other federal or Provincial enactment; and
>
> (b) the power and authority to enforce and to act under every enactment of the Province and any reference in any enactment or in any law, by-law, ordinance or regulation of a municipality to a police officer, peace officer, constable, inspector or any term of similar meaning or import shall be construed to include a reference to a member of the Provincial Police, the Royal Canadian Mounted Police, a municipal police department, another police department providing policing services in the Province or the Serious Incident Response Team.

[46] Section 26K provides sole authority to the Director, upon completion of an investigation, to make the decision as to whether or not the police officer(s) under investigation will be charged.

[47] I do not agree with the opinion of the Review Officer that the "law enforcement" character of the report is lost once the investigation is concluded. This line of reasoning was considered and rejected in the case of *Lavigne v. Canada (Office of the Commissioner of Official Languages)* 2002 SCC 53. The issue before the court was whether information obtained in an investigation conducted by the Commissioner of Official Languages should be exempted from disclosure on grounds set out in section 22 of the **Privacy Act** R.S.C. 1985, c. P-21,which reads:

> 22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> ...
>
> (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information
>
> (i) relating to the existence or nature of a particular investigation,
>
> (ii) that would reveal the identity of a confidential source of information, or
>
> that was obtained or prepared in the course of an investigation;

[48] While this language is not the same as the Nova Scotia **FOIPOP Act** it speaks to the same issue: an exemption from disclosure of information obtained in an investigation conducted by a public body where to disclose that information

could “reasonably be expected” to be “injurious” (or in the language of the Nova Scotia Act “harm”) to the conduct of lawful investigations.

[49] As in the case before this court, the investigation was concluded. Counsel had submitted that section 22 did not permit an exemption based upon an anticipation of harm to a future investigation. Gonthier J., writing on behalf of the Court concluded:

> **52** First, it must be noted that the word "investigation" is defined in s. 22(3) of the Privacy Act:
>
> 22. ...
>
> (3) For the purposes of paragraph (1)(b), "investigation" means an investigation that
>
> (a) pertains to the administration or enforcement of an Act of Parliament;
> (b) is authorized by or pursuant to an Act of Parliament; or
> (c) is within a class of investigations specified in the regulations.
>
> That definition does not suggest that the word is limited to a specific investigation, or an investigation that is circumscribed in time. Indeed, Parliament has not limited the scope of that expression by any qualifier whatever. None of the paragraphs of s. 22(3) limits the word "investigation" to investigations that are underway, or excludes future investigations or the investigative process in general from its protection. It therefore seems, *prima facie,* that the word retains its broad meaning and may refer equally to investigations that are underway, are about to commence, or will take place. We shall now consider whether Parliament restricted the scope of that definition for the purpose of the application of the exception to disclosure set out in s. 22(1)(b).
>
> …

> 54 In short, there is nothing in s. 22(1)(b) that should be interpreted as restricting the scope of the word "investigation" to investigations that are underway or are about to commence, or limiting the general meaning of that word to specific investigations. There is therefore no justification for limiting the scope of that section.

[50] Similarly, the legislature of Nova Scotia has put no temporal restrictions on "investigations" that fall within the definition of "law enforcement" in section 3 (e) (2) of the **FOIPOP Act.**

[51] In summary, SiRT investigators are peace officers who conduct investigations into alleged serious criminal conduct by law enforcement officers. Their work forms part of the basis upon which decisions are made that can lead to a police officer being subject to sanction imposed by criminal or quasi-criminal laws. The investigator's report is a record created in furtherance of that law enforcement mandate. The conclusion of the investigation does not change the fact that it was created for law enforcement purposes. There is no statutory restriction to suggest that disclosure of that report is incapable of causing harm to future investigations, hence causing harm to law enforcement.

Could disclosure of the requested redacted information in the investigator's report reasonably be expected to harm law enforcement?

[52] There are two types of information contained in the redacted materials. Some of the sought after information would tend to identify the Crime Stoppers' tipster. The balance of the information consists of the investigator's personal assessment of the information gathered.

Investigator's Opinions

[53] The question to be decided is whether disclosure of the requested redacted opinions in the investigator's report could reasonably be expected to harm law enforcement.

[54] What is the applicable test for determining a reasonable expectation of harm to law enforcement?

[55] In *Chesal v. Nova Scotia (Attorney General)* 2003 NSCA 124, a CBC radio reporter sought disclosure of an Audit Report prepared for the Nova Scotia Government and which reviewed the state of the Unama'ki Communities Tribal Police Force. A chief of one of the Unama'ki Communities objected to the release.

The issue before the court was whether disclosure could be refused on the basis of this **FOIPOP Act** exemption:

> 12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:

[56] The Court of Appeal considered the question of the threshold of proof necessary to satisfy the language "could reasonably be expected to harm". Bateman J., writing on behalf of herself, Justice Cromwell and Justice Oland held:

> **37** It is my view that the statutory test "reasonable expectation of harm" did not require restating. The rewording of the test to include the notion of probable harm was an error. … The analysis in *Canada Packers* must be read in context. MacGuigan, J.A. obviously found the reference to "probability" helpful in distinguishing a "reasonable expectation" in s. 20(1) (c) and (d) of the Access to Information Act from a mere "possibility". For the reasons which follow, it is my view that Coughlan, J. did not err in rejecting a bare possibility of harm as sufficient to ground a refusal to disclose or in the result he reached that the exemption under s 12(1)(a)(iii) had not been established on this record.
>
> **38** In reading the FOIPOP Act as a whole, and considering its interpretation by this Court, particularly in *O'Connor, supra*, I have concluded that the legislators, in requiring "a reasonable expectation of harm", must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. Our Act favours disclosure and contemplates limited and specific exemptions and exceptions:…
>
> **39** Before access to a record is refused pursuant to s. 12(1)(a)(iii), it must be "reasonably expected" that the public release of the information will harm relations between governments. The legislation does not say, "might possibly harm" or "could reasonably harm". The Merriam-Webster Online dictionary defines "reasonable" as (a) being in accordance with reason; (b) not extreme or excessive. To "expect" means (a) to consider probable or certain; (b) to consider reasonable, due, or necessary; (c) to consider bound in duty or obligated. The Cambridge Advanced Learners Dictionary, online, defines "reasonable" as (1) based on or using good judgment and therefore fair and practical, or (2) acceptable. To "expect" means to think or believe something will happen, or

> someone will arrive. Finally, the American Heritage Dictionary of the English Language, online, defines "reasonable" as (1) capable of reasoning; rational. (2) governed by or being in accordance with reason or sound thinking; (3) being within the bounds of common sense. (4) not excessive or extreme; fair. To "expect" means 1(a) to look forward to the probable occurrence or appearance of; (b) to consider likely or certain; and also (2) to consider reasonable or due; (3) to consider obligatory; require; (4) to presume; suppose. All of these definitions lend support to the proposition that the language of the statute requires that there be more than a mere possibility of harm.
>
> (emphasis added)

[57] It has been suggested by counsel for the appellant that the correct test is found in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997) 140 FTR 140. In that case, while section 22(1)(b) of the Federal **Privacy Act** only permitted non-disclosure where it "could reasonably be expected to be injurious to investigations", Richard J. applied a test requiring proof of a "reasonable expectation of *probable* harm".

[58] This interpretation was adopted by the Court in *Lavigne, supra,* and more recently in *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 SCC 3. Justice Cromwell, writing on behalf of the majority in *Merck* addressed the apparently diverging interpretations applied to the Federal legislation and Nova Scotia:

> **193** Merck proposes that this line of jurisprudence should be abandoned and that the word "probable" should be omitted. Merck submits that the proper test was articulated by the Nova Scotia Court of Appeal in *Chesal v. Nova Scotia (Attorney General)*, 2003 NSCA 124, 219 N.S.R. (2d) 139, where the court held that the introduction of "probable" into the language of the test was incorrect. Hence, all that is required is a "reasonable expectation of harm" (para. 37).

> Merck's proposed test would therefore require the third party to show a "reasonable expectation of harm" resulting from disclosure.
>
> **194** Health Canada maintains that the well-established standard applied by the Federal Court of Appeal in this case should be maintained. As the case law clearly indicates that a mere possibility is insufficient, the proper test is a reasonable expectation of probable harm. Any test in between cannot be conceptualized.
>
> **195** I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes.
>
> **196** It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination -- "a reasonable expectation of probable harm" -- the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.
>
> (emphasis added)

[59] *Merck* is somewhat vague in whether it is intended to specifically overrule the *Chesal* decision. The reasoning speaks to the long standing application of this test in federal cases and observes that it "has been followed with respect to a number of similarly worded provincial access to information statutes". Of course,

it has not been so interpreted by the Nova Scotia Court of Appeal, and to now apply it in this province would, in theory, create disruption to the jurisprudence of this province.

[60] Having said, that I am not convinced that there is a significant difference in the two formulations. Justice Cromwell's conclusion is that "while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible." Justice Bateman's formulation in paragraph 38 that: "I have concluded that the legislators, in requiring "a reasonable expectation of harm", must have intended that there be more than a possibility of harm to warrant refusal to disclose a record" is essentially the same. And at paragraph 39 of *Chesal* Justice Bateman included the following definitions:

> [39] The Merriam-Webster Online dictionary defines … To "expect" means (a) to consider probable or certain; (b) to consider reasonable, due, or necessary; (c) to consider bound in duty or obligated….. Finally, the American Heritage Dictionary of the English Language, online, defines …To "expect" means 1(a) to look forward to the probable occurrence or appearance of; (b) to consider likely or certain; …"

[61] Reading the decisions of the Supreme Court of Canada with that of the Nova Scotia Court of Appeal leads to the following conclusion: that the burden falls on

the Director to show that it is more than merely possible, but at a standard less than a balance of probabilities, that disclosure could harm "law enforcement".

[62] Any assessment of the exemption claimed must be set in the context of the "purpose and scope of the two Acts" - in this case the **Police Act** and the **FOIPOP Act.** This principle was set out by Justice Gonthier in *Lavigne , supra.:*

> **20** The issue in this case is the application of the Official Languages Act and the Privacy Act in relation to each other. What we must first do is to ascertain the purpose and scope of the two Acts, and analyse the respective roles of the two Commissioners. It will then be possible, having regard to those general principles, to consider the statutory provisions on which the parties rely.
>
> **58** … As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the Official Languages Act. Section 22(1)(b) must be applied in a way that is consistent with both Acts.

[63] While the **Police Act** of Nova Scotia does not contain a specific authority establishing the confidentiality and secrecy of SiRT investigations, regard to confidentiality and secrecy is essential to maintaining the integrity of criminal investigations. This is implicit in the discretion that is afforded the Director under section 15(1) to refuse disclosure of investigatory information. The issue is not whether there is a mechanism for the Director to refuse disclosure, it is the circumstances in which it is justified to do so. That fact must be assessed in the context of the principles of the **FOIPOP Act**.

[64] In *O'Connor v. Nova Scotia (Priorities and Planning Secretariat*), 2001 NSCA 132, Saunders J.A. provided a very clear statement of the "purpose and scope" of the Nova Scotia **FOIPOP Act:**

> [55] In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are fully accountable to the public; so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute that being:
>
> > b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
> >
> > > (i) facilitate informed public participation in policy formulation,
> > > (ii) ensure fairness in government decision-making,
> > > (iii) permit the airing and reconciliation of divergent views;
>
> [56] Thus the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific".
>
> [57] I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[65] The public interest in protecting law enforcement efforts from being harmed was discussed in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23. In that case the question was whether certain

investigative records pertaining to a failed criminal prosecution should be disclosed.

[66] The exemption in question stated:

> 22 Section 14, dealing with law enforcement records, states:
>
> > 14. -- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
> >
> > (a) interfere with a law enforcement matter;
> >
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> >
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
> >
> > (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > (f) deprive a person of the right to a fair trial or impartial adjudication;
> >
> > (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;
> >
> > (h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;
> >
> > (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

[67] The Court observed:

44 We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the *Act*. As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 33; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 623, *per* L'Heureux-Dubé J.; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the *Act* reflects this. The legislature in s. 14(1) has in effect

> declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.
>
> **45** However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.
>
> **...**
>
> **47** By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.
>
> (emphasis added)

[68] Before turning to the specific concerns offered by the respondent in this case I will address the respondent's argument that a court sitting on appeal under section 41 should show deference to the decision of the Director in the exercise of his discretion to refuse disclosure. The discretion in section 15(1) has been previously identified. There is a further discretion found in section 15(3):

> 15 (3) After a police investigation is completed, the head of the public body shall not refuse to disclose to an applicant pursuant to this Section the reasons for a decision not to prosecute if the applicant is aware of the police investigation, but nothing in this subsection requires disclosure of information mentioned in subsections (1) or (2). 1993, c. 5, s. 15.

[69] The Director submits that this court must decide whether the Director exercised his discretion in good faith and for reasons which are rationally connected to the purpose for which the discretion is granted. This submission is founded on the decisions in *Newfoundland and Labrador (Information and Privacy*

Commissioner) v. Newfoundland and Labrador (Minister of Environment and Conservation) 2014 NLTD(G) 90; *Pomerleau v. Smart* 2011 NLTD(G) 105; and in *Dagg v Canada (Minister of Finance*) [1997] 2 S.C.R. 403.

[70] These cases do not reflect the law in Nova Scotia. The appeal provisions under consideration in the Newfoundland and Labrador cases called for a judicial review under the **Access to Information and Protection of Privacy Act, SNL 2002, c A-1.1,** (since repealed) which stated:

> 62. (1) The Trial Division shall review the decision, act or failure to act of the head of a public body that relates to a request for access or correction of personal information under this Act as a new matter and may hear evidence by affidavit.

[71] Similarly, in *Dagg* the statutory provision under consideration was section 41 of the **Access to Information Act,** R.S.C. 1985, c. A-1 which permitted an applicant the right to "…apply to the Court for a review of the matter…" of a refusal to disclose information.

[72] Both of the statutory provisions considered in these cases contrast with the Nova Scotia **FOIPOP Act** which provides for an appeal *de novo.*

[73] The investigation of alleged police misconduct has been an evolving area of concern for both the police and for the public. A review of legislative efforts in

Nova Scotia reflects the move away from self-policing, including police officers of the same force investigating each other, to one of independent civilian oversight by the Nova Scotia Police Review Board.

[74] The establishment of SiRT added an important component to civilian oversight where the allegation is of a "serious incident". The legislation ensures that every aspect of the investigation and decision to lay criminal charges is undertaken by civilians with specialized knowledge relevant to such investigations. The Director cannot be a current or former police officer. The current Director is a well-experienced former Crown Attorney.

[75] Accountability is promoted by the system of reporting and supervision. The Director of SiRT answers to the Minister of Justice directly. Public reporting of SiRT activities is mandated. The provision of public Summaries of Investigations allows public access to the reasons for laying or not laying charges in any given case. There is a recognition in the legislation that the public have a right to know what SiRT does and why.

[76] In my view the existence of the statutorily prescribed discretion over release of information contained in the Nova Scotia legislation demonstrates that records created for law enforcement purposes should not be presumptively disclosed – that disclosure can be contrary to the public interest where current or future law enforcement efforts "could reasonably be expected" to be harmed. The manner in which the discretion is exercised by the Director is relevant to understanding the context in which information is gathered, and should inform as to the way in which harm could reasonably result from disclosure of an investigator's opinions. The Legislature has not elected to make the Director's decisions, as to the extent of disclosure, final.

[77] I conclude that a reading of the **Police Act** and the **FOIPOP Act** emphasizes the importance of exercising care to balance what may be competing public interests, but they do not, with respect, require the appellate court to give deference to the Director's exercise of discretion in granting or refusing to make disclosure of "law enforcement" records created by SiRT.

[78] The respondent's position is forward looking, that is, that release of a record prepared in one investigation can harm future law enforcement efforts undertaken

by SiRT. I accept that as a reasonably foreseeable result in some cases and one that section 15(1) specifically seeks to protect against.

[79] I do not view the position of the Director as being opposed to the disclosure of established facts found and recited by the investigator in the report. Instead the opposition is to the disclosure of the investigator's opinions formed on the basis of those facts. Those opinions may include commentaries on any aspect of the investigation. It seems to me that the opinions of an investigator may be:

1. inconsistent with the conclusion reached by the Director;
2. consistent with the conclusion reached by the Director;
3. superfluous to the objectives of the investigation, that is, not relevant or material to the Director's decision.

[80] In this case the Director has not identified any specific expressed opinion of the investigator which if released could, in and of itself, result in harm to SiRT's future investigative efforts. Instead the argument is that, as a general proposition, opinions should be exempted because:

- "SiRT's ability to thoroughly investigate relies upon the ability of their investigators to provide full and open reporting";

- The public is best served when the Director, in reaching his conclusions, has the benefit of candid investigative opinions;
- That investigators "must balance the public's trust with the trust of the police officers" to ensure the reality and the appearance of impartiality. Failure to have the trust of either the public or the police would "greatly" compromise SiRT's ability to fulfill its mandate;
- That permitting the public release of the investigator's opinions provided to the Director will inhibit the investigator from offering those opinions in the future;

[81] The Director submitted to the Review Officer that:

> Limiting the candor of SiRT investigators would be very contrary to the public interest, in the current and future investigations. There is no question that should their frank opinions be subject to disclosure, that would have a deleterious impact on the quality of advice I am able to receive from them. This would be a serious impediment to ensuring that the public of Nova Scotia can have the utmost trust and confidence in the investigations we conduct and the quality of decisions I must make based on those investigations.

[82] The respondent, quite properly, points to the tensions that have existed in Ontario between that province's independent investigation unit (SIU) and police officers. It has been the subject of public and judicial commentary. For example, in *Peel (Regional Municipality) Police v. Ontario (Director, Special Investigations Unit)* 2012 ONCA 292 the Court opened its decision with:

> 1 E.A. CRONK J.A.:— In the late 1980s, several fatal police shootings in Ontario gave rise to considerable public concern regarding the impartiality and transparency of police investigations into the use of deadly force by police officers. The ensuing government response led to the creation in 1990 of the Special Investigations Unit (the SIU), a civilian agency whose director is empowered under Part VII of the Police Services Act, R.S.O. 1990, c. P.15 (the Act) to conduct independent investigations into serious injuries and deaths that may have resulted from criminal offences committed by police officers.
>
> 2 From the outset, the role of the SIU has been controversial, resulting in uneasy, and often hostile, relations between some police agencies and the SIU. The dispute in this case, which arises from allegations of serious historical wrongdoing by a former police officer, is an example of persisting tensions between these groups.

The dispute was over the authority of the SIU Director to cause investigations on his own initiative.

[83] I accept the submissions of the respondent as legitimate concerns. I do not accept that a blanket exemption of disclosure of any opinion expressed by an investigator is presumed. The exemption must be based on the determination of how the disclosure of the opinion under scrutiny could reasonably be expected to cause harm to law enforcement. The threshold for making that assessment is set out in the *Chesal* and *Merck* cases.

[84] There are a number of legitimate concerns that could arise. Section 14 of the Ontario Act discussed above in my consideration of *Ontario (Public Safety and*

Security) v. Criminal Lawyers' Association enumerated 12 specific ways in which aspects of "law enforcement" could be harmed by disclosure. Opinions that speak to those points, for example, may be grounds to consider exemption. Disclosure of an investigator's opinion on the credibility of a police officer may arguably be subject to exemption, particularly where it is not substantiated in an objective review of the evidence.

[85] The assessment of the "harm" will vary from case to case. The investigator's opinions must always be assessed through a consideration of both the harm that may result to the system under which SiRT fulfills its law enforcement mandate, and the harm that could result to specific current or future law enforcement activity.

[86] Applying these principles to the information in the case at bar, I have concluded that the respondent has failed to meet its burden to justify exemption under section 15(1) (a) of the "Findings" located on page 2 of the Investigator's report. Redaction of some information in that paragraph is justified, under section 20, of the names and identifying information in a manner consistent with similar redactions in the balance of the report. I can find no evidence upon which to

conclude that the information in this paragraph could reasonably harm any aspect of SiRT's current or future fulfillment of its law enforcement mandate.

[87] I conclude that the third and fourth paragraphs under "Conclusions" should be exempted under section 15(1) (a). These paragraphs include opinions that the investigator was not qualified to express and went beyond the scope of his mandate. These were opinions that only a qualified expert could speak to. They could not advance the public's understanding of the Director's decision. The Director did not reference them in making his decision, but instead relied upon properly grounded expert opinion. The disclosure of the investigator's opinions in this regard could reasonably cause harm to law enforcement. An investigator is qualified in his field, however, the expression of expert opinion by an unqualified investigator can sow confusion and has the potential to unnecessarily undermine the investigative credibility of the Team.

[88] The respondent has failed to meet its burden to justify exemption under section 15(1) (a) of paragraphs 7, 8, 9 and 10 under the "Conclusions" heading. Redaction of some information in those paragraphs is justified, under section 20, of the names and identifying information in a manner consistent with similar redactions in the balance of the report.

[89] The Opinions expressed in paragraphs 7 to 10 are not relevant or material to the Director's decision but there is no evidence by which to conclude that the disclosure of these paragraphs could reasonably be expected to cause harm to the law enforcement mandate of SiRT.

Crime Stoppers' Information

[90] I conclude that paragraph 6 under "Conclusions" should be exempted under section 15(1)(a).

[91] The investigator provided commentary and opinion relating to the Crime Stoppers' tip. The anonymity of such informants is assiduously protected by the courts as a form of "informer privilege".

[92] *In R. v. Leipert* [1997] 1 S.C.R. 281 the Supreme Court of Canada held that:

> 9 A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those

> involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. …
>
> 11 In most cases, the identity of the informer is known to the police. However, in cases like the instant one, the identity of the informer is unknown to everyone including the Crime Stoppers' agent who received the call. The importance of the informer privilege rule in cases where the identity of the informer is anonymous was stressed by the California Court of Appeal in *People v. Callen*, 194 Cal.App.3d 558 (1987). The court, in holding that the police have no duty to determine or disclose the identity of anonymous informers, stated at p. 587:
>
> > Such an investigatory burden would not only be onerous and frequently futile, it would destroy programs such as Crimestoppers by removing the guarantee of anonymity. Anonymity is the key to such a program. It is the promise of anonymity which allays the fear of criminal retaliation which otherwise discourages citizen involvement in reporting crime. In turn, by guaranteeing anonymity, Crimestoppers provides law enforcement with information it might never otherwise obtain. We are satisfied the benefits of a Crimestoppers-type program -- citizen involvement in reporting crime and criminals -- far outweigh any speculative benefits to the defense arising from imposing a duty on law enforcement to gather and preserve evidence of the identity of informants who wish to remain anonymous.

[93] There is redacted information in the investigator's report that could identify the Crime Stoppers' informant. The identity of that person is protected from disclosure by informer privilege. The "innocence at stake" exception, which permits disclosure to ensure a person's right to make full answer and defence where they could not do so without the information, has no application in this matter.

[94] I am satisfied that to disclose some of the redacted information may tend to identify the Crime Stoppers' informant whose identity is protected by informant

privilege. I conclude that such disclosure could reasonably be expected to harm law enforcement. That information will not be disclosed.

[95] While not relied upon in making my decision, and acknowledging that the parties did not made submissions on this question, I note that it may be arguable that a Crime Stoppers' tipster is a third party within the meaning of section 45(2) of the **FOIPOP Act** and if so then the appellant would carry the burden "…to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy."

[96] I conclude that any information that could tend to identify the Crime Stoppers' informant is exempted from disclosure.

Conclusion

[97] The respondent has failed to meet its burden to justify exemption from disclosure under section 15(1) (a) of the **FOIPOP Act** of the "Findings" located on page 2 of the SiRT Investigator's report. Redaction of some information in that paragraph is justified, under section 20, of the names and identifying information in a manner consistent with similar redactions in the balance of the report.

[98] The third and fourth paragraphs under “Conclusions”, found on pages 27 and 28 of the Investigator’s Report, are exempt from disclosure pursuant to section 15(1)(a).

[99] The respondent has failed to meet its burden to justify exemption under section 15(1)(a) of paragraphs 7, 8, 9 and 10 under the “Conclusions” heading. Redaction of some information in those paragraphs is justified, under section 20, of the names and identifying information in a manner consistent with similar redactions in the balance of the report.

[100] Paragraph 6 under the heading “Conclusions” is exempt from disclosure under section 15(1)(a).

Costs

[101] If the parties are unable to agree on costs they may contact my office to arrange a time to make submissions on this question.

Order accordingly.