CITATION: Ministry of Correctional Services v. McKinnon, 2010 ONSC 3896
DIVISIONAL COURT FILE NO.: 277/10
DATE: 20100707

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

WILSON, SWINTON AND NORDHEIMER JJ.

2010 ONSC 3896 (CanLII)

BETWEEN:	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CORRECTIONAL SERVICES Applicants	*Leslie M. McIntosh* and *Lise Favreau* for the Applicants
– and –	
MICHAEL MCKINNON, ONTARIO HUMAN RIGHTS COMMISSION AND ONTARIO PUBLIC SERVICE EMPLOYEES UNION Respondents	*Freya Kristjanson* and *Adrienne Telford*, for the Respondent, Michael McKinnon *Joshua Phillips,* for the Respondent, Ontario Public Service Employees Union *Prabhu Rajan*¸for the Respondent, Ontario Human Rights Commission
	HEARD at Toronto: July 7, 2010

NORDHEIMER J. (ORALLY)

[1] This is an application for judicial review brought by the Ministry of Correctional Services regarding an order made by the Human Rights Tribunal requiring the Ministry to produce certain

settlement documentation. This issue arises in the context of an ongoing dispute dating back to 1998 between Mr. McKinnon and the Ministry over racial discrimination that Mr. McKinnon has suffered as an employee of the Ministry at the Toronto East Detention Centre and regarding which a Board of Inquiry had ordered a series of remedies. The current proceeding involves allegations made by Mr. McKinnon that the Ministry has failed to implement or honour the remedies that the Board ordered against it.

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[2] Mr. McKinnon sought production of settlement documentation regarding investigated and substantiated complaints arising out of the Workplace Discrimination and Harassment Prevention policy process on the basis that that documentation might reveal a practice by the Ministry of settling WDHP complaints rather than have the existence and nature of those complaints revealed that might, in turn, assist in establishing that the Ministry has not been complying with the remedies that had earlier been ordered against it.

[3] Argument has been made over whether the standard of review applicable to the decision to order production of the settlement documentation is correctness or reasonableness. For the purposes of this application, it is unnecessary to decide that issue because even if the higher standard is applied, for reasons that we shall explain, we are of the view that the decision of the adjudicator was correct.

[4] Argument was also directed at whether the settlement documentation in question is subject to a class privilege or whether the presence of a privilege can only be determined on a case by case basis. Again, we do not consider it necessary to decide that issue especially given that the issue is currently scheduled to be argued before the Court of Appeal in September.

Whether one concludes that settlement documentation is *prima facie* privileged or can only be found to be privileged on the individual case, we agree with the adjudicator that on either test the material was properly ordered to be produced. Any privilege is not absolute. It is subject to exceptions. One of these exceptions is where the settlement documentation is necessary for the proper disposition of a proceeding. As was said in *Inter-Leasing Inc. v. Ontario (Minister of Finance),* [2009] O.J. No. 4714 (Div. Ct.) at para. 11:

> A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice.

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[5] In our view, the adjudicator correctly decided that the settlement documentation in question was relevant and necessary for the proper disposition of the matter that was before him. In particular, we agree with the adjudicator that the decision in *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada,* [2005] B.C.J. No. 5 (B.C.C.A.) does not require that the documentation in question be the “only way” in which a fact in question can be established. Rather necessity is established if there is a compelling or overriding interest of justice achieved through production of the material in the circumstances of a given case.

[6] There is a compelling interest in having the documentation produced given the nature of the allegations made against the Ministry. Central to the issues currently before the adjudicator is whether the Ministry has failed to abide by earlier orders directed at remedying a serious case of discrimination. Indeed the adjudicator refers to the material as touching upon “matters that lie

at the heart of this litigation" and "crucial to a proper resolution of the matters before the Tribunal". The adjudicator provided cogent reasons for those characterizations of the material and why they were necessary to the task before him including that the settlement documentation may provide important evidence suggesting that the Ministry has not been acting in good faith in terms of its implementation of the remedies earlier ordered. These included that the settlements arose out of the same workplace of Mr. McKinnon, that two of them involved a high ranking person within the workplace who has figured as an antagonist to Mr. McKinnon throughout the long saga of his complaint, and that the Ministry might be engaged in a systematic process of trying to protect this person from adverse findings that would figure prominently in the issues that the adjudicator was tasked with determining.

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[7] In response to all of those reasons, the Ministry submits that there are alternatives to getting at the information, principally that questions can be asked of Ministry witnesses regarding these matters. Not only does that submission not take into account the distinct possibility that the witnesses would refuse to answer questions based on the claim of privilege, it also ignores one of the critical aids that documentary evidence provides and that is a contemporary record that can be used to test the evidence of witnesses. As the adjudicator himself noted, the material could be used "for testing responses that might be simply self-serving".

[8] We would make an additional observation regarding the suggestion that harm will be done by ordering production of the settlement documentation by noting that OPSEU, another party to some of the settlements concerned, has consented to their release and has expressly

stated that the release of this documentation would not dissuade it from engaging in future settlement discussions with the Ministry. The possibility of harm in this case from ordering production of this material therefore appears to be absent. Further, the production of this material does not in any way undermine the enforceability of the settlements or adversely affect the persons involved.

[9] Lastly, we feel obliged to make some comment on the submission by the Ministry that there was some impropriety in the actions of the adjudicator when he released what the Ministry contends is four sets of reasons, each one, according to the Ministry, trying to bolster the reasoning found in the prior set of reasons. What in fact happened was the adjudicator gave his bottom-line decision that the settlement documentation should be produced within the proceedings as they unfolded. The Ministry indicated that it would seek instructions to review that decision. The adjudicator then agreed to quickly provide written reasons for his decision to assist the Ministry in obtaining those instructions. It appears that the adjudicator could not meet his self-imposed deadline and, as a consequence, he forwarded draft and incomplete reasons to the parties. He then subsequently provided formal reasons that were changed in some respects from the draft reasons or "coopered up" in the words of counsel for the Ministry. Thereafter the adjudicator became aware that certain stylistic changes had not been made to the formal reasons before they were released and then issued a corrected set of reasons. Fairly observed, then, there were only two sets of reasons. While these events point out the hazards associated with releasing draft reasons to accommodate parties, it must be remembered that the adjudicator only did so in an apparent effort to assist the parties. It hardly seems fair in those circumstances for the Ministry to now complain about receiving more than one set of reasons. In any event, we do not

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see any aspect of those events that detracts from the conclusion that the correct decision was made from the start.

[10] The application is therefore dismissed.

WILSON J.

[11] After hearing submissions we fix costs on a partial indemnity basis in the amount of $17,500.00 inclusive of GST, which we think is fair and reasonable in the circumstances and in light of the complexity of the case.

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NORDHEIMER J.

WILSON J.

SWINTON J.

Date of Reasons for Judgment: July 7, 2010

Date of Release: July 9, 2010

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Respondents

ORAL REASONS FOR JUDGMENT

NORDHEIMER J.

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