COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), 2018 ONCA 559
DATE: 20180618
DOCKET: C63765

Rouleau, Benotto and Roberts JJ.A.

BETWEEN

Children’s Lawyer for Ontario

Applicant (Appellant)

and

Information and Privacy Commissioner/Ontario and the Ministry of the Attorney General for Ontario, and John Doe, Requester

Respondents (Respondents)

Ian Ross and Sheena Scott, for the appellant, Children’s Lawyer for Ontario

Sara Blake and Sarah Kromkamp, for the respondent, Attorney General for Ontario

Linda Rothstein and Jodi Martin, for the respondent, Information and Privacy Commissioner of Ontario

Jesse Mark and Mary Birdsell, for the intervener, Justice for Children and Youth

Heard: December 1, 2017

On appeal from the order of the Divisional Court (Justices Katherine E. Swinton, Carolyn J. Horkins and Michael G. Emery), dated February 2, 2017, with reasons reported at 2017 ONSC 642, dismissing an application for judicial review from an order of the Information and Privacy Commissioner of Ontario, dated August 7, 2015.

Benotto J.A.:

OVERVIEW

[1] Are a child-client's litigation records with the Children's Lawyer for Ontario subject to a father's freedom of information access request? The answer turns on whether the records are "in the custody or under the control" of the Ministry of the Attorney General for Ontario ("MAG") for purposes of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*").

[2] The Assistant Information and Privacy Commissioner of Ontario (the "Adjudicator" and the "IPC") determined they were and ordered that MAG respond to the father's request. The Divisional Court upheld the Adjudicator's order on judicial review.[1] The Children's Lawyer appeals. MAG and Justice for Children and Youth[2], an intervener, support the Children's Lawyer's position.

[3] I have concluded that the Adjudicator's decision should be reviewed for correctness and that it cannot stand. The issue on appeal involves matters of central importance to the administration of justice and is outside the Adjudicator's specialized expertise. As I will explain, the Adjudicator's decision is based on a fundamental misunderstanding of the role and function of the Children's Lawyer, her relationship to MAG, and her duty to provide children with the heightened protection the law mandates. This decision is not in the best interests of children.

[4] For the reasons that follow, I would allow the appeal.

STATUTORY PROVISIONS

[5] Before addressing the facts and decisions below, it is helpful to summarize the various statutes that inform the appeal. The following are relevant: (i) *FIPPA* – which governs access to information; (ii) the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") – which provides for the appointment of the Children's Lawyer; and (iii) several other statutory provisions – which establish the functions of the Children's Lawyer.

(1) *FIPPA*

[6] *FIPPA* has two purposes: to provide access to information and to protect individuals' privacy as it relates to that information. These are set out in s. 1:

> 1 The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,

> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. [Emphasis added.]

[7] Under s. 10(1), every person has a right to access records or part of records in the custody or under the control of an institution, subject to certain exemptions:

> 10(1) … [E]very person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) The record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) The head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

[8] Pursuant to s. 2(1) "institution" includes "a ministry of the Government of Ontario". MAG is captured by this definition.

[9] The exemptions under ss. 12-22, and their exceptions, relate to various matters. Of note, s. 19 creates an exemption for records that are subject to solicitor-client privilege:

> 19 A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

(2) The *CJA*

[10] Part VI of the *CJA* – under the heading "Judges and Officers" – provides for the appointment of the Children's Lawyer by the Lieutenant Governor in Council:

> Children's Lawyer
>
> 89(1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario.

[11] Subsections 89(3)-(3.1) set out the Children's Lawyer's duties:

> (3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding.
>
> (3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding.

[12] Under s. 112, the Children's Lawyer may also cause investigations to be made, report to the court, and make recommendations to the court in custody and access matters.

(3) Other statutes

[13] In addition to providing legal representation to children in custody and access disputes, the Children's Lawyer:

- Provides legal representation to children in child protection proceedings, alternative dispute resolution proceedings, and secure treatment and health emergency matters pursuant to ss. 78(3), 78(5), 17(3), 161(6) and 171(8) of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*");
- Provides independent legal advice to children as well as minor parents consenting to adoption pursuant to ss. 180(6), 180(7) and 180(11) of the *CYFSA*, and rr. 34(11) and 34(11.1) of the *Family Law Rules*, O. Reg. 114/99;
- Acts as the litigation guardian for minors in all applications for guardianship of a child's property; and
- Is the head of the Office of the Children's Lawyer ("OCL"). The OCL has one function: to support the Children's Lawyer in fulfilling her independent statutory duties and functions.

[14] Against this statutory backdrop, I turn to the facts underlying this appeal.

FACTS

[15] Two children were the subject of a custody and access dispute between their parents. In 2008, when the children were nine and eleven years old, McCartney J. appointed the Children's Lawyer and requested that she conduct an investigation, report and make recommendations pursuant to s. 112(1) of the *CJA*. The Children's Lawyer determined that she would provide legal representation to the children pursuant to s. 89(3.1) of the *CJA*. She also assigned a clinical investigator to assist counsel.

[16] In May, 2010 Warkentin J. made a final order terminating the father's access to the children as well as all forms of verbal communication. In 2012, the father brought a motion to change. Coats J. referred the matter, again, to the Children's Lawyer. The Children's Lawyer decided to provide legal representation to the children, this time without the assistance of a clinical investigator.

[17] On January 23, 2014 the father requested access to information from MAG pursuant to *FIPPA*. He sought records in the Children's Lawyer's litigation files, including:

- Privileged and non-privileged reports relating to the children;
- All documents filed with the court, including settlement reports, medical reports, psychological and educational reports, filed conversations and notes, and transcripts;
- All notes and information relating to the duties of the lawyers acting for the Children's Lawyer, including notes, court documents, and assessments; and
- Social worker notes.

DECISIONS BELOW

(1) MAG denies the father's request

[18] The Children's Lawyer took the position that *FIPPA* does not apply to private litigation files involving her provision of services to children. She emphasized that her office is an independent office within MAG, appointed by the Lieutenant Governor in Council under s. 89 of the *CJA*; she represents the independent legal interests of children and does not act on behalf of MAG or the Crown. She determined that since the records the father requested were prepared or collected in the course of her independent legal representation of the children, they are not within MAG's custody or under its control.

[19] Given the Children's Lawyer's position, MAG advised the father that it does not have custody or control of the records and *FIPPA* does not apply.

(2) The appeal to the IPC

[20] The father appealed MAG's decision to the IPC. The Adjudicator determined that the sole issue before her was whether MAG has custody or control of the requested records. She noted that resolving this issue did not necessarily mean

the father would be provided access to the records – even when records are in the custody or control of an institution, they may be excluded under one of *FIPPA*'s exemptions or may be subject to an overriding confidentiality provision enacted in another statute.

[21] The Adjudicator concluded that the records at issue are in MAG's custody or control. She identified two "overriding considerations" leading to this conclusion: "the undisputed fact that the [Children's Lawyer] is a branch of [MAG]"; and that "the records at issue were generated in the course of the [Children's Lawyer] fulfilling its core mandate."

[22] The Adjudicator rejected the submission that the Children's Lawyer is distinct from MAG. She noted that the Children's Lawyer operates as a branch within the formal structure of MAG, is accountable to MAG for the expenditure of public funds, records related to such expenditures are subject to *FIPPA*, and the Children's Lawyer has no separate administrative structure from MAG.

[23] The Adjudicator similarly rejected the Children's Lawyer's submission that while she is "part of" MAG with respect to some records for the purposes of *FIPPA*, she is not "part of" MAG with respect to others. The Adjudicator stated:

> The result urged by the [Children's Lawyer] would treat some of its records as excluded from [*FIPPA*] when it is engaged in certain functions, while other records would be subject to [*FIPPA*]. While [*FIPPA*] itself provides for such a result, through the exclusion of some categories of records, the [Children's Lawyer's] submissions would, in effect, amount to an indirect recognition of an additional exclusion which has not been explicitly legislated.

[24] The Adjudicator further rejected the submission that the Children's Lawyer's fiduciary duties to her child clients are incompatible with access rights under *FIPPA*. She determined that confidentiality concerns could be addressed by the exemptions under *FIPPA*, including s. 19 relating to solicitor-client privilege. She similarly determined that subjecting the Children's Lawyer's litigation files to access requests did not give rise to an "intolerable conflict" as urged by the Children's Lawyer. She noted that the Children's Lawyer is authorized by the Attorney General to respond to access requests and has been doing so since 1998. Yet, no conflicts between the Children's Lawyer, her child clients, or MAG appear to have impeded this task to date.

[25] Finally, the Adjudicator assessed the factors typically applied to determine whether records are in the custody or control of an institution. She held that since the Children's Lawyer is a branch of MAG, "it would be redundant to ask whether the [Children's Lawyer] 'could reasonably be expected' to obtain the records at

issue." Instead she determined that the Children's Lawyer has the right to the files; the records were created in carrying out activities central to the Children's Lawyer's mandate; and the Children's Lawyer has the authority to regulate the use of its records, subject to its fiduciary and legal obligations to its child clients. She concluded that the records were therefore in MAG's custody or under its control.

[26] The Adjudicator ordered MAG to issue an access decision to the father, which could be made by the Children's Lawyer.

(3) The Divisional Court's decision

[27] The Children's Lawyer, supported by MAG, applied to the Divisional Court for a judicial review of the Adjudicator's order. The Divisional Court identified reasonableness as the appropriate standard of review and held that the Adjudicator's decision was reasonable. It noted that even if the standard of correctness applied, the decision was also correct.

[28] The Divisional Court rejected the submission that compliance with the Adjudicator's order threatened the Children's Lawyer's ability to safeguard either solicitor-client privilege or her clients' confidentiality. It endorsed the Adjudicator's conclusion that the Children's Lawyer's confidentiality concerns could be addressed through the *FIPPA* exemptions, noting that solicitor-client privilege is a specified ground for refusing disclosure under s. 19 of *FIPPA*.

[29] The Divisional Court similarly rejected the Children's Lawyer's submission that compliance with the Adjudicator's order gives rise to an intolerable conflict of interest. It held it was reasonable for the Adjudicator to rely on the absence of any examples of conflicts over the two decades during which the Children's Lawyer has made access decisions.

[30] Ultimately, the Divisional Court concluded that the Adjudicator's decision was consistent with the text and scheme of *FIPPA*. It held that it was reasonable for her to consider the application of s. 10(1) of *FIPPA* in relation to the children's records; she reasonably considered the custody and control factors; and her interpretation promotes the purpose of access to information.

ISSUES

[31] This appeal raises two issues:

1. Did the Divisional Court identify the appropriate standard of review?

2. Did the Divisional Court err in upholding the Adjudicator's determination that the Children's Lawyer's records are in MAG's custody or control?

ANALYSIS

1. Standard of review

(i) Overview

[32] The parties did not agree on the applicable standard of review before the Divisional Court and they continue to disagree on appeal. The Children's Lawyer and MAG submit that the Divisional Court should have selected and applied correctness; the IPC maintains that the Divisional Court correctly selected reasonableness.

[33] When considering an appeal from a judicial review, this court must determine whether the Divisional Court identified the appropriate standard of review and applied it correctly. This requires this court to step into the Divisional Court's shoes and focus on the administrative decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

[34] Identifying the appropriate standard of review is a two-step process. At the first stage, "courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62; and *Agraira*, at para. 48.

[35] If it has, the inquiry ends there. However, where the first stage "is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review", courts must "perform a full analysis in order to determine what the applicable standard is": *Agraira*, at para. 48; and *Dunsmuir*, at para. 62. That is the case here.

[36] I conclude that the Divisional Court erred in selecting reasonableness as the standard of review. As I will explain, the jurisprudence on jurisdiction-limiting questions may well have evolved. However, the inquiry does not end there. In my view, on a full analysis to determine the applicable standard, the appropriate standard remains correctness. The interpretation of "custody or control of records" under s. 10(1) of *FIPPA* as it applies to the Children's Lawyer is a matter of central importance to the legal system as a whole and is also outside the decision-maker's specialized expertise.

(ii) Correctness is the appropriate standard

[37] The Children's Lawyer and MAG submit that jurisprudence has already determined that correctness applies to the interpretation of custody or control of records under s. 10(1) of *FIPPA*. They rely on this court's decision in *Walmsley v. Ontario (Attorney General)* (1997), 1997 CanLII 3017 (ON CA), 34 O.R. (3d) 611 (C.A.).

[38] *Walmsley* involved a request for access to records relating to the appointment of a provincial court judge. The records at issue were in the personal

possession of individual members of the Judicial Appointments Advisory Committee. This court held that correctness applied to its review of the IPC's determination that MAG had control over these records, since s. 10 (1) of *FIPPA* was jurisdiction limiting and did not require a specialized expertise to interpret. Goudge J.A. explained, at p. 618:

> [Section 10(1)] is a jurisdiction limiting one in the sense that records under the control of an institution are subject to the workings of the Act…. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the Commissioner or his designee. Moreover, the test found in s. 10(1), namely "custody or control", is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the Commissioner. Finally, the legislation has not seen fit to clothe the Commissioner with the protection of any privative clause.

[39] The Children's Lawyer and MAG also rely on *City of Ottawa v. Ontario*, 2010 ONSC 6835, 272 O.A.C. 162 (Div. Ct.), at para. 20, leave to appeal to ONCA refused, March 30, 2011 (M39605); and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172, 104 O.R. (3d) 588 (Div. Ct.), at paras. 22-24 ("*MAG v. IPC*"). In both decisions, the Divisional Court – relying on *Walmsley* – applied correctness to judicial reviews of the IPC's interpretation of "in the custody or under the control".

[40] The IPC submits that this analysis no longer applies and that true questions of jurisdiction are rare. It relies on *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, in which the Supreme Court recognized a presumption of reasonableness where a court is reviewing a tribunal's interpretation or application of its home statute, and that true questions of jurisdiction are "narrow" and "exceptional": at para. 39. The IPC emphasizes that true questions of jurisdiction are now limited to "whether or not the tribunal had the authority to make the inquiry": *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32.

[41] The Divisional Court accepted the IPC's position, stating, at para. 39:

> I appreciate that the Court of Appeal in *Walmsley* described s. 10 as "a jurisdiction-limiting" provision and acknowledge that this was followed in two subsequent decisions. However, these decisions are inconsistent with the specific

> direction in *Dunsmuir* that has been repeated and clarified in more recent appellate jurisprudence. This jurisprudence supports my conclusion that s. 10 does not raise a true question of jurisdiction that would require a correctness standard of review.

[42] I agree with the Divisional Court that, to the extent they rely on the jurisdictional nature of s. 10(1), *Walmsley* and the cases that followed are not in line with recent developments in the common law. In my view, however, this analysis does not determine the issue here. I say this for two reasons.

[43] First, the jurisdictional nature of s. 10(1) was not the only basis earlier decisions identified for applying correctness. *Walmsley*, *City of Ottawa* and *MAG v. IPC* all determined that the test for custody or control was outside the specialized expertise of the decision-maker. Moreover, in *City of Ottawa* the Divisional Court determined that whether freedom of information legislation applied to documents in question – in that case government employees' personal workplace emails – was "a legal question of broad significance for thousands of individuals across the province, going well beyond the interests of the particular parties before the court": at para. 20.

[44] These aspects of these decisions have not been changed by subsequent jurisprudence. *Walmsley*, *City of Ottawa* and *MAG v. IPC* have, therefore, satisfactorily determined that correctness applies in this case.

[45] Second, even if these decisions have not satisfactorily determined the standard of review, the nature of the question at issue attracts correctness under the second stage of the standard of review analysis.

[46] The unique role of the Children's Lawyer is fundamental to the proper functioning of the legal system. It is thus reviewable on the standard of correctness as per *Dunsmuir*, at para 60:

> [C]ourts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. [Citation omitted.]

[47] Matters fundamental to the functioning of our legal system remain subject to a correctness standard of review post-*Dunsmuir*. In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555

("*Alberta v. UC*"), the majority of the Supreme Court applied correctness to the interpretation of freedom of information legislation where it might impact solicitor-client privilege. *Alberta v. UC* involved a judicial review of a decision pursuant to Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPP*"). The central issue was whether *FOIPP* allowed the Information and Privacy Commissioner of Alberta (the "Commissioner") and her delegates to review documents over which solicitor-client privilege is claimed.

[48] Coté J., writing for the majority, held that whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole. She explained, at para. 20:

> As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy. [Citations omitted. Emphasis added.]

[49] She emphasized, at para. 26, that the "importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole" (emphasis added).

[50] Coté J. also held that the issue was outside the Commissioner's specialized area of expertise. She stated, at para. 22: "[T]here is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts".

[51] Coté J.'s comments in *Alberta v. UC* aptly apply to this case. The protection of the relationship between the Children's Lawyer and her child clients is of central importance to the legal system as a whole. It is a relationship based on confidentiality that extends beyond solicitor-client privilege and requires a *heightened* degree of protection by the courts. As I will explain, the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the "*Convention*"), to which Canada is a signatory, requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy.

[52] Like solicitor-client privilege, the confidential relationship between the Children's Lawyer and children is "fundamental to the proper functioning of our legal system" and the protection of that relationship "has a central importance to the legal system as a whole".

[53] In summary, the role of the Children's Lawyer is fundamental to the proper functioning of our system of justice; the issue is outside the Adjudicator's

specialized area of expertise; and the standard of correctness with respect to the protection of a relationship that has central importance to the legal system has already been adjudicated. Therefore, correctness is the appropriate standard.

2. Was the Adjudicator correct that the Children's Lawyer's records are in MAG's custody or control correct?

(i) Overview

[54] A court undertaking a correctness review will "undertake its own analysis of the question" and "decide whether it agrees with the determination of the decision maker". If it does not, "the court will substitute its own view and provide the correct answer": *Dunsmuir*, at para. 50.

[55] In applying this standard, I begin by situating the issue on appeal within a context, namely: the best interests of the child; the voice of the child; the confidential role of the Children's Lawyer; the child's privacy interests; the fact that confidentiality is broader than solicitor-client privilege; and the fact that the records belong to the child. I then apply the context to the relationship between the Children's Lawyer and MAG to demonstrate that with respect to her core functions of representing children, the Children's Lawyer cannot be a "branch" of MAG as determined by the Adjudicator.

[56] I determine that the Adjudicator *started* from the assumption that the Children's Lawyer is a "branch" or "part of" MAG, and thus MAG had custody or control of the records. In so doing, she failed to give appropriate weight to the Children's Lawyer's role and responsibilities. She did not address the impact of her decision on the best interests of the child who is entitled to heightened protections within the law. Nor did she consider the importance of the relationship on the administration of justice.

[57] I conclude that, given the relevant context, the Children's Lawyer does and must operate separately and distinctly from MAG. When representing children, her office is therefore not a branch of MAG. The Adjudicator was required to analyze whether records held by the Children's Lawyer – as not part of an institution under *FIPPA* – are in MAG's custody or control. She failed to do so. Upon undertaking this analysis, I determine that MAG does not have custody or control of the requested records.

(ii) The context

Best interests of the child

[58] Whenever a child is affected by a court or government process, the primary consideration must be the child's best interests. This regularly cited principle has been enshrined in the *Convention*. Article 3.1 provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[59] In *A.C. B. v. R. B.*, 2010 ONCA 714, 104 O.R. (3d) 368, Weiler J.A. speaking for a five-member panel of this court, at paras. 12-14, confirmed that the values reflected in the *Convention* can help to inform the contextual approach to statutory interpretation and judicial review.

[60] In my view, the statutes at issue in this appeal, including *FIPPA* itself, must be viewed through this lens and interpreted in a way that gives primacy to the best interests of the child. The Adjudicator, and the Divisional Court on judicial review, failed to consider the best interests of the child – who is at the center of the issue before this court now. The results of the Adjudicator's order would impact the child's voice in the judicial system and the child's privacy rights. Further, the family law courts would lose the benefit of important information provided by children, affecting decisions for families throughout the province.

[61] A correct interpretation of the relevant statutory provisions at issue requires close attention to the interests and needs of children.

The voice of the child

[62] A classic family law custody dispute gave rise to the Children's Lawyer's involvement in this case. Over the past several years, courts have taken great initiative to seek out and consider the views and preferences of the child. Professors Birnbaum and Bala explain:

> The movement towards child inclusion in decision-making in education, medical treatment, and various areas of the law, including separation and divorce, has grown over the last decade. Studies have explored children's rights as citizens, children's perspectives on family relationships and what is a family, and children's attitudes about parental separation and participation in the decision-making process about post-separation parenting. Research clearly suggests that children's inclusion in the post-separation decision-making process is important to the promotion of their well-being. [Footnotes omitted.][3]

[63] Indeed, art. 12 of the *Convention* requires that:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[64] Children are among the most vulnerable members of society. Courts, administrative authorities and legislative bodies have a duty to recognize, advance and protect their interests. When children are the subject of a custody dispute or child protection proceedings, they are at their most vulnerable. Exposure to conflict has been called the "single most damaging factor for children in the face of divorce": per Backhouse J., in *Graham v. Bruto*, [2007] O.J. No. 656 (S.C.), at para. 65, aff'd 2008 ONCA 260.

[65] It has always been a challenge for family law courts to find a way for children to express their views without exposing them to further trauma or causing more damage to the family. Those who work in the family law system are all too aware that children remain part of the family long after a judicial decision is reached. The process of determining the child's true wishes and preferences requires delicacy, for to undertake the process without expertise may further hurt the child and fracture family relationships.

[66] The Children's Lawyer has been recognized as a model for addressing this challenge. The Honourable Donna J. Martinson and Caterina E. Tempesta, wrote that:

> In Canada, the most expansive child representation program is offered by the Office of the Children's Lawyer…[it] may serve as a model for other jurisdictions in promoting access to justice for children by ensuring that their views are heard in court processes.[4]

[67] In this case, the judges involved in the underlying custody dispute sought the Children's Lawyer's involvement in the matter.

The Children's Lawyer's role: a confidential relationship with the child

[68] The Children's Lawyer is an independent statutory office holder appointed by Cabinet through the Lieutenant Governor. She derives her independent powers, duties and responsibilities through statute, common law and orders of the court.

[69] Her fiduciary duties to the child require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG. As stated by Abella J., as she then was, in *Re W.* (1980), 1980 CanLII 1958 (ON CJ), 27 O.R. (2d) 314 (Prov. Ct.), at p. 317, the Children's Lawyer has an obligation to ensure that the views expressed by the child are freely given without duress.

[70] The Children's Lawyer not only represents the child's interests; she provides a safe, effective way for the child's voice to be heard. For her to do this, she must provide a promise of confidentiality. Children must be able to disclose feelings and facts to the Children's Lawyer that cannot or will not be communicated to parents. Children's interests can be averse to that of their parents. Feelings of guilt and betrayal that may influence a child require a safe person to speak to.

[71] It is difficult enough for children to be the subject of litigation. For their voices to be heard, they must be guaranteed confidentiality when they say, "please, don't tell my mom", or "please, don't tell my dad".

[72] To allow a disgruntled parent to obtain confidential records belonging to the child would undermine the Children's Lawyer's promise of confidentiality, inhibit the information she could obtain and sabotage her in the exercise of her duties. This would, in turn, impact proceedings before the court by depriving it of the child's voice and cause damage to the child who would no longer be meaningfully represented. Finally, disclosure to a parent could cause further trauma and stress to the child, who may have divided loyalties, exposing the child to retribution and making the child the problem in the litigation.

The child's privacy interests

[73] The child has significant privacy interests in the information disclosed to the Children's Lawyer. The child's privacy rights, as with her other rights, are entitled to more, not less protection.

[74] The preamble to the *Convention* directs that special safeguards and care, including legal protection, be afforded to children. The preamble states:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, <u>needs special safeguards and care, including appropriate legal protection</u>, before as well as after birth"[.] [Emphasis added.]

[75] These special safeguards include "[t]o have his or her privacy fully respected at all stages of the proceedings": *Convention*, art. 40(2)(b)(vii).

[76] As explained above, to allow a parent to have access to a child's records would negatively impact the child's privacy interests.

Confidentiality is broader than solicitor-client privilege

[77] The Adjudicator concluded that the Children's Lawyer's "confidentiality concerns … can be addressed by exemptions under the applicable access to information legislation." In doing so, she conflated solicitor-client privilege with confidentiality. The former is caught by the exemption at s. 19 of *FIPPA*, the latter is not. And yet, it is the latter that gives rise to the most sensitive information about the child, and which is deserving of special protection.

[78] Information may be confidential without being privileged. As the British Columbia Court of Appeal explained in *British Columbia (Securities Commission) v. B.D.S.*, 2003 BCCA 244, 13 B.C.L.R. (4th) 107, at para 45:

> There is no doubt that lawyers are under an obligation to keep confidential all documents and other communications made to them by their clients, but not all such communications are subject to solicitor-client privilege and a claim of privilege does not convert non-privileged documents into privileged documents.

[79] The Children's Lawyer gathers information from and about her child clients in numerous ways: with assistance from social workers; through therapists, school teachers; and so on. This information is necessary for the Children's Lawyer to properly represent the child. It is crucial in order for the child's voice to be heard.

[80] As Mesbur J. explained in *Catholic Children's Aid Society of Toronto v. S.S.B.*, 2013 ONSC 4560, 35 R.F.L. (7th) 178, at para. 21:

> When [the Children's Lawyer] takes a position on behalf of a child, child's counsel will ascertain the child's views and preferences. In doing so, it will consider the independence, strength and consistency of the child's views and preferences; the circumstances surrounding those views and preferences, and all other relevant evidence about the child's interests. It is in this context the [Children's Lawyer] relies on a clinical investigator to assist counsel in determining those views and preferences so that it can advocate a position on behalf of the child. Essentially, the clinical investigator assists counsel in ascertaining its client's reasonable

> instructions; that is, the position to be taken on behalf of the child. [Footnote omitted.]

[81] While some records may be subject to the solicitor-client exemption, others may not. These include the child's views expressed to teachers, counsellors, therapists, friends, and parents of friends. Yet, the Children's Lawyer's duty of confidentiality applies to all records.

The records belong to the child

[82] The records in question here belong to the child.

[83] The decisions below were incorrect to rely on *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 2003 CanLII 72347 (ON SCDC), 66 O.R. (3d) 692 (Div. Ct.) ("*Children's Lawyer*"), aff'd (2005), 2005 CanLII 11786 (ON CA), 75 O.R. (3d) 309 (C.A.). In that case, the Divisional Court considered a judicial review from a request by an adult whom the Children's Lawyer represented as a child for her files held by the Children's Lawyer. Oddly, the request was made pursuant to *FIPPA*, rather than as a request from a client for her own files. The Divisional Court upheld an IPC decision ordering the Children's Lawyer to disclose most of the requested documents. The Children's Lawyer appealed only with respect to whether the IPC had standing before the Divisional Court. This court dismissed the appeal, but Goudge J.A. commented as follows, at para. 5:

> Upon reaching majority and apparently dissatisfied with her representation, Jane Doe requested a copy of her "complete files". The Children's Lawyer, whose office operates as a branch of the Ministry of the Attorney General, treated this as a request for information under *FIPPA* rather than as a request from a client for her file. However reasonable it might be to analyze the interests at stake in this framework, this was not raised as an issue before us, and I will say nothing more about it.

[84] The issue of whether the Children's Lawyer is a branch of MAG was not argued before, or addressed by either court. Nor was the issue of whether the files belonged to the client and thus the application was unnecessary. For these reasons, *Children's Lawyer* does not determine the issue here: whether a third party can have access to a child's records through *FIPPA*.

[85] Interestingly, in *Children's Lawyer*, the Divisional Court refers to the fiduciary duties the Children's Lawyer owed the child. At para. 83, the court endorses the IPC's description of the fiduciary nature of the Children's Lawyer as follows:

> The [Children's Lawyer] meets the criteria for the imposition of fiduciary duties, apart from doing so on the basis of the solicitor and client relationship…. It has the classic indicia of a fiduciary relationship: the scope for the exercise of discretion or power; the opportunity to exercise that power unilaterally so as to affect the minor's legal or practical interests; a peculiar vulnerability due to the minority status of the client; and an expectation that the [Children's Lawyer] will be concerned with the minor's interests and not its own.

[86] Here the Adjudicator dismissed the Children's Lawyer's submission as to the child client's ownership of the files. She found: "[T]his argument overreaches". This conclusion is flawed for two reasons.

[87] First, it ignores the heightened privacy rights of children. As the Supreme Court observed in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para 17:

> Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under [various statutes], not to mention international protections such as the *Convention on the Rights of the Child*… The law attributes the heightened vulnerability based on chronology, not temperament [.] [Emphasis in original.]

[88] The only way that the role of the Children's Lawyer differs from that of a conventional solicitor-client relationship is that the child is entitled to a heightened protection of confidentiality as mandated by the *Convention.* As stated by Mesbur J. in *S.S.B.*, at para. 32:

> A child-client's right to a confidential relationship with counsel must be guarded with more vigilance than that accorded to an adult client, not with less.

[89] Second, it is premised on the erroneous notion that children cannot represent themselves in court. The Adjudicator stated:

> The existence of the [Children's Lawyer] is premised in part on the fact that children cannot represent themselves or retain counsel without a litigation guardian, as they are under the legal disability of childhood.

[90] She continued:

> Even with respect to child protection cases, the role of the Children's Lawyer as legal representative … differs from a conventional solicitor-client relationship[.]

[91] This premise is wrong. Children can represent themselves without a litigation guardian and do so regularly in family proceedings. They are not always under a legal disability. For example, the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, specifically provides, at s. 63(1), that "[a] minor who is a parent may make an application under this Part [Custody, Access and Guardianship] without a next friend and may respond without a litigation guardian".

[92] Against this context, I turn to the question of whether MAG has custody or control of the records of the Children's Lawyer.

(iii)Applying the context to custody or control

The Children's Lawyer is separate and distinct from MAG

[93] In my view, the Adjudicator erred when she started from the assumption that the Children's Lawyer was a branch of MAG. She stated:

> There is no dispute that [*FIPPA*] applies to "institutions", which are defined to include provincial ministries. The overriding considerations in this case are:
>
> > • the undisputed fact that the [Children's Lawyer] is a branch of the ministry and
> >
> > • all of the records at issue were generated in the course of the [Children's Lawyer] fulfilling its core mandate.
>
> Despite these considerations, a consistent theme of the [Children's Lawyer's] submissions is an effort to differentiate the [Children's Lawyer], together with its mandate as a branch within [MAG], from [MAG] itself. For the reasons set out below, I find this approach flawed.

[94] It is not "undisputed" that the Children's Lawyer is a branch of MAG. The Adjudicator based her determination on the *Children's Lawyer* decision. However, as discussed, that issue was not argued or addressed in *Children's Lawyer* for it was irrelevant to the outcome of the case.

[95] By starting from the assumption that the Children's Lawyer is a branch of MAG, the Adjudicator did not take into account the context in which the Children's Lawyer must operate, separate and distinct from MAG. Instead, she used the concept of a "branch" to cloak MAG with control over the Children's Lawyer.

[96] Although MAG is an institution within the meaning of s. 2(1) of *FIPPA*, bodies that may be administratively structured under MAG are not automatically subject to *FIPPA*. An organization's administrative structure is not determinative of custody or control; a contextual analysis is required. In *Walmsley*, this court explained that a determination of care or control "depends on an examination of all aspects of the relationship between [here the Children's Lawyer] and [MAG] that are relevant to control over the documents": at p. 619.

[97] An examination of the relationship between the Children's Lawyer and MAG relevant to custody or control over the documents discloses that – for her core functions regarding children – the Children's Lawyer is not a branch of MAG.

[98] The Children's Lawyer represents the child. She is not a government agent. Her functions and promise of confidentiality are not conferred on MAG.

[99] While the Children's Lawyer is administratively structured under and has a funding relationship with MAG, they are not connected with respect to her core functions: there is no statutory relationship between the two entities; she does not receive direction from MAG; she does not report to MAG; and her fiduciary duties are to her child clients, not to MAG.

[100] The Children's Lawyer's fiduciary duties to her child clients require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG. The independence of the Children's Lawyer is particularly significant when she must act contrary to the interests of MAG or the Crown. Her child clients could have an action against the Crown, could have a constitutional question before the court, or could be a defendant in an action brought by the Crown.

[101] When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, does not provide MAG with access to records relating to children and MAG does not have authority to request them. The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG.

[102] Thus, the Children's Lawyer is not a branch of MAG for the purposes of the children's records. Again, an organization's administrative structure is not determinative of custody or control for purposes of *FIPPA*.

[103] In *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1, aff'd 2017 SCC 47, 414 D.L.R. (4th) 577, this court affirmed that the existence of an administrative relationship between two government entities does not

necessarily make them one for the purposes of access to information legislation. *Fontaine* concerned the fate of records generated by the Indian Residential Schools Agreement and the Independent Assessment Process (the "IAP"), which were operated within Aboriginal Affairs and Northern Development Canada ("AANDC"). Strathy C.J.O. commented on the nature of the records, at para. 179:

> Were the head of AANDC to receive an access to information request … it would have no reasonable legal or practical expectation that it could obtain copies of such IAP Documents from the Secretariat … That may not be the case for documents of a different nature, such as those relating to funding, auditing, and human resources - documents for which AANDC would have a much stronger claim for control.

[104] The court ultimately concluded that the Secretariat of the IAP, an "autonomous branch" of AANDC, "retains possession of the documents provided to and generated by the IAP": at para. 174. It held that IAP documents in the Secretariat's possession "are simply not under the control of AANDC": at para. 180.

[105] The Divisional Court distinguished *Fontaine* on the basis that the Secretariat had decision-making functions, akin to that of a court. That fact, in my view, does not alter the rule that an administrative relationship does not determine custody or control.

[106] Other cases have similarly held that an administrative relationship with a designated institution does not amount to custody or control for freedom of information legislation. For example, the following have been held not be in an institution's custody or control:

> a) Records of the members of the Judicial Appointments Advisory Committee, which was set up by the Attorney General;[5]
>
> b) Personal emails of a city employee on his government email account;[6] and
>
> c) Records held within Ministers' offices under their respective Ministries, except in defined circumstances.[7]

The records are not within MAG's custody or control

[107] Since the Children's Lawyer is not part of MAG, and is thus not an institution, an analysis is required to determine whether the records are under MAG's custody or control.

[108] In *Minister of National Defence* the Supreme Court articulated a two-part test for whether records held by bodies that are not part of an institution are under the institution's control and thus subject to freedom of information requests:

> 1. Do the contents of a document relate to a departmental matter?
>
> 2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[109] Charron J. noted, at paras. 55-56:

> Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry….
>
> Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. [Emphasis in original.]

[110] The Adjudicator referred to the two-part test from *Minister of National Defence*, but determined that: "Accepting that the [Children's Lawyer] is a branch of [MAG], it would be redundant to ask whether the [Children's Lawyer] 'could reasonably be expected' to obtain the records at issue."

[111] The Adjudicator's reasoning is flawed for several reasons. First, it is circular, for it starts from the premise that the Children's Lawyer is part of MAG when the object of the exercise is to determine whether MAG has custody or control of the records of another organization. Second, it analyzes whether the Children's Lawyer has control of the records, when what is required under the test is that MAG has control. There was no issue but that the Children's Lawyer had control.

[112] Once the relevant test is applied to the child's records with the Children's Lawyer, it is clear that MAG does not have control of the records:

> *Step one: Do the contents of the requested records relate to a departmental matter*?
>
> The answer must be no. MAG plays no part in the records of the Children's Lawyer. The records do not relate to a

> departmental matter; MAG has nothing to do with the Children's Lawyer's work.
>
> *Step two: Could MAG reasonably expect to obtain a copy of the records upon request?*
>
> Again the answer – for the reasons set out above – is no. Neither MAG officials nor the Attorney General could reasonably expect to obtain a copy of the requested records.

[113] The Divisional Court in *City of Ottawa*, at para. 30, cited approvingly ten questions former Commissioner Sidney Linden outlined in IPC Order 120 to be asked when determining whether an institution has custody or control of records. Although the Adjudicator referred to some of these questions, she failed to situate her analysis within the context of the Children's Lawyer's work. I address these ten questions and provide answers based on the context I have set out:

1) Was the record created by an officer or employee of the institution?

[114] Here, the records at issue were created by legal agents of the Children's Lawyer (who is appointed by the court pursuant to the *CJA* to exercise independent statutory functions) while providing legal representation to children. The records were not created for or on behalf of MAG. The Children's Lawyer's role precludes it from acting in the interest of MAG or the Crown in these matters.

2) What use did the creator intend to make of the record?

[115] The records were intended solely for use in litigation on behalf of child clients in custody and access proceedings as ordered by the court. The records were not created for MAG's use or on behalf of the Crown.

3) Does the institution have possession of the record?

[116] MAG does not have possession of the records. They are exclusively held by the Children's Lawyer in her legal file.

4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

[117] The records are being held by the Children's Lawyer for the purposes of her independent statutory, legal and fiduciary duties to children, and not as an agent of MAG.

5) Does the institution have a right to possession of the record?

[118] MAG has no statutory or other right to possess the records. The Children's Lawyer does not allow MAG officials to access or possess these records. Allowing MAG to have access to, or possession of, the records would violate the Children's Lawyer's duty to maintain the confidentiality of her child clients' records.

6) Does the content of the record relate to the institution's mandate and functions?

[119] The contents do not relate to MAG's mandate or functions. The contents of the records relate to the Children's Lawyer's independent statutory functions in providing legal representation to children in custody and access proceedings. The records relate to litigation where the Children's Lawyer is acting, at the request of the court, independently from MAG in representing child clients who are subjects of custody and access proceedings. These functions are statutorily conferred exclusively on the Children's Lawyer, and not on MAG or the Attorney General.

7) Does the institution have the authority to regulate the record's use?

[120] MAG has no authority to regulate the use of the records. The regulation of the use of these records is within the exclusive authority of the Children's Lawyer in accordance with her professional obligations to her child clients. The Children's Lawyer uses these records for the sole purpose of representing the interests of her child clients.

8) To what extent has the record been relied upon by the institution?

[121] MAG has never relied on, or had possession of, these records. The records have only been relied on by the Children's Lawyer in order to represent the interests of its child clients in litigation.

9) How closely has the record been integrated with the other records held by the institution?

[122] These records have never been integrated with MAG records. The Children's Lawyer's files related to legal services provided to children are kept separately from any MAG records. No official or employee outside of the Children's Lawyer has access to these records.

10) Does the institution have the authority to dispose of the record?

[123] The records are maintained and disposed of in accordance with a records policy established by the Children's Lawyer in 2006. The Children's Lawyer does

not obtain MAG approval or direction related to its child client records or on its internal policies related to these files.

[124] The IPC alleges that because in the past MAG has forwarded *FIPPA* requests relating to the Children's Lawyer records to the Children's Lawyer for response, it must continue to do so. First, past practice is not determinative. As stated by Charron J. in *Minister of National Defense*, at para. 56:

> [A]ny expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, [or] on the actual legal relationship between the government institution and the record holder…

[125] Second, the evolving nature of the functions of the Children's Lawyer with respect to advancing children's interests and the voice of the child, particularly in light of the *Convention*, requires new scrutiny.

The Adjudicator's order does not promote the purposes of FIPPA

[126] The IPC submits that the Adjudicator's order is consistent with the purpose and the scheme of *FIPPA*. I do not agree.

[127] The purposes of *FIPPA* include providing access to "government information" and protecting the privacy of individuals with respect to personal information about themselves. Subjecting the Children's Lawyer's records to this regime does not accomplish either goal. Children's records do not contain information that could be described as "government information", nor do they contain any information that would advance the goals of government accountability and transparency.

[128] On the contrary, providing third parties with access to a child's records would seriously undermine the Children's Lawyer in her role as advocate for the child. It would also sabotage the child's heightened privacy rights, eviscerate the work of the Children's Lawyer and seriously limit the court's ability to fully address the child's best interests.

[129] One of the most significant developments in family litigation affecting children is the recognition that the child has a voice. The Adjudicator's decision would muzzle that voice, undermine the court process and go against the best interests of the child.

CONCLUSION

[130] For these reasons, I would allow the appeal and quash the Adjudicator's order. In accordance with the parties' agreement, I would not order costs.

Released: "PR" JUN 18 2018

"M.L. Benotto J.A."
"I agree. Paul Rouleau J.A."
"I agree. L.B. Roberts J.A."

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[1] The Divisional Court applied a reasonableness standard of review and indicated that – in any event – the decision was correct.
[2] Justice for Children and Youth is a legal clinic funded by Legal Aid Ontario with a mission of advancing the rights, interests and dignity of children and youth. It was granted intervener status based on its expertise regarding child representation and the privacy rights of children.
[3] Rachel Birnbaum and Nicholas Bala, "Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations" (Paper for presentation, delivered in Toronto, June 21, 2017)
[4] The Honourable Donna J. Martinson and Caterina E. Tempesta, "Legal Representation for Children in Family Law Cases: A Rights-Based Approach", CLEBC and CBABC Joint Conference, Access to Justice For Children, Child Rights in Action, May 2017, Vancouver B.C.
[5] *Walmsley*, at pp. 615-16 & 618-19.
[6] *City of Ottawa*, at paras. 29-31.
[7] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at paras. 27, 28, 41 & 43.