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What is "Advice"? Supreme Court Exempts Policy Options from Access to Information Request

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Case commented on: *John Doe v Ontario (Finance)*, 2014 SCC 36 (CanLII)

In this case, the Supreme Court of Canada considered whether certain government documents constituted "advice" under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, thus exempting them from disclosure in an access to information request. In making this determination, the Court balanced two competing and important policy interests: the public's interest in accessing government information, and the government's interest of obtaining full and frank opinions from public servants. The Court claimed that its decision to protect public service candour was compelled by principles of statutory interpretation. A detailed examination of the case demonstrates that the judgment, while defensible, was actually less inevitable than the Court would like us to believe.

Factual Background

The Ministry of Finance (the Ministry) amended a provision of the *Corporations Tax Act*, RSO 1990, c C-40 that eliminated a loophole for tax haven corporations. The law was partially retroactive. A tax lawyer (John Doe) made a request pursuant to the Ontario *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-31 (*FIPPA*) regarding the amendment – and particularly its retroactivity. Pursuant to this request, the Ministry located several drafts of a policy option paper (the Policy Options). The Policy Options examined possible effective dates for the relevant amendments, and indicated which options were undesirable. It also made a statement from which the author's recommendation could easily be inferred (para 5). One of the options was eventually enacted (para 6).

The Ministry refused to provide the Policy Options to John Doe, claiming that they constituted advice to the government from a public servant. Pursuant to s 13(1) of the *FIPPA*, a public servants' advice or recommendations can be exempted from disclosure:

> 13 (1) [Advice to government] A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The Information and Privacy Commissioner (IPC) held that the Policy Options were not advice, and ought to be disclosed. The IPC reached this conclusion after determining that, in order to constitute "advice", the Policy Options must:

- suggest a course of action to be accepted or rejected by the person being advised; and
- have been communicated to a decision maker (para 8).

There was no clear evidence that the Policy Options were provided to anyone.
The Ministry brought an unsuccessful application for judicial review, and appealed that dismissal to the Ontario Court of Appeal.

The Court of Appeal found that the IPC's decision was unreasonable. In its view, there was no need to prove that information was communicated to a final decision maker in order to constitute advice. Moreover, there was no need to show a single course of action was recommended (para 14). These restrictions, in the Court of Appeal's view, would strip s 13 of any real meaning (para 15, citing with approval the reasoning in *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)* 2012 ONCA 125 at para 29).

The Supreme Court of Canada's Decision

The Supreme Court of Canada agreed with the Ontario Court of Appeal -- the IPC's decision was unreasonable. Justice Rothstein grounded the Court's unanimous decision in principles of statutory interpretation. He conducted a detailed examination of s. 13's text, the context of the information request, the *FIPPA*'s legislative history, and the purpose of the s. 13(1) exemption.

Section 13's Text

Section 13(1) of the *FIPPA* exempts a public servant's "advice or recommendations" from disclosure. While "advice" and "recommendations" are not defined in the *FIPPA*, common sense dictates that the words be given distinct meanings, lest they be redundant (para 24).

The IPC adjudicator held that, to constitute "recommendations or advice" the document must suggest a "course of action that will ultimately be accepted or rejected by the person being advised" (para 23). While Rothstein J. agreed that this definition encompassed recommendations, he held that advice was a broader term. Because the IPC adjudicator failed to consider and apply a distinct definition for advice, it was unreasonable (para 24).

The Context of the Complaint

Rothstein J. then considered whether policy options were likely considered advice by legislative drafters.

He noted that, while policy options vary greatly in content, they typically provide more than objective data -- they filter information, provide an "evaluative analysis" and sometimes (like the present case) provide guidance on the desirability of the listed options (para 26).

With that backdrop, Rothstein J. made several inferences about the nature of policy options, and their interaction with the *FIPPA*.

First, he noted that a federal case dealing with a similarly worded section of federal legislation (the *Access to Information Act*, RSC 1985, c A-1) found policy options to constitute advice (see: *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254 at paras 61-64 [*Telezone*]).

Second, he was influenced by s 13(2) of the *FIPPA*, which provides a list of documents that must be produced, whether or not they constituted "advice" or "recommendations" under s 13(1). To Rothstein J., s 13(2) demonstrated that legislative drafters knew that the word "advice" was open to very broad construction (para 29). Policy options were not on s 13(2) list – a fact that was "telling" in Rothstein J.'s view (para 33).

Finally, s 13(3) of the *FIPPA* held that disclosure could not be refused where the head of an institution publicly cited the record as the basis for reaching a decision. The Policy Options were not cited publicly. Rothstein J. extrapolated that, where an institution did not publicly cite a record as the basis for reaching a decision, it could not be compelled (para 34).

Legislative History of the FIPPA

The claimant relied on the Williams Commission Report (the report upon which the *FIPPA* was based) to demonstrate that policy options were not intended to fall within the scope of "advice" under s. 13(1) of the *FIPPA* (para 36).

Rothstein J. was not persuaded, and declined to give the Report anything but "limited weight" (para 36). He adopted this view because:

- the wording ultimately selected for s. 13 was not proposed in the Williams Commission Report (paras 36, 37);
- there was an 8 year gap and a change of government between the Williams Commission Report and the *FIPPA* (para 38); and
- the wording of s 13 was substantively similar to the federal *Access to Information Act*, which was enacted after the Williams Commission Report was published (para 39).

As such, while it was clear the *FIPPA* was based on the Williams Commission Report, Rothstein J. did not accept that it reflected the scope of s 13(1) (para 39).

Purpose

Finally, Rothstein J. considered the purpose of the *FIPPA*, of s 13(1) specifically, and of the competing policy objectives at play. On the one hand, increased transparency in the government is a valid social objective. As such, the *FIPPA* establishes a presumption of granting access (para 41).

On the other hand, however, s 13(1) exists to protect the ability of public servants to provide full and frank advice. The Williams Commission Report was concerned that failing to exempt public service advice or recommendations risks the candid, complete nature of public service opinions, and the political neutrality (real and perceived) of Canada's civil service (paras 43, 44).

Rothstein J. accepted that the Williams Commission Report outlined the purpose of s 13(1). He held that those features were essential to the public service, and that the forced disclosure of

advice or recommendations "risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process" (para 45).

Rothstein J. concluded that including the Policy Options within the meaning of "advice" accorded an appropriate balance between s 13(1) and the *FIPPA* to preserve an effective public service while providing meaningful access to information (para 46).

Therefore, the Policy Options were advice, and were exempted from disclosure.

Commentary

Rothstein J.'s judgment that the IPC adjudicator's decision was unreasonable is defensible. Demanding that all "advice" must suggest a single course of action unacceptably conflates the words "advice" and "recommendation" into the same concept. This is redundant and does not accord with principles of statutory interpretation.

In addition, there is no basis to conclude that advice has to be communicated to the final decision maker to be exempted from disclosure. This would create a troubling paradox whereby all drafts of a final opinion would be producible, but the final version itself would be held back. This defeats the entire purpose of the exemption (para 49).

With that said, Rothstein J.'s ultimate conclusion that the Policy Options (and all policy options generally) are "advice" is somewhat less convincing. To explain, Rothstein J. appears to contradict himself when he initially dismisses the Williams Commission Report because its recommendations did not make it into the final draft of s 13(1). However, six paragraphs later, he relies on the Williams Commission Report as providing an accurate description of s 13(1)'s purpose.

Rothstein J. implicitly acknowledges this inconsistency at paragraph 43 of his decision in stating "[a]lthough I would not give the report much weight in defining the scope of s. 13(1), I accept that its discussion of the purpose of s. 13(1) is accurate." This acknowledgement, however, completely fails to explain why it was appropriate to rely on the Williams Commission Report to explain the purpose of s 13(1) when, as he pointed out, s 13(1) bore no resemblance to the recommendations in that Report.

Secondly, Rothstein J. was influenced by federal legislation and a Federal Court of Appeal judgment that policy options constituted advice under the federal *Access to Information Act*, RSC 1985, c A-1 (para 28, discussing *Telezone*). Later, however, he refused to assign any weight at all to the legislative treatment of policy options in other provinces. Instead, he dismissed this information from other provinces as "not conclusive" (para 40).

And lastly, while Rothstein J. referred to the balancing of interests and the public's valid need for a transparent government, the vast majority of his discussion is spent defending the candour of the public service and political neutrality.

Rothstein J. did not consider the extent and frequency with which policy options shape the lives

of Canadians in meaningful and significant ways. In this case, John Doe had arranged his clients' tax liability in compliance with the laws in force at the time. The amendments at issue were retroactive. Rothstein J. declined to ask whether the public (and John Doe's clients) had a right to know why an exceptional amendment was made to render their previously legal activities retroactively illegal.

This decision will undoubtedly affect access to information requests in the future. Policy options, which are commonplace within the civil service, will now likely be withheld from disclosure, despite the fact that they contain relevant information on government initiatives that affect all Canadians. Given these implications, it is important to be aware that while Rothstein J.'s decision may be logically defensible, it was not a foregone conclusion. Indeed, it was much more discretionary than the judgment would lead us to believe.