ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ADJUDICATION ORDER #2

May 24, 2002

ALBERTA JUSTICE

Review Numbers 2170 and 2234

Date: 20020524

INFORMATION AND PRIVACY COMMISSIONER
(ADJUDICATOR: JUSTICE T.F. MCMAHON)

IN THE MATTER OF AN APPLICATION PURSUANT TO THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT, R.S.A. 2000 c.F-25 AND IN THE MATTER OF AN ADJUDICATION INQUIRY, PURSUANT TO S. 75 THEREOF

BETWEEN:

HUGH MacDONALD, M.L.A.

Applicant

- and -

ALBERTA JUSTICE

Public Body
Respondent

AND BETWEEN:

THE GLOBE AND MAIL

Applicant

- and -

ALBERTA JUSTICE

Public Body
Respondent

REASONS FOR DECISION
of the
HONOURABLE MR. JUSTICE T. F. MCMAHON, ADJUDICATOR

APPEARANCES:
Peter M. Jacobsen
Carlos P. Martins
for the Globe and Mail

Hugh MacDonald, MLA
for himself

Christopher D. Holmes
for Alberta Justice

SUMMARY & CONCLUSION

[1] These reasons deal with two requests for access to information made pursuant to the ***Freedom of Information and Protection of Privacy Act,*** R.S.A. 2000, c.F-25. The requests relate generally to the same subject matter and so will be dealt with together in these reasons.

[2] Section 93 of the ***Act*** permits the head of the public body (defined to include a Department of Government, here, Alberta Justice) to require an applicant to pay fees as provided for in Regulations. Alberta Justice, by one Barry Clothier, required an estimated fee of $59,571.00 from one applicant and $60,696.00 from the other. Each applicant requested a waiver of the fees because the records relate to a matter of public interest. Each request was refused. Each applicant then requested a review of that refusal by the Information and Privacy Commissioner ("Commissioner"). The Commissioner considered he had a conflict and could not undertake that review. Accordingly, the Lieutenant Governor in Council appointed me as an Adjudicator pursuant to s.75 of the ***Act***.

[3] The issue for determination in this inquiry is a review of the refusal to waive or reduce the fees.

[4] For the reasons that follow, I have concluded that the fees should be reduced.

BACKGROUND

[5] These two access requests arise from a defamation suit brought in 1999 by a Red Deer lawyer, Mr. Lorne Goddard, against Mr. Stockwell Day, a senior cabinet minister, the Provincial Treasurer in the Government of Alberta, and a Government Member of the Legislative Assembly of Alberta.

[6] The suit was eventually settled on December 22, 2000. According to a Government Press Release of January 16, 2001, the total settlement cost was $792,064.40, including $60,000.00 in damages paid to Mr. Goddard. Those costs were paid with public funds out of the province's Risk Management and Insurance Fund. The suit, settlement and payment generated much media interest.

THE MacDONALD REQUEST

[7] Mr. Hugh MacDonald is the MLA for Edmonton Goldbar. Just prior to the press release on December 27, 2000, Mr. MacDonald's office had made the following request to Alberta Justice:

> Copies of all reports, memoranda, claim submissions, claim receipts, agreements, and background documents prepared by or for Alberta Justice, or sent to Alberta Justice, for the period September 9, 1999 to December 27, 2000, relating to the

> Government of Alberta, through the Alberta Risk Management Fund, covering legal and other expenses incurred by Stockwell Day.

[8] The request was handled by Mr. Barry Clothier, Senior Manager Strategic Business Services for Alberta Justice. On March 28, 2001, Mr. Clothier provided a fee estimate to Mr. MacDonald's office in the amount of $59,571.00. It was said to be based upon "some 60,000 pages of records to review on a page by page basis to determine their responsiveness". He assumed the effort would take two people seven months, working full time.

[9] On April 12, 2001, Mr. MacDonald requested a waiver of the fee "because these records relate to a matter of public interest".

[10] By letter of June 29, 2001, Alberta Justice refused the waiver request in these terms

> We have reviewed your request in light of the assessment of the thirteen criteria articulated by the Information and Privacy Commissioner in Order 97-001. Our position is that the "public interest", as contemplated both by that Order and by Section 31 (1) of the *Act,* has been served by the release of records/documents by the Minister in January, 2001. That release of information included both supporting documentation and a summary of legal costs associated with the file. Accordingly, we will not excuse the payment of fees.

[11] Mr. MacDonald requested a review of that decision from the Commissioner on July 24, 2001. The Commissioner appointed a staff member on July 30, 2001, to try to resolve or mediate the issue. Nothing before me indicates what became of that effort.

[12] On October 12,2001, the Acting Commissioner advised Mr. MacDonald that he had a conflict and that Mr. MacDonald may seek the appointment of an adjudicator. That was done, and I was appointed.

[13] I have had a telephone conference with Mr. MacDonald and the other applicant. Oral evidence was not considered necessary on this issue of a fee waiver or reduction. Written submissions have been received.

THE GLOBE AND MAIL REQUEST

[14] Two requests for access to information were made by Jill Mahoney of the Edmonton Bureau of the Globe and Mail. The first was dated January 25, 2001, and was in these terms:

> Copies of all reports, memoranda, letters, e-mails, notes, claim submissions, claim receipts, agreements, and background documents prepared by Alberta Justice or sent to Alberta Justice or sent between lawyers relating to the defamation lawsuit

[15]

> of Stockwell Day, former provincial treasurer of Alberta, for the period from March, 1999 to present.
>
> Documents should include, but in no way be limited to: the June 19, 1999 decision to grant Mr. Day coverage under Risk Management and Insurance; the July 2, 1999 letter from Gerald Chipeur to Virginia May; the July 15, 1999 letter from Gerald Chipeur to Virginia May; Bob Thompson's Sept. 7, 2000 and Sept. 18, 2000 letters to Alberta Justice; communications strategy relating to the possible disclosure of terms of settlement; the request by Robert Seidel to postpone Oct. 19, 2000 as the deadline for Mr. Day to decide to continue as a participant under Risk Management and Insurance; all documents relating to the postponement of this Oct. 19, 2000 deadline; all documents relating to the second deadline of Dec. 8, 2000; the communications plan for the Jan. 16, 2001 public release of information relating to the Dec. 22, 2000 settlement.
>
> Given that some documents relating to this file - including "without prejudice" correspondence between lawyers - have already been deemed to be in the public interest and have been released by Justice Minister Dave Hancock, there is no reason to withhold the remaining documents pertaining to this file.

[15] Then on January 31, 2001, Ms. Mahoney made a second request in these terms:

> Copies of all reports, memoranda, letters, e-mails, notes, claim submissions, claim receipts, agreements and background documents relating to legal counsel who worked in any way for Alberta Justice and/or Stockwell Day on the matter of Mr. Day's defamation lawsuit.
>
> Specifically, I am requesting the number of hours billed for the Day/Alberta government side of this lawsuit, the number of lawyers who worked on this file for the Day/Alberta government side and the time period for when the hours were billed. I am also requesting the lawyers' hourly rates.
>
> Given that some documents relating to this file, including "without prejudice" correspondence between lawyers, has already been deemed to be in the public interest and released by Justice Minister Dave Hancock, there is no reason to withhold the above request information.

[16] On March 27, 2001, Mr. Clothier provided a fee estimate totalling $60,696.00 for the two requests. Again he said the fee estimate was based upon a page by page review of some 60,000 pages. He demanded her agreement to pay that amount and an advance deposit of 50%. The same demand had been made of Mr. MacDonald.

[17] Again it was established that the work would require two people, full time, for seven months.

[18] Notwithstanding the similarity on the access requests by Mr. MacDonald and the Globe and Mail and the fact that apparently the same 60,000 documents would be reviewed to respond to both requests, no explanation was given for billing for the same work twice.

[19] By letter of April 30, 2001, to the Commissioner, Ms. Mahoney requested a waiver of the fee on the basis that "the requested records are in the public interest". No response to that written request was ever made in writing by Alberta Justice.

[20] On May 2, 2001, the Commissioner responded to Ms. Mahoney advising that he had a conflict and that she may seek the appointment of an adjudicator. A copy of that letter went to the Minister of Justice, to whom Mr. Clothier was ultimately responsible. Thus, there can be no doubt that Alberta Justice knew, or ought to have known, of the waiver request, at least by receipt of the letter of May 2, 2001.

[21] There is an issue whether there was a waiver request made and rejected orally before this exchange of correspondence and in the course of a phone conversation between Ms. Mahoney and Mr. Clothier on April 24, 2001.

[22] There is a further issue whether the request was repeated and rejected in a phone conversation on July 16, 2001, between the same two parties, and just over two weeks after the rejection of Mr. MacDonald's request.

[23] In any event, an adjudicator was requested and I was appointed.

PRINCIPLES & OBJECTIVES OF THE ACT

[24] Freedom of information legislation is relatively new to Alberta but less so to many other provinces and countries. In Alberta, the current ***Act*** came into force June 1, 1994.

[25] The Supreme Court of Canada in ***Dagg v. Canada (Minister of Finance),*** [1997] 2 S.C.R. 403, considered the federal ***Access to Information Act,*** R.S.C. 1985, c.A-1. La Forest, J., although dissenting in the result in that case, described the legislation's purpose in these terms at para. 61:

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

> citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci* 479, at p.480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

[26] In decision No. 96-002, the Commissioner in Alberta described two principles to be considered when determining whether a record relates to a matter of public interest under the Alberta ***Act***. The first is that it was intended to foster open and transparent government, subject to the limits provided. To that I would add accountability. The right of the people to require that government account to them is fundamental to a strong democracy. It is with our consent that we are governed by others; that consent is given conditionally upon good government. The decision to continue or withdraw that consent requires that the people have the information required to made an informed decision. Access to information legislation is a means by which people get that information from sometimes reluctant government hands.

[27] The second principle identified by the Commissioner is that the user should pay. Whether this is a "principle" of access to information legislation is doubtful. In any event, it begs the question of who the "user" really is. As well, this ***Act*** expressly provides for several exceptions to that "principle", one of which is central to this review.

JURISDICTION

[28] Alberta Justice argues that I lack jurisdiction to undertake this review of the fee waiver request made by The Globe and Mail. This issue does not arise in respect of the MacDonald request.

[29] The reasoning is that the ***Act*** by s.93 provides the head of the public body (here Mr. Clothier for Alberta Justice) with authority to excuse fees and the Commissioner or Adjudicator with authority only to review that decision.

[30] Section 93(4) and (5) reads as follows:

> 93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,
>
> (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

(b) the record relates to at matter of public interest, including the environment or public health or safety.

(5) If an applicant has requested the head of a public body to excuse the applicant from paying all or part of a fee and the head of a public body has refused the applicant's request, the head must notify the applicant that the applicant may ask for a review under Part 5.

[31] It is then argued on the facts that no request was made by Ms. Mahoney to the public body. Consequently, no request was refused by the public body, and thus there is no decision to review.

[32] One can understand the applicant's concern with this procedural issue being raised at this late date. On March 27, 2001, Mr. Clothier invited Ms. Mahoney, regarding the fee waiver issue, to "please call me directly in order that we can discuss the matter". She did on April 24, 2001. I conclude that she was told that a waiver would not be entertained. Only six days later, on April 30, 2001, she wrote to the Commissioner requesting a review and a waiver of the fee estimate. Specifically she requested "a review of Alberta Justice's handling of two requests dated January 25, 2001 and January 31, 2001". The only "handling" that had occurred was the provision of the fee estimate and several phone conversations, including the one of April 24. It would make little sense for her to request a review if she had not already made a waiver request and that request had been rejected.

[33] The ***Act*** does not require that a fee waiver request be in writing, but any doubt that Alberta Justice may have had about her request must or ought to have been removed when the Commissioner, on May 2, 2001, responded to Ms. Mahoney and copied the Minister of Justice. Yet the public body did not even then see fit to reduce its refusal to writing.

[34] Mr. Clothier deposes that he told Ms. Mahoney in a phone conversation sometime after this date that she had not, in his view, yet made a waiver request and so he had not yet made a decision. That recollection is difficult to reconcile with the next conversation which occurred between Mr. Clothier and Ms. Mahoney on July 16, 2001. A transcript of that conversation has been provided, and its accuracy deposed to by Ms. Mahoney.

[35] I am not, of course, bound by the rules of evidence in this capacity. I consider this transcript because I am satisfied that it is reliable, and, by this time, The Globe and Mail had requested the appointment of an adjudicator. That request was made on June 5, 2001.

[36] Mr. Clothier clearly understood that the adjudication would relate to the fee waiver issue.

[37] The transcript reveals this conversation:

> BC: ...Some member of the Bench agrees to hear the thing, that if we're not arguing or arbitrating, is that a word?, if we are not arbitrating the issue of the fee waiver and whatever, if that arbitration can be an examination of the records themselves and the discloseabilty of those records.
>
> JM: So you are asking me to forget about asking for a fee waiver?
>
> BC: Oh, no, absolutely not. No. No. No. I am not suggesting that for a moment.
>
> …

[38] Still no refusal was forthcoming in writing from the public body, nor did Mr. Clothier tell Ms. Mahoney in writing that he did not consider that he had yet received the waiver request.

[39] I presume that Mr. Clothier understood the significance of s.10(1) of the ***Act***:

> 10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[40] I note, as well, the provisions of s. 11:

> 11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless
>
> (a) that time limit is extended under section 14, or
>
> (b) the request has been transferred under section 15 to another public body.
>
> (2) The failure of the head to respond to a request within the 30 day period or any extended period is to be treated as a decision to refuse access to the record.

[41] Thus, even if, at least in his own mind, Mr. Clothier had not formally rejected the waiver request, he failed to respond as required within 30 days. Although s.11(2) refers only to an inferred decision to refuse access to a record, in fairness, the same inference must be drawn from a failure to respond to a waiver request.

[42] That the formal decision would have been to refuse the request cannot be doubted, given that Mr. MacDonald's similar request had been refused on June 29, 2001.

[43] In the result, I conclude that a fee waiver request was made by The Globe and Mail and rejected, such that I have jurisdiction to proceed with this review.

[44] Lastly, I note that the public body in its submission says:

> It is accepted that you have the authority in the course of your inquiry to:
>
> > 72(3)(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met.

[45] The public body argues that that authority does not extend to granting a waiver *"de novo* ". On a plain reading of that section, if the adjudicator has the authority to confirm a fee, then surely the adjudicator must also have the authority to decline to confirm a fee, which would appear to equate to a waiver. Similarly, if the adjudicator has the authority to order a refund without limitation, then a full refund surely equates to a waiver. Therefore I do not consider that an adjudicator's authority, as argued by the public body, is limited to a review of the improper exercise of a public body's discretion.

PUBLIC INTEREST

[46] Section 93(4) provides for the waiver of a fee in whole or in part if the record relates to a matter of public interest.

[47] The Commissioner has, in several decisions, thoroughly canvassed the meaning of public interest in this context. See decisions at No. 96-002, 96-022, and 97-001.

[48] Of particular importance in this case is a press release on the letterhead of Alberta Justice dated January 16, 2001, entitled "Government releases details of Goddard vs. Day settlement and costs". The release was accompanied by 15 documents selected by government for disclosure. They included a one page summary of costs, several settlement offers, and three letters from Alberta Justice to Stockwell Day. In justifying the release of these documents, the Minister of Justice in his statement said:

> "We are releasing this information in keeping with this government's policy of openness and accountability," said Dave Hancock, Minister of Justice and Attorney General.
>
> "We sought consent to release this information, but that has been slow in coming. Because this matter is in the public interest we are releasing it now in accordance with the *Freedom of Information and Protection of Privacy Act.* "

[49] The requests here by both applicants were made just before, and within 15 days after, that press release. It is inconceivable that a matter of government accountability, which is found to be in the public interest by a minister of the crown, could not have that character two weeks before or retain that character two weeks later. Even if that were not enough, a review of the issue in light of the principles and the 13 criteria enumerated by the Commissioner in decision No. 96-002 for determining whether the record relates to a matter of public interest, compels the conclusion that the matter is one of public interest.

[50] Although not all of the criteria are relevant to these requests, I will review each briefly in turn:

1. Is the applicant motivated by commercial or other private interests?

[51] As to Mr. MacDonald, the answer is no. His is a public duty to hold government to account. As to The Globe and Mail, it is obviously a commercial enterprise but I do not take that to be a negative. Alberta Justice argues that fees discourage media "fishing trips". While no doubt true, fees also discourage the pursuit of the truth. The proper balance is more likely to be found by determining what is genuinely in the public interest rather than by the levy of punishing fees.

[52] Alberta Justice also argues that this request is about selling advertising and "whether the applicant can turn a profit". That argument characterizes a free and independent press at its basest level. The media, in my view, has a higher role to play. Absent proof of overriding self-interest, I decline to reduce respected print media to this level, or to dismiss its attempts to bring accountability to government management of public funds, as merely an effort to sell advertising. The role of the press in reporting on court proceedings was addressed by the Supreme Court of Canada in ***Edmonton Journal v. Alberta (Attorney General),*** [1989] 2 S.C.R. 1326. The media role in relation to government management of public funds is no less important. Cory, J. said at 1339-40:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role…It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution.

2. Will members of the public benefit from disclosure?

[53] Knowledge of government treatment of the Risk and Insurance Management Fund and the expenditure of public funds in defence of a cabinet minister is essential to an informed electorate. One would expect that the government would be anxious to show that its actions were beyond criticism. Alberta Justice argues that the release of the selected 15 documents is sufficient

information for the public. Given that the public body now says that there are some 60,000 pages of related material, that is a decision best made by others.

3. Will the records contribute to the public understanding of an issue and to open and transparent government?

[54] The issue is accountability of government for public funds. Release of only a few selected records cannot assist public understanding of that issue in the context of this claim upon the Fund. Only release of all relevant records, subject to statutory exceptions, will provide the necessary public understanding.

4. Will disclosure add to public research on the operation of government?

[55] This very general question is difficult to answer within the context of specific requests such as these. Generally, it seems apparent that full knowledge of government management of the fund in one case will shed some light on the operation of government.

5. Has access been given to similar records at no cost?

[56] Mr. MacDonald references his access to documents in other unrelated cases. I have found no Alberta precedent for a waiver of fees of this size.

6. Have there been persistent efforts by the applicant and others to obtain the records?

[57] The applicants here have been diligent in seeking access.

7. Would the records contribute to debate on or resolution of events of public interest?

[58] Access to the records will contribute to a debate on accountability and administration of the Fund in the context of this event.

8. Would the records be useful in clarifying public understanding of issues where government has itself established that public understanding?

[59] This question does not relate to the kind of events concerned here

9. Do the records relate to a conflict between the applicant and government?

[60] No.

10. Should the public body have anticipated the need of the public to have the record?

[61] The government did properly anticipate the need to disclose some of the records. The real issue now is whether that limited disclosure should have satisfied the public interest and I have concluded that it cannot.

11. How responsive has the public body been to the applicant's request?

[62] The response to Mr. MacDonald has been straightforward. The response to The Globe and Mail has been less so. The transcripts of the phone conversations between Mr. Clothier and Ms. Mahoney, their accuracy deposed to by Ms. Mahoney, display an attempt by Mr. Clothier over several months to dissuade her from pursuing her first request. He went beyond merely assisting her to narrow or focus her request so as to reduce costs. The fee estimate was provided within a reasonable period of time, given the quantity of material involved. Of more concern is the failure to provide a timely denial of the waiver request in writing, or to provide written confirmation that no such request was considered to have been received.

[63] As I concluded earlier, by the April 24 phone conversation, or at best by the May 2 letter, copied to the Minister of Justice, the public body knew, or ought to have known, of the waiver request. To be consistent with the statutory obligation to assist and respond "openly, accurately and completely" the applicant should have been told in writing long before receipt of the respondent's brief in these adjudication proceedings in March 2002 that the public body had the view that no waiver request had been received or denied.

[64] Also, as directed by the Commissioner, Ms. Mahoney on June 5, 2001, wrote to yet another government minister requesting an adjudicator be appointed to deal with her request "that the entire fee estimate of $60,696.00 be waived". Yet in the phone conversation of July 16.2001, Mr. Clothier did not tell Ms. Mahoney that she had made the request to the wrong party or that he had not considered the request, or that he had not yet denied it and so an adjudicator would lack authority.

[65] I am thus of the view that the public body's responsiveness to this applicant has been less than required by the ***Act***.

12. Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body?

[66] None of the parties suggest that this fee estimate would have any impact on the operations of Alberta Justice. The public body does, however, argue that the principle of "user pay" is embedded in the ***Act***. It is true that the ***Act*** permits regulations requiring fees and that such regulations are in place. Although that fact is outside the parameters of this criteria, it is useful to consider who the

"user" really is when the applicants are an elected member of the legislature and a newspaper.

[67] In the case of the former, it can be persuasively argued that the M.L.A. is a representative of his constituents and has little or no personal interest in the records. As a member of the opposition in the Legislative Assembly, he may even be said to have a duty to represent the interests of all citizens in holding government to account when the need arises.

[68] In respect of the newspaper, as I have already said, its responsibility goes well beyond its pursuit of a bit more advertising.

[69] When the beneficiaries of the release of records of public interest are the public at large, then the public purse should primarily bear the costs.

13. What is the probability that the applicant will disseminate the contents of the record?

[70] It is likely that both applicants intend to make public some or all of the records sought.

[71] I note that although Ms. Mahoney makes mention of a public interest in the records relating to a contribution made by a law firm to a political party, none of the three requests refer to any such records, and I see no public interest issue in respect of them.

[72] In the result, I conclude that access to the requested records would be of benefit to the Alberta public in a pursuit of openness and accountability in government affairs and the management of public funds. The records relate to a matter of public interest as described in s.93(4)(b). The fees demanded of both applicants should be reduced or waived, except for the application fee of $25.00 if it was paid.

[73] I emphasize that the burden of proving a public interest in an onerous one. It will neither be frequently nor easily met. It has been met here in the unique factual circumstances of this case.

FEE REDUCTION

[74] In respect of both applications, I have given consideration to a fee reduction as opposed to a waiver. I conclude that a complete waiver is not appropriate.

[75] The regulations do not permit a fee for time spent reviewing a record. They do permit a fee for preparing a record for "disclosure". It seems to me that to prepare a record for disclosure, the record must necessarily be "reviewed". Separating out the time spent reviewing the record will reduce the time spent preparing the record for disclosure.

[76] I also wish to record my view that a knowledgeable person locating and preparing the records for disclosure could not possibly spend seven months doing it. I am familiar with the conduct of litigation. I doubt very much that a defamation suit could generate 60,000 pages of original documents, even adding in the fund coverage issues.

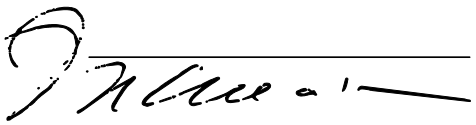
[77] It is also likely that the documents should not have to be reviewed separately for each applicant.

ORDER:

[78] The fees demanded of each applicant will be reduced to $2,500.00 for The Globe and Mail and $500.00 for Mr. MacDonald, in addition to the application fee paid by each.

[79] I thank counsel and the applicants for their assistance.

DATED at Calgary, Alberta this 24th day of May, 2002.



J.C.Q.B.A.

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REASONS FOR DECISION of the HONOURABLE MR. JUSTICE T. F. MCMAHON, ADJUDICATOR