IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner),* 2013 BCSC 2322

Date: 20131218
Docket: S121527
Registry: Vancouver

In the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (as amended), and in the matter of Order No. F12-02 of the Delegate of the Information and Privacy Commissioner of British Columbia

Between:

Provincial Health Services Authority

Petitioner

And

Office of the Information and Privacy Commissioner for British Columbia and Stanley Tromp

Respondents

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Petitioner:	S.M. Tucker K. Phipps
Counsel for the Respondent:	C.J. Boies Parker
Place and Date of Hearing:	Vancouver, B.C. April 25 and 26, 2013
Written Submissions:	May 10 and 24, 2013
Place and Date of Judgment:	Vancouver, B.C. December 18, 2013

INTRODUCTION

[1] The petitioner, Provincial Health Services Authority ("PHSA"), applies for judicial review of a decision of a delegate of the Information and Privacy Commissioner for British Columbia ("Adjudicator") following an inquiry under s. 56 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*"). The inquiry arose from a request by the respondent, Stanley Tromp, seeking the executive summaries of all reports by PHSA's internal audit department for 2010.

[2] PHSA declined to release any portion of the five Internal Assurance Executive Summaries that it had identified as responsive to Mr. Tromp's request (referred to as Records "A" to "E" in this application), on the grounds that the records were exempt from disclosure pursuant to ss. 12(3)(b) and 13(1) of *FIPPA.* At the inquiry, PHSA also argued that the exemption under s. 17 of *FIPPA* applied.

[3] Mr. Tromp sought a review of PHSA's decision by the Information and Privacy Commissioner for British Columbia ("the Commissioner"). Following the inquiry, the Adjudicator, the delegate of the Commissioner, ordered that PHSA disclose the entirety of two records (Records "B" and "E") and redacted copies of the remaining three records (Records "A", "C" and "D"): *Provincial Health Services Authority (Re)*, 2012 BCIPC 2, Order F12-02 ("Decision").

[4] In accordance with the Adjudicator's order, PHSA provided Records B and E to Mr. Tromp. It refused, however, to disclose any portion of Records A, C, and D ("the Disputed Records").

[5] On this application, PHSA seeks the following relief:

(i) An order in the nature of *certiorari* quashing or setting aside the orders in the Decision respecting Records A, C and D;

(ii) An order directing the Commissioner to reconsider and determine the application of s. 13 of *FIPPA* to Records A, C and D;

(iii) In the alternative, an order directing the Adjudicator to provide reasons for decision setting out his interpretation of s. 13 of *FIPPA* and explaining the basis for his application of that provision to Records A, C and D; and

(iv) An order directing the Commissioner to reconsider and determine the application of s. 17 of *FIPPA* to Record A.

[6] Mr. Tromp did not participate in the hearing of the judicial review application.

[7] Before turning to the analysis, it is necessary to summarize the mandate of PHSA, the legislative framework of *FIPPA*, the functions of PHSA's Internal Audit Department, and Mr. Tromp's request.

BACKGROUND

PHSA

[8] PHSA is charged with the responsibility of overseeing the design and delivery of regional health care services by five regional health authorities.

[9] In particular, as part of its mandate, PHSA is charged with overseeing and managing various health and health protection agencies that deliver services throughout the province, including B.C. Cancer Agency, B.C. Centre for Disease Control, B.C. Mental Health and Addiction Services, B.C. Transplant Society, and B.C. Children's Hospital and Women's Hospital and Health Centre.

[10] In 2001, under the *Society Act*, R.S.B.C. 1996, c. 433, PHSA was established as a society. Its purposes and objectives are set out in its Constitution, which, *inter alia*, states:

> The purposes of the Authority are to … [p]lan, manage, and as appropriate, operate the integrated delivery of Province-wide health care services and health protection services, in a manner consistent with Provincial health policy, including without limitation, any administrative and related services and activities in support of and complementary to such health care services or health protection services …

[11] PHSA has also been designated as a "hospital" under the *Hospital Act*, R.S.B.C. 1996, c. 200.

Legislative Framework

[12] *FIPPA* applies to all records in the custody and under the control of a public body: *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 at para. 4. PHSA is clearly a "public body", as defined in Schedule 1 of *FIPPA*.

[13] In general terms, *FIPPA* is a specialized regulatory regime governing the right of access to information in records which are in the custody or under the control of public bodies. The Commissioner has independent oversight of the administration of the *Act*.

[14] A stated purpose of *FIPPA* is "to make public bodies more accountable to the public" by "giving the public a right of access to records" and by "specifying limited exceptions to the rights of access": s. 2(1).

[15] Part II of *FIPPA* establishes information access rights and describes how those rights may be exercised when seeking disclosure of information. The statute's general policy is that there is a right of access to any record in the custody or under the control of the public body. This right does not extend, however, to information excepted from disclosure under ss. 12 to 22.1 of *FIPPA*: ss. 4(1), (2). These exceptions either require or authorize the head of a public body to refuse access to information in certain prescribed circumstances.

[16] The exception found in s. 13(1) is a central issue in this proceeding. S. 13(1) protects from disclosure any information that would reveal advice or recommendations developed by or for a public body. However, "factual material" is excluded from this exception pursuant to s. 13(2)(a). The pertinent provisions state as follows:

> **Policy advice or recommendations**
>
> **13** (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> …

[17] Also at issue are the exceptions found in ss. 17(1) and 17(1)(d), which provide that a public body may refuse to disclose any information that is potentially harmful to its financial or economic interests. These provisions state as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> **17** (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> …

[18] When the head of a public body refuses access to a document, the applicant may request a review of that decision: *FIPPA*, s. 52. The Commissioner is authorized to conduct an inquiry as to whether the documents should be released. Where the inquiry relates to a decision to refuse an applicant access to all or part of a document, the head of the public body has the onus to prove that the applicant has no right of access to the record: *FIPPA*, s. 57.

The Internal Audit Department and the Records

[19] The Records were prepared by PHSA's Internal Audit Department ("IA Department"), which reports directly to the Chair of the Board of Directors of PHSA

("the Board") and operates independently of management. The Director of Internal Audit also reports administratively to the Chief Executive Officer of PHSA.

[20] All of the members of the IA Department are experienced internal auditors who hold at least one of the following professional designations: Chartered Accountant, Certified Management Accountant, Certified Internal Auditor, Certified Information Systems Auditor, and Certified Fraud Examiner.

[21] Primarily, the IA Department's function is to investigate allegations of wrongdoing, identify areas of risk, and provide the Board with candid and objective advice and recommendations on how best to mitigate or take corrective action to address those risks. The Board, after considering these audit reports, makes final decisions about implementing action plans.

[22] In all matters regarding the substantive reviews, investigations and audits that it performs, the IA Department takes direction from and is accountable primarily to the Board. As per the IA Department's charter, the IA Department "owes a duty of care to the Board, its Committees, and the Chair to disclose all relevant information with honesty and candour. All [IA Department] employees must deliver their conclusions with the objective of acting in the best interests of PHSA". Furthermore, given the sensitive nature of the IA Department's work, in appropriate circumstances, the communications between the IA Department and the Board are confidential. This ensures that the members of the IA Department feel free to express their advice and opinions to the Board openly and honestly and without fear of reprisals.

[23] In the ordinary course, once a review, investigation or audit is completed, a report is prepared that sets out the IA Department's conclusions, analysis, findings, and recommendations. These reports are usually reviewed with management representatives before they are finalized, but the IA Department does not require any management approval. Management provides feedback and responses to recommendations, which are then summarized and included in the information

distributed to the Board. The executive summary of the final report then is then presented to the Finance Committee, a committee of the Board, for consideration, clarification, or further deliberation. In addition, when necessary, a report from the IA Department is referred to the full Board for its consideration.

[24] As for the Disputed Records, which are five to eight page executive summaries of longer reports prepared by the IA Department, all were prepared on a confidential basis and were presented to PHSA's Finance Committee. They each contain a section setting out the IA Department's findings, conclusions, opinions regarding risk issues and the factual analysis upon which such conclusions were based. Each also contains a section setting out recommendations and strategies for mitigating identified risks.

[25] Leon Bresler, General Legal Counsel and Chief Privacy Officer of PHSA, in his affidavit #1, sworn November 1, 2011, described the Records in the following manner:

> The Records are comprised of concise five to eight page executive summaries. The summary of the IA Department's analysis and recommendations comprised almost the entirety of the Records, and I determined that severing the Records was a practical impossibility without revealing the information that was protected from disclosure.

[26] In general terms, Record A concerns certain practices within the organization and contains analysis and opinion on various risks within certain PHSA operations. It also sets out specific strategies and recommendations for addressing those risks. Record C also addresses concerns with PHSA's operations and provides analysis and opinion on various operational risks and recommendations for addressing those risks, Record D is a summary of an investigation into a particular issue regarding PHSA's operations. It provides a review of practices and similarly sets out recommendations on how to address particular operational issues. Notably the final decision-making authority regarding acceptable action plans arising from the recommendations lies with the Board.

Mr. Tromp's Request

[27] On January 4, 2011, Mr. Tromp, identifying himself as a "…reporter working for the public and educational interest", wrote to PHSA requesting the release of the "executive summaries of all reports by [the PHSA's] internal audit department (or the branch that performs that function) for the year 2010".

[28] PHSA identified Records A to E (the five Internal Assurance Executive Summaries). However PHSA determined that it would not disclose any portion of these records to Mr. Tromp.

[29] By way of a letter dated February 15, 2011, Mr. Bresler informed Mr. Tromp that PHSA was withholding the records in their entirety, on the basis that the records represented confidential deliberations at *in camera* meetings (*FIPPA*, s. 12(3)(b)) and that they were expert opinions that contain advice and recommendations to the Board of Directors (*FIPPA*, s. 13(1)).

[30] On February 21, 2011, pursuant to s. 52 of *FIPPA*, Mr. Tromp wrote to the Commissioner seeking a review of PHSA's decision.

[31] As they were unable to reach a resolution through mediation, the parties proceeded to a written inquiry. The issues for determination were whether PHSA was authorized to refuse access to the records under ss. 12(3)(b), 13(1), or 17(1).

[32] The Decision was issued on January 19, 2012.

The Adjudicator's Decision

[33] As stated earlier, relevant to this application is the Adjudicator's decision with respect to ss. 13(1), 17(1) and 17(1)(d) of *FIPPA*.

[34] The Adjudicator began his discussion of s. 13(1), at para. 19 of the Decision, by stating that its purpose is "to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations":

British Columbia (Ministry of Agriculture and Food), [2001] B.C.I.P.C.D. No. 16, Order 01-15.

[35] He then noted that in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, leave to appeal dismissed [2003] S.C.C.A. No. 83 [*Physicians*], the Court of Appeal held that "advice", for the purposes of s. 13 of *FIPPA*, includes "expert opinion on matters of fact on which a public body must make a decision for future action": *Physicians* at para. 113.

[36] The Adjudicator concluded that portions of the Records could be disclosed, as some of the material was background and other factual information that did not disclose, or would not enable anyone to infer, any recommendations, advice, options or expert opinions on matters of fact. He stated:

> [21] I agree with the PHSA that the audit summaries reflect reviews and investigations that the IA department conducted. They include findings, factual analysis, opinions and recommendations. There is some information within the audit summaries that meets the criteria of advice or recommendations, under s. 13(1) of FIPPA. The remaining information consists of background and other purely factual information. Disclosure of this latter information would not reveal any recommendations, advice, expert opinions on matters of fact, or any other type of information to which previous decisions have found that s. 13(1) applies.
>
> …
>
> [26] The PSHA takes the position that the entire records are subject to s. 13(1), including the title of each document. I note that the PHSA has not provided any argument or explanation as to how s. 13(1) applies to these titles. I disagree with the PHSA that the records in their entirety consist of advice or recommendations. Some of the information is clearly background and other factual information that does not disclose, or enable anyone to infer, any recommendations, advice, options or expert opinions on matters of fact. I find that s. 13(1) does not apply to this type of information.

[37] He further concluded that any information falling within the ambit of s. 13(2) may not be withheld by a public body, even if that information would reveal "advice or recommendations developed by or for a public body" as contemplated by s. 13(1).

[38] The Adjudicator then turned to address the issue of adequacy of his reasons. He explained that the circumstances – including the fact that PHSA withheld the Records in their entirety and that all of PHSA's submissions and evidence with respect to the nature and details of each record were received *in camera* – trammeled his ability to communicate fully the reasons for his decision: paras. 22-25.

[39] Next, he addressed the application of ss. 17(1) and 17(1)(d) of *FIPPA*, which PHSA argued applied to Records A, B and E.

[40] Again noting that most of PHSA's submissions on this issue were conducted *in camera*, the Adjudicator reiterated that he could not refer to the arguments or his reasons in any detail. With respect to s. 17(1) and 17(1)(d), the Adjudicator held at paras. 39 and 46 that PHSA:

> (a) failed to establish a direct connection between the disclosure of the information and the anticipated potential occurrence of fraud or other financial harm;
>
> (b) made bald assertions about potential harm that is vague and speculative; and
>
> (c) failed to explain how third parties would go about using this information in a way that would cause economic harm.

[41] The Adjudicator made the following orders at para. 48:

> 1. Sections 12(3)(b) and 17(1) of FIPPA do not authorize the PHSA to withhold any information.
> 2. Section 13(1) of FIPPA authorizes the PHSA to withhold some information in Record A, Record C and Record D. I have marked the passages in yellow on the following pages that the PHSA is authorized to withhold: 2, 4, 5, 6, 7, 8, 20, 22, 23, 24, 29, 30 and 31.
> 3. I require the PHSA to disclose all of the remaining information.
> 4. I require the PHSA to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before March 1, 2012 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

[42] The Adjudicator delivered to PHSA a copy of Records A, C and D, with the passages marked for redaction that the Adjudicator held fell within s. 13(1).

[43] Pursuant to s. 59 of *FIPPA*, the order to disclose the Disputed Records was stayed pending completion of these judicial review proceedings.

Confidentiality Order

[44] PHSA, at the commencement of the hearing, sought out an order to protect the confidentiality of the Disputed Records pending the further order of this Court. PHSA specifically sought an order sealing Mr. Bresler's Affidavit #3 (which attaches unredacted versions of PHSA's affidavits and submissions below and the Disputed Records). It also sought an order that any oral submissions which referenced the unredacted Disputed Records be conducted *in camera* and that the notes of the court clerk be sealed until further order of this Court.

[45] The Commissioner agreed that the order sought was appropriate in the circumstances. Otherwise disclosure of the Disputed Records would render the judicial review moot.

[46] In my ruling of April 25, 2013, I granted the order in the terms sought.

ISSUES

[47] I will analyze the issues under the following headings:

1. What is the scope of the Commissioner's participation in these proceedings?
2. What is the appropriate standard of review?
3. Did the Adjudicator make a reviewable error by:
    (a) unreasonably interpreting or applying s. 13(1) of *FIPPA*;
    (b) providing inadequate reasons regarding the interpretation or application of s. 13(1) of *FIPPA*, rendering the Decision unjustifiable, opaque or unintelligible, and thus unreasonable; or
    (c) unreasonably interpreting and applying s. 17(1) of *FIPPA*?

DISCUSSION

Role of the Commissioner's Counsel

[48] The Commissioner indicated that she would not take a position on the merits of the disposition of the petition. This position is in accordance with the usual role of a tribunal at a hearing when its decision is subject to challenge.

[49] A tribunal's standing to participate in judicial review proceedings is typically restricted to making submissions on or explaining the legislative scheme, the record of proceeding, the standard of review, and questions of jurisdiction: *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *British Columbia Lottery Corporation v. Skelton*, 2013 BCSC 12 at para. 44. Generally, in this jurisdiction, tribunals are not permitted to defend the merits of their decisions because of the potential for compromising its impartiality in cases where the matter is referred back to the tribunal: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476.

[50] In *Timberwolf Log Trading Ltd. v. British Columbia (Commissioner Appointed Pursuant to s. 142.11 of the Forest Act),* 2011 BCCA 70 at para. 11, however, our Court of Appeal recognized three exceptions to the normal rule:

> a) where the question is whether the tribunal has made a patently unreasonable interpretation of a statutory right to be heard;
>
> b) where the tribunal is defending a long standing policy; and
>
> c) where there is no one else to argue the other side.
>
> [Emphasis added.]

[51] In this case, as a result of Mr. Tromp's decision not to participate in this judicial review, there was no one opposing the application. In these circumstances, constraining the role of the Commissioner would leave the court without the benefit of balanced submissions. I agreed with PHSA that it was appropriate for the Commissioner to assume an expanded role at the hearing.

[52] At the hearing, counsel for the Commissioner did not advance aggressively adversial positions nor did she defend the merits of the Decision. The Commissioner made explanatory submissions to assist the Court respecting the record of proceeding, the evidence received *in camera*, the provisions of the applicable legislation, the Commissioner's procedures, and the decision under review. I also requested supplementary submissions from both PHSA and the Commissioner relating to the interpretation of ss. 13(1) and 13(2)(a) - in particular, the intersection of "factual material" under the latter section - and "information that would reveal advice or recommendations developed by or for a public body" in the former.

Standard of Review

[53] PHSA alleges that the Delegate made the following reviewable errors: (i) his interpretation and/or application of s. 13; (ii) rendering a decision that is not rational, intelligible and/or defensible by reason of his failure to provide adequate reasons regarding his s. 13 determinations; and (iii) his interpretation and/or application of s. 17(1).

[54] It is common ground that reasonableness is the applicable standard for all grounds for review raised by PHSA. For the reasons set out below I agree with this submission.

[55] The *Administrative Tribunals Act*, S.B.C. 2004, c. 45 does not apply to the Commissioner. Accordingly, the standard of review must be determined on the analytical framework established in the seminal decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Weyerhaeuser Company Ltd. v. Assessor of Area No. 04 - Nanaimo Cowichan*, 2010 BCCA 46 at para. 32.

[56] In *Dunsmuir*, the Court held that there are two standards of review: correctness and reasonableness. The Court explained the standard of reasonableness as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of

> reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" …
>
> [Citations omitted.]

[57] The Court in *Dunsmuir* formulated a two-stage analysis to determine which standard applies in any given circumstances:

> [62] ... First, 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. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [Emphasis added]

[58] *Dunsmuir*, therefore, dispensed with the need to analyze the standard of review where existing jurisprudence had already determined the appropriate standard of review.

[59] In *B.C. Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at paras. 24-34 the Court determined that the reasonableness standard is applicable to the interpretation and application of s. 13(1).

[60] In *Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 217, at paras. 32-34 the Court determined that the reasonableness standard is applicable to the interpretation and application of ss. 17(1).

[61] The jurisprudence also establishes that the issue of assessing the adequacy of reasons attracts the reasonableness standard of review.

[62] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Nurses' Union*], the Court clarified that *Dunsmuir* did not hold that the adequacy of reasons provides a stand-alone basis for quashing a decision, nor did it set out a two-step analysis of the reasons and then the result. Rather, *Dunsmuir* stated that, in determining whether the decision-maker's reasons are justified, transparent and intelligible, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": para. 14. The reasons and result are to be considered together as an "organic exercise".

[63] With respect to addressing whether a decision is reasonable in light of the outcome and the reasons, the Court emphasized that courts must show respect to decision-makers and must refrain from substituting their own reasons: *Nurses' Union* at paras. 15 and 17. Reasons need not be perfect or comprehensive. Nor must they include all the arguments, statutory provisions, jurisprudence, or other details the reviewing judge would have preferred: *Nurses' Union* at para. 16. As long as the reasons allow the reviewing court both to understand why the decision-maker made its decision and to determine whether that conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are satisfied: *Nurses' Union* at para. 16.

[64] In summary on this issue, the jurisprudence establishes that reasonableness is the proper standard of review for all grounds of review raised by PHSA.

A. Interpretation and Application of Section 13

Positions of the Parties

[65] PHSA's overarching submission is that the entirety of the factual information in the Disputed Records constitutes background and factual analysis integral to the expert opinions offered therein and, as such, forms part of the "advice" provided to the Board for the purposes of s. 13(1).

[66] The Commissioner submits that factual information is not to be withheld under s. 13(1) unless it reveals the substance of advice, even if that information is of potential relevance to the decision being made.

Legal Framework

[67] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, the Court, in considering exemptions under the freedom of information legislation in Ontario, observed as follows:

> [1] Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

[68] In this province, *FIPPA* protects both the public's right of access to the records of public bodies and the public bodies' rights to confidentiality in certain prescribed circumstances. The relationship between those competing rights under the legislative scheme of *FIPPA* lies at the heart of this judicial review.

[69] PHSA anchored its submissions in the judgment of the British Columbia Court of Appeal in *Physicians*. In *Physicians*, the applicant complained to the College of Physicians and Surgeons, alleging misconduct by her employer, a physician. In investigating these complaints, the College consulted with and obtained opinions from four experts, two in writing and two orally, to assist in assessing the basis for the complaint. Each expert was asked to assess the facts, as provided by the College, and decide, applying his or her knowledge and experience, whether a

particular event had in fact happened. The expert then communicated his or her conclusions to the College.

[70] The lawyer subsequently prepared memoranda summarizing the oral opinions. The documents in dispute included the two written opinions, the two memoranda prepared by the College's lawyer summarizing the oral opinions, and a letter later received by the College from one of the experts whose opinion had initially been given orally (referred to collectively as "the Documents").

[71] The Applicant requested that the College disclose the Documents to her, but the College refused. The College claimed that the opinions were exempt from disclosure under s. 13 of *FIPPA*, as advice or recommendations developed for a public body. The Applicant applied to the Commissioner for review of the College's refusal.

[72] In *College of Physicians and Surgeons of British Columbia*, [2000] B.C.I.P.C.D. No. 8, Order 00-08, the Commissioner held that, while the disputed records detailed "expert technical, or medical, findings, opinions or conclusions, expressed by physicians or other experts", the "kind of expert opinion" provided was not "advice" or "recommendations" for the purposes of s. 13(1), para. 141. The key to the Commissioner's holding was that the information did not involve "a communication, by an individual whose advice [had] been sought to the recipient of the advice, as to which courses of action are preferred" (para. 144), but rather was "in the nature of findings, expressed by experts, in response to technical questions posed by the College" (para. 151).

[73] The chambers judge agreed with this interpretation on judicial review.

[74] On appeal, however, the Court of Appeal took a different view, holding that the College was entitled to withhold the entirety of the relevant disputed records under s. 13(1). The Court of Appeal stated:

> [105] In my view, s. 13 of the *Act* recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping

> investigations and deliberations focussed on the substantive issues, free of disruption from extensive and routine inquiries. …
>
> [106] By defining "advice" so that it effectively has the same meaning as "recommendations", the Commissioner and the chambers judge failed to recognize that the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action. Their narrow view of the nature of the complaint investigation process was similarly reflected in their characterization of the function of the College's lawyer in the investigation and in their conclusions that she was not acting as a lawyer but as an investigator, which I have previously rejected. [Emphasis added]

[75] The Court noted that although the Commissioner acknowledged the principles of statutory interpretation, he failed to apply the principles that require different words contained in a statute be given different meanings and same words the same meaning (para. 107). Citing s.12 of the *Act*, the Court pointed to separate use of the words "advice" and "recommendation" and that s.12 (2)(c) outlined an exemption from the requirements of ss.12 (1). The Court interpreted the statute accordingly:

> [110] In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information...the purpose of which is to present background explanations or analysis...for...consideration in making a decision..." is generally included. There is nothing in s. 13 that suggests that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.
>
> [111] The Commissioner noted that s. 13(2)(a) excludes from the ambit of s. 13(1) "any factual material". Section 13(2) also excludes many other kinds of reports and information. If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice" for the purposes of s. 13, it could have explicitly excluded them.
>
> [112] In ***J.R. Moodie Co. Ltd. v. Minister of National Revenue***, [1950] 2 D.L.R. 145 at 148 (S.C.C.), it was recognized that the word "advice" is not limited to a communication concerning future action. Rand J. said:
>
> > The word "advice" in ordinary parlance means primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence....Now, [the matters on which the Minister was to be satisfied] are in one sense, matters of fact, but they also involve the exercise of judgment in the weight and significance to be attributed to the special circumstances and conditions of the business....The advice to be furnished by

> the Board would, then, ordinarily contemplate at least its opinion on the main question and the facts or reasons upon which it was based.
>
> [113] I am similarly of the view that the word "advice" in s. 13 of the *Act* should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.
>
> [Emphasis added; bold in original.]

[76] Finally, the Court concluded that even if s. 13 were given the narrower definition proposed by the Commissioner and the chambers judge, the experts' reports still provided "advice", as the experts were expressly asked for their opinions of whether hypnosis had been performed and for their views of whether the College should take further action.

[77] It is noteworthy that *Physicians* was decided before *Dunsmuir* and appears to have applied a correctness standard of review: *B.C. Freedom of Information and Privacy Association* at para. 22. It is an open question as to whether the outcome in *Physicians* would have been the same had the Court applied a "reasonableness" standard: *Insurance Corporation of British Columbia v. Automotive Retailers' Association*, 2013 BCSC 2025 at para.30.

[78] I must nonetheless, in compliance with the rule of *stare decisis*, apply the principles articulated in *Physicians* regarding the interpretation of s. 13(1).

Discussion

[79] On my reading of *Physicians*, the Court of Appeal recognized that the deliberative process of a public body's internal decision-making is to be afforded some degree of confidentiality. Only then, according to the Court, would public bodies be free to engage in full and frank discussion of advice and recommendations. At para. 106 the Court of Appeal clarified that the deliberative

process "includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative causes of action".

[80] The Court held in *Physicians* that in order to protect "expert opinions" from disclosure, those opinions did not have to constitute "recommendations". The Court concluded that properly interpreted, s. 13(1) of *FIPPA* – in particular, the word "advice" – captures:

> 1. expert opinions that are "obtained to provide background explanations or analysis necessary to the deliberative process of a public body" (para. 111);
>
> 2. opinions that involve "exercising judgment and skill to weigh the significance of matters of fact" (para. 113); and
>
> 3. expert opinions that are "on matters of fact on which a public body must make a decision for future action" (para. 113).

[81] The Commissioner brought to the Court's attention the Ontario authorities which have considered s. 13 in the Ontario *Freedom of Information and Protection of Privacy Act*, which is similar but not identical to s. 13 of *FIPPA*. S. 13 of the Ontario *Freedom of Information and Protection of Privacy Act* states as follows:

> 13.(1) 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. R.S.O. 1990, c. F.31, s. 13(1).
>
> Exception
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;

[82] The Commissioner points out that the Ontario Court of Appeal has given the Ontario provision a somewhat more restrictive interpretation than that of the B.C. Court of Appeal in *Physicians.* The Ontario Court of Appeal concluded that in order to qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process or must permit the drawing of accurate inferences as to the nature of the specific advice and recommendation given: see *Ontario (Ministry*

of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner), [2005] O.J. 4048 (C.A.), affirming [2004] O.J. No. 163 (S.C.J.), leave to appeal ref'd [2005] S.C.C.A. No. 564 [*MONDM*]; *OMT*.

[83] In *MONDM*, the Ministry submitted to the lower court that it should adopt the broad definition of "advice" that our Court of Appeal established in *Physicians*. The lower court rejected that argument for three reasons. First, the Court in *Physicians* relied on the rule of statutory interpretation against tautology and referred to parallel language in s. 12 of *FIPPA* that is not found in the equivalent exemption under Ontario's statute: para. 52. Secondly, unlike *FIPPA*, the Ontario statute does not contain the verb "developed" in its s. 13 and thus does not extend the exemption to information generated in the process leading up to the giving of advice or recommendations: para. 56. Third, such an interpretation would be overly broad and would eviscerate the fundamental purpose of the statute to provide a right of access to information controlled by public bodies, in accordance with the principle that information should be available to the public and that exemptions from the right should be limited and specific: para. 62. This decision was upheld on appeal.

[84] In any case, the Ontario Court of Appeal appears to have recently broadened its interpretation of the s. 13 equivalent in its statute. In *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125, the Ontario Court of Appeal held at para. 23 that "advice" may be no more than material that permits "the drawing of inferences with respect to a suggested course of action but does not recommend a specified course of action". The Court concluded that advice as to the range of possible actions should be protected and not solely advice which is directory and supports only one option. Leave to appeal to the Supreme Court of Canada has been granted: [2012] S.C.C.A. No. 243.

[85] In the end, given the difference in the wording of the Ontario statute and that I am bound to follow *Physicians*, I decline to follow the Ontario authorities.

[86] Turning to the circumstances of this case, the IA Department employees clearly are experts. As I mentioned earlier all these individuals are experienced auditors certified in various areas relevant to internal audit, including accounting, financial audit, internal audit, information technology audit, project management, and fraud examination. The purpose of the IA Department is to provide the Board with candid and objective analysis and opinion. Specifically, the IA Department's primary function is to investigate allegations of wrongdoing, identify areas of risk, and provide the Board with advice and recommendations on how best to mitigate or take corrective action to address those risks. The Board, after reviewing the reports, then makes final decisions about implementing pertinent action plans.

[87] The IA Department employees charged with the duty of drafting these reports, including the Disputed Records, compile information for the purpose of providing analysis and opinion regarding particular operational risks in PHSA. In doing so, they exercise their skill and judgment in weighing the significance of matters of fact, and provide background explanations and analysis necessary to the consideration of specific or alternative course of action. The investigation and gathering of these facts and information is integral to the deliberative process of the Board: *Physicians* at para.106. The Court in *Physicians* endorsed the notion that the purpose of s. 13(1) is to protect the documents created as part of a public body's deliberative process from exposure to public scrutiny.

[88] I have reviewed the entirety of the Disputed Records. Based on the Court of Appeal's interpretation and application of s. 13(1) in *Physicians*, I agree with PHSA that portions of the Disputed Records ordered to be disclosed contain "advice" for the purpose of s. 13 of *FIPPA*. The Disputed Records clearly include facts and information compiled as part of an investigation by expert IA Department employees using their skills and expertise; these compilations were "necessary to the consideration of specific or alternative courses of action": *Physicians* at para. 106. Some of the information ordered to be disclosed was clearly assembled for the deliberative process and consideration of specific advice or recommendations: for

example, Graphs 3 and 4 on page 3 of Record A. I note parenthetically that the Disputed Records were attached as Exhibit "E" to Mr. Bresler's affidavit #3, and the page numbers here refer to those of Exhibit "E".

[89] Even if the information in the Disputed Records does not constitute "advice", some of the information ordered to be disclosed reveals the advice and recommendations provided by the IA Department. Accordingly, such information is protected under s. 13(1), as it cannot reasonably be severed and disclosed without revealing advice. I do not propose to review the entirety of the Disputed Records in these reasons. However, the following are some examples of information that directly or indirectly reveals advice or recommendations but were ordered to be disclosed:

> 1. At pages 3 and 4 in Record A, the IA Department sets out its major findings. Some risks that are identified are of such a nature that they reveal what advice or recommendations are provided later in the report.
>
> 2. At the bottom of page 18 in Record C, the IA Department expressly states an operational risk, revealing the nature of the recommendation provided.
>
> 3. At page 21 in Record C, the IA Department identifies the risk such that the advice may reasonably be inferred.

[90] I turn to address the Adjudicator's reasoning in relation to Section 13(2)(a) which states that "factual material" in a record must be disclosed. He held that some information in the Disputed Records fell under this provision and should be disclosed, even if that disclosure would reveal "advice or recommendations". He explained:

> [27] … The effect of s. 13(2) is that even in cases where information would reveal "advice or recommendations developed by or for a public body" as contemplated by s.13 (1), if the information falls within the ambit of any part of s. 13(2), the PHSA may not withhold the information. In other words, the legislature has expressly excluded information that falls within the ambit of s. 13(2) from the effect of s. 13(1).

[91] The Adjudicator's interpretation of s. 13(2) requires all factual statements to be parsed from the Disputed Records, regardless of whether they constitute "information" or "material". PHSA contends that reading s. 13(1) and 13(2)(a) together compels the conclusion that factual information can be protected by

s. 13(1). The structure and wording of s. 13 mandate an interpretation whereby "factual material" is distinct from factual "information". S. 13(2)(a) is a narrow exemption from what is included in s. 13(1). I find there is merit to PHSA's submission that the Adjudicator's interpretation, which simply removes all factual information from the protection of s. 13(1), unduly restricts the scope of s. 13(1) and deprives s. 13(2)(a) of meaning.

[92] As PHSA submitted, this interpretation can be gleaned from the words "information" and "material". While the term "information" appears in virtually every *FIPPA* provision, the term "material" appears only in s. 13(2)(a) of the statute. As the Court noted in *Physicians* at para. 107, interpretive principles mandate that different terms be given different meanings as appropriate.

[93] The *Canadian Oxford English Dictionary* defines "material" in part as "the matter from which a thing is or can be made". Accordingly, whatever constitutes the "material" exists *prior* to its use in service of a particular purpose or goal. Applying this definition to the term "factual material" in s. 13(2)(a) and applying the principles articulated in *Physicians* I conclude that s. 13(2)(a) does not apply to factual information compiled from source materials by experts, using their expertise, for the specific purpose of aiding the deliberative process.

[94] It is important to recognize that source materials accessed by the experts or background facts not necessary to the expert's "advice" or the deliberative process at hand would constitute "factual material" under s. 13(2)(a) and accordingly would not be protected from disclosure. However, if the factual information is compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body or if the expert's advice can be inferred from the work product it falls under s. 13(1) and not under s. 13(2)(a). As I held earlier, these compilations do not exist separately and independently from the opinions and advice in the reports. Rather, the compilation of factual information and weighing the significance of matters of fact is an integral component of the expert's advice and informs the decision-making

process. Based on the principles articulated in *Physicians*, the documents created as part of a public body's deliberative process are subject to protection.

[95] The Court's analysis of the scope of s. 13(2)(a) in *Insurance Corporation of British Columbia* at para. 52 is apposite here:

> …Section 13(2) expressly requires the disclosure of "factual material". But where that factual material is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created, the assembly is part of the deliberative process and the resulting work product is clothed with the same protection as the opinions or advice themselves. Otherwise disclosure of the facts that have been assembled would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.

[96] I find that the Adjudicator's conclusion regarding what constitutes advice, his conclusion that disclosure of portions of the Record would not reveal the advice or facilitate the drawing of inferences about the advice, and his interpretation of s. 13(1) and s. 13(2)(a), cannot be reconciled with the principles that animate the Court of Appeal's reasoning in Physicians. In failing to apply the proper legal principles the Adjudicator's decision with respect to s. 13(1) was unreasonable .

B. Adequacy of Reasons

[97] I turn to address the adequacy of the Adjudicator's reasons with respect to s. 13(1). While the authorities establish that adequacy of reasons is not a stand-alone basis for quashing a decision the reasons must be read together with the result and serve the purpose of showing whether the result falls within a range of possible outcomes.

Positions of the Parties

[98] PHSA submits that the Adjudicator provided inadequate reasons. Relying on *Lake v. Canada*, 2008 SCC 23 at para. 46, PHSA's primary contention is that the Adjudicator failed to give sufficiently transparent and intelligible reasons that fairly indicated the legal basis and reasoning for the inclusion or exclusion of specific portions of the Disputed Records. According to PHSA, it does not follow that, because this matter was conducted partially *in camera*, the Adjudicator could

abdicate his responsibility to provide reasons that enable PHSA to understand why the decision was made. PHSA also submits that the Adjudicator's delineation between information that must and need not be disclosed is not self-explanatory, evidently rational or defensible, rendering the Decision unreasonable. PHSA points to several examples in the Disputed Records where it alleges that the Adjudicator ordered the disclosure of information that was in substance, indistinguishable from other information that was held to be properly withheld.

[99] The Commissioner submits that the Decision should be set aside only if this Court cannot identify the basis on which the Adjudicator could have made his decision.

Discussion

[100] On reviewing the Disputed Records and for the reasons that follow I find merit to PHSA's submission that the Adjudicator's order is, at least in part, not self-explanatory, evidently rational or defensible.

[101] The Adjudicator explains the brevity of his reasons at para. 22 as follows:

> [22] I am unable to describe in any detail my analysis of the application of s. 13(1) to these audit summaries because the PHSA withheld them in their entirety. In addition, all of the PHSA's submission and evidence with respect to the nature and details of each record was received, appropriately, *in camera*. This circumscribes my ability to communicate fully the reasons for my decision.

[102] While decision-makers are not required to refer to all evidence in their reasons, *Dunsmuir* mandates some justification, transparency and intelligibility in the reasons. Adequacy of reasons will always depend upon the context: *Johal v. Surrey (City)* 2011 BCSC 710 at para. 28. Here, the Adjudicator's reasoning on ordering disclosure of portions of the Disputed Records was limited to one conclusory sentence at para. 26: "Some of the information is clearly background and other factual information that does not disclose, or enable anyone to infer, any recommendations, advice, options or expert opinions on matters of fact". It is not apparent how the distinction the Adjudicator drew in his reasons- at paragraphs 21

and 26- between background and other "factual information" applied to the redacted portions in the Disputed Records. In my view the Adjudicator did not explain the basis of his conclusions or any line of analysis that could have reasonably led to his conclusion. Significantly, the reasons do not allow this reviewing court to assess the validity of the decision. While the Adjudicator undoubtedly faced challenges when assessing matters that involved *in camera* documents and submissions, this did not abrogate his responsibility to provide reasons that were justifiable, transparent and intelligible.

[103] The Adjudicator could have, as PHSA suggests, assigned numbers to documents, pages of documents, or disputed paragraphs or sentences (as I did above), and then provide reasons in reference to the same. I am not persuaded that the Adjudicator, within the constrictions of confidentiality, could not have provided better and adequate reasons. When stated in such general terms, the Adjudicator would not be disclosing any confidential information.

[104] I also note that there are several instances where information of the same general kind was ordered disclosed in some portions of the Disputed Records, yet at the same time was found to be protected from disclosure elsewhere. By way of illustration:

(i) At page 4 in Record A, a statement under "Major Findings", the description of a particular process risk arising from the current process was ordered disclosed, yet the same information was held to be properly withheld under "Business Risks". Both statements describe a risk arising from a current process and the harm associated with that risk.

(ii) PHSA was ordered to disclose under "Major Findings" one portion of Record A on page 6 that points out an explicit policy violation, but on page 7, under "Major Findings", another portion of the report that also explicitly describes a policy violation was found to be protected from

disclosure. The Adjudicator's reasons do not indicate any principled basis for the distinctive treatment of these passages.

(iii) In Record C the Adjudicator ordered disclosure of information regarding monetary losses arising from a particular form of error and the effects of that error on page 21, but on page 23 permitted the non-disclosure of a further passage summarizing the monetary effects of such errors. This is the same information.

(iv) The Adjudicator treated similar material under similar subheadings in Records A and D, respectively, differently. By way of example, in Record A under "Major Findings and Conclusions" on page 4, PHSA was required to disclose information noting the absence of any automated or formal process for a particular matter. However in Record D, on page 29, also under "Major Findings and Conclusions", similar information regarding the absence of formal terms and process to manage a comparable matter was permitted to be withheld.

[105] In my view, the rationale of ordering and withholding disclosure of these passages cannot be discerned from the reasons.

[106] In summary I conclude that the Adjudicator's reasons with respect to s. 13(1) were inadequate in linking his reasoning to the outcome. For the reasons discussed above the reasons do not show that the result regarding the interpretation and application of s. 13(1) falls within a range of possible acceptable outcomes which would be defensible within the principles articulated in *Dunsmuir.* In the result the Adjudicator's order with respect to s. 13(1) is unreasonable and requires reconsideration.

C. Interpretation and Application of Section 17

Positions of the Parties

[107] PHSA's case on judicial review is limited to the application of s. 17(1) (harm to PHSA's financial and economic interests) and s. 17(1)(d) (undue gain by a third party) to Record A.

[108] PHSA argues that the Adjudicator unreasonably interpreted s. 17 as requiring the public body to demonstrate a direct connection between the disclosure of particular information and the anticipated harm, by providing evidence beyond the disputed document itself. Alternatively, it says that the Adjudicator failed to consider Record A itself as evidence in support of the s. 17(1) exclusion and that it is evident on the face of Record A, that its disclosure could reasonably be expected to harm PHSA's financial or economic interests. As such, PHSA contends that the Adjudicator clearly ignored Record A and restricted his consideration of the evidence to PHSA's affidavits, rendering his decision unreasonable.

[109] The Commissioner's overarching submission is that the Court should interfere only if it finds that the Adjudicator did not, or could not have had, a tenable basis for deciding as he did. The Commissioner submits that the Court should not assume that the Adjudicator did not review and weigh all the evidence in making his determination. In that regard, the Adjudicator is not required to refer to every item of evidence to be considered, or to detail the way each item was assessed: *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 53.

Discussion

[110] As stated above, the PHSA is asserting that that Record A itself provides sufficient evidence to demonstrate that ss. 17(1) and 17(1)(d) are engaged and that this Court should set aside his decision on that basis.

[111] In essence PHSA is asking this Court to substitute its own findings of fact. In particular, it asks that this Court find that Record A provides a confident, objective basis for concluding that disclosure of Record A could reasonably be expected to harm PHSA's financial or economic interests.

[112] Upon a review of all the evidence before me, taking into consideration the principles set out by the Court in *Dunsmuir* and *Nurses' Union*, I find that the Adjudicator's decision in respect of ss. 17(1) and 17(1)(d) "falls within a range of possible acceptable outcomes". He rejected PHSA's general contention that there was a direct connection between the disclosure of the information and the potential occurrence of fraud or any other type of financial harm. Although Record A highlights areas of risk and ways in which that risk can be mitigated, in my view, it was open for the Adjudicator to find that there was no objective basis for concluding that disclosure could reasonably be expected to harm PHSA's financial or economic interests. This is a finding of fact that I would not disturb on judicial review. The Adjudicator is entitled to deference from this Court on this point.

[113] Furthermore, the authorities clearly establish that the Adjudicator was not required to point to every single piece of evidence in his reasons. Again, if the reasons allow the reviewing court both to understand why the decision-maker made its decision and to determine whether that conclusion is within the range of acceptable outcomes, the reviewing court will not intervene. In this case, the Adjudicator provided some basis for his decision, stating that "[i]t would have been useful to know, for example, whether PHSA has already suffered fraud or other financial harm, as a result of the concerns the audit summaries highlight": para. 39. I take this to mean that he did not consider that Record A, by itself, provided sufficient evidence to establish the requisite nexus between disclosure and harm.

[114] In light of the deferential standard which I must apply on this review, I am unable to conclude that the Adjudicator committed a reviewable error in this regard. The Adjudicator's decision on this point was a reasonable interpretation of his own

legislation and that is a matter within his core expertise. He is entitled to deference from this Court on his orders with respect to ss. 17(1) and 17(1)(d).

CONCLUSION

[115] Applying the deferential standard of review set out in *Dunsmuir*, I find that the order in the Decision with respect to s. 13(1) in relation to Records A, C and D is unreasonable, in that it is not within the range of acceptable and defensible outcomes. I come to that conclusion having given due consideration to the fact that the Adjudicator may be expected to have particular familiarity and expertise in the interpretation of *FIPPA*.

[116] Accordingly, the Adjudicator's decision with respect to s. 13(1) is hereby quashed and the matter is remitted to the Commissioner for reconsideration in light of these reasons.

[117] There shall be no order for costs.

"Dardi J."