IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harrison v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 1204

Date: 20110906
Docket: S106689
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 243
The *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165,
and Order F10-321 of the Delegate of the Information and Privacy Commissioner for British Columbia

Between:

Robert Glen Harrison

Petitioner

And

British Columbia (Information and Privacy Commissioner), Mary Carlson, Catherine Tully, Justine Austen-Olsen, Patrick Egan

Respondents

And

British Columbia Minister of Children and Family Development Mary Polak, Bruce McNeill, Joan Bischoff

Respondents

- AND -

Docket: S107196
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241
and in the matter of the Decision of the Information and Privacy Commissioner of British Columbia (Order No. F10-31), dated 7 September 2010,
made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

Between:

The Ministry of Children and Family Development and The Attorney General of British Columbia

Petitioners

And

Robert Glen Harrison

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Appearing on his own behalf:	Robert G. Harrison
Counsel for Respondents Information and Privacy Commissioner for British Columbia, Mary Carlson, Catherine Tully, Justine Austen-Olsen and Patrick Egan:	Susan E. Ross
Counsel for British Columbia (Attorney General and Ministry of Children and Family Development):	Jonathan G. Penner
Place and Date of Hearing:	Vancouver, B.C. April 5, 6 and May 2, 2011
Place and Date of Judgment:	Vancouver, B.C. September 6, 2011

[1] This matter concerns two petitions, each of which seeks judicial review of Order F10-31 (the "Order") made September 7, 2010 by a delegate of the Information and Privacy Commissioner for British Columbia (the "Commissioner").

[2] The first petition is brought by Mr. Harrison; the second by the Attorney-General on behalf of the Ministry of Children and Family Development (the "MCFD").

[3] The petitions are the culmination of protracted litigation between Mr. Harrison and the MCFD arising from alleged actions taken and statements made by representatives of the MCFD which Mr. Harrison asserts have damaged his health, reputation and ability to earn a livelihood.

OVERVIEW

[4] By way of overview, in May 2006 Mr. Harrison was terminated from his position as a therapist with Access House, an agency which operated a group home for troubled teens. Mr. Harrison had been hired to work one-on-one with several youths. He was terminated a week after he started his employment.

[5] During the course of applying for employment Mr. Harrison signed consents to the disclosure of information about his prior work with children which was in the possession of the MCFD.

[6] An official with MCFD, Ms. Bischoff, advised Access House there was a prior complaint involving Mr. Harrison and that he should work under supervision. As a consequence of such advice Access House terminated Mr. Harrison's employment.

[7] The prior complaint had been reported to MCFD in August, 1996. It had ultimately been determined by MCFD officials to be unsubstantiated. MCFD did not investigate the complaint further.

[8] Mr. Harrison found out the complaint had been made against him in September, 2006. He contacted MCFD and adamantly denied the allegations in the complaint. He was assured by MCFD officials that MCFD considered the complaint

unsubstantiated and that the Ministry intended to take no further action arising from it.

[9] Following the termination of his employment, Mr. Harrison sought redress from the MCFD requesting a formal review of the events surrounding the release of information to his employer. When he did not receive a timely response he wrote to the Commissioner's office asking it to undertake a formal review.

[10] He asserted MCFD was in breach of various sections of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 47 ("CFCSA"), and the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 Ch.165 ("FIPPA").

[11] Mr. Patrick Egan, a delegate of the Commissioner's, investigated Mr. Harrison's complaint and, following a number of reviews, issued a decision on September 17, 2007, concluding the Ministry was authorized under CFCSA to disclose Ms. Bischoff's opinion to Access House and that Ms. Bischoff had acted in good faith in doing so.

[12] Mr. Harrison was not satisfied with the Commissioner's ruling on his application and applied for judicial review of that decision. His petition was heard by Mr. Justice Pitfield; that hearing concluded in March 2008: *Harrison v. British Columbia (information and Privacy Commissioner)*, 2008 BCSC 411 ("2008 BCSC 411").

[13] Justice Pitfield quashed the Commissioner's ruling and remitted Mr. Harrison's complaint to the Commissioner to reconsider based on findings as reflected in the decision. He concluded Ms. Bischoff had breached s. 28 of FIPPA. In quashing the decision he stated:

> [72] The Commissioner's decision of September 17, 2007 that Ms. Bischoff and the MCFD did nothing inappropriate in relation to Mr. Harrison resulted from an improper characterization of the issue. It cannot stand as approbation of Ms. Bischoff's conduct. I am satisfied the ruling should be and it is hereby quashed.
>
> [73] As I have remarked, it is not obvious that *FIPPA* can provide any meaningful or effective remedy insofar as Mr. Harrison is concerned. At the

> same time, having exercised his discretion to review the Harrison complaint, the Commissioner should now be required to consider whether the circumstances are such that he should order that the personal information in the Harrison assessment file, and any references to it in any other *CFCSA* file, be expunged, or its use otherwise restrained because of s. 28 of *FIPPA*. Accordingly, I remit the matter to the Commissioner for reconsideration for that purpose.

[14] 2008 BCSC 411 was appealed by the MCFD. The appeal was allowed on the basis Pitfield J. had erred in finding Ms. Bischoff breached s. 28 of FIPPA: see *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2009 BCCA 203 ("2009 BCCA 203"), leave to appeal to S.C.C. refused, 33250 (January 14, 2010), 292 B.C.A.C. 319. The Court of Appeal noted that in all other respects Pitfield J. had dismissed the relief claimed in Mr. Harrison's petition (para. 39).

[15] The bases for the Court of Appeal's conclusion was that a judge on judicial review has no jurisdiction to make such a finding; that a determination whether there was a breach of s. 28 of FIPPA was one the Commissioner must make. Accordingly the court remitted the matter back to the Commissioner "to consider the issues raised by s. 28.of FIPPA".

[16] The Court of Appeal stated:

> [69] While it is obvious that the chambers judge was troubled by the s. 28 issue, the proper course, and indeed the only course available to him, was to invite submissions from the Attorney General and, if so advised, counsel for Ms. Bischoff, and then remit the issue to the Commissioner to properly consider it. Instead, the chambers judge, without hearing submissions or evidence from the Attorney General or Ms. Bischoff on her purported breach of s. 28, made findings of fact which he was without jurisdiction to make on judicial review.
>
> ...
>
> [89] It follows that we allow the appeals and remit the matter to the Commissioner to consider the issues raised by s. 28 of *FIPPA* ... .
>
> [90] We do not find it necessary to address the numerous other issues raised by counsel. Indeed, we consider it prudent to refrain from commenting on those issues given the outcome of these appeals.

BACKGROUND

[17] In the paragraphs above I have set out a brief background to the current dispute.

[18] A more thorough review of the facts is set out in 2009 BCCA 203:

> [6] The factual background to these appeals was fully set out in the chambers judge's reasons indexed as 2008 BCSC 411, and reported at 292 D.L.R. (4th) 73. For our purposes, it may be summarized as follows.
>
> **A. Events Prior to the Access House Application (1996-2005)**
>
> [7] In 1996, Mr. Harrison lived in Sechelt, British Columbia, with his then wife who operated a licensed family child care facility in which Mr. Harrison worked as a caregiver. In August 1996, someone telephoned the Ministry of Social Services (the predecessor to the Ministry of Children and Family Development) and alleged that five years previously Mr. Harrison may have abused his young daughter.
>
> [8] The Ministry's intake worker opened an "Assessment Only" file and noted that the allegation was "outside of statutory definition" and that "no service was required". The Ministry took no further action.
>
> [9] Mr. Harrison became aware of the Assessment Only file when the Chief Medical Officer for Sechelt, who has statutory authority in respect of licensing of daycares and whom he knew personally, advised Mr. Harrison of the existence of the file, in breach of protocol.
>
> [10] Mr. Harrison contacted the Ministry to discuss the allegation. The intake worker explained to him that no investigation had been undertaken and no further action would be taken.
>
> [11] The Ministry opened a "Resource" file in 2001 when Mr. Harrison and his wife were approved as foster parents.
>
> [12] Mr. Harrison also managed a licensed out-of-school child care program between September 2001 and September 2004. Mr. Harrison separated from his wife in 2002. In 2005 he moved to the Lower Mainland area.
>
> **B. The Application to Access House (April – June 2006)**
>
> [13] On 28 April 2006, Mr. Harrison submitted an application for employment at Access House, which provides services to troubled youth on behalf of the Ministry. He attended an interview the following day and started work on 1 May 2006.
>
> [14] As a condition of employment, Mr. Harrison signed a consent to disclosure form which allowed Access House to obtain a "Prior Contact Check" from the Ministry, disclosing all information about him in the custody or control of the Ministry.

[15] Sometime between 10 and 12 May 2006, Joan Bischoff, a Ministry social worker, advised the program director of Access House that a file concerning Mr. Harrison existed in the Ministry's records but she could not disclose the nature of the file unless Mr. Harrison provided a more specific consent.

[16] On May 13 or 14, Mr. Harrison met with the program director and executive director of Access House to discuss the need for a further consent, at which time Mr. Harrison disclosed his knowledge of the 1996 Assessment Only file.

[17] Mr. Harrison signed a second and more specific consent to disclosure on 18 May 2006, to permit Ms. Bischoff to disclose to Access House,

relevant information about myself in reference to caring for children, my history with children and reports that MCFD [the Ministry] may have received regarding these events or other relevant reports they may have received about my previous conduct.

[18] After receiving the second consent, Ms. Bischoff disclosed to Access House the nature of the allegation contained in the Assessment Only file and information in the Resource file and expressed her opinion that the 1996 allegation had not been properly investigated. Prior to expressing this opinion, Ms. Bischoff reviewed the Resource file which, among other things, contained Ministry correspondence that included the following information not mentioned by the chambers judge:

- Mr. Harrison began "fostering" in 2001; the home was closed in 2004 with no explanation for the closure in the file;
- Mr. Harrison "had trouble with boundaries", "more so than others";
- Mr. Harrison and his wife neglected to give a foster child a "puffer" for asthma because she "really didn't need to use it", and the child's "lungs are in bad shape";
- a social worker reported "hostility" from Mr. Harrison; and
- Mr. Harrison allowed children to hit others "twice as hard" if they were hit first and told a foster child that she would be put in a foster home for "bad girls".

[19] Ms. Bischoff recommended to Access House that, pending her review of the file, Mr. Harrison should be supervised. Mr. Harrison's work at Access House involved one-to-one contact with youth which was not compatible with supervision. His contract was terminated on 22 May 2006.

C. Review by the Ministry of Ms. Bichoff's Decision

[20] Approximately one week later, Mr. Harrison requested a formal review by the Ministry's Fraser Region of Ms. Bischoff's decision to disclose the existence of the Assessment Only file to Access House.

[21] On 5 June 2006, Ms. Bischoff contacted Access House to advise of the results of her review of the Assessment Only and Resource files. Access House advised her that Mr. Harrison no longer worked there.

[22] On 22 June 2006, Mr. Harrison met with Bruce McNeill, the Ministry's Director of Child Welfare (Fraser Region) to discuss the formal review completed by the Ministry. Mr. Harrison demanded compensation, which Mr. McNeill refused to discuss. Following the meeting, Mr. McNeill wrote to Mr. Harrison and stated that as indicated at their meeting, he was prepared to do the following to mitigate the impact of the disclosure:

> 1. I indicated that I wanted, with your agreement, to write a letter to the Executive Director of Access House that clarifies the Director's position that the Assessment Only file does not, in my opinion, represent a barrier to your employment in a position of trust involving children. My intention is to correct any incorrect impressions that your former employer may have had with regard to the significance of the Assessment Only file. At the meeting you told me that I could do what I wanted. I have therefore written and sent this letter. A copy is attached for your information. Another copy will be attached to the Assessment Only file so that anyone accessing the Assessment Only file in the future will also see my letter.
>
> 2. I invited you to submit a letter that outlines your views with regard to the Assessment Only file. I would ensure that such a letter would also be attached to the Assessment Only file so that anyone accessing it would also see your letter. This offer remains open.

[23] Mr. Harrison requested a copy of the Assessment Only file from the Ministry under *FIPPA*, and received a redacted copy on 3 August 2006.

[24] On 14 September 2006, Mr. Harrison wrote to Chris Jones, a senior manager in the Information, Privacy and Records Services department of the Ministry, to request a formal review of Ms. Bischoff's actions. Mr. Jones provided Mr. Harrison with the results of the formal review on 21 November 2006. In his letter to Mr. Harrison, Mr. Jones stated that the regional complaints process included a thorough review of the available information and a sincere attempt to resolve Mr. Harrison's concerns. Mr. Jones recognized that Mr. Harrison remained dissatisfied. He suggested further meetings with Mr. McNeill or, in the alternative, that Mr. Harrison contact either the Ombudsman or the Office of the Information and Privacy Commissioner ("OIPC").

D. Investigation by the Office of the Information and Privacy Commissioner

[25] Before receiving the results of the formal review by the Ministry, Mr. Harrison wrote to the OIPC, seeking an investigation of the Ministry's disclosure to Access House.

[26] Three reviews of Mr. Harrison's complaint followed. The first, by OIPC portfolio officer Catherine Tully, concluded that the second consent signed by Mr. Harrison was sufficient authorization for Ms. Bischoff to disclose the information in the Access Only file. Ms. Tully also concluded that s. 79(a) of the *CFCSA* authorized the disclosure if it is "necessary to ensure the safety or well-being of a child".

[27] Mr. Harrison was dissatisfied with Ms. Tully's review and on 16 April 2007 submitted to the Commissioner a 20-page critique that endeavoured to

"chronicle the complex dynamics associated" with Ms. Bischoff's disclosure to Access House.

[28] OIPC adjudicator Justine Austin-Olsen conducted a reconsideration of Ms. Tully's review. Ms. Austin-Olsen reported to Mr. Harrison on 23 May 2007. She confirmed that the two consents signed by Mr. Harrison were valid, but that there was insufficient evidence to confirm the finding that disclosure was made in compliance with s. 33.1(1)(b) of *FIPPA*, or that it was authorized under s. 79(a) of the *CFCSA*.

[29] A third investigation was conducted by OIPC portfolio officer Patrick Egan. Mr. Egan investigated two issues. The first was whether the Ministry's disclosure was made in compliance with s. 33.1(1)(b) of *FIPPA*. That section permits a public body, such as the Ministry, to disclose personal information "if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure inside or outside Canada, as applicable". The second issue was whether the disclosure was authorized by s. 79(a) of the *CFCSA* which, as previously noted, permits a director to disclose, without the consent of any person, information obtained under the *CFCSA* if the disclosure is "necessary to ensure the safety or well-being of a child".

[30] In his decision, provided to Mr. Harrison on 17 September 2007, Mr. Egan concluded that the Ministry was authorized under s. 33.1(1)(b) of *FIPPA* to disclose the information contained in the Access Only and Resource files but the Ministry was not authorized under *FIPPA* to disclose Ms. Bischoff's opinion that Mr. Harrison should be supervised because the opinion was not identified in the signed consents.

[31] Mr. Egan concluded, however, that the Ministry was nevertheless authorized under s. 79(a) of the *CFCSA* to disclose Ms. Bischoff's opinion. As Mr. Egan explained, he was of the view that the Ministry was entitled to rely on s. 79(a), and was also satisfied that Ms. Bischoff acted in good faith and followed proper procedures in making the disclosure to Access House:

> In my opinion, the MCFD's stated reliance on s. 79(a) after the fact does not mean that such reliance is invalid or that MCFD was covering up any deficiency in the previous consents. In my view, it is likely that MCFD social workers are disclosing personal information under s. 79(a) on a daily basis, and they are authorized to do so when necessary, in order to properly discharge the duties imposed on them.
>
> I also asked MCFD to explain the process that led the resource worker to conclude that there was enough potential risk to ask that Access House supervise your work with the youth. As I outlined above, according to the resource worker, the AO [Assessment Only] file did not adequately explain why no investigation took place and why the file was closed as "no case made". The homestudy in the RE [Resource] file did not contain a PCC [Prior Contact Check] or a review of the AO file as she expected and as she believed it should have. The resource worker took this information to her supervisor and, after discussing the matter, they decided that a comprehensive review of the AO file was required. They decided to pass on their

> concerns to Access House and suggested that you be supervised in your position until their review was complete.
>
> As I have said, our office does not have the expertise to determine whether the safety or well-being of the child in this case was in fact at risk. However, based on the above information, I am satisfied that the resource worker acted in good faith; that she followed the proper procedures by consulting with her supervisor in coming to this decision; that the decision was made after weighing the privacy issues against the child's safety or well-being; and that the resource worker's decision was consistent with the guiding principles of the CFCSA.
>
> I find that s. 79(a) of the CFCSA authorized the resource worker to disclose your personal information, including her professional opinion about you, to Access House without your consent.

[32] It must be noted that, throughout this protracted process, one of Mr. Harrison's fundamental complaints has been that the information contained in the Access Only file was untrue. The decision by Mr. Egan referred to in the above quote is the decision Mr. Harrison sought to have reviewed on judicial review before Pitfield J.

THE CIVIL ACTION

[19] I intervene in my description of the chronology to describe the circumstances involved in a civil action commenced by Mr. Harrison shortly after the decision of Pitfield J. in 2008 BCSC 411. Such reference is necessary because that case also ultimately found its way in the Court of Appeal. Certain comments by the Court of Appeal are relevant to the determination of the Attorney General's position on its application for judicial review.

[20] In April 2008 Mr. Harrison filed a law suit against the MCFD and two employees seeking substantial damages, for negligent disclosure of personal information about him to Access House for misfeasance in public office and defamation.

[21] The Attorney General applied to have the action dismissed under the then Rule 18A as disclosing no reasonable cause of action. The summary trial judge declined to grant such relief on the basis there was a material conflict on the facts:

Harrison v. British Columbia (Children and Family Development), 2009 BCSC 460 (the "Civil Action").

[22] The Attorney General appealed to the Court of Appeal. That court allowed the appeal and dismissed the Civil Action: *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220 ("2010 BCCA 220").

[23] Applying the Supreme Court of Canada's decision in *D.(B). V. Children's Aid Society of Halton (Region)*, 2007 SCC 38 ("*Syl Apps*"), the court concluded, having regard to the preeminent purpose of child protection legislation, the MCFD and its employees did not owe a duty of care to Mr. Harrison.

[24] The court stated:

> [47] I do not entirely accept the appellants' expansive interpretation of *Syl Apps*. The relationship at issue in that case is not identical to the one here. Nonetheless, I agree that the deciding principle in *Syl Apps* applies and is equally compelling in the present circumstances: as a child care worker, Ms. Bischoff's paramount obligation to the child in care precludes finding an ancillary duty of care to Mr. Harrison that would interfere with the effective discharge of that primary obligation.
>
> ...
>
> [50] In this case, the relationship at issue is not between child protection authorities and family members of children in their care, as it was in *Syl Apps*. The material relationship in this case is between a MCFD resource social worker and an employee of a contracted agency, where the social worker is specifically responsible to review the employee's background to identify possible child safety concerns.
>
> [51] Despite this difference, the same basic concern arises in both: the recognition of an ancillary duty of care would create a conflict of duties that could interfere with the overriding mandate of child protection authorities—to promote the best interests and welfare of the child. *Syl Apps* is clear that where such potential for conflict exists, no duty should be recognized.
>
> [52] The primary obligation of social workers operating under the *CFCSA*, including Ms. Bischoff, is found under s. 2 of the Act, which provides that the safety and well-being of children must be the paramount considerations in the administration of the statute. It is in the context of this statutory mandate that Ms. Bischoff was expressly required to review the background of individuals seeking to work with vulnerable children in the care of the MCFD.
>
> [53] Imposing a private law duty of care on a social worker to those whose background he or she must review for child safety concerns has the potential to interfere with their ability to discharge that vital task. More broadly, it would

> interfere with the paramount duty to the safety of the child. A social worker should not feel torn between her paramount obligation to the child and an ancillary duty to consider the employment status of those who seek to care for them. Accordingly, imposing a duty of care on Ms. Bischoff in these circumstances poses precisely the risk for inherent conflict that was found to be determinative by the Supreme Court of Canada in *Syl Apps*. There is simply no basis to distinguish *Syl Apps* in this regard.
>
> [54] Further, it is significant that family members have a far stronger argument for "proximity" than individuals in Mr. Harrison's position. Both the *CFCSA* and the equivalent statutory framework addressed by the Supreme Court in *Syl Apps* include obligations that explicitly recognize the important rights and interests of the families of children in care. Although these are essentially procedural rights—which the Supreme Court found were incapable of standing alone, detracting from the determinative emphasis on the protection of children, or of grounding proximity—they acknowledge the important (albeit secondary) interests of families in both the process and outcome of child protection proceedings. If the considerable weight of such interests is insufficient to ground a duty of care, it is hard to see why <u>other</u> third parties—further removed from the primary mandate of the legislation and with less of a claim on the deliberative conscience of a social worker—should nevertheless prevail. This is particularly true in the present case where the relationship is defined by the resource worker's role of providing vigilant supervision to ensure vulnerable youth are not placed at risk.
>
> [55] For these reasons, and irrespective of the conflict in the evidence, Mr. Harrison's claim in negligence could not succeed, and the appellants are entitled to have the action in negligence dismissed.

THE DECISION BY THE COMMISSIONER UNDER REVIEW ON THE PRESENT APPLICATION

[25] A delegate of the Commissioner issued Order F10-31 on September 7, 2010.

[26] Prior to doing so the Commissioner sought further submissions from the parties. The Commissioner wrote a letter to the parties on January 25, 2010 clarifying the scope of the its inquiry:

> Mr. Harrison made a submission dated October 13, 2009. The Ministry made no response to Commissioner's Loukidelis's letter.
>
> Instead of raising procedural or preliminary issues Mr. Harrison's submission alleged a list of breaches of s. 28 of the Act and other laws, referring to various documents and an affidavit and examinations for discovery from his civil action against the Ministry and others (SCBC Docket No. S-082915, Vancouver Registry).
>
> Because of the breadth of the allegations in Mr. Harrison's October 13, 2009, submission, it seems important to restate, very clearly, that the purpose of the

> remittal is to consider whether the Ministry breached s. 28 of the Act and remedies arising, if any.
>
> The work, analysis or conclusions of the Commissioner's staff, Catherine Tully, Justine Austin-Olsen and Patrick Egan, in earlier phases of Mr. Harrison's complaints against the Ministry will not be revisited. The consideration of s. 28 will focus on personal information of Mr. Harrison. Compliance with s. 28 as regards his daughter will not be considered. Whether the Ministry was authorized to disclose information by s. 79 of the *Child, Family and Community Service Act* will not be considered. Whether the Ministry breached rights under the Canada *Charter of Rights and Freedoms* will not be considered.

[27] After setting out the history of the proceedings and the facts, the Commissioner's delegate then set out the directions the Commissioner had been given by the Court of Appeal "that I consider Mr. Harrison's complaint in relation to s. 28 of FIPPA".

[28] After reciting s. 28 of FIPPA the Commissioner described the issues:

> [28] The issues under review therefore are:
>
> 1. Did the Ministry, or someone on behalf of the Ministry, use Mr. Harrison's personal information to make a decision that directly affected him and, if so,
>
> 2. Did the Ministry make every reasonable effort to ensure that the information was accurate and complete prior to using the information in the decision that directly affected Mr. Harrison?

[29] The Commissioner noted at para. 30:

> In considering this matter, I consulted the evidentiary foundation already gathered in Mr. Harrison's civil action against the Ministry and others, and specifically the material the parties filed in their respective applications under Rule 18A of the Supreme Court *Rules of Court*. I also invited the parties to make further submissions and received submissions from the Ministry and the applicant.

[30] In the course of its decision the Commissioner addressed a number of questions. I cite from portions of the Order:

> ***Is The Information The Applicant's Personal Information?***
>
> [31] Under FIPPA, "personal information" means "recorded information about an identifiable individual".

...

[33] However, the Ministry argues that the verbal recommendation of the social worker that Mr. Harrison not be left unsupervised with clients at the group home is not Mr. Harrison's personal information, because it is not "recorded" information.

[34] In my view, the Ministry's submission misses the point because the verbal opinion of the social worker provided to the group home is not the matter under consideration here.

[35] What is the subject of this review is the information that the social worker reviewed and considered during the prior contact check process. That information, in the custody and control of the Ministry, is clearly Mr. Harrison's personal information.

Did The Ministry Use the Applicant's Personal Information?

...

[43] Taking all of this evidence together with the definitions of "use," I conclude that the social worker "employed the information in a manner to accomplish the public body's objectives". In short, she "used" the information in making her recommendation, pending the outcome of her review, that Mr. Harrison be prohibited from one-on-one contact with youth and that he engage only in activities with the residents of the group home in which he could be supervised.

Was The Personal Information Used In A Decision That Directly Affected Mr. Harrison?

...

[47] The Ministry argues that "decisions" within the meaning of s. 28 ought to possess "formality and processes" and that the impact on the individual of those decisions be "obvious and clear".

[48] The Ministry further submits:

> The work of child protection social workers, including their actions to investigate a report or to alert an employer or the like, does not involve decisions that directly affect individuals, within the meaning of [s. 28 of FIPPA]. Rather, these are simply the functions of social workers doing their jobs.

[49] The Ministry suggests that s. 28 only applies to "formal" decisions and not to "routine" decisions or actions of social workers. I do not agree. There is nothing in FIPPA that warrants drawing such a distinction. The only distinction made under FIPPA concerning "decisions" are those that "directly affect" individuals from those that do not.

...

[53] The Ministry takes the position that the information was not used by anyone in a "decision of the Ministry" and, in any event, not in any decision of the Ministry that directly affected Mr. Harrison, as the decision to fire Mr. Harrison was made by the management of the group home.

[54] I do not agree. The Ministry correctly states that the group home and not the Ministry decided to fire Mr. Harrison. However, this does not change the fact the Ministry also made a decision in this instance. The decision in question was the social worker's decision to recommend the suspension of Mr. Harrison's unsupervised access to youth at the group home until she completed her review. It is not within my mandate to determine whether her recommendation was correct or not. However, there can be no doubt the decision to make this recommendation had profound consequences for Mr. Harrison.

[55] The Ministry's attempt to deny there was a direct link between the recommendation of the social worker and the subsequent firing of Mr. Harrison is not believable. Mr. Harrison was hired specifically to provide one-on-one supervision for a youth receiving services through the group home. The Ministry was the overseer of the contractor and appeared to have the power in the contract to approve all caregivers. Mr. Harrison fell squarely under the definition of caregiver.

[56] It is not believable to suggest the group home management would disregard the social worker's decision to recommend that Mr. Harrison be removed from unsupervised access to clients of the group home. This recommendation had the direct impact of frustrating the purpose for which Mr. Harrison was hired. Mr. Harrison's employment was promptly terminated.

[57] I find that the personal information was used in a decision that directly affected Mr. Harrison.

Did The Ministry Make Every Reasonable Effort To Ensure Accuracy And Completeness Of Mr. Harrison's Personal Information?

[58] Whether the information contained in Ministry files about Mr. Harrison was accurate and complete is not within the scope of this hearing. The question is whether the Ministry made every reasonable effort to ensure the accuracy and completeness of Mr. Harrison's personal information before it used that information to recommend Mr. Harrison be prohibited from unattended contact with the youth at the group home.

[59] The Ministry states that:

> …in the context of child protection social work, social workers are required to accurately record what is reported to them, and to completely record what is reported to them. They are not required to ascertain the veracity of what is reported to them at the time of the report. Attempts to do that may occur during the report investigation state, not at the report receipt stage.

[60] In its initial submission, the Ministry correctly states that the Freedom of Information and Protection of Privacy Policy and Procedure Manual published by the sponsoring Ministry of Citizens' Services does not define the terms "accuracy" and "completeness". Neither does FIPPA. The Ministry states that the term "accuracy" cannot be read as "true" or "proven" but rather should be read as "careful, precise, lacking errors—in other words, recorded carefully, precisely and without errors". If this were not the case, the Ministry argues, then social workers would be prohibited from deciding to investigate a child protection report unless the investigator was "already satisfied as to

the veracity of the report", which would frustrate the "very nature and purpose of child protection work".

[61] The Ministry's reasoning does not persuade me because it ignores what is plain and obvious: the terms "accurate and complete" in s. 28 directly relate to the veracity of the individual's personal information, not to the preciseness of the transcription. The Ministry's act of investigating a child protection report *is* the process the Ministry follows to determine the accuracy of the information in the report.

[62] The Ministry's argument implies that s. 28 requires only that a public body ensure that information it uses in a decision is carefully transcribed and completely recorded, without any regard to its veracity. Such an interpretation could have dramatic adverse consequences for individuals, where the use of inaccurate or incomplete information to make decisions could result in improper health care treatment, discrimination, loss of employment, loss of driving privileges, loss of child custody and/or financial loss.

...

[31] The Commissioner's delegate discussed the rationale for her decision at paras. 72-79 of the Order:

3.0 DISCUSSION

[72] What is the standard by which one can conclude a public body has made "every reasonable effort" to ensure that personal information is accurate and complete, before it makes a decision affecting someone, based on that information?

[73] In this matter, the evidence is clear that the social worker made no effort, let alone every reasonable effort, to ensure the accuracy and completeness of the information she relied upon to come to her interim decision recommending Mr. Harrison not be left alone with youth in his workplace. Her opinion was based in part on her belief that the matter had not been "properly" investigated. Yet she did not make a single inquiry of any one of the several Ministry employees who had had dealings with Mr. Harrison over the previous decade. To compound matters, she admitted that, when she made her recommendation concerning Mr. Harrison, it had been more than twenty-four years since she had worked in the field of child protection. This decision, based on allegations determined at the time to be without substance and warranting no further investigation, has led to consequences that cannot be remedied.

...

[76] In addition, it is not clear to me whether the Ministry has a strategy, policy or process dealing with the management of files concerning unsubstantiated or worse, uninvestigated, allegations of sexual (or other) abuse. It is however clear that those who have been subjected to the latter are in an unenviable situation in which there can be no successful outcome. Since no investigation ever takes place, the veracity of the allegation is not conclusively resolved. Yet no further investigation will ever take place,

frustrating closure to the matter and leading to the possible loss of reputation or other harm.

[77] What is "reasonable" with respect to s. 28 will be contextual, but the evidence in this case leads me to conclude that the standard of reasonability with respect to prior contact checks will generally be higher in the presence of any of the following factors:

- The decision may have a serious impact on the individual's health, safety, finances, employment or reputation;
- The personal information was not collected directly from the person concerned and the person concerned has not reviewed the information;
- The personal information is outdated or archived;
- The personal information is being used for purposes secondary to the original purpose for which it was originally collected;
- The personal information was supplied anonymously.

[78] The presence of any one of these factors increases both the risk that use of the personal information could have an adverse effect on the person concerned and the obligations on the part of the public body to ensure the accuracy of personal information before it is used in a decision that affects someone.

[79] In this case, *all* of these factors were present and combined to produce a deleterious outcome for Mr. Harrison.

[32] The Commissioner concluded:

4.0 CONCLUSION

[80] For the reasons given above, under s. 58(3)(a) of FIPPA, I find that the Ministry breached its duty under s. 28 to make every reasonable effort to ensure that Mr. Harrison's personal information in its custody and control was accurate and complete before it was used in a decision that directly affected Mr. Harrison.

[81] Under s. 58(3)(a), I require the Ministry to perform its duty under s. 28 and to take all appropriate steps to ensure this duty is met in the future.

[82] I recommend that the Ministry:

1. Clarify in writing for all relevant Ministry staff the purposes for which personal information is collected, used and disclosed in the prior contact check process; and

2. With regard to the criteria outlined in paragraph [77] of this decision, develop and implement policies and procedures pertaining to the accuracy, completeness, use, disclosure and retention of personal information relating to allegations of sexual or other abuse determined to be unsubstantiated and/or uninvestigated on the grounds that no case has been made to justify an investigation.

> 3. I ask the Ministry to provide the Information and Privacy Commissioner with an update on the progress of these recommendations on or before December 7, 2010.

THE APPEAL OF THE ORDER BY MR. HARRISON

[33] Mr. Harrison is highly critical of the Order. Essentially, he says that the Commissioner, by focusing on the requirement the MCFD develop and implement policies and procedures to address future cases, has ignored the harm inflicted on him as a result of the disclosure of personal information and that it has ignored any redress available to him arising under FIPPA.

[34] In his petition Mr. Harrison asks the court to direct the Commissioner:

- to conclude that the MCFD's breach of s. 28 and s. 29 of FIPPA constituted a breach of s. 73(a) and (b) of FIPPA;
- to conclude the consent he gave to the MCFD did not comply with FIPPA;
- to conclude the MCFD contravened ss. 30.4, 74(1)(a) and (b) and ss. 74.1 and 74.1(4) of FIPPA;
- under s. 58(3)(f) of the Act, to expunge his personal information collected in contravention of s. 27(1) of FIPPA;
- to conclude the Commissioner contravened s. 74(1) (a) and (b) of FIPPA; and
- to conclude that the Commissioner contravened s. 48 of FIPPA by failing to investigate the petitioner's complaint in good faith under s. 48 of FIPPA.

[35] What Mr. Harrison seeks, in essence, is a remedy for the injury he says has been done to him as a consequence of the improper release of personal confidential

information by the MCFD to his former employer which resulted in his loss of employment.

[36] Mr. Harrison also argues the factual findings referred to by the Commissioner and the issues under review were unduly limited by the Commissioner giving rise to an error in jurisdiction and to breaches in the principles of procedural fairness and natural justice. As he states in his petition:

> 18. The Petitioner says that the consequences of the Respondent's actions can never be reversed, but FIPPA does provide remedy in the form of punitive measures under ss. 30.4, 74(1), and 74.1.
>
> 19. The Petitioner says that he has been deprived of procedural fairness and natural justice by the actions of the Ministry respondents and that the breach of ss. 28 and 29 are contraventions of section 73 of *FIPPA*.
>
> 20. The Petitioner says that he has been deprived of procedural fairness and natural justice by the actions of the Privacy Commissioner of British Columbia Delegate(s) and that the actions of the Commissioner's Delegate(s) contravened section 48 of the *FIPPA*.

THE APPEAL FROM THE ORDER BY THE ATTORNEY GENERAL ON BEHALF OF THE MINISTRY

[37] The Ministry argues the Commissioner erred in law in failing to consider the intent and purpose underlying the CFCSA: that is, that the Act imposes "transient" and "paramount" duties on persons such as Ms. Bischoff which override any duty which may have been owed to a caregiver in Mr. Harrison's position.

[38] The Ministry further argues the Commissioner erred in law in a number of respects. I refer to the Ministry's petition:

> 56. The Commissioner's delegate erred in law in her interpretation of s. 28 of FIPPA. In particular, she erred in finding that:
>
> (a) Ms. Bischoff's recommendation to Access House was capable of being characterized as a "decision" that "directly affected" Mr. Harrison;
>
> (b) Access House's decision to terminate Mr. Harrison's employment was capable of being a decision made "by or on behalf of" the Ministry; and

> (c) Ms. Bischoff was required to ensure the veracity of the allegation made in 1996 before recommending that Mr. Harrison ought to be supervised.

[39] The Ministry further argued the Commissioner made unreasonable findings of fact:

> 57. The Commissioner's delegate made patently unreasonable findings of fact. In particular, she erred in finding that:
>
> (a) the Court of Appeal had not set aside Mr. Justice Pitfield's finding that the Ministry had conveyed inaccurate personal information about Mr. Harrison and, in doing so, breached s. 28 of FIPPA;
>
> (b) a "decision" that "directly affected" Mr. Harrison was made "by or on behalf of" the Ministry;
>
> (c) Ms. Bischoff made no effort to ensure the accuracy and completeness of the information she relied on; and
>
> (d) the purpose for which Ms. Bischoff used Mr. Harrison's personal information was a "secondary purpose" that was not consistent with or reasonably connected to the purpose for which it was originally collected.

THE STANDARD OF REVIEW

[40] As pointed out by Madam Justice Wedge at para. 13 in *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33, on a judicial review the court does not sit as an appellate court:

> The court on judicial review does not sit as an appellate court. It does not re-try the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction: *Ross v. British Columbia (Human Rights Tribunal)* (1 May 2009), Vancouver L042211 (B.C.S.C.); *Tse v. British Columbia (Council of Human Rights),* [1991] B.C.J. No. 275 (QL) (S.C.).

[41] Justice Wedge's comments are, in my view, particularly apposite in the present case as Mr. Harrison, as will be discussed, seeks to have this Court do precisely what Justice Wedge says is not to be done by a court on a judicial review.

[42] The *Administrative Tribunals Act*, S.B.C. 2004, c. 45, does not apply to decisions of the Commissioner and therefore the standard of review falls to be determined on the basis of the common law: *Weyerhaeuser Co. v. Nanaimo Cowichan Assessor, Area No. 4*, 2010 BCCA 46 at para.32.

[43] In *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210, the Court of Appeal considered the general nature of the tribunal and some of the factors to be considered in assessing the standard of review applicable to its decisions:

> [33] In the instant case there is neither a privative clause nor a right of appeal. The absence of such clauses in itself is not determinative; this is somewhat of a neutral factor. However, the statute is the constituent legislation of the tribunal. This latter circumstance could be said to indicate a more deferential standard of review. The relative expertise of the tribunal also falls to be considered. This area of access to information is a fairly specialized area and one with which the Commissioner will, over time, gain a familiarity. He is well situated to appreciate the issues and concerns that have arisen and will arise in the operation of the Act. The continuing administration of the Act will cause the Commissioner to be alive to issues such as the parameters of likely concern by those who could be potentially affected by decisions relating to the release of information under the Act. There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the Act requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is appropriate to notify and to allow to formally participate in any inquiry. In *Macdonell v. Quebec (Commission d'accs à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71 [*Macdonell*], a case where a limited right of appeal in the legislation could have been indicative of a less deferential standard of review, Gonthier J., speaking for the majority, had this to say, at para. 8, regarding the expertise of privacy commissioners:
>
> > The Quebec Commission d'accs à l'information has no special interest in the decision it must make, and so it is able to play its role independently. By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.
>
> In *Macdonell*, the court found it appropriate to apply a standard of reasonableness to the decision of the Commissioner.

[44] In determining the appropriate standard of review I am required to have regard to the particular issue(s) before the court and to assess those issues within

the analysis set out in *New Brunswick (Board of Management) v. Dunsmuir* (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E.. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th), 1 (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) ("*Dunsmuir*"). *Dunsmuir* requires four factors to be taken into account:

1. the presence or absence of a privative clause;

2. the purpose of the decision-maker as determined by the interpretation of the enabling legislation;

3. the nature of the question; and

4. the expertise of the decision maker.

[45] As stated, FIPPA does not contain a privative clause or a right of appeal: accordingly this is a neutral factor: see *Guide Outfitters Assoc.*

[46] In *B.C. Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162, Madam Justice Gropper concluded:

> [30] Regarding the purpose of the decision maker, the Act creates a discrete and specialized administrative regime concerning the rights of access to information in records held by public bodies, the limited exceptions to those rights, and the Commissioner's independent oversight of the administration of the Act. The Act also provides for an independent review of decisions made under the Act (s. 2(1)(e)). The Act provides specialized tools and powers to the Commissioner. The Commissioner has multiple roles under the Act for education, research, public information, policy advice, compliance investigations and audits, complaint and review investigations and mediations, inquiries and order making. The Commissioner is charged to ensure public bodies comply with the Act to review their decisions about access requests. The Commissioner's responsibilities are not similar to the normal role of a court. This factor favours a deferential approach to the Commissioner's interpretation and application of the statutory machinery for

> access requests and reviews under the Act, including the disclosure exception in s. 13.
>
> [31] The nature of the question, whether s. 13 protects submissions provided by stakeholders in the public consultation process, is an issue of interpretation and application within the parameters of the administration of the Act and the Commissioner's responsibility to monitor compliance with it. It is not the type of question, for example general law, which is of essential importance to the legal system as a whole or outside the Commissioner's specialized area of expertise. This factor favours the application of the correctness standards.
>
> [32] The expertise of the decision maker was considered in *British Columbia Teachers' Federation*, at para. 27, which points out that the expertise must be considered in three dimensions: the characterization of the expertise of the tribunal; the courts own expertise relative to the tribunal; and the identification of the issue relative to that expertise. The Act describes a complex administrative scheme where the Commissioner is an independent officer of the legislature. He or she is legislatively chosen to monitor the administration of the Act, ensure compliance by public bodies, and review their decisions about access requests. The creation of the Commissioner's position and mandate to oversee access in privacy compliance under the Act through a range of specific tools is an expressed legislative statement of expertise: *Dunsmuir* para. 49.

[47] In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)* 2011 BCSC 112, Mr. Justice Joyce, referring to *Moreau-Berubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, concluded, at para. 61:

> ... I agree with the submission that the standard of review analysis in *Aquasource* on questions of interpretation has been superceded by the Supreme Court's clarification of the law of judicial review, which establishes that deference is the norm for questions of law involving a decision maker's interpretation of its home statute and that correctness applies only to true jurisdictional questions.

[48] Based on the nature of the questions involved in the two petitions before me, I conclude the Commissioner's interpretation of the Court of Appeal judgment in 2009 BCCA 203 is judicially reviewable on the correctness standard insofar as it defined the terms of remittal back to the Commissioner. The interpretation of the court's order required no exercise of any specialized expertise under FIPPA.

[49] I further conclude the grounds of review raised by the petitioner Mr. Harrison are judicially reviewable on a standard of reasonableness because they concern

issues of fact, or involve the interpretation or application of the terms of the statute administered by the Commissioner and involve matters that are within the Commissioner's jurisdiction and expertise: see *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7; and *Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E.*, *Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62. I also conclude the grounds of review raised by the MCFD as set out above involve the application of the reasonableness standard warranting some deference to the conclusions of the Commissioner.

DISCUSSION OF RELIEF CLAIMED IN MR. HARRISON'S PETITION

[50] I turn to discuss the various claims for relief sought by Mr. Harrison, within the context to the reasonableness or deference tests described earlier.

1. *The consent forms provided to MCFD*

[51] Mr. Harrison argues the Commissioner should have considered the consents he gave to MCFD did not comply with FIPPA. The issue of the consents he provided was considered by the Commissioner in its prior report of May 23, 2007. It was a matter argued before Pitfield J. and referred to in the subsequent Court of Appeal decision (see para. 64 of 2009 BCCA 203). The Court of Appeal concluded that Mr. Egan had erred by focusing on the issues of the consents and s. 79 of CFCSA rather than s. 28 of FIPPA:

> ... We agree with the chambers judge's conclusion (at paras. 63, 68) that the Commissioner (through his designate, Mr. Egan) unduly narrowed the focus of the investigation of Mr. Harrison's complaint by excluding the s. 28 issue, and thereby confining it to the question of whether Mr. Harrison's consents authorized the disclosure and, if not, whether the disclosure was authorized under s. 79(a) of the *CFCSA*.

[52] Again, the Court of Appeal specifically referred the matter back to the Commissioner to consider the issues raised by s. 28 of FIPPA.

[53] Section 28 reads:

> **Accuracy of personal information**
>
> **28** If
>
> (a) an individual's personal information is in the custody or under the control of a public body, and
>
> (b) the personal information will be used by or on behalf of the public body to make a decision that directly affects the individual,
>
> the public body must make every reasonable effort to ensure that the personal information is accurate and complete.

[54] The issue of the consent forms has been dealt with by both the Commissioner's office and by the court. I conclude this is not a proper ground to raise on this application.

2. *Expunging of Mr. Harrison's personal information*

[55] Mr. Harrison argues the Commissioner erred in failing to direct MCFD to expunge his personal information pursuant to s. 58(3)(f) of FIPPA.

[56] Again, this matter was expressly dealt with in 2009 BCCA 203 at para. 72:

> The chambers judge's instructions on the remedy issue are also complicated by the fact that the Commissioner's power to destroy personal information under s. 58(3)(f) of *FIPPA* applies only in circumstances in which the personal information was collected in contravention of *FIPPA*, which has never been said to be the case here. ...

3. *The Commissioner be directed to find the MCFD committed offenses under ss. 74(1)(a) and (b) and 74.1(4) of FIPPA by not complying with s. 30.4 of FIPPA*

[57] Those sections read:

> **General offences and penalties**
>
> **74** (1) A person must not willfully do any of the following:
>
> (a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

> (b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;
>
> ...
>
> **Privacy protection offences**
>
> ...
>
> 74.1(4) If a corporation commits an offence under this section, an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence, whether or not the corporation is prosecuted for the offence.
>
> ...
>
> **Unauthorized disclosure prohibited**
>
> **30.4** An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this Act.

[58] While it may be implicit in the Commissioner's Order that Ms. Bischoff did not comply with s. 30.4 because she did not comply with her responsibilities pursuant to s. 28, ss. 74(1) and 74.1 are general offense sections which do not fall within the jurisdiction of the Commissioner. Accordingly it cannot be said the Commissioner committed any error in failing to apply these sections.

4. *Failing to investigate in good faith*

[59] Mr. Harrison argues the Commissioner acted unreasonably in failing to investigate his complaint in good faith under s. 48 of FIPPA.

[60] Section 48 reads:

> **Protection of commissioner and staff**
>
> **48** No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

[61] There is nothing in the record before me to substantiate such a claim. To the contrary, the Commissioner's delegate appears to have taken care to follow the directions of the Court of Appeal.

[62] In my view, this ground of appeal, as well as Mr. Harrison's assertions he has been denied procedural fairness and natural justice, arises from the frustration he must feel that the Commissioner did not, in addressing relief under s. 28, provide him with any substantive remedy.

5. *Section 73(a) and (b) remedy*

[63] Mr. Harrison argues the Commissioner erred in failing to find MCFD contravened s. 73(a) and (b) of FIPPA. He asks this Court to direct the Commissioner to conclude the Ministry's breach of ss. 28 and 29 constitute a breach of s. 73 of FIPPA.

[64] Section 73(a) and (b) read:

> **Protection of public body from legal suit**
>
> **73** No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from
>
> (a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or
>
> (b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

[65] There are several problems with Mr. Harrison's position. The first and primary one is that his civil action against MCFD was dismissed because it disclosed no reasonable cause of action. The Court of Appeal concluded there was simply no duty of care owed by MCFD to him.

[66] The second difficulty is that the decision to determine whether there was a breach of s. 73 of FIPPA is one for the Commissioner to make, not for the courts to

determine. This was the reason the Court of Appeal allowed the appeal in 2009 BCCA 203.

[67] In my view, the relief claimed in Mr. Harrison's petition ought to have been raised by Mr. Harrison in his original application for review or that has already been considered and dealt with by either Pitfield J. or by the Court of Appeal. In his original petition Mr. Harrison claimed the Commissioner erred when he failed to find the disclosure of information was contrary to s. 79(a) of the CFCSA; that he erred in finding the disclosure was authorized under and complied with s. 28 of the Act. He also alleged errors under ss. 30 and 56 of FIPPA. His applications were dismissed with the exception that Pitfield J. found Ms. Bischoff, the MCFD worker who had communicated the information to Mr. Harrison's employer, had breached s. 28 of FIPPA. The Court of Appeal allowed the appeal (2009 BCCA 203) and referred the matter back to the Commissioner for "consideration of the issues arising under s. 28 ... and remedies arising, if any."

[68] As can be seen from the Order, the Commissioner concluded the Ministry had not complied with s. 28 of FIPPA (para. 80). It had made no effort to ensure the accuracy of the information relied on. The Commissioner found this to have had a "deleterious outcome for Mr. Harrison" which "has led to consequences that cannot be remedied". The Commissioner applied s. 58(3)(a) of the FIPPA and made an order recommending MCFD develop and implement policies that would prevent re-occurrence of the injustice which it found had occurred to Mr. Harrison.

[69] The Commissioner's conclusion that the consequences of the breach could not be remedied was a conclusion drawn by a tribunal administering its own statute and as such must be given deference.

[70] In my view, Mr. Harrison's argument concerning the manner in which his "consent" was obtained and the other issues he raises under ss. 48, 73, 74 and 74.1 are not appropriate arguments on this judicial review. My jurisdiction is a limited one: that is, to consider whether the Order can be reviewed within the scope of the

narrow terms of the referral to the Commissioner by the Court of Appeal and the applicable legal standard of review discussed above.

[71] In his argument to the court, Mr. Harrison argued the court should revisit the facts underlying his termination. He asserted the Court of Appeal was wrong in concluding MCFD did not owe him a duty of care and argued Ms. Bischoff and MCFD did not act in good faith when they "snared" him into signing the second consent which, he argued, was obtained by "deception and concealment".

[72] For the reasons expressed in para. 40 above, this Court, on a judicial review, cannot address these concerns. Many, if not all of which ask the court to revisit issues already addressed by the court. My jurisdiction is limited to a consideration of whether the Commissioner acted and made its decision within its statutory authority.

[73] I conclude it has and therefore Mr. Harrison's petition must be dismissed.

DISCUSSION OF RELIEF SOUGHT BY THE MCFD

1. *The Commissioner failed to consider the "paramount" purposes of child protection underlying the CFCSA*

[74] One of the main arguments made by MCFD in its submission to the Commissioner was:

> The Public Body is responsible for the provision of child protection services in BC pursuant to the *Child, Family, and Community Services Act* (the "CFCSA"). the governing principles in section 2 of the CFCSA state that the safety and well-being of children are the paramount considerations in the administration of the CFCSA.
>
> (See "Initial Submissions for the Public Body" filed by the MCFD March 19, 2010).

[75] MCFD argued the responsibilities to children and the duties imposed on social workers working under the CFCSA justified the action taken by Ms. Bischoff in the circumstances of this case.

[76] The MCFD cited the decisions of *Syl Apps* and *Halford v. Chief Constable of Hampshire* (2003), EWCA Civ. 102 para. 65, in support of its position "about the importance of child protection social work, and about the latitude within which social workers must be free to do that work".

[77] It is apparent from a review of MCFD's submissions that the argument about the "paramount" purpose of the CFSA was raised in the context of its argument that Ms. Bischoff had not made a "decision" that "directly affected" Mr. Harrison. MCFD took the position Ms. Bischoff had simply made a "judgement call" which she was entitled or even required to make in the course of performing her duties.

[78] Notwithstanding the context in which the argument was made, the issue raised is relevant to the Commissioner's determination whether the MCFD made "every reasonable effort" to ensure that the personal information was accurate and complete.

[79] It is apparent from the face of the Order the Commissioner did not consider the MCFD's argument. There is simply no discussion in the Order about how, if at all, the principles underlying the CFCSA impact on the actions taken by Ms. Bischoff. There is no discussion by the Commissioner about whether there is a tension between the provisions of FIPPA and the CFCSA, and in particular s. 79 of the latter enactment.

[80] Such interrelationship was referred to by the Court of Appeal in 2009 BCCA 203 at paras 57-61. I refer in particular to para. 60:

> [57] The chambers judge made two essential findings that ground the Commissioner's and the Attorney General's appeals, the first of which relates to the chambers judge's interpretation of the interplay between the sections of *FIPPA* and *CFCSA* discussed above. The chambers judge rejected the Commissioner's submission that he did not have the authority to investigate Mr. Harrison's complaint that Ms. Bischoff had improperly disclosed personal information contrary to *FIPPA*. Based on the chambers judge's interpretation of ss. 74-79 of the *CFCSA*, the Commissioner was not required to refrain from investigating Mr. Harrison's complaint in this respect. The chambers judge explained as follows:
>
> > [59] I do not find the effect of the amendments to be that urged by counsel. Were the interpretation counsel suggested to prevail, there

> would be no means to investigate or review a director's compliance with the access and privacy provisions contained in s. 74 to 79 of *CFCSA*. *CFCSA* makes no provision for review. If there were such a procedure, and the director were to have the powers of the Commissioner under *FIPPA* as counsel suggested, the director would be in the invidious position of having to review the propriety of his or her own actions to ensure they complied with *CFCSA*. That cannot have been the legislature's intent.
>
> [60] In my opinion the only effect of s. 74 to 79 of *CFCSA* is to override *FIPPA* in certain respects. By virtue of s. 74, some of the constraints *FIPPA* imposes do not apply for purposes of the accumulation and disclosure of information under *CFCSA*. Nonetheless in the event of a complaint under *FIPPA* that relates to the accumulation, use or disclosure of information obtained for *CFCSA* purposes, the complaint must be made to the Commissioner who, in the event an investigation ensues, is obliged to respect the fact that a director acting under *CFCSA* has been granted powers in respect of the accumulation and disclosure of information that other public authorities do not enjoy. That is the reasonable interpretation of s. 74(2)(f) which provides that the supervisory and investigatory powers of the Commissioner under *FIPPA* apply in respect of the exercise of the powers, duties or functions *CFCSA* confers on a director, but the Commissioner must exercise that supervisory role with due regard for the rights s. 74 to 79 of *CFCSA* accord a director.
>
> [61] In my opinion nothing in *CFCSA* required the Commissioner to refrain from investigating Mr. Harrison's complaint regarding the information Ms. Bischoff disclosed in purported reliance on s. 79(a) of *CFCSA*.
>
> [Emphasis added]

[58] On appeal, the Commissioner submits that the chambers judge misinterpreted ss. 74(2)(e) and (f) of the *CFCSA*. As we have already observed, the effect of those subsections renders the Commissioner without jurisdiction to review complaints with respect to disclosures made under s. 79 of the *CFCSA*.

[59] The chambers judge was evidently concerned that, without such jurisdiction, there would be no proper review of a director's decision under the *CFCSA*. There is, however, under s. 93.1 of the *CFCSA* a mandated procedure "for reviewing the exercise of a director's powers, duties and functions" under that Act. Furthermore, as with any exercise of statutory power, the director's decision would be subject to judicial review.

[60] In our opinion, the chambers judge erred in law in his interpretation of ss. 74(2)(e) and (f). The correct interpretation, as we have explained, limits the Commissioner's jurisdiction to review a director's decision under *FIPPA* and does not permit the Commissioner to review a director's decision under s. 79 of the *CFCSA*.

[61] In our opinion, it is necessary to rectify the trial judge's erroneous interpretation. To allow the misinterpretation to stand uncorrected would

> potentially affect the possible future judicial review by the Supreme Court with an inevitable and unnecessary appeal on the point.

[81] Unfortunately the Commissioner did not have the benefit of the Court of Appeal's decision in 2010 BCCA 220, decided May 5, 2010. The court considered the application of *Syl Apps* and concluded:

> [50] In this case, the relationship at issue is not between child protection authorities and family members of children in their care, as it was in *Syl Apps*. The material relationship in this case is between a MCFD resource social worker and an employee of a contracted agency, where the social worker is specifically responsible to review the employee's background to identify possible child safety concerns.
>
> [51] Despite this difference, the same basic concern arises in both: the recognition of an ancillary duty of care would create a conflict of duties that could interfere with the overriding mandate of child protection authorities—to promote the best interests and welfare of the child. *Syl Apps* is clear that where such potential for conflict exists, no duty should be recognized.
>
> [52] The primary obligation of social workers operating under the *CFCSA*, including Ms. Bischoff, is found under s. 2 of the Act, which provides that the safety and well-being of children must be the paramount considerations in the administration of the statute. It is in the context of this statutory mandate that Ms. Bischoff was expressly required to review the background of individuals seeking to work with vulnerable children in the care of the MCFD.
>
> [53] Imposing a private law duty of care on a social worker to those whose background he or she must review for child safety concerns has the potential to interfere with their ability to discharge that vital task. More broadly, it would interfere with the paramount duty to the safety of the child. A social worker should not feel torn between her paramount obligation to the child and an ancillary duty to consider the employment status of those who seek to care for them. Accordingly, imposing a duty of care on Ms. Bischoff in these circumstances poses precisely the risk for inherent conflict that was found to be determinative by the Supreme Court of Canada in *Syl Apps*. There is simply no basis to distinguish *Syl Apps* in this regard.
>
> ...
>
> [67] The defence of qualified privilege operates to protect otherwise defamatory communications that are made on occasions of qualified privilege. Privileged occasions arise where the person making the statement has an interest—legal, social or moral—to make the statement to persons with a corresponding interest or duty to receive it: *Moises v. Canadian Newspaper Co.* (1996), 24 B.C.L.R. (3d) 211 (C.A.); *Haight-Smith v. Neden*, 2002 BCCA 132 at paras. 52-55.
>
> [68] In this case, Ms. Bischoff had a legal and moral duty to ensure the protection of youth in the care of the MCFD. Ms. Ford had a corresponding duty to receive information about an individual providing care to youth through the Access House program. It is in accordance with both those duties

> that Ms. Bischoff communicated her concerns about the results of the PCC check to Ms. Ford.
>
> [69] The law is clear that statements made on such occasions are protected, as long as they are made in good faith and honestly for the purpose for which the privilege exists: *Botiuk v. Toronto Free Press Publications Ltd.,* [1995] 3 S.C.R. 3 at para. 79.
>
> [70] The onus for defeating the defence rests entirely on the plaintiff: *Netupsky v. Craig*, [1973] S.C.R. 55. I have already concluded that there is no evidence that Ms. Bischoff acted with bad faith. Mr. Harrison has therefore failed to meet this onus, and the defence of qualified privilege remains a complete defence to his claim in defamation. It follows that the appellants are entitled to have this action dismissed.

[82] I note Mr. Egan, the Commissioner's delegate who authored the report which was subject to the judicial review by Pitfield J., did assess the impact of the provisions of the CFCSA on FIPPA.

[83] In my view it would be difficult, if not impossible, for the Commissioner to conclude there was a breach of s. 28 of FIPPA without doing so. It seems to me an assessment of the impact of the provisions of the CFCSA on s. 28 of FIPPA must be conducted in order for the Commissioner to assess whether the MCFD made "every reasonable effort" within the context of the duties and responsibilities imposed on it under that statute. I find that in failing to consider this issue the Commissioner committed a reviewable error in law.

[84] Although the language of the statutes is similar, the facts of this case are different from those in *IMS Health Canada Limited v. Alberta (Information and Privacy Commissioner*, 2008 ABQB 213 and *Stubicar v. Alberta (Office of the Information and Privacy Commissioner*), 2008 ABCA 357. In the latter case the Alberta Court of Appeal stated at para. 23:

> We agree with Ross J.'s [*IMS Health Canada Limited*, *supra*] interpretation of the privative clauses, the nature of the tribunal and the OIPC's expertise. The question before us is perhaps an even clearer example of a decision which warrants deference. Section 10(a) requires that the custodian "make every reasonable effort to assist the applicant..." The use of the words "reasonable effort" suggests an application of the facts to the legal requirement imposed on the custodian "to assist." This is not a pure question of law which can be separated from the facts. Deference ought to apply to issues where fact and law are difficult to separate: *Dunsmuir* at para. 53.

[85] In the present matter, the question of "whether the Ministry used "every reasonable effort" has a direct link to the purposes underlying the CFCSA. This is a question that in my view goes beyond the expertise of the Commissioner and accordingly invokes a correctness standard of review.

[86] In the result, I allow the MCFD's application on this basis and remit the matter back to the Commissioner for reconsideration based on my reasons.

2. *The MCFD's argument that the Commissioner's finding that Ms. Bischoff made a "decision" that "directly affected" Mr. Harrison was an error in law and was unreasonable*

[87] The Commissioner dismissed the MCFD's argument that Ms. Bischoff did not make a decision but simply made a recommendation Mr. Harrison work under supervision. The Commissioner also dismissed MCFD's argument that Ms. Bischoff's statement to Access House "directly affected" Mr. Harrison.

[88] In my view, to determine whether a "decision" has been made and, if it has, whether such decision has "directly" affected an individual, involves a mixed question of law and fact. Such question goes to the heart of the Commissioner's responsibilities in interpreting and applying s. 28(b) of FIPPA. The standard of review, accordingly, is one of reasonableness and deserves a measure of deference by the court: *Dunsmuir* at para. 53. As stated in *Dunsmuir* at para. 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 h*ave a margin of appreciat*ion 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.

[89] In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, the Supreme Court of Canada described the standard of reasonableness:

> 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> 56 This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> See also *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.

[90] In my view the analysis contained in the Commissioner's decision-making process at paras. 72-79 is a reasonable one and the conclusions drawn from that analysis at paras. 80-82 are well within the range of possible, acceptable outcomes defensible both in respect of the law and the facts. In my view the MCFD's position on these two issues is disingenious. It ignores the reality of the impact Ms. Bischoff's remarks had on the options available to Access House. Access House had little choice in the matter but to terminate Mr. Harrison's employment.

[91] I dismiss this portion of MCFD's application.

SUMMARY

[92] In summary, I have concluded:

1. Mr Harrison's application for judicial review is dismissed;

2. the Attorney General's application for judicial review on behalf of MCFD is allowed on the basis set out in these reasons but is otherwise dismissed;

3. the parties may file written submissions on the issue of costs should they be unable to agree.

"GREYELL J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia (Ministry of Children and Family Development) v. Harrison,* 2012 BCCA 277

Date: 20120622
Dockets: CA039367; CA039859

Docket: CA039367

Between:

The Ministry of Children and Family Development and the Attorney General of British Columbia

Appellants
Respondents on Cross Appeal
(Petitioners)

And

Robert Glen Harrison

Respondent
Appellant on Cross Appeal
(Respondent)

And

The Information and Privacy Commissioner of British Columbia

Respondent
(Respondent)

- and -

Docket: CA039869

Between:

Robert Glen Harrison

Appellant
(Petitioner)

And

The Ministry of Children and Family Development and the Attorney General of British Columbia

Respondents
(Respondents)

And

The Information and Privacy Commissioner of British Columbia

Respondent
(Respondent)

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, September 6, 2011, (*Harrison v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 1204, Vancouver Docket Nos. S107196 & S106689)

Counsel for the Appellants:	J. Penner
The Respondent, Mr. Harrison:	In Person
Counsel for the Respondent, The Information and Privacy Commissioner of British Columbia:	S.E. Ross
Place and Dates of Hearing:	Vancouver, British Columbia April 17-18, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 22, 2012

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Garson

Dissenting Reasons in-part by:
The Honourable Mr. Justice Hinkson (page 29, para. 93)

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] This is the fourth time this long and protracted litigation has been to this Court. On this occasion, we are asked to determine two appeals and one cross appeal from the judgment of Mr. Justice Greyell sitting in judicial review of a September 7, 2010 decision of the Information and Privacy Commissioner (the "Commissioner"). The chambers judge heard two petitions together: one filed by the Attorney General of British Columbia (the "AG") and the Ministry of Children and Family Development (the "Ministry"), and the other filed by Mr. Harrison. Mr. Justice Greyell issued one set of reasons for judgment. He granted the AG's petition in part, and remitted the case to the Commissioner. He dismissed the remainder of the AG's petition. He dismissed Mr. Harrison's petition.

[2] The AG and the Ministry appeal from the part of Greyell J.'s order that dismissed part of their petition. Mr. Harrison filed a cross appeal from that part of Greyell J.'s order allowing the AG's and Ministry's petition and remitting the case to the Commissioner. We permitted Mr. Harrison to file an appeal from the dismissal of his own petition at the outset of the case, with the consent of the AG and the Commissioner, as Mr. Harrison's factums and other material filed on the AG's appeal and his cross appeal contained everything necessary for the prosecution of his appeal.

[3] I would allow Mr. Harrison's cross appeal, dismiss both appeals, and restore the Commissioner's decision of September 7, 2010.

Facts

[4] The events leading up to these appeals began in 1996. Mr. Harrison operated a licensed family day care in Sechelt, B.C. with his then wife. In August 1996, a person telephoned the Ministry and alleged that Mr. Harrison may have abused his infant daughter five years earlier.

[5] The Ministry intake worker opened an "Assessment Only" file (the "AO File"). It was determined that no action would be taken and Mr. Harrison would not be

informed of the allegation. However, Mr. Harrison learned about the allegation from a friend.

[6] Mr. Harrison contacted the Ministry and was told that no investigation had been or would be undertaken with respect to the unsubstantiated allegation. Mr. Harrison continued to operate the day care with his wife, and no other complaints were ever received. In 2001, a "Resource File" was opened when Mr. and Mrs. Harrison were approved as foster parents.

[7] In 2004, the Harrisons separated and Mr. Harrison moved to the Lower Mainland.

[8] On April 29, 2006, Mr. Harrison applied for a position at Access House, a residential program operating for male youth between 12 and 18 years of age. The Ministry paid for the program through a private contractor. Mr. Harrison was interviewed by Access House's program director, Marian Haden, for a temporary contract to assist staff with a particular youth who had severe behavioural difficulties. At the conclusion of the interview, Ms. Haden told Mr. Harrison that he was hired and would start work the following Monday, May 1, 2006. He signed a contract to work for 60 days, part-time as a "subcontractor", for four hours per day at the rate of $15 per hour.

[9] On May 2, 2006, a Resource Social Worker with the Ministry, Joan Bischoff, was contacted by Access House and told that Mr. Harrison had begun to work one-to-one with a youth in care.

[10] Ms. Bischoff's duties included monitoring and supervision of individuals and agencies providing residential care and other services to children in the custody of the Ministry's Director of Children. Ms. Bischoff was the Ministry employee who was tasked with monitoring the provision of services to children in care at Access House, which operated two houses at that time.

[11] Access House forwarded to her a consent form for disclosure, which had been signed by Mr. Harrison on May 1, 2006. Ms. Bischoff obtained Mr. Harrison's birth date on May 8, 2006. This information enabled her to perform a "prior contact check" ("PCC"). The prior contact check revealed the existence of the AO File. Ms. Bischoff ordered the physical file so she could review it. She learned about the allegation made in 1996 upon receipt of the file a few days later.

[12] She decided to investigate further, and she requested that Mr. Harrison complete a more specific "disclosure of information" form. She advised Jessie Ford, who had replaced Ms. Haden and was now the Acting Program Director of Access House, that "something had come up on Mr. Harrison's PCC".

[13] On May 18, 2006, Ms. Ford asked Ms. Bischoff in an email if she wanted Mr. Harrison supervised while working with the youth. Ms. Bischoff replied, "to be on the safe side I would prefer that he may be supervised, if you can do this". After receiving the second consent, Ms. Bischoff released information contained in the AO File to Ms. Haden and Ms. Ford.

[14] In the meantime, Mr. Harrison told Ms. Ford about the fact of the 1996 allegation. At some point, likely on May 24, 2006, Mr. Harrison was terminated as an employee of Access House because they were unable to supervise him while working.

Administrative and Procedural History

[15] I indicated at the outset of these reasons that this matter has a long and protracted history. By my count, five administrative decision-makers, three Supreme Court justices, and three divisions of this Court have previously considered aspects of Mr. Harrison's dispute with the Ministry. The Supreme Court of Canada has twice refused leave to appeal. What follows is a relatively brief summary of these decisions.

[16] Within a week of his termination, Mr. Harrison requested that the Ministry conduct a formal review of Ms. Bischoff's actions. Bruce McNeill, Director of Child

Welfare for the Fraser Region, reviewed the matter and placed a letter on the AO File, with a copy to Access House, stating that the contents of the AO File did not constitute a barrier to Mr. Harrison's employment in a position of trust involving children. This letter was dated June 22, 2006.

[17] Mr. Harrison then filed a complaint with the Commissioner of Information and Privacy with respect to the Ministry's disclosure of his personal information to Access House. This complaint was reviewed by Catherine Tully, Senior Portfolio Officer, who issued a report on March 16, 2007. She concluded that Mr. Harrison had given his consent to the disclosure, and in any event, the applicability in these circumstances of s. 79(a) of the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 ["*CFCSA*"] rendered his consent unnecessary.

[18] At Mr. Harrison's request, a reconsideration of Ms. Tully's decision was undertaken by Justine Austin-Olsen, an Adjudicator. On May 23, 2007, she concluded that the two authorizations signed by Mr. Harrison formed valid consents to release information in the AO File, but she was not satisfied that the consents also covered any release of information found in the Resource File opened in 2001 (the foster child file). She also had concerns about the correctness of Ms. Tully's conclusion noted above with respect to the applicability of s. 79(a) of the *CFCSA*.

[19] As a result of Ms. Austin-Olsen's opinion, the Commissioner undertook a third investigation via Patrick Egan, a Portfolio Officer, who reported on September 17, 2007. He concluded that the information Ms. Bischoff disclosed constituted disclosure of personal information under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ["*FIPPA*"] that was in the custody and control of the Ministry. Mr. Egan concluded that the consents covered the information in the AO File, but not the opinion of Ms. Bischoff that Mr. Harrison should be supervised. However, he concluded that s. 79(a) of the *CFCSA* authorized Ms. Bischoff to disclose the personal information, including her opinion about him, without his consent.

[20] Although Mr. Egan made reference to s. 28 of *FIPPA*, which imposes an obligation on public bodies to make every reasonable effort to ensure personal information is accurate, it did not form part of his analysis.

[21] Mr. Harrison filed a petition for judicial review of this decision. The application was heard by Pitfield J. During the hearing process, Pitfield J. made an interim order that enjoined the Attorney General and all ministries of government from disclosing any of Mr. Harrison's personal information, amongst other things. This order was set aside in this Court by consent of all parties on February 12, 2008 (2008 BCCA 67).

[22] Mr. Justice Pitfield quashed the decision of Mr. Egan and remitted Mr. Harrison's complaint for consideration in accordance with his reasons for judgment. He concluded that Ms. Bischoff's disclosure of her opinion to Access House that Mr. Harrison should be supervised constituted a breach of her duty under s. 28 of *FIPPA*. The reasons also raised the possibility of Mr. Harrison suing the government over the events recounted above. Shortly after Pitfield J.'s reasons were issued, Mr. Harrison initiated a lawsuit against the AG, Mr. McNeill and Ms. Bischoff. I will return to this litigation later in the chronology of events.

[23] Both the AG and the Commissioner appealed the decision of Pitfield J. On May 7, 2009, this Court allowed the appeal for reasons indexed at 2009 BCCA 203 (leave to appeal ref'd [2010] 1 S.C.R. x). The Court concluded that Pitfield J. did not have the jurisdiction to make findings pursuant to s. 28 of *FIPPA*. This Court remitted the matter to the Commissioner to consider s. 28 of *FIPPA*, which was the only outstanding issue. I will also return to the import of this decision as it plays a significant role in Mr. Harrison's cross appeal and appeal.

[24] In the meantime, the Province of British Columbia (the "Province"), the Ministry, Mr. McNeill and Ms. Bischoff brought an application to dismiss Mr. Harrison's civil suit by way of a summary trial, pursuant to Rule 18A. For reasons indexed at 2009 BCSC 460, Mr. Justice Ehrcke dismissed the action

against Mr. McNeill but concluded that the remainder of the case could not be decided by way of a summary trial.

[25] The Province, the Ministry and Ms. Bischoff appealed. This Court allowed their appeal on May 5, 2010 (2010 BCCA 220, leave to appeal ref'd [2010] 3 S.C.R. vi), concluding that the action brought by Mr. Harrison should be dismissed in its entirety. The Court held that the Ministry did not owe a duty of care to Mr. Harrison, as its primary mandate is child protection. As a result of the Supreme Court of Canada's refusal to hear Mr. Harrison's appeal, he has no route to a civil remedy in damages for what occurred in 2006.

[26] Adjudicator Mary Carlson reconsidered the matter as agent for the Commissioner and rendered her decision on September 7, 2010 (Order F10-31, 2010 BCIPC 44, [2010] B.C.I.P.C.D. No. 44). Her decision was judicially reviewed by Greyell J., who issued his decision on September 6, 2011. Mr. Justice Greyell remitted the matter to the Commissioner once again. The instant appeals are from this decision.

The Legislative Provisions

[27] The following are the sections of *FIPPA* which are raised in this appeal:

> **Purposes of this Act**
>
> 2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.
>
> ...

Accuracy of personal information

28 If

(a) an individual's personal information is in the custody or under the control of a public body, and

(b) the personal information will be used by or on behalf of the public body to make a decision that directly affects the individual,

the public body must make every reasonable effort to ensure that the personal information is accurate and complete.

...

Unauthorized disclosure prohibited

30.4 An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this Act.

...

Inquiry by commissioner

56 (1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

...

Commissioner's orders

58 (2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must …

(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:

(a) confirm that a duty imposed under this Act has been performed or require that a duty imposed under this Act be performed;

(b) confirm or reduce the extension of a time limit under section 10 (1);

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require a public body or service provider to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of a public body or service provider to collect, use or disclose personal information;

(f) require the head of a public body to destroy personal information collected in contravention of this Act.

...

Protection of public body from legal suit

73 No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from

(a) the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or

(b) the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

...

General offences and penalties

74 (1) A person must not willfully do any of the following:

(a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

(b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

(c) fail to comply with an order made by the commissioner under section 54.1 or 58 or by an adjudicator under section 65 (2).

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of up to $5 000.

(3) Section 5 of the *Offence Act* does not apply to this Act.

Privacy protection offences

74.1 (1) A person who contravenes section 30.4 (unauthorized disclosure) or 30.5 (notification of unauthorized disclosure) commits an offence.

...

(5) A person who commits an offence under this section is liable

(a) in the case of an individual, other than an individual who is a service provider, to a fine of up to $2 000,

(b) in the case of a partnership that is or individual who is a service provider, to a fine of up to $25 000, and

(c) in the case of a corporation, to a fine of up to $500 000.

(6) The time limit for laying an information to commence a prosecution for an offence under this section is

(a) one year after the date on which the act or omission that is alleged to constitute the offence occurred, or

> (b) if the minister responsible for this Act issues a certificate described in subsection (7), one year after the date on which the minister learned of the act or omission referred to in paragraph (a).
>
> (7) A certificate purporting to have been issued by the minister responsible for this Act certifying the date referred to in subsection (6) (b) is proof of that date.
>
> (8) In a prosecution for an offence under this section, it is a defence for the person charged to prove that the person exercised due diligence to avoid the commission of the offence.
>
> **Definitions (Schedule 1)**
>
> "public body" means
>
> (a) a ministry of the government of British Columbia,
>
> (b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or
>
> (c) a local public body
>
> but does not include
>
> (d) the office of a person who is a member or officer of the Legislative Assembly, or
>
> (e) the Court of Appeal, Supreme Court or Provincial Court;

[28] The sections of the *CFCSA* raised in this appeal are as follows:

> **Disclosure without consent**
>
> 79 A director may, without the consent of any person, disclose information obtained under this Act if the disclosure is
>
> (a) necessary to ensure the safety or well-being of a child,
>
> ...
>
> **Administrative reviews**
>
> 93.1 A director must, in accordance with the regulations,
>
> (a) establish an administrative procedure for reviewing the exercise of a director's powers, duties and functions under this Act, and
>
> (b) ensure that information about the administrative review procedure is available to any person on request.

Ms. Carlson's Decision

[29] Prior to commencing the *FIPPA* review, Ms. Carlson sought and obtained submissions from the parties with respect to her terms of reference. In her reasons,

Ms. Carlson set out the background facts and s. 28 noted above. She then said that the questions under review were:

> 1. Did the Ministry, or someone on behalf of the Ministry, use Mr. Harrison's personal information to make a decision that directly affected him, and, if so,
>
> 2. Did the Ministry make every reasonable effort to ensure that the information was accurate and complete prior to using the information in the decision that directly affected Mr. Harrison?

[30] Ms. Carlson found that the subject matter of her consideration was not the verbal opinion which Ms. Bischoff provided to Access House (that she preferred that Mr. Harrison be supervised), but rather the recorded information Ms. Bischoff reviewed and considered during the PCC process. She concluded that this information was clearly Mr. Harrison's "personal information".

[31] Ms. Carlson concluded that Ms. Bischoff "used" the information in making her recommendation that, pending the outcome of her investigation, Mr. Harrison should be supervised.

[32] Ms. Carlson concluded that Ms. Bischoff's recommendation that Mr. Harrison be supervised was a "decision" as that word appears in s. 28 of *FIPPA*. In addition, the decision to make this recommendation had "profound consequences for Mr. Harrison". She also concluded that the decision "directly affected" Mr. Harrison.

[33] Ms. Carlson ultimately concluded that the Ministry breached its duty under s. 28 to make every reasonable effort to ensure that Mr. Harrison's personal information in its custody and control was accurate and complete before it was used in a decision that directly affected Mr. Harrison.

[34] Ms. Carlson also noted that there is no remedy for Mr. Harrison for the consequences he suffered as a result of Ms. Bischoff's actions. She made certain recommendations with respect to the Ministry's policies and required follow-up within three months.

The Chambers Judge's Decision

[35] As noted above, both Mr. Harrison and the AG filed petitions in the Supreme Court for judicial review of Ms. Carlson's decision. Mr. Justice Greyell heard both petitions and gave reasons indexed at 2011 BCSC 1204. In his petition, Mr. Harrison sought remedies from the Commissioner including: a finding that the Ministry contravened s. 73 of *FIPPA*, the expunction of the personal information in issue, a finding that the Commissioner did not act in good faith, a finding that the Ministry breached ss. 30.4, 74(1)(a) and (b) and 74.1 and 74.1(4) of *FIPPA*, and a finding that the Commissioner breached s. 74(1)(a) and (b) of *FIPPA*.

[36] The AG argued that Ms. Carlson erred in law by concluding: that Ms. Bischoff's recommendation that Mr. Harrison be supervised was a "decision" that "directly affected" Mr. Harrison, that Access House's decision to terminate Mr. Harrison's employment was capable of being a decision made "by or on behalf of" the Ministry, and that Ms. Bischoff was required to ensure the veracity of the allegation made in 1996 before recommending that Mr. Harrison ought to be supervised.

[37] The AG also argued that Ms. Carlson made unreasonable findings of fact. In her reasons, Ms. Carlson said, at para. 5:

> The Commissioner and the Attorney General of British Columbia appealed Justice Pitfield's decision. In *Harrison v. British Columbia (Information and Privacy Commissioner)*, the BC Court of Appeal set aside Justice Pitfield's decision, except for his finding that the Ministry had conveyed inaccurate personal information about the complainant and, in doing so, breached s. 28 of *FIPPA*. [Footnote omitted.]

[38] It is conceded that Ms. Carlson made an error in the above paragraph. However, it is equally clear that this error was inadvertent. As noted above, this Court overturned Pitfield J.'s finding with respect to s. 28 of FIPPA and remitted this question to the Commissioner. The rest of Ms. Carlson's reasons clearly indicate that she was not operating with a mistaken impression of what had occurred before this Court.

[39] The chambers judge discussed the applicable standard of review. As this is an issue on appeal, I will refer to his reasons in more detail when discussing this question.

[40] The first of Mr. Harrison's issues that the chambers judge addressed was the validity of Mr. Harrison's consents to disclosure of information. The chambers judge concluded that this issue had already been addressed in the previous judicial review and associated appeal.

[41] The next issue was whether the Commissioner should have ordered that Mr. Harrison's information be expunged. Mr. Justice Greyell concluded that this issue was expressly addressed by this Court in its previous review of Pitfield J.'s decision.

[42] Next, the chambers judge considered Mr. Harrison's request that the Commissioner be directed to find that the Ministry committed offences under ss. 74(1)(a) and (b) and 74.1(4) of *FIPPA* by not complying with s. 30.4. Mr. Justice Greyell concluded that the Commissioner did not have the authority to do what Mr. Harrison requested.

[43] Next, Greyell J. addressed the question of whether the Commissioner acted unreasonably in failing to investigate the complaint in good faith. Mr. Justice Greyell concluded that there was nothing in the record to substantiate this claim. He opined that these assertions arose from Mr. Harrison's frustration upon failing to obtain a personal remedy despite the Commissioner finding that s. 28 was contravened.

[44] Mr. Harrison sought a finding that the Ministry acted in bad faith amounting to a breach of s. 73 of *FIPPA*, which breach would, in his view, permit him to bring his civil action. Mr. Justice Greyell stated that the Court of Appeal had already dealt with his civil action and concluded that the Ministry owed no legal duty of care to him.

[45] In conclusion, Greyell J. stated that all of Mr. Harrison's matters had been previously litigated and the only outstanding matter was consideration of s. 28 of *FIPPA*.

[46] The AG argued in its petition that the Commissioner failed to account for the paramount purpose of child protection when it considered whether Ms. Bischoff complied with s. 28 of the *FIPPA*. Mr. Justice Greyell concluded that Ms. Carlson committed an error when she failed to consider the effect of the *CFCSA*, and in particular s. 79, when considering whether there had been a breach of s. 28 of *FIPPA*. He remitted the matter to the Commissioner for reconsideration, particularly in light of the May 5, 2010, decision of this Court in 2010 BCCA 220 dismissing Mr. Harrison's civil action. As noted above, Mr. Harrison challenges this determination by cross appeal in the case at bar.

[47] The AG also argued before Greyell J. that the Commissioner erred in concluding that Ms. Bischoff made a "decision" that "directly affected" Mr. Harrison. The chambers judge reviewed this decision on a reasonableness standard, according to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. His entire reasoning for upholding the Commissioner's determination on this point appears at para. 90:

> [90] In my view the analysis contained in the Commissioner's decision-making process at paras. 72-79 is a reasonable one and the conclusions drawn from that analysis at paras. 80-82 are well within the range of possible, acceptable outcomes defensible both in respect of the law and the facts. In my view the MCFD's position on these two issues is [disingenuous]. It ignores the reality of the impact Ms. Bischoff's remarks had on the options available to Access House. Access House had little choice in the matter but to terminate Mr. Harrison's employment.

[48] The AG impugns this conclusion on its appeal.

Positions of the Parties

Mr. Harrison

[49] In his cross appeal, Mr. Harrison says Greyell J. incorrectly remitted the matter to the Commissioner for consideration of s. 79 of the *CFCSA*. He submits

that that this issue was foreclosed by this Court's May 7, 2009 judgment in 2009 BCCA 203.

[50] The issues Mr. Harrison raises on his appeal are the same as those he raised before Greyell J. He states that he has shown that he did not consent to the disclosure, the information disclosed was false, the Ministry took no steps to ensure the accuracy of the information, its decision directly affected him and there was no child protection risk.

[51] Mr. Harrison seeks the following remedies from this Court:

> 66. Mr. Harrison asks this Court to dismiss the Greyell J. remittal and the Province appeal.
>
> 67. Mr. Harrison asks this Court to allow the cross-appeal on terms this Court considers just.
>
> 68. Mr. Harrison also seeks direction from this Court for the means to pursue vacating the May 5, 2010 Decision of this Court to re-instate the summary judgment decision of Mr. Justice Ehrcke and remit this matter for full trial.

The AG

[52] The "decision" in question, as framed by Ms. Carlson, was Ms. Bischoff's decision to recommend the suspension of Mr. Harrison's unsupervised access to youth. The AG submits that this is not a "decision" within the meaning of s. 28 of *FIPPA*. It submits that Ms. Carlson's contrary finding was unreasonable, and the chambers judge erred in upholding it.

[53] The AG also says that the chambers judge erred in upholding, as reasonable, Ms. Carlson's conclusion that the decision "directly affected" Mr. Harrison. The AG takes the position that if this act was a decision, it only indirectly affected Mr. Harrison as the decision to fire him was made by Ms. Ford on behalf of Access House.

[54] The AG submits there is no merit to Mr. Harrison's appeal or cross appeal.

The Commissioner

[55] The Commissioner only made submissions with respect to the standard of review. She submitted that the chambers judge ought to have applied a reasonableness standard of review to all aspects of Ms. Carlson's decision, except for her interpretation of this Court's order remitting the matter for her consideration. I turn to this issue next.

Analysis

Standard of Review

[56] At para. 49 of his reasons for judgment, the chambers judge said that the grounds of review raised in the Ministry's petition "involve the application of the reasonableness standard warranting some deference to the conclusions of the Commissioner". However, at para. 85, he contradicted this statement by invoking and applying the correctness standard when he assessed whether Ms. Carlson erred in her analysis of s. 28 as the Ministry alleged she did.

[57] The AG primarily submits that correctness is the proper standard of review for this part of the decision. The Commissioner submits that the proper standard of review is reasonableness. I respectfully agree with the Commissioner's position, for the reasons set out below.

[58] I also note that the issue of whether a chambers judge presiding over a judicial review selects and properly applies the right standard of review is itself a question of law reviewable on a standard of correctness (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at paras. 70-79).

[59] In one of many recent decisions addressing the standard of review in the context of administrative tribunals, the Supreme Court of Canada said this in

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 18 and 24:

> [18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).
>
> …
>
> [24] … In substance, <u>if the issue relates to the interpretation and application of its own statute, it is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.</u>
>
> [Emphasis added.]

[60] Ms. Carlson was interpreting her home statute. The trial judge erred when he concluded that she was "outside of her expertise". Section 28 of *FIPPA* is well within the expertise of the Commissioner. There are no issues of general legal importance raised by this question. No question of jurisdiction is raised.

[61] In *Stubicar v. Alberta (Office of the Information and Privacy Commissioner)*, 2008 ABCA 357 at para. 23, the Court considered the standard of review applicable to an administrative assessment of whether the Calgary Health Region complied with its statutory duty to make "every reasonable effort to assist the applicant" in obtaining records:

> [23] … The question before us is perhaps an even clearer example of a decision which warrants deference. Section 10(a) requires that the custodian "make every reasonable effort to assist the applicant…" The use of the words "reasonable effort" suggests an application of the facts to the legal requirement imposed on the custodian "to assist." This is not a pure question of law which can be separated from the facts. Deference ought to apply to issues where fact and law are difficult to separate: *Dunsmuir* at para. 53.

[62] The question of whether Ms. Bischoff made "every reasonable effort to ensure that [Mr. Harrison's] personal information is accurate and complete" is similarly not a pure question of law. It involves the application of the facts to the question of what is "reasonable" in the context of the legal duties imposed upon Ms. Bischoff by statute. In my respectful view, the learned chambers judge erred when he applied a standard of correctness to Ms. Carlson's determination on this point. He ought to have applied a standard of reasonableness and considered, as he did later in his reasons in relation to another ground of review, whether this determination "[fell] within a range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir* at para. 47).

[63] The ground of review with respect to which the chambers judge applied the wrong standard of review forms the basis for Mr. Harrison's cross appeal. Accordingly, it is open to this Court to determine the cross appeal, to which I now turn, by applying the proper standard of review to Ms. Carlson's conclusion on this point.

Mr. Harrison's Cross Appeal

[64] As noted above, Mr. Harrison's cross appeal impugns the chambers judge's decision to remit this matter to the Commissioner for reconsideration. It is Mr. Harrison's submission that this aspect of the chambers judge's order was precluded by the restricted scope of reconsideration of s. 28 of *FIPPA* that this Court previously ordered in 2009 BCCA 203.

[65] In order to assess this ground of appeal, it is important to set out exactly where things stood after the decision of this Court of May 7, 2009.

[66] The Court examined the statutory framework and the relationship between *FIPPA* and the *CFCSA*. The Ministry relied on s. 79(a) as a justification for Ms. Bischoff disclosing Mr. Harrison's information to Jessie Ford and Marian Haden. This Court concluded that the Ministry's decision was not reviewable by the Commissioner as decisions made pursuant to s. 79(a) were no longer reviewable under *FIPPA*. The Court said this:

> [55] Thus, the Commissioner has jurisdiction to investigate a director's duties under *FIPPA*, but does not have jurisdiction to investigate a director's compliance with s. 79(a) of *CFCSA*. This is significant to the interpretation of the remittal order, which we will discuss below in these reasons.
>
> ...
>
> [58] On appeal, the Commissioner submits that the chambers judge misinterpreted ss. 74(2)(e) and (f) of the *CFCSA*. As we have already observed, the effect of those subsections renders the Commissioner without jurisdiction to review complaints with respect to disclosures made under s. 79 of the *CFCSA*.
>
> [59] The chambers judge was evidently concerned that, without such jurisdiction, there would be no proper review of a director's decision under the *CFCSA*. There is, however, under s. 93.1 of the *CFCSA* a mandated procedure "for reviewing the exercise of a director's powers, duties and functions" under that Act. Furthermore, as with any exercise of statutory power, the director's decision would be subject to judicial review.
>
> [60] In our opinion, the chambers judge erred in law in his interpretation of ss. 74(2)(e) and (f). The correct interpretation, as we have explained, limits the Commissioner's jurisdiction to review a director's decision under *FIPPA* and does not permit the Commissioner to review a director's decision under s. 79 of the *CFCSA*.
>
> [61] In our opinion, it is necessary to rectify the trial judge's erroneous interpretation. To allow the misinterpretation to stand uncorrected would potentially affect the possible future judicial review by the Supreme Court with an inevitable and unnecessary appeal on the point.
>
> [Emphasis in original.]

[67] However, in the 2009 decision at para. 64, this Court viewed Mr. Egan's decision as too narrow, in that it focussed only on whether the consents obtained were valid and whether s. 79 of the *CFCSA* applied. This Court agreed with Pitfield J. on this point and referred to paras. 63 and 68 of his decision, which read as follows:

> [63] In this case, the Commissioner focused on Mr. Harrison's complaint that personal information had been disclosed without his consent. In conducting his investigation, the Commissioner was exercising a statutory power within the meaning of *JRPA*. He was exercising a power *FIPPA* confers to make an investigation into Mr. Harrison's legal rights, privilege, immunity, duty or liability within the meaning of s. 1 of *JRPA*. However, in my opinion the focus of the investigation was inappropriately narrow.
>
> ...
>
> [68] Had the Commissioner analyzed the substance of Mr. Harrison's complaint in the entire context of *FIPPA*, as he was obliged to do once he

> had exercised his discretion to investigate the Harrison complaint, and had the Commissioner directed his mind to the question of whether a director of *CFCSA* had, to the extent reasonably possible, determined that the personal information relating to Mr. Harrison was reliable, he may have concluded that it was appropriate to make an order under s. 58(3). Alternatively, or in addition, the Commissioner may have concluded that it was appropriate to make an order requiring the unverified and unreliable personal information pertaining to Mr. Harrison to be expunged from *CFCSA* files or otherwise managed in order to ensure it would not be at risk of use or disclosure again.

[68] This Court remitted to the Commissioner consideration of whether s. 28 was violated and, if so, whether a remedy was available under s. 58(3)(e) of *FIPPA*. It concluded that there was no remedy available under s. 58(3)(f) as no party alleged that the information was collected in contravention of *FIPPA*.

[69] The Court did not find that the issue with respect to the consents or s. 79(a) should be remitted. As noted above, the Court concluded that the Commissioner had no power to review the decision of the Minister under s. 79. This decision could only be reviewed internally under s. 93.1 of the *CFCSA*, but not by the Privacy Commissioner.

[70] Mr. Justice Greyell said the following at paras. 82 and 83:

> [82] I note Mr. Egan, the Commissioner's delegate who authored the report which was subject to the judicial review by Pitfield J., did assess the impact of the provisions of the CFCSA on FIPPA.
>
> [83] In my view it would be difficult, if not impossible, for the Commissioner to conclude there was a breach of s. 28 of FIPPA without doing so. It seems to me an assessment of the impact of the provisions of the CFCSA on s. 28 of FIPPA must be conducted in order for the Commissioner to assess whether the MCFD made "every reasonable effort" within the context of the duties and responsibilities imposed on it under that statute. I find that in failing to consider this issue the Commissioner committed a reviewable error in law.

[71] In coming to this conclusion, Greyell J. relied on the comments of this Court in 2010 BCCA 220, which dismissed Mr. Harrison's tort claim, at para. 53.

> [53] Imposing a private law duty of care on a social worker to those whose background he or she must review for child safety concerns has the potential to interfere with their ability to discharge that vital task. More broadly, it would interfere with the paramount duty to the safety of the child. A social worker should not feel torn between her paramount obligation to the child and an ancillary duty to consider the employment status of those who seek to care

> for them. Accordingly, imposing a duty of care on Ms. Bischoff in these circumstances poses precisely the risk for inherent conflict that was found to be determinative by the Supreme Court of Canada in [*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83]. There is simply no basis to distinguish *Syl Apps* in this regard.

[72] Mr. Justice Greyell concluded that the question of whether Ms. Bischoff made every reasonable effort to confirm the accuracy and completeness of the information upon which she relied required consideration in the context of the *CFCSA*. As noted above, he decided this on a correctness basis, rather than on whether the decision was reasonable. He concluded that Ms. Carlson did not apply the child protection concerns in the *CFCSA*.

[73] Given that the chambers judge applied the wrong standard of review, it is open to this Court to apply the proper standard. An examination of Ms. Carlson's reasons shows that, although she could not review the earlier decision by the Ministry under s. 79(a), she was fully alive to the paramountcy of child protection in Ms. Bischoff's mandate. She made repeated references to this statutory responsibility in summarizing the Ministry's submissions. She specifically stated that what is reasonable within s. 28 must be contextual.

> [58] Whether the information contained in Ministry files about Mr. Harrison was accurate and complete is not within the scope of this hearing. The question is whether the Ministry made every reasonable effort to ensure the accuracy and completeness of Mr. Harrison's personal information before it used that information to recommend Mr. Harrison be prohibited from unattended contact with the youth at the group home.
>
> [59] The Ministry states that:
>
> > ...in the context of child protection social work, social workers are required to accurately record what is reported to them, and to completely record what is reported to them. They are not required to ascertain the veracity of what is reported to them at the time of the report. Attempts to do that may occur during the report investigation [stage], not at the report receipt stage.
>
> ...
>
> [70] At the examination for discovery, the social worker was asked to explain why she disclosed the 1996 allegation concerning Mr. Harrison to Access House before she had completed a full review. She responded "Well, the AO file has a very serious allegation and as my role is to protect children, there was that worry in mind". She further testified that when she read the AO

> file, she wondered "how they came to their conclusion" and "would have preferred to have seen a lot more documentation recorded on file as to how they came to that conclusion".
>
> [71] She further deposed that, had she been conducting a child protection investigation, she would have interviewed "all the relevant parties...the people involved in that report". However, in this instance, despite her stated concerns that the documentation in the 1996 AO file was inadequate and her stated role of child protection, she did not attempt to contact a single person involved in that matter. Neither did she contact any staff involved in the decisions to approve Mr. Harrison as a foster parent and out-of-school caregiver, both of which post-dated the abuse allegation. She also never contacted Mr. Harrison.
>
> …
>
> [72] What is the standard by which one can conclude a public body has made "every reasonable effort" to ensure that personal information is accurate and complete, before it makes a decision affecting someone, based on that information?
>
> [73] In this matter, the evidence is clear that the social worker made no effort, let alone every reasonable effort, to ensure the accuracy and completeness of the information she relied upon to come to her interim decision recommending Mr. Harrison not be left alone with youth in his workplace. Her opinion was based in part on her belief that the matter had not been "properly" investigated. Yet she did not make a single inquiry of any one of the several Ministry employees who had had dealings with Mr. Harrison over the previous decade. To compound matters, she admitted that, when she made her recommendation concerning Mr. Harrison, it had been more than twenty-four years since she had worked in the field of child protection. This decision, based on allegations determined at the time to be without substance and warranting no further investigation, has led to consequences that cannot be remedied.
>
> [Footnotes omitted.]

[74] It is abundantly clear that Ms. Carlson had the important context of child protection in mind when she concluded that s. 28 of *FIPPA* had been violated. When one examines her factual findings and the analysis she performed based on those findings, it cannot be said that her conclusion, that s. 28 of *FIPPA* was violated, was unreasonable.

[75] In my respectful view, the learned chambers judge erred when he remitted the matter to the Commissioner.

Mr. Harrison's Appeal

[76] I will address Mr. Harrison's appeal briefly. In my view, the only issue outstanding after this Court's decision in 2009 BCCA 203 was whether s. 28 of *FIPPA* had been breached. I agree with Greyell J. that this Court has already finally resolved all of the issues Mr. Harrison now revives in his appeal. In addition, Mr. Harrison seeks an order we have no ability to make. This Court dismissed his civil action and cannot reopen it.

The AG's Appeal

[77] Ms. Carlson's reasons for determination of the issues subject to the AG's appeal are found at paras. 44–57 of her decision.

"Decision"

[78] The first question raised by the AG is whether Ms. Carlson reached a reasonable conclusion in determining that Ms. Bischoff's recommendation that Mr. Harrison be supervised was a "decision" within the meaning of s. 28 of *FIPPA*.

[79] Ms. Carlson applied s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, and considered the purpose of *FIPPA* in interpreting "decision". She rejected the Ministry's proffered distinction between formal decisions and routine decisions or actions of social workers, instead observing that *FIPPA* distinguishes only between decisions that directly affect individuals and those that do not.

[80] The AG submits that a decision for the purpose of s. 28 involves something like hiring or firing an employee, issuing or denying a permit or licence, granting or denying benefits, or taking a child into care; in other words, something of substance, rather than an expression of a "preference, if possible".

[81] The AG supports this argument with the submission that, if Ms. Bischoff's recommendation is considered a "decision" under s. 28 of *FIPPA*, absurdities will ensue. I quote from its factum:

> 61. An example will suffice to demonstrate the untenability of Ms. Carlson's interpretation. Ms. Carlson's interpretation would bring into the rubric of "decision" in s. 28 a "decision" by a social worker to investigate a

> report of child abuse, because the investigation may ultimately have an effect on the person being investigated. In order to comply with Ms. Carlson's interpretation, the social worker would have to determine the veracity of the allegations *before* making the "decision" to conduct an investigation.
>
> 62. Imagine, as another example, a situation where an employee of the Ministry of Social Development receives a report from a member of the public that a benefit recipient is defrauding the Province. If Ms. Carlson's decision were correct, before the employee could "decide" to recommend that an investigator undertake an investigation, she would have to ascertain for herself the veracity of the allegation.
>
> 63. Alternatively, imagine a situation where an employee of the Liquor Control and Licensing Branch of the Ministry of Solicitor General receives correspondence from a municipal police force alleging that the management of a particular licensed establishment has been infiltrated by the Hells Angels. According to Ms. Carlson's interpretation of "decision," before that employee could "decide" to recommend that a hearing be held into whether the licensee is "fit and proper," he would have to ascertain for himself the veracity of the allegations.

[82] I do not think the AG's examples properly apply Ms. Carlson's interpretation of s. 28. Section 28 does not require a public body to make every reasonable effort to ascertain the veracity of an allegation before commencing an investigation. The AG's submission confuses the reasonable effort undertaken to verify personal information with the decision that results from its use once verified.

[83] The AG points to the *Ministry of Citizen's Services Policy and Procedures Manual*, which defines "decision" for the purpose of *FIPPA*:

> "decision" in the context of a request under the Act means a conclusion, formal judgment, including the reasons which were used in reaching that judgment, or resolution reached by the head of a public body (or by the person with the head's delegated authority) in the course of processing the request. The decision must, in some manner, affect the rights of the applicant or have an effect on the person concerned (e.g. entitlement to benefit, service or a particular job), and be made in the exercise of a discretionary power or an adjudicative function. [1]

[84] The AG concedes that this manual does not have the force of a statute, but submits it is relevant when considering whether what Ms. Bischoff did amounted to a decision under the s. 28 of *FIPPA*.

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[1] Accessible at http://www.cio.gov.bc.ca/cio/priv_leg/manual/definitions/def.page.

[85] It must be remembered that Ms. Carlson's decision is reviewable on a standard of reasonableness. The question is whether this determination "[fell] within a range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir* at para. 47).

[86] Ms. Bischoff's primary task was the protection of children. Part of her mandate was to perform checks on potential employees and determine whether they were suitable for working with children. In the process of checking Mr. Harrison's background, she saw information that caused her concern. In the course of her investigation, she communicated to Mr. Harrison's employer that she would prefer he be supervised.

[87] The purpose of s. 28 is to ensure that public bodies, which would include Ms. Bischoff as a Ministry employee, do not make decisions based on inaccurate personal information, which will have direct effects on individuals. Inquiries under s. 28 are fact-based and made in the context of the case. In this case, Ms. Bischoff's first and foremost responsibility was child protection, but she was also subject to other statutory duties. During the course of her inquiries, she concluded that it would be preferable that Mr. Harrison be supervised until she could conclude her investigation. She came to this conclusion based on personal information the Ministry had in relation to Mr. Harrison which she made no effort to verify before deciding to recommend that he be supervised.

[88] In my view, Ms. Carlson came to a reasonable conclusion within the meaning of *Dunsmuir* in determining that "Ms. Bischoff's recommendation that Mr. Harrison be supervised pending her investigation" was a decision within the meaning of s. 28 of *FIPPA*. Therefore, the chambers judge did not err in upholding this finding as reasonable.

"Directly Affects"

[89] The AG argues that if Ms. Bischoff made a "decision", it did not directly affect Mr. Harrison because he was fired by Jessie Ford, not Ms. Bischoff.

[90] Ms. Carlson considered the Ministry's submission that, although termination of employment is a decision that directly affects an individual, this decision was made by Access House and Ms. Bischoff's actions played no direct role in it. Ms. Carlson ultimately rejected this submission. She found that Ms. Bischoff's decision to recommend the suspension of Mr. Harrison's unsupervised contact with youth at Access House had a direct impact on his termination because the purpose of his employment was to provide one-to-one care. Supervision of him in this context was unworkable. Ms. Carlson rejected the Ministry's submission that Access House could or should have disregarded Ms. Bischoff's direction.

[91] As noted above, the purpose of s. 28 of the *FIPPA* is to ensure that public bodies do not make decisions directly and significantly affecting individuals based on inaccurate personal information. Inquiries under s. 28 are fact-based and made in the context of the case. The factual context of this case, including the authority of Ms. Bischoff's position and the requirements of the job for which Mr. Harrison was hired, produced a situation in which Ms. Bischoff's recommendation rendered Mr. Harrison unable to perform his employment duties. Ms. Carlson's conclusion that the decision directly affected Mr. Harrison was reasonable.

Summary

[92] I would:

1. allow Mr. Harrison's cross appeal from Greyell J.'s decision remitting the matter to the Commissioner;

2. restore the decision of the Commissioner;

3. dismiss Mr. Harrison's appeal, including his request that this Court give direction for the means to pursue vacating the May 5, 2010 Decision of this Court to re-instate the summary judgment decision of Mr. Justice Ehrcke and remit this matter for full trial;

4. dismiss the AG's appeal;

5. order that Mr. Harrison have his costs against the AG; and

6. order that the Commissioner will not pay or receive costs to or from the other parties.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Garson"

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[93] I have had the privilege of reading the draft reasons for judgment of Madam Justice Bennett in this case. I agree with her conclusions and dispositions with respect to Mr. Harrison's appeal and cross appeal, but not with respect to the disposition of the appeal of the AG. I am, with respect, unable to agree with one of her conclusions respecting that appeal.

[94] The history of the protracted litigation has been fully set out by Madam Justice Bennett, and I agree with her conclusions concerning the applicable standards of review with respect to the issues raised by the appeals and the cross appeal.

[95] Where I differ from my colleague is with respect to the acceptance by the chambers judge that Ms. Carlson's conclusion that Ms. Bischoff made a "decision that directly affected Mr. Harrison", which invoked the analysis of s. 28 of *FIPPA* in her decision of September 7, 2011, was reasonable.

[96] In order to explain the basis for my disagreement with Bennett J.A., it is necessary to identify what I consider to be an error in the reasoning of Ms. Carlson and ultimately, the chambers judge whose decision is the subject of this appeal.

[97] The question of the validity of the consents signed by Mr. Harrison had previously been determined and was not before Ms. Carlson. The questions before her were, as she described at para. 28 of her decision:

> 1. Did the Ministry, or someone on behalf of the Ministry, use Mr. Harrison's personal information to make a decision that directly affected him and, if so,
>
> 2. Did the Ministry make every reasonable effort to ensure that the information was accurate and complete prior to using the information in the decision that directly affected Mr. Harrison?

[98] In her second affidavit filed in the proceedings, Ms. Bischoff swore that:

> On or about May 12, 2006, I contacted Jessie Ford over the telephone to advise her that something had come up on Mr. Harrison's PCC that I wished to investigate further. I told Ms. Ford that I would like to receive a more specific consent to the disclosure of information from Mr. Harrison before I was prepared to discuss the content of the file in detail.

[99] In the same affidavit Ms. Bischoff also swore that when Ms. Ford asked her in an email of May 18, 2006 if she wanted Mr. Harrison supervised while working with the youth, she replied:

> ... to be on the safe side I would prefer that he may be supervised, if you can do this.

[100] In my opinion, Ms. Bischoff's reply was nothing more than the expression of a preference qualified by the possibility of its accommodation by Access House. It was, however, treated as more than that by Ms. Carlson.

[101] It may well be that Ms. Carlson was led into error by the AG's "Initial Submissions for the Public Body" of March 19, 2010, which were before her at the hearing. The AG, in those submissions, described the contents of the email in a variety of ways including: "opinion", "preference", "concern", "recommendation", and "judgment call"; any of which could have led Ms. Carlson into error. In the AG's Petition that was heard by the chambers judge, it is asserted at para. 20 that:

> On 18 May 2006, Ms Bischoff recommended to Access House that, pending her review of the file, Mr. Harrison should be supervised. Specifically, she said, in an e-mail to Ms. Ford: "to be on the safe side I would prefer that he may be supervised, if you can do this".

[102] Similar references to Ms. Bischoff making a "recommendation" are also seen in the AG's factum on this appeal. Counsel's use of the term "recommendation", or synonymous terms, is not proof that what Ms. Bischoff offered was something that it was not, and it was for Ms. Carlson to satisfy herself as to what it was that Ms. Bischoff offered.

[103] At para. 54 of her decision, Ms. Carlson wrote:

> ... The Ministry correctly states that the group home and not the Ministry decided to fire Mr. Harrison. However, this does not change the fact the Ministry also made a decision in this instance. The decision in question was the social worker's decision to recommend the suspension of Mr. Harrison's unsupervised access to youth at the group home until she completed her review. It is not within my mandate to determine whether her recommendation was correct or not. However, there can be no doubt the decision to make this recommendation had profound consequences for Mr. Harrison.
>
> [Emphasis added.]

[104] Ms. Carlson's conclusion that Ms. Bischoff made a decision to make a recommendation is either a finding of fact or an inference drawn from the evidence before her, but however categorized, is a conclusion that attracts a standard of review of reasonableness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[105] The decision that was under review in *Dunsmuir* was that of an adjudicator appointed pursuant to the New Brunswick *Public Service Labour Relations Act* R.S.N.B. 1973, c. P-25. His decision was quashed, in part, on the basis that his interpretation of his jurisdiction pursuant to that *Act* was unreasonable.

[106] At paras. 46–47, Bastarache and LeBel JJ., for the majority of the Court, considered the standard of reasonableness:

> [46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> [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.

[107] In his reasons, concurring in the result, Binnie J. cautioned at para. 141:

> ... The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

[108] Madam Justice Abella, writing for the Court, further considered the standard of reasonableness in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 12:

> It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:
>
> > "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
> >
> > David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)
>
> See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.
>
> [Emphasis added by Abella J.]

[109] Ms. Carlson's reasoning that explains her conclusion that Ms. Bischoff made a decision that affected Mr. Harrison is found at paras. 55–57 of her decision:

> [55] The Ministry's attempt to deny there was a direct link between the recommendation of the social worker and the subsequent firing of Mr. Harrison is not believable. Mr. Harrison was hired specifically to provide one-on-one supervision for a youth receiving services through the group home. The Ministry was the overseer of the contractor and appeared to have the power in the contract to approve all caregivers. Mr. Harrison fell squarely under the definition of caregiver.
>
> [56] It is not believable to suggest the group home management would disregard the social worker's decision to recommend that Mr. Harrison be removed from unsupervised access to clients of the group home. This recommendation had the direct impact of frustrating the purpose for which Mr. Harrison was hired. Mr. Harrison's employment was promptly terminated.
>
> [57] I find that the personal information was used in a decision that directly affected Mr. Harrison.

[110] In my opinion, Ms. Carlson's reasoning is problematic. It is based upon the premise that Ms. Bischoff made a recommendation that "Mr. Harrison be removed from unsupervised access to clients of the group home". Ms. Carlson could only have reached that conclusion by ignoring the words that were used by Ms. Bischoff. Ms. Bischoff clearly made a decision to email Ms. Ford, but that was not the "decision" that Ms. Carlson found to have impacted Mr. Harrison.

[111] The entire content of Ms. Bischoff's email, including the qualification "if you can do this" had to be considered in order to understand what Ms. Bischoff communicated to Ms. Ford. What Ms. Bischoff communicated was the fact that she had not completed her review, and that until she did, her preference was for Mr. Harrison to be supervised if that could be done. She did not recommend that he be removed from unsupervised access to clients, and the conclusion that she did so is unreasonable.

[112] I recognize, as was emphasized in *Newfoundland*, that the reasonableness standard requires the court to first seek to supplement the reasons of the administrative decision maker before it seeks to subvert them. I am unable to do so in this circumstance. At para. 16, Abella J. continued:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[113] Ms. Carlson's reasons for determining that the actual content of the email was a "decision" pursuant to s. 28 of *FIPPA* are absent from the reasons. At paras. 47 to 51 she reasons that both informal and formal decisions are caught under s. 28 of *FIPPA*, however, there is no analysis of whether the contents of the email is a "decision", informal or otherwise. As her reasons do not permit me to determine why she made that conclusion, and as I am of the opinion that that conclusion is not within a range of acceptable outcomes, it follows that I find her conclusion is unreasonable.

[114] Clearly child protection must be paramount in Ms. Bischoff's mandate. While the interpretation of s. 79(a) of the *CFCSA* was not a matter remitted to the Commissioner by this Court, I agree with Madam Justice Bennett that it should have and did provide important context for Ms. Carlson in her consideration of s. 28 of *FIPPA*. Social workers placed in the situation that Ms. Bischoff found herself in, face awesome responsibilities. In my view, the stated preference of Ms. Bischoff, qualified as it was by the rider "if you can do this" cannot be elevated as it was by Ms. Carlson, to the status of even an informal "decision".

[115] Further, in addition to the problems discussed above, Ms. Carlson's reasoning concerning the effect of Ms. Bischoff's email on Mr. Harrison's position at Access House is problematic in its own respect. Ms. Carlson's reasoning that the "recommendation" "directly affected Mr. Harrison" because the group home management could not believably disregard that "recommendation", in the absence of some evidence to that effect from the group home staff (and Ms. Carlson refers to

no such evidence) is nothing more than speculation on Ms. Carlson's behalf, and offers no transparent rational explanation for her conclusion.

[116] Ms. Ford's affidavit details the events as follows:

> 17. I do recall Ms. Bischoff advising [her] at some point in mid-May that she would prefer that Mr. Harrison not be left unsupervised with B until she had the opportunity to investigate further, and we could discuss her findings. I reviewed the email exchange which is attached as Exhibit "D" to Ms. Bischoff's Affidavit. This email is generally consistent with my recollection of the advice I received from Ms. Bischoff at this time.
>
> 18. Ms. Haden, in consultation with me, decided that Mr. Harrison should be put on stand-by while Ms. Bischoff completed her review. I recall having further discussions with Ms. Haden and Mr. Harrison as to whether he should be looking for other work, given that we were not sure how long the review process would take to complete. I believe Ms. Haden may have had additional discussion with Mr. Harrison on her own. At some point in time, Ms. Haden decided to let Mr. Harrison go as an employee.

[117] Ms. Ford perceived the email as "advice" only. There is no evidence as to how Ms. Haden perceived it. This is problematic, particularly where the "advice" was pending the completion of Ms. Bischoff's investigation, and in the circumstances of there being no evidentiary foundation to conclude that Ms. Haden merely did what she was told to do by Ms. Bischoff. For this reason, in my opinion, Ms. Carlson's further conclusion that Ms. Bischoff made a decision that directly affected Mr. Harrison is also unreasonable.

[118] It follows that I find that the chambers judge erred in upholding as reasonable Ms. Carlson's finding that Ms. Bischoff made a "decision that directly affects the individual" pursuant to s. 28(b) of *FIPPA*, and I would set aside the finding of the chambers judge that Ms. Carlson's conclusion that Ms. Bischoff made a decision in that regard as reasonable. Having reached that conclusion, there is no basis for remitting the matter back to the Commissioner, and I would not do so.

"The Honourable Mr. Justice Hinkson"