Date: 19990203
Docket: A970437
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

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. 144-1997),
DATED JANUARY 17, 1997, MADE UNDER THE FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT, R.S.B.C. 1996, c. 165

BETWEEN:

GREATER VANCOUVER MENTAL HEALTH SERVICE SOCIETY

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF THE PROVINCE OF BRITISH COLUMBIA and
MS. DOE (APPLICANT) and DR. ROE (THIRD PARTY)

RESPONDENTS

Docket: A970483
Registry: Vancouver

BETWEEN:

DR. ROE

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF THE PROVINCE OF BRITISH COLUMBIA and
MS. DOE (APPLICANT) and GREATER VANCOUVER
MENTAL HEALTH SERVICES SOCIETY (INQUIRY RESPONDENT)

RESPONDENTS

Docket: A970484
Registry: Vancouver

BETWEEN:

"CONSULTANT"

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER
OF THE PROVINCE OF BRITISH COLUMBIA and
MS. DOE (APPLICANT) and GREATER VANCOUVER
MENTAL HEALTH SERVICES SOCIETY (INQUIRY RESPONDENT)

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LYNN SMITH

Counsel for the Petitioner, G.V.M.H.S.:	Lauri Ann Fenlon
Counsel for the Petitioner, Dr. Roe:	William S. Clark
Counsel for the Petitioner, "Consultant":	Chris E. Hinkson, Q.C.
Counsel for the Respondent, Ms. Doe:	Nazeer Mitha and Brian Dartnell
Counsel for The Attorney General of British Columbia:	Jeff Loenen
Counsel for the Information and Privacy Commissioner:	Deborah Lovett
Place and Date of Hearing:	Vancouver, B.C. September 10 - 11, 1998

I. INTRODUCTION

[1] These three applications for judicial review of decisions of the Information and Privacy Commissioner of British Columbia arose from a complaint by a former patient against her then psychiatrist, made to the Greater Vancouver Mental Health Service Society ("GVMHSS"). The applications were heard together, with evidence on each admissible in the

others.

II. FACTS

A. The parties:

[2] The GVMHSS is a non-profit society that coordinates and provides mental health services under contract to the British Columbia Ministry of Health and Ministry Responsible for Seniors (the "Ministry"). Medical practitioners enter contracts with GVMHSS to provide their services to GVMHSS's clients. Ms. Doe, a respondent to these petitions, was a client of GVMHSS in family therapy prior to 1991 and in individual therapy with Dr. Roe for about two years between 1991 and 1993.

B. The complaint to the GVMHSS and its disposition:

[3] When Ms. Doe's therapy with Dr. Roe ended in 1993, she expressed dissatisfaction and two years later, in 1995, she complained to GVMHSS about aspects of Dr. Roe's conduct. These included his use of their sessions for his own therapeutic needs, inappropriate sexual and personal comments, and breach of confidentiality to a third person regarding her status as his former patient. (Ms. Doe also complained to the College of Physicians and Surgeons. That complaint and its disposition are not relevant to these proceedings.)

[4] John Russell, the Executive Director of the GVMHSS, deposed that when Ms. Doe's complaint came forward the organization did not have an approved policy for dealing with such complaints (since they normally are directed to the College of Physicians and Surgeons). He also stated that to the best of his understanding GVMHSS has no authority, by statute or otherwise, to discipline or impose sanctions upon a medical practitioner who provides services to GVMHSS or to require that practitioner to take particular actions in response to a complaint, outside of its ability to terminate or alter the contract for services.

[5] The GVMHSS sent its initial response to Ms. Doe on June 27, 1995, in a letter from the Director of Family & Children's Services. The letter said that GVMHSS had conducted a "thorough review of services provided to you and your family through Blenheim House" and that "GVMHS is satisfied that the care provided was appropriate and there was nothing improper about Dr. [Roe's] conduct in this case."

[6] Ms. Doe wrote a lengthy response on July 10, 1995 that set in motion further review by the GVMHSS. The Executive Director asked the Medical Director, Dr. Sladen-Dew, and staff to review the complaint and provide advice and recommendations on how to deal with it. It was in the course of the review conducted by Dr. Sladen-Dew that the two documents central to these proceedings were generated.

[7] The first document was a written response by Dr. Roe to Ms. Doe's complaint, prepared in October 1995. He provided it

to the GVMHSS on the condition that it would be read and returned to his counsel and that no copies would be made. Without the agreement of GVMHSS to that condition, the report would not have been provided. GVMHSS did not retain a copy and did return the report as required by Dr. Roe.

[8] The second document was the report of a consultant described by Mr. Russell to be "from outside of GVMHS" who was asked to review the complaint and provide comments on the manner in which it should be handled and resolved. The consultant (whose identity was disclosed to the Commissioner and to the court in in camera submissions but not to Ms. Doe or the other parties) is a psychiatrist who deposes that he/she was retained to review the care given by Dr. Roe to Ms. Doe, that he/she "agreed to undertake this task on the condition that my identity and report remain confidential", and that "[i]f the GVMHSS did not agree that my identity and report would remain confidential I would not have agreed to review [Ms. Doe's] care nor to prepare a report." Ms. Doe has since received a copy of the contents of the consultant's report relating to her except for those portions that would identify the consultant. She seeks to know the identity of the consultant in order to be in a position to assess whether the consultant was an impartial third party and thus to assess the report.

[9] The GVMHSS advised Ms. Doe by letter on December 15, 1995 that it had completed its review of all the information at its disposal, including Dr. Roe's response to her complaints (referring to the undisclosed report) and the opinions of the Medical Director and of "an independent psychiatric consultant" (referring to the confidential report from the anonymous consultant). The letter stated that in general, Dr. Roe had denied most of the allegations and that the GVMHSS had been faced with largely irreconcilable accounts of what transpired during the therapy. The GVMHSS confirmed that Dr. Roe had admitted the breach of confidentiality about Ms. Doe's status as a former patient, and had acknowledged making some of the comments complained of. The GVMHSS considered the breach of confidentiality had been appropriate in the circumstances in which it occurred, but apologized for Dr. Roe's inappropriate sexual and personal comments and said that it had advised Dr. Roe of its view regarding the use of such language. The letter concludes:

Again, the GVMHSS acknowledges your disappointment about your therapy with [Dr. Roe] and your desire to have him acknowledge the same. The GVMHS is not able to assist you any further in obtaining the type of response you are seeking from [Dr. Roe].

The letter advised Ms. Doe of her access to the complaint procedure of the College of Physicians and Surgeons and to the courts with respect to unresolved issues.

C. The application to the Commissioner:

[10] On January 20, 1996 Ms. Doe submitted a request to the GVMHSS for a copy of her personal file and records. The GVMHSS agreed to release only a portion of those records. Ms. Doe wrote on February 6, 1996 to the Office of the Information and Privacy Commissioner requesting access to a complete copy of her GVMHSS file and records.

[11] After the receipt of submissions, some of which were in camera, and mediation leading to disclosure of some records, the Commissioner gave his decision on January 17, 1997.

[12] As a preliminary matter, the Commissioner concluded that he had jurisdiction. This was on the premise that, although the GVMHSS is not a "public body" named in the Freedom of Information and Privacy Act, R.S.B.C. 1996, c. 165 (the "Act"), the Ministry of Health and Ministry Responsible for Seniors is a "public body". The Commissioner referred to the contractual relationship between the GVMHSS and the Ministry, and concluded that the Ministry had control of all records created pursuant to the contract. The Commissioner wrote, "[t]hus the Ministry is the public body for purposes of this inquiry." He also referred to the fact that the Ministry had delegated to the Executive Director of the GVMHSS, under s. 66 of the Act, the authority to make representations in the Commissioner's inquiry and to respond to any orders made as a result of the inquiry.

[13] The Commissioner ruled in favour of Ms. Doe on some issues and against her on others. He referred to the need to balance her right to access to personal information about herself against the need to permit organizations such as the GVMHSS to conduct reviews of allegations of misconduct in circumstances of privacy. He wrote:

While I have considerable sympathy with the applicant's wish to view exactly what her former psychiatrist has argued or reported with respect to this specific complaint, an important principle is at stake. The GVMHS has the basic responsibility for processing this complaint and is entitled to a considerable amount of discretion and confidentiality in the process.

[14] He acknowledged that "the public body" had made considerable disclosures of its records to the applicant, had taken the complaint seriously and acted upon it. He also referred to privacy considerations affecting the interests of third parties, and to the ultimate responsibility for "public" discipline, were that to occur, in the College of Physicians and Surgeons.

[15] Ms. Doe does not seek judicial review with respect to any aspect of the Commissioner's order. Judicial review is sought by the GVMHSS and Dr. Roe of the Commissioner's order that Dr. Roe's report be produced for the Commissioner's review and possible disclosure, and by the GVMHSS and the consultant of the Commissioner's order for disclosure of the anonymous

consultant's identity.

[16] With respect to Dr. Roe's report, the Commissioner reviewed the circumstances under which it was prepared, received and returned. He commented that it appeared self-evident the GVMHSS had used the report as part of its decision-making about the complaint and highly likely it contained "personal information" about Ms. Doe within the meaning of s. 1 of the Act. He referred to s. 31 of the Act and concluded the GVMHSS was obliged to retain a copy of this "personal information" about Ms. Doe for possible access by her.

[17] The Commissioner said, "I intend to order production of the record to me for review" and in response to the GVMHSS submission that he could not make an order in relation to a record not in the possession of a public body, stated "I note in this connection the GVMHS's statement that its relationship with the third party can best be described as that of "employer."" The Commissioner observed:

> Absent criminal sanctions in the Act itself, the remedy for any public body for breach of the privacy provisions of the Act is to discipline the culpable individual. Such is a very powerful sanction in an era of government cutbacks. I note, as well, that the GVMHS's own submission stated that it used the severed information in the records in dispute "to consider whether the Third Party's contractual relationship with GVMHS should be altered or terminated." ... It is this contractual relationship that persuaded me ... that the missing record is in the control of the GVMHS. To decide otherwise would be to allow public bodies to flout the clear intent of section 31 of the Act.

[18] With respect to the consultant's report, the Commissioner observed that Ms. Doe had been given segments of the report in which were comments adverse to her credibility. The Commissioner found it relevant that Ms. Doe submitted she would not have given permission to have her identity disclosed to the consultant if she had known that she would not be given a full copy of the report or the identity of its author. The Commissioner wrote:

> I find it disturbing, in terms of fairness, that the applicant was not represented by counsel during the complaint process, whereas the psychiatrist/third party and the GVMHS have had legal representation throughout, ultimately supported by the public purse. There has not been a level playing field for this applicant.

[19] He concluded:

> In the present inquiry, I am persuaded that section 22(2)(c) of the Act is a "relevant circumstance" militating in favour of disclosure of

the identity of the consultant, because "the personal information is relevant to a fair determination of the applicant's rights." (section 22(2)(f)) I state this particularly in light of the statement of the medical director of the GVMHS that "[t]he reason I had for obtaining the consultant's advice and recommendations was to ensure that our review process was being carried out fairly to both parties." ... I regret that the necessity of maintaining confidentiality about certain personal matters in my Orders makes it impossible for me to spell out this point more completely.

[20] The Commissioner concluded that the GVMHSS could not withhold the name and address of the consultant and a paragraph in the report which disclosed it.

D. The applications and the relief sought:

[21] The GVMHSS seeks an order quashing those parts of the Commissioner's order relating to both the consultant's report and the Dr. Roe report and declaring that those aspects of his order are invalid and of no force and effect, or, in the alternative, setting aside the Commissioner's order in those respects and remitting the matters to the Commissioner to hear and decide according to law and pursuant to directions from this Court. Dr. Roe seeks an order quashing the Commissioner's order with respect to his finding that the report Dr. Roe prepared is within the "control" of the GVMHSS, declaring that the Commissioner is without jurisdiction to order the GVMHSS or Dr. Roe to produce the report, and declaring that Dr. Roe has an expectation of confidentiality which prohibits the GVMHSS from disclosing the report to Ms. Doe. The consultant seeks an order quashing the order of the Commissioner with respect to the consultant's report, declaring that the consultant has an expectation of privacy prohibiting the GVMHSS from disclosing the consultant's identity to Ms. Doe and from disclosing to Ms. Doe those documents authored by the consultant or making reference to the consultant, or, in the alternative, setting aside the Commissioner's order in that respect and remitting the matter back to the public body or, in the further alternative, to the Commissioner to hear and decide according to law and pursuant to directions from this Court.

[22] The Attorney General intervened in the petitions of the GVMHSS and Dr. Roe in support of quashing that part of the Commissioner's order which found that the GVMHSS has "control" over the Dr. Roe report for the purposes of s. 3(1) of the Act and which ordered production of the report for review. The Attorney General sought an order setting aside the Commissioner's order and directing that the Commissioner reconsider the jurisdictional issue in accordance with law and the directions of this Court.

[23] Counsel for the Commissioner also appeared, to make submissions regarding the record of the proceeding, the appropriate standard of review, issues of fairness, and

jurisdictional issues.

III. ISSUES

[24] The issues are:

A. Did the Commissioner err in law and exceed his jurisdiction in ordering production to himself of the report from Dr. Roe for review and possible disclosure?
   (1) What is the appropriate standard of review?
   (2) Was the GVMHSS a public body?
   (3) Was the report from Dr. Roe under the control of the Ministry?
   (4) If the letter was under the control of a public body, did Dr. Roe nevertheless have an expectation of confidentiality prohibiting that body from now disclosing it?

B. Did the Commissioner err in law and exceed his jurisdiction in ordering disclosure of the identity of the Consultant and of his/her full report?
   (1) What is the appropriate standard of review?
   (2) Did the Commissioner exceed his jurisdiction by imposing an "equitable" policy outside the terms of the Act?
   (3) Was the Commissioner's application of the legislation reasonable?
   (4) Did the Commissioner breach the duty of fairness in allowing the in camera submissions of the complainant?
   (5) Did the consultant have an expectation of confidentiality prohibiting the GVMHSS from disclosing his/her identity?

C. What are the appropriate remedies in the circumstances?

IV. ANALYSIS

[25] The purposes of the Freedom of Information and Protection of Privacy Act, supra, are set out in s. 2:

> 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.

[26] Bearing in mind those purposes, I will address the

issues identified above in turn.

A. Did the Commissioner err in law and exceed his jurisdiction in ordering production to himself of the report from Dr. Roe for review and possible disclosure?

(1) What is the standard of review?

[27] The Commissioner's jurisdiction under the Act is limited to "records in the custody or under the control of a public body" (s. 3) and therefore an error in the interpretation of what constitutes "control" will cause the Commissioner to lose jurisdiction and subject the decision to judicial review. All parties were in agreement that the standard of review for such questions is correctness, as set out by the Supreme Court of Canada in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1086:

> In its decision, a tribunal may have to decide various questions of law. Certain of these questions fall within the jurisdiction conferred on the tribunal; other questions however may concern the limits of its jurisdiction.
>
> It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
>
> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in doing so without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.

[28] See also Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.) in which the Court held the standard of correctness was to be applied to the review of a decision of the Assistant Commissioner under the Ontario Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F31, regarding custody or control of a document. I conclude that should be the standard here.

(2) Was the GVMHSS a public body?

[29] The Act defines "public body" to mean "a ministry of the government of British Columbia", "an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2" and "a local public body"

(in turn defined to mean local government bodies, health care bodies, educational bodies or governing bodies of professions or occupations designated or added by regulation to Schedule 3). There was no argument that the GVMHSS is included in Schedule 2 nor that the GVMHSS is a "local public body". Although the Commissioner stated at the beginning of his decision, "[t]hus the Ministry is the public body for the purposes of this inquiry", in other parts of his decision he clearly assumed that the GVMHSS was the public body. The Commissioner appeared to reach the position that the GVMHSS should be treated as if it were a public body because (a) its contract gave the Ministry control of all records created pursuant to the contract, (b) the Ministry delegated to the Executive Director of the GVMHSS under s. 66 of the Act the authority to make representations in the Commissioner's inquiry and to respond to any orders made, and (c) apparently the GVMHSS did not take the position it was not a "public body"; indeed, in the opening paragraph of an affidavit that was submitted to the Commissioner, Dr. Sladen-Dew deposed, "I am the Medical Director with the [GVMHSS], the public body herein..."

[30] If the GVMHSS was not a public body, the Commissioner was asking himself the wrong question when he asked whether the Dr. Roe report was in the GVMHSS's control. As Mr. Loenen, counsel for the Attorney General argued, the Commissioner should have been asking instead whether the document was in the control of the Ministry.

[31] There is an important underlying issue. The Act has addressed the definition of "public body". Schedule 2 brings some 216 bodies under the legislation and the definition of "local public bodies" and Schedule 3 bring many more. Legislative decisions to include and exclude particular bodies must be respected, bearing in mind that a central purpose of the legislation is to make public bodies more accountable. The Act imposes serious obligations on public bodies. A blurring of the distinction between inclusion and exclusion seems undesirable and inconsistent with its scheme.

[32] Under s. 66 of the Act, the head of a public body may delegate to any person "any duty, power or function of the head of the public body under this Act, except the power to delegate under this section." The Minister of Health and Minister Responsible for Seniors did delegate to the Executive Director of the GVMHSS the authority to respond to the request for access to information and to implement any orders that might be made as a result. However, the Minister could not thereby make the GVMHSS a "public body" within the meaning of the Act.

[33] The Commissioner considered that because the GVMHSS used the Dr. Roe letter as part of its decision-making with respect to Ms. Doe's complaint, under s. 31 of the Act it was required to retain a copy of this "personal information" about her in case she sought access to it. Section 31 states:

31. If a public body uses an individual's

personal information to make a decision that directly affects the individual, the public body must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

[34] In the concluding passage of his discussion of this issue, after referring to the contractual relationship between the GVMHSS and Dr. Roe, the Commissioner wrote:

It is this contractual relationship that persuaded me, with respect to Issue B, that the missing record is in the control of the GVMHS. To decide otherwise would be to allow public bodies to flout the clear intent of section 31 of the Act.

The Commissioner thus identified the risk that if public bodies are permitted to deal with documentation in the way the GVMHSS did with Dr. Roe's response, a route will be created for circumventing the access to personal information that is one of the objectives of the Act.

[35] I agree with the Commissioner's view that it is undesirable to permit public bodies to avoid disclosure of documents containing personal information about individuals by entering into agreements to "read and return". However, the GVMHSS is patently not a public body within the meaning of the legislation. Its contract with the Ministry is to be construed according to and governed by provincial legislation, including the Act. This may mean that the Ministry would have a contractual remedy against it for non-compliance, but does not make the GVMHSS a public body under the Act. Even if the GVMHSS were a public body, its alleged breach of s. 31 might make it subject to a penalty under s. 74 of the legislation, but would not necessarily justify an order for it to produce a document it does not have. Justification for such an order would depend upon whether it actually had "control" of the document.

[36] I have concluded that the GVMHSS was not a public body. Nevertheless, the question should be asked whether Dr. Roe's report was under the control of the Ministry, which is a public body.

(3) Was the report from Dr. Roe under the control of the Ministry?

[37] The contractual provisions between the Ministry and the GVMHSS bearing on the issues here are as follows:

5. The Agency will, upon the request, from time to time, of the Minister:

(a) fully inform the Minister of the work done and to be done by the Agency in connection with the provision of the Services; and

(b) permit the Minister at all reasonable times to inspect, examine, review, and copy any and all findings, data, specifications, drawings, working papers, reports, documents and material whether complete or otherwise (herein collectively called the "Material") that have been produced or developed by the Agency or that have been provided by the Province to the Agency as a result of this Agreement.

...

14. The Material produced or developed by the Agency as a result of this Agreement and any property provided by the Province to the Agency shall:

(a) be the exclusive property of the Province, and

(b) forthwith be delivered by the Agency to the Minister on the Minister giving written notice to the Agency requesting delivery of the same, whether such notice is given before, upon or after the expiration or sooner termination of this Agreement.

...

30. This Agreement will be governed by, and construed in accordance with the laws of the Province of British Columbia, including the Freedom of Information and Protection of Privacy Act, S.B.C. 1992, c. 61, as amended.

[Emphasis added]

[38] The Ministry and the GVMHSS, through this Agreement, seem to intend that the documents produced or developed by the GVMHSS in its provision of services pursuant to the contract, including psychiatric outpatient services, will be the property of the Ministry and accessible to the Ministry upon demand. A central issue, therefore, is whether Dr. Roe's report was "produced or developed" by the GVMHSS.

[39] One of the issues that attracted considerable attention at the hearing was whether the Commissioner was correct in assuming Dr. Roe was an employee of the GVMHSS. The Commissioner seemed to consider that the GVMHSS and perhaps then the Ministry would have a greater measure of control over the work product and over the activities of Dr. Roe if he was an employee.

[40] In a decision reviewed by this court in Neilson v. British Columbia (Information and Privacy Commissioner), [1998] B.C.J. No. 1640 (Q.L.) (S.C.), the Commissioner had ordered

production of notes made by a school counsellor during counselling sessions. These were "raw notes", which the counsellor kept at her home and used to prepare reports that went into the school records. Her employer, the School District, took the position that the notes were in its custody or control. Dorgan J. upheld the Commissioner's order allowing the School District access to those notes. She referred to the need to give the provisions of the Freedom of Information and Protection of Privacy Act a broad and liberal construction which will give effect to its purpose (citing Canada Post Corporation v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.)) Her conclusion is summarized in para. 35:

> In my view, the facts in this case support the correctness of the Commissioner's finding that the counsellor's disputed notes are under the control of the School District as contemplated by the Act. The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment, she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes are created by an employee of a public body to make periodic reports, possession of which is held by the public body.

[41] A careful review of the record before the Commissioner shows that the GVMHSS and its deponents did use some language that suggested there was an employer-employee relationship. At the same time, indeed sometimes in the same paragraphs, they used language that suggested Dr. Roe was an independent contractor who delivered services to clients of the GVMHSS pursuant to a contractual arrangement between himself and the GVMHSS. For example, Mr. Russell, the Executive Director of the GVMHSS swore:

> I understood that the review process I was asking the Medical Director to undertake may involve the Medical Director making comments which would consist of personal evaluations of the Third Party, including personal information relating to the Third Party's employment history with GVMHSS and character and personnel (performance-related) evaluations of the Third Party. It was accepted by me and an understanding between me and the Medical Director that those personal comments he would make regarding the Third Party would be kept confidential, given the sensitive nature of the complaint and the continuing dealing which the Medical Director would have with the Third Party, who is still a contracting party with GVMHSS.
>
> [Emphasis added]

[42] In turn, the Commissioner both used language indicating an employment relationship and language referring to the contract between the GVMHSS and Dr. Roe. Neither a copy of that contract nor information about its terms was provided to the Commissioner. I declined to consider evidence about the contract, tendered for the first time at the hearing, because it did not form part of the record before the Commissioner, following the Judicial Review Procedure Act R.S.B.C. 1996, c-241 definition of "record" in s. 1, and the well-established authorities such as R. v. Nat Bell Liquor Ltd. (1922), 65 D.L.R. 1 at 27 (P.C.); Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 114 D.L.R. (3d) 162 (Ont. C.A.); and Kwan v. Minister of Municipal Affairs, [1991] B.C.J. No. 3354 (Q.L.) (S.C.).

[43] The evidence before the Commissioner about the nature of the relationship between Dr. Roe and the GVMHSS was ambivalent and incomplete. Because a linchpin of his reasoning was an assumption that the GVMHSS had sufficient economic leverage to compel Dr. Roe to produce the report, the Commissioner was required to consider the factual basis for that assumption. If Dr. Roe was an employee, was the preparation of the report part of his work for the GVMHSS such that it had a proprietary interest in the document or such that it could compel him to give them a copy? If he was not an employee, what were the contractual provisions governing their relationship and the ownership of or right to control reports such as the one he produced?

[44] The record does not disclose that the Commissioner considered those questions, nor does it reveal a factual basis sufficient to ground his assumption that the answer to one or the other of them justified a finding of "control".

[45] Mr. Clark, counsel for Dr. Roe, pointed out that the evidence before the Commissioner was that the GVMHSS had no power to discipline Dr. Roe, and the contractual powers of termination or provisions regarding ownership of materials produced by Dr. Roe relating to the services provided under the contract were not in evidence before the Commissioner. There was no evidence that Dr. Roe produced the report in the course of his employment, if he was an employee, or in fulfillment of his contractual terms, if he was a contractor, and there was no indication that it had otherwise been produced or developed by the GVMHSS. In sum, there was no evidence that the document in question was produced or developed by the GVMHSS and thus potentially in the control of the Ministry by virtue of the contract.

[46] The Commissioner wrote:

> The GVMHS agreed to a process whereby the third party retained the only copy. This does not necessarily mean that as an employer it has no control, because it had enough control to make an agreement about returning it.

[47] I agree with the submissions of Ms. Fenlon and Mr. Clark that that reasoning was entirely circular. An agreement to produce a report on the explicit understanding that the other party has no right to retain it or make a copy is not an agreement that gives over control of the document.

[48] Ms. Fenlon and Mr. Clark urged that the indicia of "control" were not present and that the existence of possible economic leverage over a third party does not guarantee access to a document. In cases on discovery of documents, where there is not physical possession there will only be control of documents where there is a legally enforceable right to the document in question: Wolansky v. Davidson (1992), 67 B.C.L.R. (2d) 211 (S.C.); Lacker v. Lacker (1982), 42 B.C.L.R. 188 (S.C). Recognizing the point made by Mr. Mitha for Ms. Doe, that the indicia of "control" under the Act may be different, I refer to the Legislative Task Force on the Act. It defined "control" as "the power to create or dispose of a record or to make a decision on the use or disclosure of a record." The Policy and Procedures Manual under the Act, approved and adopted as the authoritative guide for provincial bodies by the Ministry of Government Services, defines "control" as: "The power or authority to manage the record throughout its life cycle, including restricting, regulating and administering its use or disclosure." The manual states, "If a record was created pursuant to a contract, or if a public body at its option has access to a record, the public body has control of records in the custody of a contractor." It sets out a number of "Indicators of control", none of which is clearly found in this case:

> the record was created by a staff member, an officer, or a member of the public body in the course of his or her duties;
>
> the record was created by an outside consultant for the public body;
>
> the record is specified in a contract as being under the control of a public body;
>
> the content of the record relates to the public body's mandate and functions;
>
> the public body has the authority to regulate the record's use and disposition;
>
> the public body has relied upon the record to a substantial extent;
>
> the record is closely integrated with other records held by the public body; or
>
> the contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the

contract.

[49] Could the GVMHSS be said to be in a position to "manage the record throughout its life cycle, including restricting, regulating and administering its use or disclosure"? The evidence did not support a positive answer.

[50] Although counsel for Ms. Doe placed considerable weight upon the Canada Post Corporation case, supra, referred to in Neilson, supra, the Canada Post Corporation case involves a very different set of facts and a different piece of legislation. In that case, Public Works Canada, a "public body" within the meaning of the Access to Information Act, R.S.C. 1985, c. A-1, compiled and held documents for Canada Post Corporation, which was not a "public body". The Canadian Union of Postal Workers obtained an order for access to some of those documents. That order was upheld in the Federal Court of Appeal because Public Works Canada, a public body, did have day-to-day managerial and administrative control over the records. The principle enunciated by the Court, that the legislation should be interpreted in a manner that gives citizens a meaningful right of access to government information, is reflected in the provisions of the British Columbia Act. However, the "public body" here, the Ministry, on the record was not shown to have day-to-day managerial and administrative control over the report from Dr. Roe, nor to be entitled to require it from the GVMHSS even if that body itself had a copy.

[51] In a previous decision of the Commissioner, Order No. 11-1994, Inquiry re: A Request for Access to Records of the Ministry of Health and Dogwood Lodge, the Commissioner considered an issue similar to this, where a document was in the custody of a contractor with the Ministry. The Commissioner wrote in that decision:

As a preliminary matter, it is important to define the meaning of "control." Does it mean only the right to have access to a document? Alternatively, does it mean the right to have say in the contents, use, or disposition of the document? In my view, where a public body does not have the right to have custody of a record, "control" means the latter. It must derive from a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.

[52] The record did not establish that the report produced by Dr. Roe fell within the definition of "materials" in the agreement between the GVMHSS and the Ministry. That report was given to the GVMHSS only on condition that it would be returned, uncopied. There was no evidence that the GVMHSS had the right to ask, or did ask, Dr. Roe to produce such a report, or had the right to claim possession or control of it. The evidence did not establish that Dr. Roe was acting for the

GVMHSS in producing the document. These circumstances mean that the document cannot reasonably be described on the basis of the record before the Commissioner as one "produced or developed by the Agency". Mr. Mitha on behalf of Ms. Doe argued that, as in the Neilson case, supra, the GVMHSS had legal control over the activities performed by Dr. Roe and accordingly it had control over the report he prepared. However, there was little evidence that the GVMHSS did have legal control over his activities and none that the control extended to the report in question.

[53] Having held that the GVMHSS was not a public body and that it was not established on the record that the document was under the control of the Ministry, I have concluded that the Commissioner was incorrect in his decision requiring the GVMHSS to produce the document for his review and possible disclosure.

(4) If the letter was under the control of a public body, did Dr. Roe nevertheless have an expectation of confidentiality prohibiting that body from now disclosing it?

[54] In his decision, the Commissioner did not discuss this issue because his order was for the report to be produced to him for review, with an opportunity for the GVMHSS to submit arguments about the application of exceptions in the Act. It is not strictly necessary for me to decide this issue, but I will comment on it when I discuss the comparable issue in connection with the Commissioner's order to disclose the consultant's identity.

B. Did the Commissioner err in law and exceed his jurisdiction in ordering disclosure of the identity of the consultant and of his/her full report?

[55] I note at the outset that no party argued that because the GVMHSS is not a public body the Commissioner exceeded jurisdiction in making this order. It appears to have been accepted by all parties that the report, which was commissioned by the GVMHSS from the consultant in connection with its delivery of services falling under the contract with the Ministry, formed part of the "Material" described in that contract and that the document was therefore within the control of the Ministry. I will proceed on that premise.

(1) What is the standard of review?

(a) The Law:

[56] There was relative consensus about the law. A leading authority is Pezim v. British Columbia (Superintendant of Brokers) (1994), 114 D.L.R. (4th) 385 (S.C.C.) where Iacobucci J. for the Court said (at 404-405):

The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative

tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether the question goes to the jurisdiction of the tribunal involved.

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause is deciding a matter within its jurisdiction and where there is no statutory right of appeal....

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights....

[57] In Aquasource Ltd. v. British Columbia (Information and Protection of Privacy Commissioner) (1996), 45 Admin. L.R. (2d) 214 (B.C.C.A.) the Court considered the appropriate standard of review of the Commissioner's decision in a case involving the interpretation and application of s. 12 of the Act (which deals with information presented to the Executive Council of the Province or to its committees). The Court referred to the recent decision of the Supreme Court of Canada in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 in which Bastarache J. said at 1005:

Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions', which must be answered correctly by the tribunal in order to be acting intra

vires. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[58] The Court of Appeal referred to the Supreme Court's statement that standards of review are issue-specific and held that it was therefore not appropriate to grant blanket deference to the Information and Privacy Commissioner, as the Ontario Divisional Court had done in a line of cases (including John Doe v. Ontario (Information and Privacy Commissioner) (1993), 106 D.L.R. (4th) 140 (Ont. Gen. Div.) and Ontario Hydro v. Tom Mitchinson, Assistant Information and Privacy Commissioner/Ontario et al. (3 December 1996), No. 357/96)). The Ontario cases had been followed in Fletcher Challenge Canada Limited v. British Columbia (Information and Privacy Commissioner) (1996), 20 B.C.L.R. (3d) 280 (S.C.), which now has been superceded by Aquasource.

[59] In Aquasource the Court considered the four factors the Supreme Court in Pushpanathan said should be taken into account in determining the standard of review on a given issue: (1) the existence of a privative clause; (2) the expertise of the tribunal; (3) the purpose of the Act, and the provision in particular, and (4) the nature of the problem -- whether of law or fact. It concluded the standard of review for the Commissioner's interpretation of s. 12 of the Act was correctness; however, when it came to the application of the Act to the particular circumstances of the case, the standard was reasonableness.

(b) The Nature of the Issues:

[60] In order to review the factors specified in Pushpanathan, it is necessary first to identify the issues and the nature of the problem.

[61] First, the consultant and the GVMHSS argue that the Commissioner took into account equitable considerations outside the scope of the legislation when he referred to his perception that there had not been a "level playing field" for Ms. Doe during the period when the consultant's report was being prepared because she did not have legal counsel.

[62] Second, they argue that the Commissioner failed to consider factors he was required to consider under the legislation, in particular under s. 22(2). The relevant parts of s. 22 provide:

22. (1) The head of a public body must refuse to disclose personal information to an applicant

> if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> >
> > ...
> >
> > (c) the personal information is relevant to a fair determination of the applicant's rights,
> >
> > ...
> >
> > (f) the personal information has been supplied in confidence,
>
> (4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> > (h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,...

[63] Third, they argue that the Commissioner failed to follow the legislative direction in s. 57 regarding the burden of proof. It reads:

> 57 (1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.
>
> (2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and
(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

[64] Finally, the GVMHSS argues that the Commissioner was in breach of his duty of fairness. It says that although s. 56(4) of the Act gives the Commissioner the right to receive evidence in camera, it does not provide that he may rely on that evidence to order disclosure of personal information without giving the person affected an indication of the general nature of the evidence and an opportunity to respond.

[65] Addressing the four factors identified in the Pushpanathan decision, first, the absence of a privative clause is not a decisive factor.

[66] Second, referring to the consideration of the relative expertise of the tribunal vis-…-vis the court on the specific issues involved, in Pushpanathan, supra, Bastarache J. said at 1006:

Described by Iacobucci J. in Southam, supra, at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review", this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded.

[67] Bastarache J. noted that expertise is a relative matter and that a lack of relative expertise on the part of the tribunal vis-…-vis the particular issue before it is a ground for a refusal of deference. He then stated at 1007:

Once a broad relative expertise has been established, however, the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation. In Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, the B.C. Securities Commission's definition of the highly general question of what constituted a

'material change' under the Securities Act was subjected to an unreasonableness standard.

[68] Under the Act the Commissioner is an officer of the Legislature (s. 37(2)) and has considerable security of tenure and independence (s. 37 & s. 38). He or she is given broad general powers to oversee the implementation of the Act and the achievement of its purposes (s. 42 & s. 44). Clearly, the legislation contemplates a Commissioner with significant relative expertise with respect to freedom of information and privacy policy and practice. It is true that the issues entrusted to the Commissioner are similar in some ways to questions that judges decide (in contrast with more specialized tasks, such as, for example, the weighing of economic interests that takes place before the Competition Bureau) but they are also unique in other ways. To the extent that the Commissioner's decision turned on the balancing of freedom of information and privacy considerations, and on an understanding of the complex issues facing public bodies, it should be afforded some degree of deference because of his relative expertise.

[69] With respect to the third factor, Bastarache J. said at 1008:

> The purpose of a statute is often indicated by the specialized nature of the legislative structure and dispute-settlement mechanism, and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.

[70] He referred to the concept of "polycentricity" and said at 1008:

> A "polycentric issue is one which involves a large number of interlocking and interacting interests and considerations' (P. Cane, An Introduction to Administrative Law (3rd ed. 1996), at p. 35). While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint. The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the 'statutory purpose".

[71] The purpose of the Act is set out in s. 2 quoted above: to "make public bodies more accountable to the public and to protect personal privacy". The purposes of the provisions in question, s. 22 and s. 57, are to prescribe the factors that must be considered in striking the right balance in particular cases (s. 22) and to allocate the burden of proof as between the person seeking, and the person seeking to withhold, access to information (s. 57). The issue here was more or less bipolar, as between the interest of Ms. Doe in learning the name of the consultant and the interest of the consultant in having confidentiality maintained. However, it was not completely so. As the Commissioner said, an important consideration was the need for bodies such as the GVMHSS to be able to conduct inquiries into complaints with a considerable amount of discretion and confidentiality. A related consideration was the concern that persons who are members of small professional communities (sometimes rife with dissension and gossip), will not be willing to render service as the consultant did in reviewing the conduct of a professional colleague unless they can be confident that assurances of confidentiality are meaningful. The Commissioner's decision may be significant in a number of cases well beyond the present one for those reasons.

[72] Fourth, the nature of the question must be considered. Bastarache J. said at 1010:

... even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention, as this Court found to be the case in Pasiechnyk, supra. Where, however, other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law. The justification for this position relates to the question of relative expertise mentioned previously.

[73] Recognizing the difficulty in drawing a hard line between questions of law and questions of fact, the court approved a distinction based upon the extent to which the decision might have an impact on other cases. Bastarache J. added as an overall consideration at 1011:

Keeping in mind that all the factors discussed here must be taken together to come to a view of the proper standard of review, the generality of the proposition decided will be a factor in favour of the imposition of a correctness standard. This factor necessarily intersects with the criteria described above, which may contradict such a presumption, as the majority of this Court found to be the case in Pasiechnyk, supra. In the usual case, however, the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or

express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

\JUD In this case, one question was of law alone: could the Commissioner take into account equitable considerations (i.e., whether the applicant had been on a "level playing field") in determining the issue before him? Others were of mixed fact and law: did the Commissioner correctly apply the provisions of s. 22 and s. 57 in his determination? Did the Commissioner breach the duty of fairness in his consideration of in camera materials?

[75] Taking all of the factors into account, including the relative expertise of the Commissioner, I have concluded that the standard of review in this case is correctness with respect to the Commissioner's use of equitable considerations, and reasonableness with respect to his application of the legislation to the facts of the case. If the Commissioner incorrectly considered factors extraneous to the legislation he exceeded his jurisdiction and his decision should be subject to judicial review. However, while he was considering and applying the legislation he was within his jurisdiction and should be afforded the measure of deference reflected in the reasonableness standard.

[76] With respect to the Commissioner's exercise of discretion in using in camera materials, I conclude that the appropriate standard of review was articulated by Ms. Lovett for the Commissioner, namely, whether there was bad faith, unfair procedure or irrelevant considerations taken into account by the Commissioner (as set out in Dagg v. Canada (Minister of Finance) (1997), 148 D.L.R. (4th) 385 (S.C.C.), Glover v. Plasterer et al. (1998), 104 B.C.A.C. 68 (C.A.), and J. Doe v. Information and Privacy Commissioner, [1996] B.C.J. No. 1950 (Q.L.) (S.C.).

(2) Did the Commissioner exceed his jurisdiction by imposing an "equitable" policy of his own invention?

[77] Mr. Hinkson, counsel for the consultant, placed considerable emphasis on this aspect of the Commissioner's decision. He said that the Commissioner misconstrued or ignored the factual and legal requirements of the Act in favour of an equitable policy of "levelling the playing field", a policy without any statutory basis. He argued that the Commissioner had previously made this same error of law in J. Doe v. Information and Privacy Commissioner, supra, in which his order to disclose the identity of an informant was quashed. In that case, the Chief Justice found that the Commissioner had unfairly ignored the petitioner's argument based upon s. 22(2)(h), stating, "Nothing in the language of the statute supports the Commissioner's approach of ignoring that question in the interests of "levelling the playing field'". He concluded that the Commissioner had erred in law in at least four respects, and said (at para 31):

> Two basic premises led to those errors. One was the view that Doe's claim to confidentiality, based on an express promise to him from the Ministry, must give way to the commissioner's view of the proper policy to be followed by heads in administering the Act. The other is the view that Doe's claim could be disallowed by exercising a general equitable jurisdiction to do justice between applicants and informants. Neither of those premises is supported by the language of the Act. But in deciding upon such a claim, the rights of the informant must be determined by reference to the language of the Act. That applies as much to the commissioner's exercise of his review jurisdiction as it does to the initial decision by the head.
>
> [Emphasis added]

[78] Ms. Fenlon for the GVMHSS also argued that in any event there never was a lack of a level playing field. Typically a complainant to a care provider will not have legal counsel involved in the body's internal review process, and the complainant's consent is not required before the body can investigate the complaint. Both Ms. Doe and Dr. Roe equally were not told the name of the consultant.

[79] Mr. Mitha, for Ms. Doe, argued that there is no evidence that the Commissioner actually based his decision on "equitable considerations". He characterized the passages in the judgment complained of as "observations", and urged that, when read as a whole, the Commissioner's decision manifestly was based on a fair and proper interpretation of the Act. He pointed out that the Commissioner refused to order the disclosure of all or a portion of six of the eight documents sought by Ms. Doe. He argued that the J. Doe decision, supra, is different on its facts. There, the identity being withheld was that of an informer who was concerned about damage to his reputation. Here, Mr. Mitha says, it is unclear why the consultant seeks to protect his or her identity, and in any event the need for confidentiality cannot be the same as in the case of an informer.

[80] The Commissioner was incorrect if he considered, as a factor in making his decision, a perceived lack of fairness through differential access to counsel. However, because the arguments of the petitioners turn on a claim that the Commissioner reached a decision based on an extraneous consideration, rather than upon a reasonable and proper interpretation of the Act, it is useful to review the arguments about his interpretation of the Act before reaching a final conclusion.

(3) Was the Commissioner's application of the legislation reasonable?

[81] I apply the reasonableness standard as articulated by

Iacobucci J. in Canada (Director of Investigation and Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1 (S.C.C.) at 19-21:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

...

The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (the Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:

> ... the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability.
>
> [Emphasis added]

Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness

simpliciter.

....
In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a 'standard of reasonableness' and deference in terms of "weight" are two sides of the same coin...

[82] First, did the Commissioner clearly ignore the statutory direction in s. 57(2) about the burden of proof? The information sought was personal information about a third party (the consultant) and therefore the applicant (Ms. Doe) was responsible to prove that disclosure of it would not be an unreasonable invasion of the consultant's personal privacy. The Commissioner referred to s. 57 near the beginning of his decision but did not specifically refer to its terms or to the burden of proof in the portion of his decision relating to the consultant's report. However, it is not necessary for a tribunal to be explicit about every step in its reasoning (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al. (1973), 41 D.L.R. (3d) 6 (S.C.C.) (at 13):

A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

[83] I do not find that the Commissioner was clearly wrong in his application of the burden of proof. As Mr. Dartnell for Ms. Doe submitted, the Commissioner had to determine the issue before him on the basis of a consideration of the totality of the circumstances. There is no basis to conclude that the Commissioner reversed the s. 57 burden of proof in making that determination.

[84] As for the interpretation and application of s. 22, in the portion of his decision relating to the consultant's report the Commissioner did not refer to the statutory direction that he must consider the fact that the personal information had been supplied in confidence, aside from a single mention of "s. 22(2)(f)" that appears to be a typographical error. However, the Commissioner did say, "[t]he authorities at the GVMHS state that they asked for the consultant's participation on the basis of an expectation of confidentiality" and did refer to s. 22(2)(f) in an earlier portion of the decision, where he wrote:

The applicant makes a related argument to the effect that the professionals who participated in the handling of her complaint at GVMHS did so in a professional capacity, so what they have had to say

about the quality of care she received should be disclosed to her.... For reasons noted above, I think that it is essential to the effective conduct of complaint investigations, especially for sensitive matters, that staff of public bodies charged with such responsibilities should have a cloak of confidentiality to do their work. Section 22(2)(f) of the Act recognizes this.

In order to justify its section 22 severances of personal information from the records in dispute, the GVMHS has invoked sections 22(2)(f), (g), and (h), 22(3)(g), and 22(3)(g.1).... It argues that none of this severed personal information involves the applicant as such but affects "the privacy interests of the Third Party and the consultant."...

[85] The Commissioner mentioned s. 22 in the portion of his decision specifically relating to the consultant's report only to quote s. 22(2)(c) ("the personal information is relevant to a fair determination of the applicant's rights") and it appears that he placed a great deal of weight on that factor. However, both the GVMHSS and the consultant asked, "What rights?" They argued that Ms. Doe was a dissatisfied client of an agency who made a complaint to that agency about the manner in which professional services had been delivered to her. The agency, unused to dealing with complaints of this nature since they normally went to the professional body (the College of Physicians and Surgeons), adopted an ad hoc review procedure. Ms. Doe did not have a legal right to an internal review by the GVMHSS and, they urge, it follows that she did not have any right to have that review conducted in a particular way.

[86] Mr. Dartnell for Ms. Doe was not able to point to any legal rights of Ms. Doe determined by the GVMHSS review. What the Commissioner referred to, however, was that the Medical Director of the GVMHSS swore that "[t]he reason I had for obtaining the consultant's advice and recommendations was to ensure that our review process was being carried out fairly to both parties."

[87] Mr. Dartnell argued that Ms. Doe is entitled to know on what basis the consultant reached his "bold conclusions" about her without having interviewed or contacted her, and that she is entitled to know how and on what basis decisions regarding her complaint were made. Specifically, she is entitled to know whether the consultant truly was independent of the GVMHSS and of Dr. Roe. He argued that the statute does not limit the Commissioner to "legal rights" and that he is entitled to consider other rights. The metaphysical aspect of this argument is challenging. Can "rights" that are not legal rights of any kind be given weight in a court of law or in the decisions of the Information and Privacy Commissioner?

[88] Here, the GVMHSS voluntarily embarked upon a review in which it acknowledged that Ms. Doe had an interest in the fairness of the process. It is undisputed that the GVMHSS,

when it received Ms. Doe's complaint, could have done nothing, and Ms. Doe would not have been able to compel it to conduct the review. After its initial less than in-depth look at the matter, it went further and retained a consultant whom it described to be "outside the GVMHS" to conduct a more thorough review. It thereby created an expectation by Ms. Doe that this review would be independent. Nevertheless, this ad hoc voluntary process and that expectation did not give rise to "rights" on the part of Ms. Doe within the meaning of s. 22(z)(c).

[89] I conclude that the Commissioner's decision was not reasonable in finding that Ms. Doe's "rights" in this context outweighed those of the consultant in protecting the confidentiality of personal information. It was not within the Commissioner's statutory mandate to "level the playing field" and it was that attempt that led him to reach a conclusion that was not only incorrect but also unreasonable.

(4) Did the Commissioner breach the duty of fairness in considering the in camera submissions of the applicant?

[90] As for the argument that the Commissioner breached the duty of fairness through his reference to in camera materials, I think that he was acting within the scope of the discretion provided under s. 56 of the Act, which states:

56 (2) An inquiry under subsection (1) may be conducted in private.

(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to made orally or in writing, and

(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

[91] The Act also provides:

47 (1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

[92] The Commissioner considered in camera submissions from all parties, as he was entitled to do. Under the standard of review applicable where a tribunal is acting within

discretionary power, namely, whether there was bad faith, unfair procedure or irrelevant considerations, there is no basis for judicial review. I add that, as I read his decision, the Commissioner found it difficult to provide complete and accurate reasons for his conclusion that the consultant's identity should be disclosed. One reason for this difficulty was the contents of the in camera materials that he could not reveal. This may mean that the reception of in camera materials should be avoided wherever possible, but does not provide a basis for judicial review in this instance.

(5) Did the consultant have an expectation of confidentiality prohibiting the GVMHSS from disclosing his/her identity?

[93] I shall discuss this issue at the same time as the comparable issue with respect to Dr. Roe's report. The evidence is that the information was provided in both cases only on the clear understanding that it would be kept confidential. (Indeed, the consultant deposes that it was also his/her understanding that his/her report would be kept confidential. Nevertheless, at some stage it was given to Ms. Doe with portions irrelevant to her complaint and portions disclosing the consultant's identity severed.) Dr. Roe's counsel, Mr. Clark, argued that the agreement between the GVMHSS and Dr. Roe created an expectation of confidentiality. He referred to s. 21(1) of the Act, which reads:

21. (1) The head of a public body must refuse to disclose to an applicant information

...

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

...

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied....

[94] It is not clear whether this section was argued to the Commissioner and whether a factual basis for it was established in this case. However, Mr. Clark argued, relying on Slavutych v. Baker, [1976] 1 S.C.R. 254 and J. Doe v. Information and Privacy Commissioner, supra, that where a report (as here) comes into existence as part of a confidential and in camera inquiry into alleged professional misconduct, and an assurance of confidentiality is given in exchange for the provision of information, the Commissioner cannot then make an order to breach that agreement. Mr. Hinkson for the consultant made a

similar argument. Both counsel stressed that the Commissioner would have been assisted in applying the Act by reference to the fundamental principles enunciated by the Supreme Court of Canada in Slavutych v. Baker, supra. There, the Court recognized that communications may be privileged where: (1) they originate in a confidence that they will not be disclosed; (2) confidentiality is essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which the community wishes to be sedulously fostered; and (4) disclosure of the communication would cause greater injury to the relation than the benefit for the correct disposal of litigation that would be gained. The Supreme Court applied those principles to conclude that a confidential evaluation by a colleague in the context of a university's consideration of granting tenure to another colleague should not have been disclosed.

[95] To what extent, if any, may or should these common law principles be considered under the Act? Mr. Mitha for Ms. Roe referred to British Columbia (Minister of Health) v. British Columbia (Information and Privacy Commissioner) [1997], 150 D.L.R. (4th) 562 (B.C.S.C.). In that case, Curtis J. considered an application for judicial review of a decision of the Commissioner allowing access to medical records. The Commissioner had decided that where an applicant was seeking access to his or her own medical records, the public body had to meet the test established by the Supreme Court of Canada in McInerney v. MacDonald,[1992] 2 S.C.R. 138. Curtis J. commented that the case involved an application of common law principles in the absence of legislation dealing with the matter, and referred to British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner) (1995), 16 B.C.L.R. (3d) 64 (S.C.), in which Thackray J., referring to the Act, wrote (para. 41):

> The Act is a comprehensive statutory scheme which regulates the release or protection of all information contained in a record which is held by a public body.

Observing that the common law test used by the Supreme Court was different from the test enacted by the statute, Curtis J. concluded (para. 10):

> The Freedom of Information and Privacy Act represents a delicate balancing of the conflicting interests of access to records, and the protection of other interests. It is therefore important that the test set forth by the statute be applied as precisely as possible.
>
> In this case, the Commissioner applied the wrong test to the evidence before him when he required the Minister to meet the common law test to establish a right to refuse access under section 19(2) of the Act. The section itself set out the test that is to be applied.

[96] Mr. Hinkson argued that there is no inconsistency here between the principles set out in Slavutych v. Baker, supra, and those in the legislation. He said that while the Commissioner is obliged to comply with the statute he need not do so in a vacuum.

[97] I agree with that argument to a limited extent. Where there is no conflict with the provisions of the Act, the Commissioner may consider principles regarding privacy and access to information that have been developed in other contexts for any assistance they might provide. I see this as different from the use of considerations outside the statute in substitution for its provisions (such as the "equitable" considerations about "levelling the playing field") that I have held to be incorrect. I do not think the Commissioner would be wrong or unreasonable if he referred to principles governing the release of confidential information in cases such as Slavutych v. Baker as guidance in his interpretation of s.22(2)(f) or of s. 21(1)(c)(ii). However, it does not follow that he is required to make such reference and is wrong or unreasonable if he refrains from such reference.

[98] In the case of the Dr. Roe report the Commissioner did not discuss issues of confidentiality, most likely because he intended to proceed in two stages: first, receive a copy of the report for review, and second, consider (with an opportunity for submissions from the GVMHSS) whether the report should be disclosed. In the case of the consultant's report the errors I have found flow from the Commissioner's failure to follow the legislation, rather than from any failure to follow common-law principles.

[99] My conclusion is that the Commissioner's decision has not been established to be unreasonable or incorrect on this ground.

C. What are the appropriate remedies in the circumstances?

[100] The Judicial Review Procedure Act, supra, provides that I may set aside the Commissioner's decisions or direct the Commissioner to reconsider and determine the whole or any part of the matter (s. 3 and s. 5.) With respect to the first order, for production of the report of Dr. Roe, I have concluded that the report was not established to be in the control of a public body, a prerequisite to the jurisdiction of the Commissioner. Because the evidence as to the relationship between Dr. Roe and the GVMHSS was ambivalent and incomplete, and the record did not show the document in question was "produced or developed by" the GVMHSS within the meaning of its contract with the Ministry, and because the Commissioner did not reach the stage of considering the fact that Dr. Roe's report had been provided on the explicit agreement that it would be confidential, it is appropriate that the matter be remitted to the Commissioner to reconsider on the basis of the law as I have described it and such further evidence and argument as the parties submit.

[101] With respect to the second order, for disclosure of the identity of the consultant, I have concluded the Commissioner incorrectly took into account considerations outside the scope of the Act and that his decision was not reasonable insofar as he gave great weight to the "fair determination of the applicant's rights" when there was no legal basis for her to assert rights in the circumstances. There is no reason to remit this matter to the Commissioner and therefore that part of his decision is set aside and is of no force or effect.

[102] If counsel wish to speak to costs, they may advise the Registry.

"Lynn Smith J."