IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Insurance Corporation of British Columbia v. Automotive Retailers Association,* 2013 BCSC 2025

Date: 20131106
Docket: S128510
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Petitioner

And

Automotive Retailers Association, Information and Privacy Commissioner of British Columbia and the Attorney General of British Columbia

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Petitioner:	D. K. Lovett, Q.C. N. Iyer
Counsel for the Respondent, Automotive Retailers Association:	P. Schwartz
Counsel for the Respondent, Information and Privacy Commissioner of B.C.:	C. J. Boies Parker
Counsel for the Respondent, Attorney General of B.C.:	R. Butler
Place and Dates of Hearing:	Vancouver, B.C. October 21 - 25, 2013
Place and Date of Judgment:	Vancouver B.C. November 6, 2013

INTRODUCTION

[1] The Insurance Corporation of British Columbia ("ICBC") seeks judicial review of an order dated October 22, 2012 ("Order") by the Assistant Commissioner in the Office of the Information and Privacy Commissioner ("OIPC") requiring ICBC to disclose to the Automotive Retailers Association ("ARA") certain records (the "Records") of communications between ICBC and the federal Competition Bureau.

[2] In particular, ICBC seeks an order in the nature of *certiorari* quashing the Order or, alternatively, setting it aside and remitting it back to the Assistant Commissioner for reconsideration with directions, pursuant to s. 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[3] The basis of the relief sought by ICBC is twofold. First, ICBC argues that the decision of the Assistant Commissioner was "unreasonable". Second, and in the alternative, ICBC argues that the records in issue came into existence as a result of steps taken in the administration and enforcement of the federal *Competition Act*, R.S.C. 1985, c. C-34 ("*Competition Act*"), that disclosure of the documents pursuant to the provisions of the provincial *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*") would frustrate the purpose of the *Competition Act* and the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*AIA*") and that the constitutional doctrine of paramountcy operates to preclude the OIPC from ordering the disclosure of records that are protected from disclosure under federal law.

[4] The Attorney General of British Columbia ("AGBC") was served with a notice under the *Constitutional Question Act*, R.S.B.C. 1996 c 68 and, by appearing on this application, became a respondent by virtue of s. 8(6) of that *Act*. The Attorney General of Canada was also served with that notice but declined to appear.

[5] Although a party to this proceeding, the OIPC took no position on the relief requested by ICBC. However, counsel for the OIPC provided the Court with helpful explanatory submissions regarding the relevant legislative framework, the OIPC's jurisdiction and procedures and the Order.

[6] All counsel emphasized that there is no need for the Court to deal with the constitutional issue if it finds that the Order was unreasonable.

[7] At the outset of the hearing, I made an order that the Records be treated as confidential, sealed and not form part of the public record in the proceeding. I also ordered that there would be no disclosure of the Records to counsel for the ARA pending my decision in this proceeding. That ruling is set out in separate reasons for judgment.

BACKGROUND

[8] ICBC is a crown corporation continued under the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228 for purposes which include carrying on the business of a compulsory insurance scheme in the province of British Columbia.

[9] The *Insurance Corporation Act* gives ICBC the power, *inter alia*, to negotiate with persons engaged in vehicle repairs to establish fair and reasonable prices for vehicle repairs for which payments may be made under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[10] ICBC is a public body subject to the provisions of *FIPPA*. It is also a corporation subject to the federal *Competition Act*, R.S.C. 1985, c. C-34.

[11] The ARA is a not-for-profit society representing 1,100 automotive industry businesses in British Columbia. The ARA's main purpose is to promote and advocate for the commercial interests of those businesses in the province. The ARA has negotiated a number of arrangements on behalf of its members with ICBC, dealing with such matters as the pricing of auto glass replacement, collision repairs and towing services. These arrangements led to many agreements between ICBC and the ARA members being entered into.

[12] Those agreements were unilaterally terminated in or around April 1, 2011 by ICBC (the "Terminations").

[13] The ARA says the Terminations were precipitated by certain communications between ICBC and the Competition Bureau. ICBC admits that in 2010 and 2011 it communicated with the Competition Bureau and that, as a result of those communications, it modified the way in which it dealt with its suppliers, including members of the ARA, and unilaterally announced the prices it would pay for their services.

[14] On April 5, 2011, the ARA sought disclosure of the Records under *FIPPA*. It wished to find out what facts ICBC told the Competition Bureau and what the resulting opinion from the Competition Bureau was.

[15] ICBC responded by providing to the ARA 264 pages of documents, many of which had been redacted in whole or in part, relying on ss. 13, 14, 17 and 22 of *FIPPA* as its justification for withholding the redacted portions.

[16] On October 22, 2012, the Assistant Commissioner ordered ICBC to produce some, but not all, of the documents sought by the ARA: *Insurance Corporation of British Columbia (Re),* [2012] B.C.I.P.C.D. No. 20. This petition seeks judicial review of that order.

[17] The documents in issue in this proceeding, the Records, are those ordered produced by the Assistant Commissioner on the basis that they are not authorized to be withheld under s. 13 of *FIPPA*. The issues related to all other disputed disclosures have been resolved.

[18] The portion of the Order dealing with whether ICBC was entitled to withhold the Records under s. 13(1) is relatively brief and is reproduced below:

> [37] **Would Disclosure Reveal Advice and Recommendations Under s. 13(1) of FIPPA?** -- Section 13 is the sole basis for withholding the remainder of the records in issue. That section has been the subject of many orders, including Order 01-15, where former Commissioner Loukidelis said this:
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> > [22] This exception is designed, in my view, to protect a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations….

> [38] The British Columbia Court of Appeal [in *College of Physicians and Surgeons v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665] has also considered the application of s. 13(1). Order F05-06 noted that a key passage in that decision is that "advice includes expert opinion on matters of fact on which a public body must make a decision for future action."
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> [39] I have considered the Court of Appeal decision and relevant OIPC orders in reaching my conclusions below.
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> [40] To summarize my findings: a very small portion of the disputed information is properly withheld under s. 13 while most of it is not. I am unable to articulate as fully as I might the reasons for this conclusion. This is because the material upon which my conclusions are based was submitted by ICBC *in camera* and properly received as such by the OPIC. What I am able to say from ICBC's out of camera submission is that advice was provided to ICBC about what approach it should take "in relation to its rate setting practices and whether changes to those practices should be initiated".
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> [41] I would agree that the information found at pp. 227-29 of the records clearly meets the criteria set out in previous orders and the BC Court of Appeal decision [in C*ollege of Physicians and Surgeons*] for the application of s. 13(1). I have underlined those passages properly withheld by ICBC in red.
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> [42] I cannot agree with ICBC's submissions that s. 13(1) applies to the rest of the information at issue. The balance of the material is not advice as that term has been defined in previous orders and court decisions. However, that does not end the analysis. The law with respect to s. 13 is also clear that, if the disclosure of the information would enable someone to *infer* the actual advice or recommendations at issue, then that information can be properly withheld. To this I would add generally, the fact that a public body seeks or is given advice, or both, is not by itself excepted from disclosure under s. 13. Again, only where any such disclosure of this fact would infer the actual advice or recommendations, would a public body be authorized to withhold such information.
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> [43] I have carefully reviewed the rest of this information in dispute and conclude its disclosure would not reveal the advice or facilitate the drawing of inferences about the advice. As noted, I am constrained from providing more detailed reasoning for this conclusion because, as noted above, portions of ICBC's submissions upon which I rest my findings, were received *in camera*.
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> [Footnotes omitted]

[19] The Assistant Commissioner concluded that disclosure of the Records would not reveal advice or recommendations developed by or for ICBC, nor would disclosure enable one to infer the actual advice or recommendations. The adjudicator was unable to articulate his reasons without revealing information which he found had been properly submitted to him *in camera* and he was prohibited from disclosing pursuant to s. 47(3) of *FIPPA*.

The Competition Bureau

[20] The administration and enforcement of the *Competition Act* is the responsibility of the Commissioner of Competition ("Commissioner"), an independent law enforcement official appointed by the Governor in Council. He has various investigatory and research powers, including powers to obtain search warrants and make compulsory production orders. The Commissioner heads the Competition Bureau that carries out the administration and enforcement of the *Competition Act.*

[21] Section 29(1) of the *Competition Act* stipulates that:

> No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act
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> …
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> (e) any information provided voluntarily pursuant to this Act".

[22] The Competition Bureau has issued an Information Bulletin regarding the communication of confidential information under the *Competition Act:*

> 1.3 The purpose of this Bulletin is to set out the Bureau's policy on the communication of confidential information and to assure parties providing confidential information to the Bureau, whether voluntarily or pursuant to a specific provision of the Act, that the Bureau takes seriously its duty to protect this information. While the Act provides the persons performing duties or functions under the Act with discretion to communicate confidential information to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act, maintaining confidentiality is fundamental to the Bureau's ability to pursue its responsibilities under the law. the Bureau also recognizes that maintaining the confidentiality of information and communicating such information only as allowed by law is essential to its integrity as a law enforcement agency.
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> 1.4 The Bureau is committed to treating confidential information responsibly and in accordance with the law. It remains vigilant to avoid communicating confidential information when dealing with matters under the Act, unless such communication is permitted under section 29 of the Act or other statutory provisions pertaining to confidentiality and, even when permitted, considers whether disclosure is, in the circumstances, advisable or necessary. In other words, the general policy of the Bureau is one of minimizing the extent to which confidential information is communicated to other parties.

> 3.6 Even in the case of formal proceedings before the Competition Tribunal or the courts, when it is necessary to use confidential information, efforts to protect the information from disclosure will be taken if such action does not hinder the administration or enforcement of the Act. Available measures include sealing orders, confidentiality orders, confidential schedules to public documents and *in camera* proceedings. these measures are ultimately under the control of the Competition Tribunal or the courts, and necessarily subject to the generally public nature of the proceedings.
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> [Footnotes omitted]

[23] The Commissioner and the Competition Bureau are subject to the federal *AIA*. Section 24(1) of that Act provides:

> 24(1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

[24] Schedule II includes the *Competition Act* section 29(1).

[25] Thus, there can be no disclosure by any federal government institution of third party information received by the Competition Bureau. This would include information provided to it by regulated corporations such as ICBC.

THE DETERMINATION RE: SECTION 13(1) OF *FIPPA*

(a) *FIPPA*

[26] *FIPPA* provides a general right of public access to records in the custody and control of public bodies unless it is outside the scope of the *Act* as provided by s. 3(1) or unless disclosure is protected by one of the various policy grounds, for instance it would reveal government confidences or solicitor-client privilege, invade personal privacy or be harmful to law enforcement, the business interests of third parties or the financial interests of the public body itself.

[27] In addition, s. 13(1) of *FIPPA* gives a public body the discretion to refuse to disclose information that would reveal advice or recommendations developed by or for the public body.

[28] The relevant sections of *FIPPA* provide as follows:

Information rights

4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required under section 75.

How to make a request

5 (1) To obtain access to a record, the applicant must make a written request that

> (a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought,
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> (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, and
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> (c) is submitted to the public body that the applicant believes has custody or control of the record.

(2) The applicant may ask for a copy of the record or ask to examine the record.

Duty to assist applicants

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
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> (b) creating the record would not unreasonably interfere with the operations of the public body.

Policy advice or recommendations

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

> (a) any factual material,
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> (b) a public opinion poll,

> (c) a statistical survey,
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> (d) an appraisal,
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> (e) an economic forecast,
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> (f) an environmental impact statement or similar information,
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> (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,
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> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
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> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
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> (j) a report on the results of field research undertaken before a policy proposal is formulated,
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> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
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> (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
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> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
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> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
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> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[29] The purpose of s. 13(1) is to ensure that a public body may engage in full and frank deliberations, including requesting and receiving advice, in confidence and free of disruption from requests from outside parties for disclosure. The deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative course of action. "Advice or recommendations" was intended by the Legislature to include information the purpose of which is to present background explanations or analysis for consideration in making a decision, including the opinions of experts obtained to provide background explanations or analysis necessary to the deliberative process: *College of Physicians and Surgeons* at paras. 105, 106, 110, 111.

[30] I note that the decision in *College of Physicians and Surgeons* predated *Dunsmuir v. New Brunswick*, 2008 SCC 9, by six years and was decided at a time when the applicable standard of review of the adjudicator's interpretation of s. 13(1) was "correctness". It is an open question as to whether the outcome in that case would have been the same had the court applied a "reasonableness" standard. Regardless, the principles articulated in *College of Physicians and Surgeons* regarding the interpretation of s. 13(1) continue to apply.

(b) Submissions of ICBC

[31] ICBC submits that the OIPC's decision did not fall within the range of possible acceptable outcomes which are defensible in respect of the facts and law. It argues it is clear from a review of the Records that they were created for the purpose of seeking or providing advice and/or recommendations in relation to ICBC's rate setting practices and whether changes to those practices should be considered. They include information from one public body, the Competition Bureau, to another public body, ICBC, and contain frank and full exchange of highly sensitive commercial information integral to the facilitation of advice and recommendations necessary for consideration by ICBC of a specific course of action.

[32] ICBC further submits that the exchange of information and advice between it and the Competition Bureau was undertaken in a context where it was reasonably understood that any information provided or exchanged would be kept confidential.

[33] It argues that the Records ordered disclosed by the Assistant Commissioner are precisely the deliberative information which is protected by s. 13(1) of *FIPPA*.

[34] ICBC submits that disclosure of the Records would reveal to the recipient, or allow the recipient to infer, the actual advice or recommendations given or made and that the Assistant Commissioner's finding that they would not was unreasonable.

(c) Submissions of the AG BC

[35] The submissions of Mr. Butler, counsel for the AG BC were primarily focused on challenging the constitutional and paramountcy arguments made by ICBC. He

argued that paramountcy is only engaged where there is overlap between legislative provisions, not as here where it is argued by ICBC that there is overlap between valid federal provisions under the *Competition Act* and *AIA*, on the one hand, and an order made by the OIPC, on the other hand: *Quebec (Attorney General) v. Lacombe* 2010 SCC 38 at paras. 122-126.

[36] He argued that, properly interpreted, the federal and provincial statutes in issue here can operate side by side without conflict.

[37] Mr. Butler submitted that, even though ICBC's arguments were constitutionally repugnant, s. 13(1) should nevertheless have been interpreted by the Assistant Commissioner in a "constitutionally sensitive" manner, such as was recently accomplished by the Supreme Court of Canada in *Marine Services International Ltd. v. Ryan Estate,* 2013 SCC 44, where a positive right to compensation was held to have been created but subject to provincial workers' compensation legislation. He submitted that the Assistant Commissioner should have interpreted s. 13(1) in a manner that allowed the legislative policies of both levels of government to be achieved to the maximum extent possible. Instead, the Assistant Commissioner's decision, if allowed to stand, will be contrary to the harmonious interplay of the federal and provincial statutes at play and will defeat an important and constitutionally valid objective of Parliament in enacting s. 124.1 of the *Competition Act*, namely encouraging those subject to the *Competition Act* to voluntarily provide information to the Competition Bureau without fear of its disclosure.

[38] Mr. Butler submitted that s. 13(1) of *FIPPA* should allow a provincial public body to voluntarily communicate with and obtain an opinion from the Competition Bureau, consistent with the purposes of the *Competition Act*, thereby putting the public body in a position to develop advice or recommendations such that its conduct complies with that Act. *FIPPA* should allow the public body to do so without risk of having to disclose information sent to or received from the Competition Bureau. The Assistant Commissioner's interpretation of s. 13(1) failed to give effect

to that provincial legislative intent and thus was not within the range of possible acceptable outcomes defensible on the law and facts.

(d) Submissions of the ARA

[39] The ARA acknowledges its request for disclosure of the Records is based upon the assumption that ICBC sought and obtained an opinion from the Competition Bureau pursuant to the process that is available under the *Competition Act* and that the opinion caused ICBC to change its way of doing business with ARA's members. The ARA wants disclosure of the factual material that formed the basis of that advice.

[40] Counsel for the ARA, Mr. Schwartz, submits that by virtue of ss. 4 and 5 of *FIPPA* the ARA has an absolute right to disclosure of this information and that s. 13(1) exempts from disclosure only information that "would", not "could" or "might", reveal advice or recommendations developed by or for a public body.

[41] Mr. Schwartz submits that although the Assistant Commissioner was constrained from articulating complete reasons for his conclusion due to having received the Records *in camera*, he nevertheless turned his mind to the issue of whether the Records came within the s. 13(1) exemption. The Order shows a 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: *Law Society of New Brunswick v. Ryan* 2003 SCC 20 at para. 55. If the reasons allow the reviewing court to understand why the Assistant Commissioner made his decision and permit the court to determine whether the conclusion is within the range of acceptable outcomes, the criteria set out in *Dunsmuir* are met: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16.

[42] Mr. Schwartz further submits that the Assistant Commissioner specifically confirmed he "considered the Court of Appeal decision [in *College of Physicians and Surgeons*] and relevant OIPC orders" in reaching his conclusion and it is therefore

reasonable to conclude that he was mindful of and guided by the relatively broad approach mandated by *College of Physicians and Surgeons* regarding the interpretation of the word "advice".

[43] Moreover, he argues that s. 13(2) mandates the disclosure of "factual material". Hence, even if the information would reveal "advice or recommendations", to the extent that it is factual material it must be disclosed. He says that it is a reasonable inference that the Assistant Commissioner severed from the Records the "factual material" as required by s. 13(2), which is a routine procedure within the OIPC for applying s. 13: *Ministry of Forests and Range (Re)*, [2007] B.C.I.P.C.D. No. 23 at para. 18.

[44] He points out that the Assistant Commissioner is entitled to deference based upon his expertise, including the interpretation of his home statute, *FIPPA*. Although the court may have decided the matter differently, deference requires the court to bear in mind that a range of possible outcomes may be reasonable. He submits that the Assistant Commissioner's explanation for his decision merely needs to be tenable - it need not be compelling.

(e) Analysis

[45] The parties are in agreement and, indeed, it is well settled that the standard of review of a decision involving the interpretation and application of s. 13 of *FIPPA* is that of reasonableness: *BC Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para. 34; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39.

[46] "Reasonableness" was described in *Dunsmuir* as a deferential standard animated by the principle that certain questions coming before administrative tribunals:

> 47 …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 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 the range of possible acceptable outcomes which are defensible in respect of the facts and law.
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> [Emphasis added]

[47] The court is required to pay "respectful attention to the reasons offered or which could be offered in support of the tribunal's decision": *Dunsmuir* at para. 48. A court should be cautious about substituting its own view of the proper outcome: *Newfoundland* at para. 17. Perfection is not the standard: *Public Service Alliance of Canada v. Canada Post* Corporation, 2010 FCA 56 at para. 163, Evans J.A. quoted with approval in *Newfoundland* at para. 18.

[48] This deferential approach is justified because the OIPC is a discrete and specialized administrative regime charged with dealing with the rights of access to information in records held by public bodies. The Legislature has provided the OIPC with tools and powers to enable it to discharge the explicit objectives of *FIPPA* with the result that the OIPC has familiarity and specialized expertise that the courts do not: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 63-65; *Dunsmuir* at para. 49.

[49] Here the question is whether the Assistant Commissioner's conclusion that disclosure of the Records would not reveal the advice or facilitate the drawing of inferences about the advice was reasonable.

[50] It is apparent that, because the Assistant Commissioner found [at para. 43 of his decision] that disclosure of the Records would not reveal the advice or facilitate the drawing of inferences about the advice, he did not need to go further to determine whether any of the Records was "factual material" or fell within one of the other categories of documents enumerated in s. 13(2) that must be disclosed regardless of the s. 13(1) exemption.

[51] *College of Physicians and Surgeons* is the leading case in British Columbia on the interpretation of s. 13(1) of *FIPPA*. The College had received a complaint about a physician and launched an investigation, during the course of which its in-house counsel obtained the opinions of four experts to assist the College in assessing the complaint. The in-house counsel prepared two memoranda summarizing the opinions of the experts. The complainant requested disclosure of the opinions and memoranda. The Court of Appeal held that the College could refuse to disclose the documents under s. 13(1) of *FIPPA* on the basis that they were part of the College's deliberative process provided as advice to the College as a public body. In doing so, the Court of Appeal stated:

> [110] In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information...the purpose of which is to present background explanations or analysis...for...consideration in making a decision..."is generally included. There is nothing in s. 13 that suggests that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.
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> …
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> [113] I am similarly of the view that the word "advice" in s. 13 of the Act should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.

[52] These passages endorse the notion that the purpose of s. 13(1) is to prevent harm that would occur if a public body's deliberative process was exposed to public scrutiny. Hence, documents created as part of a public body's deliberative process are protected from disclosure under s. 13(1) regardless of whether they contain or use background facts necessary to the analysis. The background facts in isolation are not protected. Disclosure of them can be requested in the usual way. Section 13(2) expressly requires the disclosure of "factual material". But where that factual material is assembled from other sources and becomes integral to the analysis and views expressed in the document that has been created, the assembly is part of the deliberative process and the resulting work product is clothed with the same

protection as the opinions or advice themselves. Otherwise disclosure of the facts that have been assembled would allow an accurate inference to be drawn as to advice or recommendations developed by or for the public body.

[53] The alternative is that a public body would be required to parse through the requested documents, word-by-word, sentence-by-sentence and disclose any "fact" included in a document prepared as part of its deliberative process. In my view the legislature could not possibly have intended such a result. Any protection afforded to advice and recommendations would be illusory and meaningless if the background information that forms the fabric of the advice and recommendations was not also protected. This "crossword puzzle" approach advocated by the ARA cannot be reconciled with the purpose of *FIPPA* or with the principles set out in *College of Physicians and Surgeons*.

[54] The word "advice" must have been intended by the legislature to mean something other than "recommendations": *College of Physicians and Surgeons* at para. 99. One who "offers advice" is making a recommendation regarding a decision or course of conduct (Merriam-Webster Dictionary). "Advice" could also be interpreted to mean "guidance" (Concise Oxford English Dictionary); "a communication (especially from a distance, containing information (Dictionary.com); "information given" (Merriam-Webster Dictionary); or an official notice concerning a business transaction (Merriam-Webster Dictionary).

[55] I agree with counsel for the OIPC that there is no need for a "constitutionally sensitive" reading in this case. Doing so would result in all documents submitted to the Competition Bureau being excluded from disclosure, rather than only those that would reveal advice or recommendations. It would result in a new class-based exemption for such documents.

[56] I have reviewed the Records in detail. It is plain that they were integral to ICBC's deliberative policy-making process.

[57] Some of the Records are obviously "advice" as that term has been defined in *College of Physicians and Surgeons.* The balance comprises of information that was obviously considered critical to the deliberative process that was assembled by counsel and others.

[58] The Records consist of the following:

a) Pages 1 to 14

> A 14 page letter marked "confidential" written by one of ICBC's senior legal counsel to the Competition Bureau, containing legal analysis and other information relevant to that analysis. The document details precisely what ICBC seeks and why. A small amount of information in some of the pages (pages 1,2,3,4,5,6,7,8,9 and 14) was released to the ARA as it was considered to be factual material or background information from which advice or recommendations either being sought or provided could not be inferred. Some additional portions of these records were also released to the ARA subsequently.

[59] This letter was created as part of ICBC's deliberative process. It was a confidential communication between ICBC and the Competition Bureau, all as contemplated by and in furtherance of the purposes of the *Competition Act*. It was created by ICBC to allow it to obtain and formulate advice or recommendations to govern its future conduct. Any facts contained in it are inextricably interwoven with the letter itself.

b) Pages 53, 54 and 57 to 69

> A memorandum dated October 29, 2007 marked "without prejudice and confidential" from the law firm of Borden Ladner Gervais, counsel for ICBC, to the Competition Bureau responding to questions posed by the Competition Bureau to ICBC. This document is referred to in the 14 page letter referenced in a) above. Portions that were considered factual or background information from which advice or recommendations, sought or provided, could not be inferred were released to the ARA.

[60] This memorandum contains background facts and extracts from pre-existing documents that were assembled by counsel as a result of the exercise of his skill and judgment as part of ICBC's deliberative process. It also contains advice from counsel regarding various aspects of ICBC's business enterprise.

c) Pages 74 to 80

> Portions of a follow-up Memorandum dated February 15, 2008 marked "without prejudice and confidential" from Borden Ladner Gervais responding to further questions and requests from the Competition Bureau.

[61] The redacted portions are part of submissions by ICBC's counsel to the Competition Bureau as part of a deliberative process the obvious purpose of which was the development of advice or recommendations by or for ICBC.

> d) Pages 155, 161, 163, 164, 178, 181, 200, 218, 220, 222, 224, 231, 232, 240, 243, 247, 250, 253, 259 and 261
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> Various correspondence between ICBC and the Competition Bureau.

[62] The redacted portions reveal advice ICBC was seeking and the strategies it was considering as part of its deliberative process.

> e) Pages 262 to 264
>
> Meeting notes taken by senior ICBC staff including the Vice-President of Claims Programs and Planning and the Senior Vice-President. The notes relate to telephone discussions with Competition Bureau staff on February 25, 2011 following up on a letter from the Commissioner which the OIPC ruled was properly withheld under section 13.

[63] These notes reveal advice developed by or for ICBC as part of its deliberative process.

[64] It is overwhelmingly clear that the Records were integral to ICBC's deliberative policy-making process regarding matters raised by ICBC with the Competition Bureau. They include a letter dated March 8, 2010 from ICBC's senior legal counsel to the Competition Bureau setting out, in detail, precisely what ICBC was seeking and why. They comprise background information amassed for that purpose, analysis and opinions, or communications directly related thereto, all developed in a confidential setting that led ICBC to engage in a particular course of action.

[65] Release of the Records would, in my view, defeat the purpose of s. 13, which is to protect a public body's internal decision and policy making processes from disclosure, thereby encouraging the free and frank flow of advice and

recommendations and to prevent the harm that would occur if the deliberative process was subject to excessive scrutiny: *BC Freedom of Information and Protection of Privacy Assn* at para. 64; *College of Physicians and Surgeons*, para. 104. It would be intolerable for a public body, such as ICBC, to be required to disclose for public scrutiny its internal, strategic policy-making process.

[66] The focus of the inquiry into whether advice or recommendations could be inferred from the Records is not on the casual reader, but rather on the "assiduous, vigorous seeker of information": *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203 at para. 30, quoted with approval in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 37.

[67] Here, it is inconceivable that disclosure of the Records would not reveal to the ARA the advice or recommendations developed by or for ICBC and/or would allow the ARA to readily and accurately infer from the Records the contents of any advice or recommendations sought or given. Disclosure would allow anyone with even a modicum of understanding of the *Competition Act* to readily draw accurate inferences about the underlying advice or recommendations sought and obtained by ICBC.

[68] Although the Assistant Commissioner stated that he had considered the principles for interpreting s. 13(1) articulated in *College of Physicians and Surgeons*, he was silent regarding how he applied those principles. I appreciate that the Assistant Commissioner was somewhat restricted in his ability to set out his reasons due to the fact that he could not reveal information submitted to him *in camera*. However, there is no line of analysis articulated within the Order that could reasonably lead to the conclusion that he reached.

[69] In concluding that disclosure of the Records would not reveal the advice or facilitate the drawing of inferences about the advice, the Assistant Commissioner made an error in his interpretation of s. 13(1) which led to an unreasonable decision. In my view, the Assistant Commissioner's determination does not fall within a range

of acceptable, possible outcomes which are defensible in respect of the facts and the law.

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[70] Given my decision that the Order was unreasonable, there is no need to consider the constitutional arguments that were raised by counsel.

[71] However, I agree with Mr. Schwartz that the sections in the *Competition Act* and the *AIA* upon which ICBC relies merely contemplate that a body delivering information to the Competition Bureau will not be worse off by doing so. In other words, ICBC can reasonably expect confidential information delivered to the Competition Bureau will not be disclosed by it to any third party. Those *Acts* do not give ICBC the right to refuse disclosure of information that is otherwise required to be disclosed.

CONCLUSION

[72] In my view, no purpose would be served in remitting this matter back to the Assistant Commissioner for reconsideration.

[73] The Order is quashed.

[74] ICBC is entitled to its costs of this proceeding as against the ARA only.

"Weatherill J."