IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 354

Date: 20190315
Docket: S184120
Registry: Victoria

In the Matter of the *Judicial Review Procedure Act,* R.S.B.C. 1966, c. 241

Between:

College of Physicians and Surgeons of British Columbia

Petitioner

And:

British Columbia Information and Privacy Commissioner and Dr. Keith Laycock

Respondents

Petition seeking an order to quash Order F18-01 made by a Senior Adjudicator of the Information and Privacy Commissioner's office, dated January 10, 2018.

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Petitioner:	D.K. Lovett, Q.C. and A.R. Westmacott, Q.C.
Counsel for the Respondent: British Columbia Information and Privacy Commissioner	C.J. Boies Parker, Q.C. and R.J.B. Gage
Dr. Keith M. Laycock:	Appearing In Person
Place and Date of Hearing:	Victoria, B.C. January 21-23, 2019
Place and Date of Judgment:	Victoria, B.C. March 15, 2019

INTRODUCTION

[1] The petitioner, the College of Physicians and Surgeons of British Columbia (the "College"), is one of 26 health professions in British Columbia that is regulated by the *Health Professions Act*, R.S.B.C. 1996, c. 183 (*HPA*). Under the *HPA*, the College has a duty to serve and protect the public and to oversee the practice of medicine in the public interest. One of the ways the College attempts to accomplish its public interest objective is by ensuring that medical services are safe, reliable, and professionally delivered by competent practitioners. To achieve this goal, the College, like other *HPA* colleges, has established a Quality Assurance Program ("QAP") under s. 26.1 to assess the professional performance of its "registrants," that is, members of the College. An integral part of the College's QAP is its Physician Practice Enhancement Program ("PPEP").

[2] The respondent, the Information and Privacy Commissioner (the "IPC"), oversees the administration of the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 (*FIPPA*). Section 2(1) states that the overarching purposes of *FIPPA* are "to make public bodies more accountable to the public and to protect personal privacy." By operation of Schedule 3, the College is a "public body" as defined in Schedule 1. *FIPPA* therefore applies to the College and other public bodies, subject to any "override provision" in a particular statute, such as s. 26.2(6) of the *HPA*.

[3] In this petition, the College seeks an order in the nature of *certiorari* pursuant to s. 2 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241, to quash a decision made by an adjudicator, exercising authority delegated by the IPC, that required the College to disclose certain information and records to the respondent, Dr. Laycock, whose medical practice had been assessed by the College through the PPEP. Dr. Laycock practiced medicine for 48 years and is now retired.

BACKGROUND

[4] The goal of the College's PPEP is to assess and support community-based physicians like Dr. Laycock and assist them in providing quality patient care. While traditional "reactive" disciplinary procedures still play an important public interest role, the Legislature and the College recognize that a proactive, supportive approach to improving quality of patient care through the PPEP and similar programs "can be more effective, constructive and beneficial."

[5] The PPEP has three components. According to Dr. Murray, the Deputy Registrar of the College, the first involves a peer physician reviewing the registrant's case records to assess the quality of care being provided. The second component is an assessment of office management and procedures. The third component is a multi-source feedback" ("MSF") assessment that gathers multiple points of view to achieve a comprehensive, balanced review of the physician's practice.

[6] The MSF assessment program adopted by the College consists of surveys or questionnaires being sent to the physician's medical colleagues, non-physician co-workers, such as nurses, pharmacists, physiotherapists, office or clinic personnel, and laboratory and X-ray technicians and patients. Topics covered in the questionnaires include medical competency, communication skills, and office management. Once completed, the questionnaires and the products of the first two PPEP components are used to prepare an assessment report. That report includes benchmarks for similar physician practices.

[7] Physicians are selected for the PPEP through random selection, clinic-based selection, or risk-prioritized selection. Once a physician is selected, the College sends the physician a letter that describes the PPEP and the process for completing the MSF assessment component of the PPEP. That letter also advises the physician that:

> Pivotal Research Inc., an independent research company specializing in client evaluation services, is responsible for the administration of the MSF component on behalf of the College and has signed a formal agreement to ensure that confidentiality is maintained throughout the MSF process. The

> distribution and collection of MSF materials will be handled by Pivotal Research. Individual questionnaire responses are anonymized and identities are not disclosed to the college.
>
> Information obtained through the Physician Practice Assessment Program is protected under section 26.1 of the *Health Professions Act*, R.S.B.C. 1996, c. 183 and cannot be used by any other College committee or accessed under freedom of information requests. Physicians participating in this program may be eligible for continuing medical education credits through the College of Family Physicians of Canada. [Emphasis added.]

[8] Once selected, the physician's name is provided to Pivotal Research, the private service provider to the College. Pivotal Research then provides the physician with an MSF package that includes instructions on completing a self-assessment and directs the physician to identify eight physician colleagues, a minimum of six co-workers, and 25 patients to participate in the assessment. The instructions include the following statement:

> While you may think that self-selection of assessors introduces bias, studies have shown that assessors are usually frank and candid when their anonymity is assured providing that the intent of the feedback is educational and not disciplinary. [Emphasis added.]

[9] Each patient the physician selects to participate in the MSF assessment is provided with a questionnaire and an envelope addressed to Pivotal Research. Among other things, the instructions advise the patient that MSF assessment information is "strictly protected from use in any disciplinary process, legal proceeding or freedom of information requests." It also provides that their responses will be sealed in an envelope and sent to an independent research firm for processing and that "your physician will not know how you responded." Each patient is directed to complete the questionnaire in the physician's office and seal it in the envelope. The physician then returns the sealed envelopes to Pivotal Research.

[10] With respect to the peer physicians and non-physician co-workers selected by the physician who is being assessed, Pivotal Research contacts them directly and arranges for them to complete and return the questionnaires. Similar to the assurances given to patients, these persons are assured that: (1) their responses are kept strictly confidential; (2) Pivotal Research anonymizes the questionnaires so

that identities are not disclosed to the College; and (3) only aggregate data are used in the report to the physician being assessed, thereby assuring anonymity. The physician who is being assessed also provides Pivotal Research with a self-assessment, and is interviewed by a peer assessor and, if required, by the PPEP medical advisor.

[11] Throughout this process, the College does not know the identity of the persons who provided an assessment of the physician. No personal information that could identify the participants is provided to the College by Pivotal Research. Rather, as noted, the individual questionnaire responses are "anonymized" by Pivotal Research. Only the aggregated data are provided to the College and the physician.

[12] MSF assessment reports are completed under the oversight and direction of the College's Physician Enhancement Panel (the "Panel"), a subset of the College's Quality Assurance Committee. Once completed, the report for the overall assessment is shared with the physician. Pursuant to s. 26.1(3) of the *HPA*, that report may recommend that the physician take further education or training, undergo clinical or other examinations, or perform other remedial activities.

[13] Given this background, the College says it is clear the PPEP has been designed to operate within a framework of confidentially and that its internal procedures are aimed at ensuring confidentiality. Electronic and paper records are only accessible to PPEP staff, unless the physician has specifically authorized another College department to access the physician's materials. In addition, all members of the Panel and the Quality Assurance Committee sign confidentiality agreements, as does Pivotal Research.

[14] The College submits it is "vitally important to the integrity and efficacy of the PPEP that the participant assessors be assured that what they say will be kept confidential in order to ensure they are open and candid in their assessments." Without such assurances, the College says that assessments or opinions about physicians – especially potentially negative ones – will not be as frank or honest as

they would otherwise be, and some potential assessors might simply decline to participate. This is why peers, co-workers, and patients are assured confidentiality and non-disclosure of the information they provide through the MSF assessment process.

[15] The College submits that patient confidentiality is especially critical as patients are in a relationship of "dependence and vulnerability" with their physicians. As a result, they should be assured that their feedback is kept in strict confidence so that there is no perception or concern that there might be adverse consequences if their assessment is negative, especially when finding a new family physician in this day and age can be a somewhat challenging undertaking.

[16] The College says the potential consequences of permitting this order to stand are significant. Although Dr. Laycock was not seeking his patients' questionnaires, if the adjudicator's decision stands, the College points out that a future request for disclosure would permit the disclosure of patient questionnaires, a result that would be directly contrary to the objective of the non-disclosure provisions of s. 26.2(1).

ANALYSIS

[17] In 2014, Dr. Laycock's medical practice was assessed by physician peers, co-workers and patients under the PPEP. Even though it was a positive assessment, Dr. Laycock applied under *FIPPA* for access to all of the questionnaires completed by his physician colleagues and co-workers. The College refused to provide the requested information, relying on the *FIPPA* "override" in s. 26.2 of the *HPA* as the basis for non-disclosure.

[18] Section 26.2(1) establishes the confidentiality of records or information provided to a health college quality assurance committee or an appointed assessor under a quality assurance program. It states:

> 26.2(1) Subject to subsections (2) to (6), a quality assurance committee, an assessor appointed by that committee and a person acting on that

> committee's behalf must not disclose or provide to another committee or person
>
> (a) records or information that a registrant provides to the quality assurance committee or an assessor under the quality assurance program, or
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> (b) a self assessment prepared by a registrant for the purposes of a continuing competence program.

[19] Section 26(6) specifically provides that s. 26.2(1) applies despite *FIPPA*. This is, in the College's view, significant.

[20] On January 18, 2016, after the assessment results were made known to him, Dr. Laycock made an access request under s. 52 of *FIPPA* for disclosure of the original questionnaires submitted to Pivotal Research by co-workers and peer colleagues as part of his MSF assessment. Although Dr. Laycock says he suggested the questionnaires be anonymized before release, the College appears to have understood the scope of his request as "including the identities of the assessors."

[21] The College withheld access on the basis that the requested information related to PPEP activities under the College's QAP and therefore *FIPPA* did not apply to that information by operation of s. 26.2 of the *HPA* and s. 79 of *FIPPA*. Section 79 provides that if a *FIPPA* provision is inconsistent or in conflict with a provision in another statute, the *FIPPA* provision prevails "unless the other Act expressly provides that it, or a provision of it, applies despite this Act." The College submits that where s. 26.2(1) of the *HPA* prohibits disclosure, the explicit *FIPPA* "override" in s. 26.2(6) means information and access rights under *FIPPA* do not apply.

[22] At the same time, even though the confidentiality protections in s. 26.2 of the *HPA* override *FIPPA*, s. 44(3) of *FIPPA* provides that "despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner" any record required for purposes of conducting an inquiry under s. 56. Accordingly, the College was required to obtain from Pivotal Research and provide to the IPC all of the records that were responsive to Dr. Laycock's

information access request but were withheld from him. In accordance with IPC procedures, those records were received on an *in camera* basis, pending the IPC adjudicator's decision in the inquiry.

[23] The IPC adjudicator issued her decision on January 10, 2018. That decision, Order F18-01, required the College to disclose the requested questionnaires to Dr. Laycock, including the names of the assessors. In seeking to quash the adjudicator's order in the present application, the College focuses on the adjudicator's interpretation and application of s. 26.2 of the *HPA*. On this point, the College maintains that the appropriate standard of review is correctness, not reasonableness, because the adjudicator was not interpreting her "home statute." The College submits that her interpretation is incorrect because it significantly impacts and undermines the College's quality assurance programs and those of other health professions regulated by the *HPA*. The IPC submits that the standard of review is reasonableness, and that the adjudicator's decision is not unreasonable.

The Order

[24] In ordering disclosure, the adjudicator concluded:

> [36] Section 26.1 prohibits disclosure of the type of information listed in s. 26.2(1)(a) or (b) to "another committee or person." I do not interpret this phrase as broadly as the College who submits it prevents disclosure to "anyone at all". By using the phrase it did, the Legislature specifically delineated who should not have access to this type of quality assurance information. In my view, the phrase "to another committee or person" does not include the registrant who provided the record or information to the quality assurance committee or assessor. The first part of s. 26.2(1) must be read as a whole, in combination with s. 26.2(1)(a) and (b) in order to understand its full meaning. The word "registrant" in s. 26.2(1)(a) and (b) specifies the source of the records and information. The phrase to "another committee or person" identifies who may not have access to those records and information. The phrase "to another committee or person" is used to differentiate those individuals from the registrant who provided or prepared the records or information pursuant to s. 26.2(1)(a) and (b).
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> [37] The term "registrant" is exhaustively defined by s. 26 and s. 1 of the HPA and there is no ambiguity as to its meaning in s. 26.2. This is a strong indicator of legislative intention and the fact that concerted thought went into conveying the precise meaning of the term "registrant" where it is used in the HPA. Nothing suggests that it was anything other than [a] conscious choice

> on the part of the legislators to *not* use the word “registrant" to identify who is prohibited from accessing records or information the registrant provides under s. 26.2(1)(a) and (b). Instead a completely different phrase was chosen, namely, “to another committee or person.”
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> [38] In my view, the non-disclosure protection provided in s. 26.2(1) fosters honest and full engagement in the quality assurance process. Information gathered about a registrant during that process may be critical and it has the potential to damage the registrant’s self-esteem, professional reputation and ability to earn a living. It seems to me that a registrant will be willing to participate fully and meaningfully in the process if assured that any information about the registrant will not be disclosed beyond those who are conducting the assessment and working with the registrant to help improve the quality of his or her medical practices.
>
> [39] I do not think that the intent of s. 26.2(1) is to prohibit a registrant from accessing a record or information about the registrant that the registrant provided under s. 26.2(1). To interpret s. 26.2(1) in that way would cause absurd results. For instance, it would mean that a quality assurance committee or assessor could not return to a registrant a record or information originally provided by that registrant. Similarly, they would be prevented from revealing details to, or having a discussion with, the registrant <u>about the records or information the registrant provided</u>. This would defeat the improvement and educational component of the quality assurance program. In order for a quality assurance process to be meaningful and effective there needs to be communication between the assessor and the assessed about the very type of records and information that s. 26.2(1)(a) and (b) capture.
>
> [40] Further, my understanding of the meaning of “to another committee or person” is supported by s. 26.2(1)(b), which is about a self-assessment prepared by the registrant. It would be absurd <u>to prohibit disclosure to a registrant of their own self-assessment,</u> and I do not think that this is what was intended by s. 26.2(1).
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> [Italic emphasis in original; underline emphasis added.]

[25] The adjudicator then determined (at para. 41) that s. 26.2(1) applied to prohibit disclosure “beyond the circle of individuals who have a right to know" and that this section protects only “the confidentiality of the registrant.” In her view, s. 26.2(1) “does not contemplate the confidentiality of others,” such as those who provided assessment information about the registrant, whose confidentiality interests are “addressed by the broader language [of] s. 53” of the *HPA*.

[26] Having reached this conclusion, the adjudicator ordered the College to give Dr. Laycock unredacted copies of all the records he requested.

[27] The College submits that the adjudicator fell into error in her interpretation and application of s. 26.2 of the *HPA* to the records requested by Dr. Laycock. The College notes that Dr. Laycock was not seeking access to his own self-assessment or any other information that he himself provided to Pivotal Research. Instead, Dr. Laycock wanted the information that other College peer physicians ("registrants") or co-workers (such as pharmacists, who are also registrants under the *HPA* for purposes of the College of Pharmacists) provided to Pivotal Research. By ordering access to that information, the College says the adjudicator applied an interpretation of the *HPA* that completely defeats the purpose of s. 26.2. The College says that giving a registrant access to all of the information that other assessors have provided about that registrant, information they were clearly told was intended to be wholly confidential and exempt from *FIPPA,* fundamentally undermines the assessment program. If the adjudicator's decision stands, the College says this will "gut" the assessment program.

[28] The IPC's position is straightforward. It says the adjudicator's interpretation of s. 26.2(1) of the *HPA* was reasonable and deference is owed to her decision.

[29] Similarly, Dr. Laycock says the adjudicator's decision was reasonable.

Standard of Review

[30] Before considering the substance of the adjudicator's decision, I must first identify the appropriate standard of review.

Position of the College

[31] The College says "the common law policy of judicial or curial deference is simply this: in the case of specialized tribunals, decisions on matters entrusted to them by reason of their expertise should be accorded deference by reviewing courts." The College submits this policy reflects an acceptance of the specialized expertise of certain tribunals, and an increasing awareness that courts may not be as well qualified to interpret complex statutes in a way that most appropriately reflects the broad policy context within which such tribunals operate: see *National*

Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 at 1336-7, 1343; and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 31.

[32] The College argues that "[t]he touchstone of deference is therefore relative expertise; i.e., the expertise of the tribunal relative to the courts in respect of interpretative issues arising under that tribunal's constituent statute." The College says expertise means a tribunal's "relative familiarity with the specialized policy context on which it relies" to interpret a provision of its home statute: *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development),* 2018 SCC 4 at para. 108. The College submits that "deference is anchored in the need to respect the legislature's intent to leave interpretive provisions in a tribunal's home statute to the tribunal because of the tribunal's informed specialist expertise."

[33] Given these principles, the College readily concedes that if the adjudicator "was interpreting her home statute, *FIPPA*, she would be entitled to judicial deference and her decision would be presumptively reviewable on a standard of reasonableness, not correctness." However, the College says the same does not hold true when the decision at issue involves the interpretation of an "external statute" in which the tribunal cannot be said to have expertise. The College says the policy context in the present case is the *HPA*, not *FIPPA*, and the IPC is not the "frontline agency operating within that legislative and policy context."

[34] The College submits that, consistent with the rationale for judicial deference, the Supreme Court of Canada has said that, as a general rule, a reasonableness standard need not be extended to a tribunal's interpretation of an external statute, with one exception. That exception is where the external statute can be said to be "intimately connected" to the tribunal's mandate and is "frequently encountered" by it as a result: *Toronto (City) Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at para. 39 (*Toronto Board of Education*), citing *Canadian Broadcasting Corp. v. Canada (Labour Relations Board),* [1995] 1 S.C.R. 157 at para. 48. In this regard, the College says the *HPA* is

not intimately connected with the IPC's mandate, nor is it frequently encountered by IPC adjudicators. The College therefore says the standard of review should be one of correctness.

Position of the IPC

[35] The IPC submits the appropriate standard of review is reasonableness, saying it is now well settled that *Dunsmuir v. New Brunswick*, 2009 SCC 9, and subsequent Supreme Court of Canada decisions have simplified the standard of review analysis. In para. 62 of *Dunsmuir,* the Court set out steps to follow in determining the appropriate standard of judicial review. The first step is to ascertain whether the jurisprudence has already determined the standard of review with regard to a particular category of question. If prior jurisprudence has determined the applicable standard, the analysis ends there. If the first inquiry does not end the matter, the court will proceed to the "standard of review" analysis to determine the proper standard of review. As the Court stated at para. 64 of *Dunsmuir*, this analysis depends on the application of a number of factors, including: (1) the presence or absence of a privative clause, (2) the purpose of the tribunal as determined by interpretation of enabling legislation, (3) the nature of the question at issue, and (4) the expertise of the tribunal.

[36] In *Dunsmuir,* the Court reiterated that deference is often warranted when a tribunal is "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at para. 54).

[37] In addition, the IPC says subsequent jurisprudence has established that where a tribunal is interpreting its "home statute" or a statute closely related to its core function, the standard of review is presumed to be reasonableness, unless the issue falls into four exceptional categories: see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers Association*, 2011 SCC 61 at para. 34 (*Alberta Teachers)*, and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47 at paras. 22-24 (*Edmonton East*).

[38] First and foremost, the IPC says prior jurisprudence has already determined that when an access and privacy commissioner is adjudicating a request for access under their own statute, and in the course of doing so is required "to interpret and apply a provision in an external statute that affects or eliminates the right of access under the Commissioner's own statute," the appropriate standard of review is reasonableness. In this regard, the IPC cites *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner*, 2014 SCC 31 (*Community Safety*), and *West Vancouver Police Department v. British Columbia (Information and Privacy Commissioner)*, 2016 BCSC 934 (*West Vancouver*), and says "the Court need not inquire further."

[39] In the alternative, the IPC says that s. 26.2 of the *HPA* is a provision in an external statute that is closely related to the IPC's core mandate of adjudicating access requests. As a result, the IPC says the presumption of reasonableness applies to the adjudicator's interpretation of s. 26.2. The IPC further submits there is no basis to find the presumption of reasonableness is rebutted in this case. The cornerstone of the IPC's submission on this point is that "the fundamental purpose of the IPC is to review decisions made by public bodies like the College about the scope of their disclosure obligations."

[40] Furthermore, the IPC says that even if the presumption of reasonableness does not apply, the application of the "contextual" factors outlined in *Dunsmuir* lead to the same result, as the IPC has expertise in determining whether records held by a public body, such as the College, must be disclosed or withheld to protect personal privacy.

Position of Dr. Laycock

[41] Although Dr. Laycock says he is "unable to comment … on such legal terms as home v. external statutes or on the legal concepts of reasonableness v. correctness," he submits that IPC officials "are knowledgeable, and have expertise in interpreting the appropriate Legislative Acts." He further submits that IPC adjudicators have "professional competence … to correctly interpret" the *HPA*

despite their lack of "frequent reference" to that statute. Furthermore, his stated view that the adjudicator's decision was reasonable implies he agrees with the IPC's submission that review on a standard of reasonableness would be appropriate.

Prior Jurisprudence

Position of the IPC

[42] As noted above, the IPC says prior jurisprudence has already established the standard of review for the purposes of this petition. The IPC relies on the Supreme Court of Canada's decision in *Community Safety*, and the decision of Harvey J. in *West Vancouver,* for the proposition that when an adjudicator considers the effect of a non-disclosure provision in an "external statute" on a right of access application, such as Dr. Laycock's, the standard of review is reasonableness.

[43] The IPC points out that in *Community Safety*, the Ontario Minister of Correctional Services argued that a decision on such an application should be reviewed on the standard of correctness, since the adjudicator in that case was interpreting *Christopher's Law (Sex Offender Registry)*, S.O. 2000, c. 1, and not her home statute, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. The Supreme Court of Canada disagreed:

> [27] … The Commissioner was required to interpret *Christopher's Law* in the course of applying *FIPPA*. She had to interpret *Christopher's Law* for the narrow purpose of determining whether, as set out in s. 67 of *FIPPA*, it contained a "confidentiality provision" that "specifically provides" that it prevails over *FIPPA*. This task was intimately connected to her core functions under *FIPPA* relating to access to information and privacy and involved interpreting provisions in *Christopher's Law* "closely connected" to her functions. The reasonableness standard applies. [Emphasis added.]

[44] The IPC says that in the present case, the adjudicator only interpreted the relevant provision in the *HPA* for the limited purpose of determining to what extent it overrides *FIPPA*. The IPC says that in both cases, the *FIPPA* adjudicator considered the external statute in the course of carrying out her core functions, and interpreted a provision that was "intimately connected" to that function.

[45] The IPC points out that in *West Vancouver*, Harvey J. applied the reasonableness standard of review to the IPC's interpretation of a confidentiality provision in s. 182 of the *Police Act*, R.S.B.C. 1996, c. 367. The question for the adjudicator in that case was whether ss. 182(c) and (d) applied to preclude the disclosure of records pertaining to an internal police investigation, such that they were exempt from disclosure because s. 182 prevailed over *FIPPA*. The adjudicator interpreted ss. 182(c) and (d) and found they did not apply to exclude the disputed records because the investigation at issue was not "initiated under" Part 11 of the *Police Act*. The result of the adjudicator's order was the disclosure of records relating to the internal police investigation of a police officer.

[46] On judicial review, Harvey J. rejected earlier jurisprudence which had held that a correctness standard applies when the court reviews a decision by the IPC concerning whether a certain document is excluded from *FIPPA*. Justice Harvey reasoned that more recent jurisprudence from the Supreme Court of Canada in *Alberta Teachers* rendered those earlier decisions inapplicable (at para. 24).

[47] Justice Harvey also decided (at para. 29) that, despite the fact the IPC had not previously considered s. 182 of the *Police Act*, interpreting that provision was not "foreign" or outside the adjudicator's expertise because s. 182 concerned the creation of records containing personal information and the disclosure of those records. In the final analysis, Harvey J. concluded that the reasonableness standard presumptively applied (at para. 36).

[48] The IPC says the present case is "on all fours" with *West Vancouver*. Like s. 182 of the *Police Act*, which states that *FIPPA* "does not apply to" certain information or records, s. 26.2(6) of the *HPA* specifically provides that s. 26.2(1) prevails over *FIPPA*. However, due to the operation of s. 79 of *FIPPA*, the adjudicator in this case was required to determine whether s. 26.2 of the *HPA* applied to the records sought by Dr. Laycock such that *FIPPA* was rendered inapplicable. The IPC says this was intimately bound up with the adjudicator's core

function under *FIPPA*: “determining whether a public body is required or permitted to withhold records.”

[49] As a result, the IPC says *West Vancouver* has already determined that the proper standard of review in the present case is reasonableness, and there is no need to proceed to the standard of review analysis.

Position of the College

[50] In response to the IPC’s submission that the appropriate standard of review has already been determined, the College says I should not follow *West Vancouver* because Harvey J. “did not consider principles of relative expertise but instead approached the question from the perspective of whether the section 182 interpretative issue was one of jurisdiction attracting a standard of review of correctness.”

[51] However, a brief review of Harvey J.’s reasons reveals that he did not choose to approach the standard of review analysis from that perspective; he merely dealt with, and rejected, the unsuccessful party’s submission to that effect (at paras. 19-24). Moreover, Harvey J. was not obliged to “consider principles of relative expertise” because his finding that a presumptive reasonableness standard applied (at para. 36) rendered a full *Dunsmuir* analysis unnecessary.

[52] The College also says Harvey J. relied on the s. 79 *FIPPA* override provision as another basis for applying a reasonableness standard. Even though s. 79 was not mentioned by the adjudicator in that case and the College says no interpretive issue involving s. 79 was engaged, Harvey J. linked s. 79 of *FIPPA* and s. 182 of the *Police Act* and found that the reasonableness standard applied because the adjudicator was “obliged to consider s. 182 as a consequence of his function under his home statute, as was the case in [*Community Safety*]”.

[53] However, the College submits that the question is not simply whether a tribunal is obliged to consider an external statute when performing its functions.

While acknowledging that administrative tribunals are frequently required to interpret external statutes in the exercise of their adjudicative powers, the College says this does not automatically import a reasonableness standard of review in respect of those statutes. Rather, the College says the Supreme Court of Canada has made it clear that the central question is whether the external statute is one that is "intimately connected" to the tribunal's mandate and "frequently encountered" as a result (*Toronto Board of Education* at para. 39). The College puts it this way: "if the tribunal frequently encounters interpretive questions relating to an external statute, the statute can be said to be intimately connected to the tribunal's mandate, triggering deference due to relative expertise."

[54] The College points out that in *Community Safety*, which Harvey J. relied on in *West Vancouver*, the appellant Ministry sought judicial review of an order made by a *FIPPA* adjudicator on the basis that the adjudicator had erred in his interpretation of the law enforcement exemptions in s. 14 of Ontario's *FIPPA*. As noted, the Supreme Court of Canada found that the standard of review of the Ontario adjudicator's interpretation of s. 14 of his home statute was reasonableness. The College says that while the adjudicator in *Community Safety* also had to interpret *Christopher's Law*, it was only for "the narrow purpose of determining whether, as set out in s. 67, it contained a 'confidentiality provision' that 'specifically provides' that it prevails over *FIPPA*."

[55] Unlike the question in *Community Safety*, the College says the issue in the present case is not whether the *HPA* specifically requires that its confidentiality provisions override *FIPPA*, because s. 26.2(6) clearly establishes that they do in respect of quality assurance matters. The College says that as the *HPA* contains a specific exclusionary clause which "ousts" *FIPPA* altogether, the decision in *West Vancouver* is not applicable, nor is *Community Safety.* The College says the threshold issue considered by the adjudicator therefore does not involve an interpretation of s. 79 of *FIPPA* or an interpretation of any of *FIPPA*'s exemption provisions. Instead, the College says the "statutory interpretation question" in this

case “focuses on the meaning of the quality assurance provisions in the HPA and what the Legislature intended when it enacted section 26.2(1) of that Act.” The IPC says the present case is therefore “entirely distinguishable from the situation” in *Community Safety*.

[56] In conclusion, the College says:

> Interpreting section 26.2 of the *HPA* in a way that is most consonant with the Act’s purposes and objects requires an understanding of, and field sensitivity to, how quality assurance committees operate in practice and why that is so. The *HPA* is the College’s home statute, not that of the IPC. Unlike the College (and all other *HPA*-regulated colleges) the IPC cannot, to borrow a phrase from the *National Corn Grower’s* case, be described as the “frontline agency" for *HPA* purposes and for that reason it is not well-positioned (let alone best positioned) to have any "understanding and insight” into the *HPA* legislative scheme. The *HPA* is not a statute that is intimately connected to the IPC’s mandate under *FIPPA* in the sense that the IPC is not frequently called upon to interpret it. Indeed, Order F18-01 represents the first time the IPC has considered sections 26.1 and 26.2 of the *HPA* in a *FIPPA* inquiry. The *HPA* is an external statute over which the IPC has no expertise relative to this Court; there is no basis for extending any deference. In these circumstances, the Court is best suited to resolve ambiguities in *HPA* statutory language. For these reasons, the College submits that the proper standard of review is correctness, not reasonableness.

[57] Notwithstanding the able submissions of counsel for the College, I am persuaded that Harvey J.’s decision in *West Vancouver* is on sound footing and consistent with the general analysis in *Community Safety.* I therefore agree with the IPC’s submission that this prior jurisprudence has determined that the appropriate standard of review in the present case is one of reasonableness.

Presumption of Reasonableness

[58] While I accept that existing jurisprudence has already determined the appropriate standard of review, for the sake of completeness I will deal with the IPC’s alternative submission that, even if this were not the case, a standard of review analysis would lead to the same conclusion.

[59] As noted above, the IPC submits it is now firmly established that the reasonableness standard will apply when a tribunal is interpreting its home statute or

"statutes closely connected to its function." As such, the first step in the standard of review analysis is to determine if the tribunal is interpreting such a statute.

[60] In *Edmonton East*, the Supreme Court of Canada explained that the reasonableness standard is applicable in order to respect both the intention of the Legislature in delegating decision-making to a tribunal and to foster access to justice:

> [22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[61] In *Community Safety*, the Court considered what is meant by a statute "closely connected" to the tribunal's function. In that case there was no suggestion that an adjudicator under Ontario's *FIPPA* would have specialized expertise in dealing with the Sex Offender Registry or that it was "closely connected" to *FIPPA*, nor would a *FIPPA* adjudicator encounter such registries on a regular basis. Nevertheless, the Court concluded that reasonableness was the appropriate standard because the adjudicator's interpretation of the external statute was "intimately connected to her core functions under *FIPPA* relating to access to information and privacy." This was because the adjudicator was interpreting provisions in *Christopher's Law* that, in the Court's view, were "closely connected" to her functions under Ontario's *FIPPA*.

[62] As noted above, Harvey J. took a similar approach in *West Vancouver*:

> [29] I do not agree that the interpretation of s. 182 of the *Police Act* was completely foreign and outside the delegate's expertise. That provision deals with the creation of records containing personal information and the disclosure, or exclusion from disclosure, of those records; matters clearly

> familiar to delegates of the Information and Privacy Commissioner, which they are accustomed to weighing and balancing in the course of their statutory duties.

[63] As a result, the IPC submits that where the IPC is required to consider whether a provision of an external statute applies so as to prohibit disclosure, the standard of review is presumed to be reasonableness.

[64] The IPC submits that similarly, the standard of review is presumed to be reasonableness in this case because the adjudicator was tasked with interpreting the *HPA* in the course of performing her core functions under *FIPPA*. The IPC says an adjudicator's core functions include giving effect to the right of access to records that are created by *FIPPA*. The IPC says that because s. 26.2 of the *HPA* specifically modifies that right of access, the interpretation of that provision is "closely connected" to the adjudicator's core functions under *FIPPA*. The IPC says the adjudicator interpreted the *HPA* for the purpose of determining how or if the access right under *FIPPA* was modified as a result of s. 26.2 of the *HPA*.

[65] The IPC also submits that in addition to *Community Safety* and *West Vancouver*, recent decisions from both the Supreme Court of Canada and our Court of Appeal have applied the presumption of reasonableness to tribunals' interpretation of external statutes where the interpretation is central to those tribunals' core functions.

[66] In *Barreau du Quebec v. Quebec (Attorney General*), 2017 SCC 56, the fact that a tribunal had to consider an external statute in order to determine a central issue under its home statute demonstrated the "close connection" between the external legislation and the tribunal's function, giving rise to a presumption of reasonableness (at para. 16).

[67] In *British Columbia (Minister of Transportation and Infrastructure) v. Registrar, Victoria Land Title Office*, 2018 BCCA 288, the Court of Appeal applied the presumption of reasonableness to the Registrar's interpretation of a provision in the *Strata Property Act*, S.B.C. 1998, c. 43 (*SPA*). Even though the *SPA* was an external

statute, the court found that the specific sections at issue were closely connected to the Registrar's core functions under the *Land Title Act*, R.S.B.C. 1996, c. 250 (*LTA*), as the Registrar was required to ensure the requirements of those *SPA* provisions were satisfied before executing a registration in accordance with the *LTA*. As a result, the presumption of reasonableness applied. The court said:

> [42] I also conclude that ss. 80 and 253 of the *SPA* are closely connected to the Registrar's core function of registering interests in land. Before accepting a plan that subdivides common property of a strata corporation, the Registrar must ensure the requirements of s. 80 of the *SPA* are satisfied. To determine whether those requirements are met, the Registrar must determine whether the disposition of common property falls under s. 253(1). In this sense, the Registrar must deal with ss. 80 and 253 of the *SPA* in the usual course of his or her duties in relation to the maintenance of the land title register. In addition, ss. 80 and 253 of the *SPA* reference the *LTA*, which further supports the position that these provisions are closely connected to the Registrar's home statute.
>
> [43] I emphasize that the Registrar was not called on to consider the *SPA* in isolation. Rather, the Registrar's decision involved interpretation of the *LTA* and the relationship between the *LTA* and the *SPA*.

[68] Moreover, the IPC says *FIPPA* is designed to apply to numerous statutory regimes and public bodies that deal with information, and that one of *FIPPA*'s purposes is to give the public a right of access to records and to give individuals access to their own personal information that has been collected by statutory bodies. As a result, in addition to interpreting their home statute, *FIPPA*, the IPC says adjudicators will necessarily have to interpret the relationship between *FIPPA* and other statutes that allow the collection of information. This may require adjudicators to determine whether certain provisions of other statutes render the right to access records under *FIPPA* inapplicable and, following that determination, determine whether a public body must disclose information in its possession or control. The IPC says:

> … This does not bring the questions before the adjudicator outside of the tribunal's specialized expertise. Quite the opposite – this falls squarely within the adjudicator's expertise, as the interpretive task is intimately connected to the adjudicator's core functions. One aspect of the IPC's familiarity and expertise with the *FIPPA* regime is expertise in how other legislation modifies or affects the operation of that scheme.

[69] In conclusion, the IPC says the adjudicator here was executing her core functions under *FIPPA*: she was tasked with determining whether Dr. Laycock had a right of access to information held by the College, a public body, and whether the College could rely on any exceptions to disclosure. The IPC says that due to the operation of s. 79 of *FIPPA*, the adjudicator was required to determine whether s. 26.2 of the *HPA* specifically prevails over *FIPPA*, and determine whether it applied in the particular circumstances of this case. In the final analysis, the IPC submits the adjudicator was acting within her core functions and her area of expertise by determining the relationship between the right to information in *FIPPA* and the mandatory confidentiality provisions in the *HPA*. On that basis, the IPC says the standard of review is reasonableness.

[70] Conversely, as noted above in para. 56 of these reasons, the College says that as the adjudicator was dealing with an external statute, the *HPA*, not her home statute, and as she has no expertise in the world of medicine, the presumption of reasonableness is not engaged. Nor is the *HPA* "intimately connected" to *FIPPA* or the IPC, as the IPC has no day-to-day involvement with the *HPA*.

[71] I am unable to accede to the College's submission on this issue. Instead I agree with the IPC that there is little doubt that the Legislature would have expected the IPC to interpret and apply the exception to *FIPPA*'s access right created by s. 26.2 of the *HPA*. Because interpreting that provision is fundamental to the IPC carrying out the statutory mandate to adjudicate on access requests such as Dr. Laycock's, and is therefore "closely connected" to the IPC's core function, I am persuaded the presumption of reasonableness applies.

[72] Furthermore, I am satisfied that none of the exceptional situations in which the presumption of reasonableness may be displaced are applicable here (see *Edmonton East* at para. 24).

Was the adjudicator's decision unreasonable?

[73] Numerous Supreme Court of Canada decisions provide guidance on applying the reasonableness standard of review. In *Dunsmuir* (at para. 47), Bastarache and Lebel JJ. (for the majority) explained the proper approach in the following terms:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[74] The Court has recognized that judicial review of administrative action is to a large extent a specialized branch of statutory interpretation, and the proper approach to statutory interpretation in this context is well-established. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, Iacobucci J. (for the Court) stated the general principle:

> [21] Although much has been written about the interpretation of legislation … Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[75] It is well settled that as long as the decision of a tribunal is a reasonable interpretation, there is no basis on which a court can interfere when reviewing that decision on a reasonableness standard. In *McLean*, Moldaver J. (for the majority) stated:

> [32] … [B]ecause legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations …
>
> …

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; [*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53]*,* at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.
>
> [39] But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are *reasonable*. The litmus test, of course, is that if the Commission had adopted the other interpretation – that is, if the Commission had agreed with the appellant – I am hard-pressed to conclude that we would have rejected its decision as unreasonable.
>
> [40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim* [*v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557], at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting <u>any interpretation that the statutory language can reasonably bear</u>. Judicial deference in such instances is itself a principle of modern statutory interpretation.
>
> [41] Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review – even in the face of a competing reasonable interpretation.
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> [Italic emphasis in original; underline emphasis added.]

[76] However, an interpretation that is not rooted in the proper approach to statutory interpretation may be unreasonable. In *Rizzo*, Iacobucci J. (for the Court) reasoned as follows:

> [20] At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to

> pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
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> …
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> [23] Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case ... I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.
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> ...
>
> [27] ... It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Côté,* [*The Interpretation of Legislation in Canada* (2nd ed. 1991)]*,* an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment ... Sullivan, [*Driedger on the Construction of Statutes* (3rd ed. 1994)], echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile ...
>
> ...
>
> [29] If the Court of Appeal's interpretation of the termination and severance pay provisions is correct … the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.
>
> [Emphasis added.]

[77] In *Rizzo,* Iacobucci J. observed that an interpretation of "terminated by the employer" which included termination resulting from bankruptcy was "consistent with statements made publicly by the Minister of Labour" when he introduced the severance pay provisions and during the ensuing legislative debates (at para. 34). Justice Iacobucci found that "[a]lthough the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation" (at para. 35). Similarly, in *Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24*,* Binnie J. (for the Court) found that "Hansard evidence can assist in determining the background and purpose of legislation" (at para. 57).

[78] In *Echelon General Insurance Company v. Ontario (Minister of Finance)*, 2018 ONSC 5029, Perell J. helpfully summarized several types of errors that the Court has held may render an administrative decision maker's decision unreasonable:

> [32] An arbitrator's decision is unreasonable where the decision is incompatible with the applicable legal principals or inconsistent with the evidence or where it is it is inconsistent with proper statutory interpretation and derived from a desired outcome [citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53 [*Mowat*]].
>
> [33] An arbitrator's decision is unreasonable where the arbitrator asks the wrong question, fails to undertake the proper analysis, misapplies the underlying legal principles, or ignores or misunderstands the evidence [citing *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29].
>
> [34] An arbitrator's decision is unreasonable if it frustrates the purposes and policies of the legislative scheme being interpreted or applied by the arbitrator [citing *Halifax*].

[79] In *Mowat*, the Court found the Canadian Human Rights Tribunal interpreted a provision of its home statute in an unreasonable manner by "supplant[ing] a textual and contextual analysis … to give effect to a policy decision different from the one made by Parliament" (at para. 62). In essence, the Tribunal erred by relying on plain meaning and a policy framework that ran counter to both the stated purpose of the provisions and their statutory context:

> [64] In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions …

[80] In *Halifax*, the Court found the Minister of Public Works and Government Services' trifling valuation of a national historic site for PILT (payment in lieu of taxes) purposes was unreasonable because it ran contrary to un-contradicted

evidence before the Minister, and also frustrated the purposes and policies of the applicable legislation:

> [47] [The Minister's decision] is unreasonable, first, because the manner in which the Minister formulated his opinion was inconsistent with his obligation to form an opinion about the value that would be established by an assessment authority. Not only did the Minister not adopt the approach which the relevant assessment authority actually *would* apply to value the property, but he also had evidence before him, apparently not contradicted, that *other Canadian assessment authorities would not value the property* in the way he did. And there was *no evidence that any assessment authority would do so*. On that record, the Minister's opinion is in my view unreasonable. The Minister's opinion is also unreasonable on a second ground: by adopting the view that a national historic site is valueless because it cannot be used for commercial activities, the Minister defeated Parliament's purpose in including national historic sites within the PILT scheme …
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> …
>
> [56] In my respectful view, the Minister's exercise of discretion was contrary to both the purposes and the policy of the Act. Parliament's purpose in including national historic sites within the ambit of the Act was to allow the Minister to make PILTs in respect of such sites, which should be valued under an approach that is conducive to this purpose. It cannot accord with the statutory purpose to accept that the Minister can undercut this inclusion by adopting a method of valuation that renders it meaningless. The Minister's approach "had the effect of frustrating the very legislative scheme under which the power is conferred": *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 … It was therefore unreasonable.
>
> [57] The Minister's position is also, in my view, at odds with the broader policy of the Act, which is to treat municipalities fairly … [T]he conclusion that an historic site has no value because it cannot be developed or used in an economically productive way is "out of sync" with the equitable purpose of the PILT scheme … [T]he Act is directed to fair and equitable PILTs with reference to what taxes would be payable if the site were taxable. The Minister's approach in my view unreasonably departs from that purpose.

Position of the IPC

[81] The IPC submits that the College cannot meet the burden of showing the adjudicator's decision was unreasonable. The IPC says the adjudicator's decision demonstrates a clear line of reasoning and falls within the range of rational and acceptable outcomes. Moreover, the IPC says the adjudicator did not interpret the *HPA* in isolation or in a vacuum. The IPC says she referred to the rules of modern

statutory interpretation and considered the objective and intention of the legislation. At para. 32, the adjudicator wrote:

> The modern approach to statutory interpretation requires that the words of an Act are to be read in their entire context, in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[82] The IPC says another example of a reviewing court adopting and implementing the deferential standard described in *McLean* is found in the decision of Russell J. in *Telus Mobility Inc. v. British Columbia (Forests and Range)*, 2012 BCSC 459, which concerned the judicial review of a decision of the Forest Appeals Commission as it related to sections in the *Wildlife Act,* S.B.C. 2004, c. 31, and the *Wildlife Regulation*, B.C. Reg. 38/2005. After reviewing various decisions of the Supreme Court of Canada and other authorities, Russell J. held as follows:

> [89] The FAC's interpretation of the legislation is not one I would have made given the wording of the section. It is, however, within the range of possible, acceptable outcomes. The decision need not be correct. The FAC has justified its decision in a transparent and intelligible manner. The outcome, as determined by the FAC, falls within a range of reasonable outcomes. I defer to its reasoning.

[83] It is clear from *McLean* that this is a correct summary of the analysis involved when considering what deference means. Our Court of Appeal made similar comments in *British Columbia v. Canadian National Railway*, 2014 BCCA 171, a case also involving the Forest Appeals Commission. Justice Saunders summarized the deferential approach to administrative tribunals as follows:

> [14] In *McLean* ... the Supreme Court of Canada … recognized at para. 32 that "legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations" ([italic] emphasis in original). Thus the issue is not only whether the interpretation of s. 103(3) propounded by the Province is reasonable, which it undoubtedly is, or even whether it is more reasonable than the Commission's, but whether the Commission's interpretation is *not* reasonable. That is a high hurdle for the Province to meet as that question engages the highest deference. [Italic emphasis in originals; underline emphasis added.]

[84] So, the IPC says, even if I was to conclude the College's interpretation was reasonable, that would not render the adjudicator's alternative interpretation

unreasonable. Given the high degree of deference that must be accorded to the adjudicator's decision in carrying out what the IPC says is her core function under *FIPPA*, the IPC says the College has not cleared the high hurdle and the College's petition must be dismissed.

[85] The IPC also submits that because the College focused on challenging the correctness of the adjudicator's decision, it is precluded from arguing it is unreasonable. I am unable to agree with the IPC on this point. As counsel for the College wrote in reply submissions:

> The order that is sought in the petition is an order in the nature of *certiorari* quashing the Order on the basis that the Adjudicator fell into legal error in her interpretation of the *HPA* provisions at issue. There is no concession in the petition or in anything that was said in Court by College counsel that the Order at issue is reasonable. It is not.

[86] I am satisfied that even though the College conceded the phrase "another committee or person," in and of itself, "is not a model of legislative clarity and… admits to more than one interpretation," that is not a concession that, when considered in light of the Legislature's intent with respect to quality assurance assessments, the decision is reasonable. Indeed, the College specifically argued in submissions that, in the alternative, the decision was unreasonable.

Position of the College

[87] The College says the adjudicator's interpretation of the *HPA* is not reasonable when viewed through the lens of the Legislature's clear intention. The College submits that while s. 26.2(1) of the *HPA* "*standing alone* admits to some ambiguity," the adjudicator's interpretation of this somewhat ambiguous provision is unreasonable because it defeats the purposes of the *HPA* and "is at odds with the express confidentiality and assessment goals" of the College's QAP. Additionally, the College says the override in s. 26.2(6) of the *HPA* is a clear statement of legislative intent that *FIPPA* has no application in respect of records, information, or self-assessments prepared for the purposes of a QAP.

[88] The College says the goal of the College's QAP, including the PPEP, is to evaluate and educate physicians in order to enhance patient safety and care, thereby protecting the public by ensuring the delivery of quality health care. The College submits that this is consistent with the goals of quality assurance programs of health professions across the country: see, for example, *Chong v. College of Physicians and Surgeons*, 2015 ONSC 922. The College also says the broader purpose of the *HPA* is to protect the public.

[89] Even though the College acknowledges the actual words of s. 26.2 of the *HPA* are "somewhat unclear," it suggests the legislative intent behind the provision is crystal clear. The College says s. 26.2 was introduced in 2003 as part of a comprehensive package of reforms that moved toward a proactive assurance approach to professional regulation. Drawing on the principles in *Rizzo* and *Canada 3000*, the College submits that the "legislative aim of imposing a confidentiality protection for these processes is clear" from the Minister of Health Planning's remarks in the Legislative Assembly: ("Bill 62, *Health Professions Amendment Act*, 2003," 2nd reading, British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 4th Sess, Vol. 16, No. 9 (6 October 2003) at 7186 (Hon. Sindi Hawkins)):

> There will be enhancements in the quality of care, in that every professional college will be required to establish quality assurance programs to improve public protection. This program will be designed to promote good practice and minimize the possibility that practitioners are providing substandard care to patients. Consistent with the well-established process of peer reviews within hospitals, information contained and recorded through quality assurance measures will be kept confidential.

[90] The College says the Minister described the scope of the confidentiality protections as extending to all information obtained through the quality assurance process, including information obtained through peer review, which is "precisely the type of information at issue here."

[91] The College submits that the Minister's reference to "the well-established process of peer reviews within hospitals" was a reference to s. 51 of the *Evidence*

Act, R.S.B.C. 1996, c. 124, which protects the confidentiality of "health care evidence" held by committees that evaluate hospital-based health care practitioners, and expressly overrides *FIPPA*. The College says s. 51 "applies to protect against disclosure of quality assurance information in the same way that section 26.2 is intended to protect against disclosure in a non-hospital setting," and cites existing case law on the policy goals underlying s. 51.

[92] For example, in *Parmar v. Fraser Health Authority*, 2012 BCSC 1596, Master MacNaughton emphasized the importance of the policy goals underlying s. 51 of the *Evidence Act* in the following terms:

> [10] The Legislature enacted s. 51 for public policy reasons. As discussed in *Sinclair v. March*, 2000 BCCA 459, rather than opting for balancing the interests of full disclosure in legal proceedings with the need for confidentiality of internal quality reviews, the Legislature enacted a prohibition against production. This was to encourage absolute candour [and] cooperation in quality reviews thereby ensuring high standards of patient care and professional competency. It protected against the possible chilling effect on cooperation of knowing that statements made could be shared outside the hospital. In particular, the Court said this about the Legislature's intent:
>
> > ... the Legislature intended to protect this area of hospital activity by preventing access by litigants. Rather than striking a balance of interests, the Legislature made a clear choice in favour of one interest, hospital confidentiality. In the course of deciding an issue under s. 51 a court should give the language of the enactment its full force and effect with the object in mind: s. 8, *Interpretation Act*, R.S.B.C. 1996, c. 238.

[93] Both *Parmar* and the Court of Appeal's decision in *Sinclair* involved former patients who wanted internal quality review documents "shared outside the hospital" so they could be used in medical malpractice suits against the doctors and hospitals in question, and in both cases s. 51 of the *Evidence Act* prevented them from doing so. Neither case opined on whether the confidentiality imposed by that provision was also intended to bar doctors, who were the subjects of those internal quality reviews from accessing those records, because that was not in issue.

[94] However, Master MacNaughton's reasons in *Parmar* also cited *Cole v. St Paul's Hospital*, 1998 CarswellBC 3023 (S.C Chambers), a case which suggests s. 51's confidentiality regime applies even when the requesting party is an assessed

medical practitioner who is the subject of the records at issue. In *Cole*, the plaintiff was a surgeon seeking access to internal review documentation to support a breach of contract claim against his former employer, the defendant hospital. Regarding the scope of confidentiality imposed by s. 51, Low J. held as follows:

> [6] The documents in question consist of reports and correspondence within the hospital relating to various committees struck to inquire into aspects of procedures within the surgery department and eventually the plaintiff's management of it. I find it unnecessary to review the description of these documents in detail. Each of them comes clearly within the definition of "record" in s. 51(2)(b) and was prepared by or for a committee, as defined in s. 51(1).
>
> [7] … [P]roduction is not permitted under s. 51(2)(b) of the *Evidence Act*… [Section] 51(2)(b)] sets up a prohibition against production. It is a statutory directive … No exceptions or judicial discretion are allowed for in the statute …

[95] Consequently, the confidentiality attached to "the well-established process of peer reviews within hospitals," to which the Minister referred when introducing the *HPA* quality assurance provisions, appears to be capable of barring access by medical doctors who are the subject of the assessment documents they wish to access, as well as barring access by the public at large. This, in my view, supports the College's submission that the Legislature intended s. 26.2 of the *HPA* to shield QAP records from disclosure to assessed registrants like Dr. Laycock, as well as disclosure to members of the public.

[96] Moreover, the College says the adjudicator in the present case unreasonably concluded (at para. 41) that the "aim of the non-disclosure provision in s. 26.2(1) is to protect the confidentiality of the registrant" being assessed, as opposed to "the confidentiality of others." I am at a loss to understand the rationale of the adjudicator's observations in this paragraph. The "confidentiality of the registrant," that is, the doctor being assessed, is a non-issue, as eight other doctors, six co-workers, and 25 of the doctor's patients already know he or she is being assessed as part of the College's QAP. The "confidentiality of others," on the other hand, is of genuine concern. Nevertheless, the adjudicator excluded their interests from consideration under s. 26.2 because they were purportedly protected by "the

broader language" of s. 53, but then proceeded to ignore s. 53 when deciding to order disclosure of the records sought by Dr. Laycock. I find that the adjudicator's conclusion that "the aim of the non-disclosure provision in s. 26.2(1) is to protect the confidentiality of the registrant" and not "the confidentiality of others" is not supported by the evidence.

[97] In addition, the College says ss. 26.1 and 26.2 of the *HPA* "must be read not just in the context of the College's overarching public interest and public protection mandate and quality assurance goals, but also in the context of other provisions in the *HPA* or the College Bylaws which place an emphasis on the need for confidentiality." Rather than relying on s. 53 to exclude the "confidentiality of others" from consideration under s. 26.2(1), as the adjudicator did, the College cites it as further evidence of the need to interpret s. 26.2(1) in a way that enhances confidentiality. Similarly, the College submits the Legislature's overarching concern with confidentiality is further reinforced in s. 26.2(5) of the *HPA*, which provides that, subject to subsection (2), records, information or a self-assessment prepared for the purposes of a QAP or continuing competence program may not be received as evidence in a proceeding under the *HPA* or a civil proceeding. I accept the College's characterization of these provisions.

[98] The College says the adjudicator's decision also undermines the purpose and intent of the College's QAP by overlooking Deputy Registrar Murray's un-contradicted affidavit evidence that assessor anonymity results in greater candour from peer physicians, co-workers, and patients who complete MSF questionnaires. The College submits the adjudicator failed to properly consider this evidence and reached a contrary conclusion that was not open to her.

[99] On this point, the College notes our Court of Appeal has recently held that an IPC adjudicator's failure to acknowledge evidence of harm that will flow from a decision to release confidential documents can render such a decision unreasonable. In *University of British Columbia v. Lister*, 2018 BCCA 139 (*UBC*), Fisher J.A. (for the court) stated that an adjudicator's "refusal to accept UBC's belief

regarding the effect of disclosure" of its admissions rubric under *FIPPA* was unreasonable because "[t]here was simply no basis on the evidence before her on which she could substitute her opinion or belief for that of UBC, the body which had developed" the documents at issue (at para. 47). I agree with the College's submission that in the present case the adjudicator substituted her own opinion or belief for that of the College without an appropriate evidentiary basis upon which to do so (*UBC* at para. 47). As in *Halifax*, I find the adjudicator ignored the College's un-contradicted evidence about the importance of assessor anonymity, as deposed to by Dr. Murray.

[100] The College further submits that by focusing on the assessed physician's "self-esteem, professional reputation and ability to earn a living" and "willing[ness] to participate fully and meaningfully" in the compulsory PPEP (at para. 38), the adjudicator improperly prioritized the interests of assessed registrants over the confidentiality interests of assessors and the public's interest in the "integrity and efficacy" of the College's QAP. Given the totality of the circumstances, I agree with the College's submission that the adjudicator unreasonably emphasized Dr. Laycock's disclosure interests over the confidentiality of his assessors.

[101] The College also questions the adjudicator's conclusions at para. 39 of her reasons. For instance, the adjudicator said that interpreting the s. 26.2(1) prohibition as extending to the registrant being assessed would lead to an "absurd" result because that would mean the assessed registrant could not access information he or she provided (such as the self-assessment). However, as the College, points out, such information would obviously already be known to the registrant. I fail to see what purpose would be served by returning it, or why prohibiting such return would be "absurd."

[102] Of even more significance, in my view, is the fact that the adjudicator also concluded that the assessed registrant must be able to obtain all the information the assessors had provided or else the quality assurance committee or appointed assessor "would be prevented from revealing details to, or having a discussion with,

the registrant about the records or information the registrant provided." The adjudicator reasoned (at para. 39) that this:

> … would defeat the improvement and educational component of the quality assurance program. In order for a quality assurance process to be meaningful and effective there needs to be communication between the assessor and the assessed about the very type of records and information that s. 262.2(1)(a) and (b) capture.

[103] However, the adjudicator's conclusion on this point overlooked the obvious fact that the assessed registrant is entitled to receive a final report, based on aggregate data, which forms the basis of the discussion between the appointed assessor and the assessed registrant. The assessment report is not "records or information" provided to the quality assurance committee or an appointed assessor, and while the assessed physician's access to the report is critical to the educational goals underlying the PPEP, access to the names of the participating individuals and the specific responses they each provided on an assured basis of confidentiality is irrelevant to those goals. In my view, the adjudicator's reasoning on this issue as articulated at para. 39 is illogical.

[104] Finally, the College submits the adjudicator's analysis is not internally consistent insofar as she interpreted the reference to "person" in s. 26.2(1) to exclude the registrant because "registrant" is a defined term in the *HPA*. As noted above, she found that the Legislature used the phrase "to another committee or person" to "differentiate those individuals from the registrant who provided or prepared the records or information." In other words, her view was that "person" excludes the registrant being assessed but includes other registrants, even though s. 26.2(1)(a) refers more broadly to "a registrant" who provides information, which on a plain reading would include peer assessors. In the adjudicator's opinion, had the Legislature's intent been otherwise, it would have expressly said so; for example, the provision would read something along the lines of "another committee, person or the registrant being assessed" or "committee, person, or registrant except the registrant being assessed." As I have already noted, in reaching this conclusion, the adjudicator placed great reliance on the definitions of "registrant" in the *HPA*:

> [37] The term "registrant" is exhaustively defined by s. 26 and s. 1 of the *HPA* and there is no ambiguity as to its meaning in s. 26.2. This is a strong indicator of legislative intention and the fact that concerted thought went into conveying the precise meaning of the term “registrant" where it is used in the *HPA*. Nothing suggests that it was anything other than a conscious choice on the part of the legislators to *not* use the word “registrant” to identify who is prohibited from accessing records or information the registrant provides under s. 26.2(1)(a) and (b). Instead a completely different phrase was chosen, namely, “to another committee or person.” [Emphasis in original.]

[105] In support of its critique of the adjudicator’s position on this issue, the College emphasizes that an interpretation of the word "person” that includes the “registrant” being assessed is more “consonant” with the intent of the legislation and the goals of the quality assurance program, which presupposes confidentiality. The College says it is unnecessary to specifically refer to a registrant in this phrase to effect exclusion because "person” has a broader meaning than “registrant.” It includes everybody, including College registrants.

[106] To put it simply, the College submits that s. 26.2(1), when viewed generously, purposively, and in a manner most consistent with the Minister’s express statement of legislative intent, coupled with the goals of the *HPA* and the QAP, should apply to prohibit disclosure to any person, including the registrant being assessed, of any records, information, or self-assessment provided to Pivotal Research for the purpose of preparing an assessment. The College says the adjudicator’s decision to interpret s. 26.2 as permitting such disclosure to a physician who is being or has been assessed is unreasonable.

[107] Quite frankly, if the only factor to be considered in this analysis was the interpretation of the phrase “another committee or person” in s. 26.2(1) and the definitions of “registrant” and “person,” I would be hard pressed to say the adjudicator’s decision was unreasonable. As the Court said in *Rizzo,* at “first blush” the plain meaning of the words supports a finding that the adjudicator’s interpretation is not unreasonable.

[108] However, as in *Rizzo*, I am not satisfied the adjudicator paid "sufficient attention to the scheme of the [*HPA*], its object or the intention of the legislature, nor was the context of the words in issue appropriately recognized." In my view, the Legislature clearly intended s. 26.2 to shield QAP records from disclosure to assessed registrants, and any reasonable interpretation of that provision must give adequate weight to that intention, as well as the confidentiality and public protection objectives of the QAP provisions and the *HPA* as a whole. Although the adjudicator correctly identified the modern approach to statutory interpretation, her ensuing analysis was insufficiently thorough and failed to give appropriate weight to these considerations. Instead, the adjudicator gave undue priority to the interests of the *FIPPA* applicant, which in my view must be secondary to the public interest in the *HPA* context.

[109] As a result, I am satisfied that the adjudicator's reasoning "give[s] effect to a policy decision different from the one made by Parliament" (*Mowat* at para. 62), resulting in a decision that runs counter to the purpose and statutory context of the provisions at issue. As in *Halifax*, I find the adjudicator reached a conclusion that frustrates the purposes and policies of the *HPA*.

CONCLUSION

[110] In conclusion, I am persuaded the adjudicator's decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). When the principles of statutory interpretation are fully applied, the adjudicator's reading of s. 26.2 ceases to be an "interpretation that the statutory language can reasonably bear" (*McLean* at para. 40). Accordingly, I find the adjudicator's decision unreasonable. The appropriate remedy is to quash Order F18-01. I so order.

"The Honourable Mr. Justice B.D. MacKenzie"