PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Health PEI v. Privacy Commissioner,*** 2019 PECA 7

Date: 20190418
Docket: S1-CA-1393
Registry: Charlottetown

BETWEEN:

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER (PRINCE EDWARD ISLAND)

APPELLANT

AND:

HEALTH PEI

RESPONDENT

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
D. Shannon Farrell, counsel for the Appellant

Karen A. Campbell, Q.C., counsel for the Respondent

Place and Date of Hearing	Charlottetown, Prince Edward Island February 14, 2019
Place and Date of Judgment	Charlottetown, Prince Edward Island April 18, 2019

Written Reasons by:
Justice John K. Mitchell

Concurred in by:
Chief Justice David H. Jenkins
Justice Michele M. Murphy

ADMINISTRATIVE LAW - Standard of review

A judicial review of a tribunal's decision interpreting its home statute or statutes closely connected to its function is to be done on a standard of reasonableness. The Privacy Commissioner was interpreting her own statute, the ***Freedom of Information and Protection of Privacy Act***, and sections of the ***Hospital Services Act*** for the narrow purpose of whether the record sought was quality improvement information. This task is closely connected to her core functions under ***FOIPPA***. The standard of review in this case is reasonableness.

STATUTORY INTERPRETATION

Courts and administrative tribunals should approach the matter of statutory interpretation by reading the words of the ***Act*** 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. Where the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretative process.

In this appeal the question for interpretation is whether information gathered by an investigator under Part II of the ***Health Services Act*** can be repurposed and protected under Part IV of the ***Health Services Act***.

Authorities Cited:

CASES CONSIDERED: Agraira v. Canada (Minister of Public Safety and Emergency Preparedness), 2013 SCC 36; ***King v. Government of P.E.I. et al.***, 2018 PECA 3; ***Dunsmuir v. New Brunswick***, 2008 SCC 9; ***Canada (Canada Human Rights Commission) v. Canada (Attorney General)***, 2018 SCC 31; ***Toronto (City) v. CUPE, Local 79***, 2003 SCC 63; ***Alberta (Information and Privacy Commissioner) v. University of Calgary***, 2016 SCC 53; ***Canada (Canada Human Rights Commission) v. Canada (Attorney General)***, 2018 SCC 31; ***Canada (Canada Human Rights Commission) v. Canada (Attorney General)***, 2011 SCC 53; ***Canada Trustco Mortgage Co. v. Canada***, 2005 SCC 54; ***Wilson v. Atomic Energy of Canada Ltd.***, [2016] 1 S.C.R. 770; ***Rizzo and Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27; ***Celgene Corp. v. Canada (Attorney General)***, 2011 SCC 1; ***BMO v. 100875 PEI***, 2014 PECA 12; ***Phillips v. WCB Prince Edward Island***, 2018 PECA 22; ***Carter v. Flemming***, 2015 PECA 9; ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61; ***St. Peter's Estate Ltd. v. Prince Edward Island Land Use Commission***, 1991 CanLII 2745 (PESCTD); ***M&M Resources Inc. v. Prince Edward Island (Workers Compensation Board)***, 2018 PECA 9.

STATUTES CONSIDERED: Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, Cap.F-15.01, ss.5, 29, 53, 53(2), (3), (4); ***Health Services Act***, R.S.P.E.I. 1988, Cap. H-1.6, ss. 26, 26(e), 27, 28, 29, 30; ***Civil Service Act***, S.N.B. 1984, c. C-5.1; ***The Public Service Labour Relations Act***, R.S.N.B. 1973, c. P-25; ***Christopher's Law (Sex Offender Registry)***, 2000, S.O. 2000, C-1.

Reasons for judgment:

MITCHELL J.A.:

[1] The Prince Edward Island Information and Privacy Commissioner appeals the decision of the Prince Edward Island Supreme Court (***Health P.E.I. v. Privacy Commissioner,*** 2018 PECS 11) that quashed the Commissioner's decision dated April 21, 2017 (***Prince Edward Island (Health) Re***, 2017 CanLII 32456 PEIPC). The Commissioner's decision ordered Health PEI to produce a complete copy of the Record relating to a systemic report in order to allow the Commissioner to ascertain whether the systemic report satisfies the definition of quality improvement information and to confirm whether any information in the systemic report falls under any of the exclusions contained in s.26(g) of the ***Health Services Act (HSA)***. Health P.E.I.'s position is that the systemic report is quality improvement information; therefore, it does not fall within the ambit of the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01 ("***FOIPPA***"). The Commissioner's position is that she needs to review the record to ensure that the information actually is quality improvement information.

[2] In these reasons QI is an abbreviation for "quality improvement" and QIA for "quality improvement activity."

Facts

[3] A complaint was made against a physician (the "subject physician") at the Queen Elizabeth Hospital ("QEH"). The QEH is a division of Health P.E.I. Acting under the bylaws passed pursuant to s.8(2)(b) contained in Part II of the ***Health Services Act***, R.S.P.E.I. 1988, Cap. H-1.6 ("***HSA***"), the QEH retained an external expert, Dr. Chin, to investigate and provide an report which they called an accountability report. An accountability report is a report used to investigate a complaint that, if warranted, may be used as evidence in a disciplinary hearing involving the physician subject of the complaint.

[4] Dr. Chin visited the province and spent two days, February 13 and 14, 2014, at the QEH conducting chart reviews and interviewing several witnesses including the subject physician. At the conclusion of his time at the QEH and before providing any

written report, he spoke to the medical director. He advised her that in addition to his accountability report, there were a number of systemic concerns that he would like to bring to the hospital's attention.

[5] The medical director advised Dr. Chin that in light of this information he should prepare two reports: the accountability report which would "*only respond to the issues identified in ... the agreement to conduct the external review*"; and a second systemic report to deal with "*any observations or opinions regarding potential systems issues*" which "*would be part of that QIA process and should not be addressed in your report resulting from the external review.*"

[6] The accountability report was completed March 17, 2014. On March 14th the Board created a Quality Improvement Committee. On March 25th they wrote to Dr. Chin requesting a quality improvement activity report. They wrote:

> We understand that not only will you be providing this QI Committee with a report focussing on systems issues, you will be sending a separate report to Dr. Henderson in relation to the external review for which you were initially retained. For the following reasons, it is very important that you separate your findings regarding potential systems issues from those findings you will be making in relation to your review of (*the subject physician)*. First, the work of the QIA is confidential and protected under the ***Health Services Act*** which makes it inadmissible in evidence in a legal proceeding. Therefore, cross-referencing these reports will not be possible.
>
> Second, as separate bodies will be responsible for implementing the recommendations found in each of your reports, it is important that each report address only those issues and recommendations that fall within the mandate of the body for which it is being produced.
>
> The mandate of the QI Committee is very distinct from the mandate of the accountability process. ...

[7] The systemic report was completed around April 10, 2014. The subject physician then filed a request with the Commissioner seeking to obtain a copy of the systemic report on April 29, 2016. He had previously been given a copy of the accountability report but he believed that there may be evidence in the systemic report that would be relevant to his defence. Health P.E.I. declined to provide the report taking the position that the systemic report was quality improvement information, and therefore it could not be released to the applicant or any other person. Thereafter followed several months of correspondence among the Commissioner, Health P.E.I., and the subject physician which culminated in the April 21, 2017 decision by the Commissioner. In her decision the Commissioner stated, at para.25:

> I received and reviewed submissions of the public body and am persuaded that a quality improvement activity occurred, but I am not able to assess whether the content of the Record at issue is only quality improvement information. The ***Health Services Act*** *definition of quality improvement information expressly excludes certain information under section 26(g). I require the production of the Record at issue, not only to determine whether it satisfies the definition of quality improvement information, but also to confirm whether any information in the Record at issue falls under the exclusions.*

[8] The Commissioner then ordered Health P.E.I. produce a "*complete copy of the Record at issue for the purpose of determining the main issue of this review, whether the Public Body properly assessed that the Applicant has no right of access to the Record at issue, pursuant to section 30 of the* ***Health Services Act***."

Judicial Review

[9] Health P.E.I. filed an application for judicial review which was heard April 6, 2018. The applications judge held that the appropriate standard of review of the Commissioner's decision was correctness. The applications judge then analyzed the provisions of both acts and concluded that the decision of the Commissioner was wrong. He found that the Commissioner had no authority to compel production of the record to see whether it satisfies the definition of quality improvement information and to confirm whether the information falls under any of the exclusions listed in s.26(g). He therefore quashed the order to produce.

The positions of the parties

- **Information and Privacy Commissioner**

[10] The Commissioner argues that the issue revolves around the interpretation of the interplay between ***FOIPPA*** and the ***HSA***. The Commissioner asserts that the question to be determined does not concern access to records but rather the compellability of records.

[11] The Commissioner relies on s.5(2) of ***FOIPPA*** which states that where there is an inconsistency or conflict with a provision of ***FOIPPA*** then ***FOIPPA*** prevails unless the other act or provision expressly provides that it prevails despite ***FOIPPA***.

[12] The ***FOIPPA*** grants an applicant a right of access to any record in the custody or under the control of a public body (s.6, ***FOIPPA***). Health P.E.I. is a public body. Should a public body refuse a request the Commissioner may conduct an inquiry

(s.64 ***FOIPPA***). The Commissioner was satisfied that a quality improvement activity took place (***Prince Edward Island (Health) Re, supra***, at para.25), but she could not determine whether the systemic report contained documents or information that were not quality improvement information.

[13] The Commissioner bases her authority to compel the production of records on the interplay between ss.26-29 of the ***HSA***, and s.53 of ***FOIPPA***.

[14] Sections 53(2) and (3) of ***FOIPPA*** give the Commissioner all the powers, privileges, immunities of a Commissioner under the ***Public Inquires Act*** and empowers the Commissioner to require a record to be produced for her examination whether or not the record is subject to ***FOIPPA***. Section 53(4) requires a public body to produce the record to the Commissioner *"despite any other enactment or privilege of the law of evidence."*

[15] Section 26(c) of ***HSA*** defines legal proceedings as meaning "*an inquiry ... in which evidence is or may be given before a ... commission, board, ... but does not include any activities carried on by quality improvement committee."*

[16] Section 29 of the ***HSA*** states that no person shall be compellable to produce or disclose quality improvement information in a legal proceeding. Section 29 does not contain an express provision that it prevails over ***FOIPPA***. The Commissioner concludes that s.53(4) prevails over s.29 of the ***HSA*** and therefore the Commissioner can compel the production of the systemic report to ascertain whether or not it is in fact quality improvement information.

- **Health P.E.I.**

[17] Health P.E.I.'s position is that this is not a legal proceeding and s.29 of the ***HSA*** has no relevance. While some of the Commissioner's inquiries may be legal proceedings, this particular inquiry is not. That is so because, Health P.E.I. argues, in this case there has been no evidence called nor will there be.

[18] In any event, the Commissioner is prevented from accessing the record by s.30 which does override ***FOIPPA***. That section reads:

> Notwithstanding the ***Freedom of Information and Protection of Privacy Act***
> no person has a right of access to quality improvement information
> regardless of whether it includes personal information about the person.

[19] A Commissioner is a person and therefore she is caught by s.30. Health P.E.I. states that by the broad definition of quality improvement activity and quality

improvement information, there is a blanket prohibition on production of quality improvement information regardless of how the quality improvement information arose provided the quality improvement committee was validly established under s.27.

Issues

[20] The Commissioner appeals this decision based on the following two grounds: (1) that the applications judge erred by applying the standard of correctness to his review of the Commissioner's decision; and (2) the applications judge erred when he determined that the Commissioner had no authority to compel the production of the Record.

[21] The role of an appellate court on an appeal from a judicial review decision is to decide whether the court below identified the appropriate standard of review and applied it correctly. This process has been described as stepping into the shoes of the lower court such that the appellate court's focus is, in effect, on the administrative decision (***Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)***, 2013 SCC 36, at paras.45-46; ***King v. Government of P.E.I. et al.***, 2018 PECA 3, at paras.30-31).

Standard of review

[22] ***Dunsmuir v. New Brunswick***, 2008 SCC 9, is the seminal case on the issue of standard of review. That case sets out presumptions and factors to be considered in determining whether to employ the standard of correctness or standard of reasonableness. The factors play no role in this case. The five presumptions are as follows:

(1) reasonableness is normally the standard when a tribunal is interpreting its own statute or statutes closely connected to its function with which it will have particular familiarity (***Dunsmuir***, para.54);

(2) reasonableness is normally the standard for questions of fact, exercise of discretion, policy decisions or questions where the legal and factual issues are intertwined and cannot be readily separated (***Dunsmuir***, para.53);

(3) correctness is the standard where the question at issue is one of general law that is both of central importance to the legal system as a whole outside the adjudicator's area of expertise (***Dunsmuir***, paras.55 and 60);

(4) correctness is the standard for decisions on constitutional entitlements or constitutional validity (***Dunsmuir***, para.58);

(5) correctness is the standard for decisions concerning jurisdictional demarcation between tribunals (***Dunsmuir***, para.61).

[23] The applications judge's first reason for choosing correctness as the standard of review is that *"the question of law raised by the relevant sections of* ***FOIPP Act*** and ***HSA*** *is of central importance to the legal system in this province when individuals seek records for public bodies where prohibition against actions exist"* (***Health PEI v. Privacy Commissioner, supra***, at para.10).

[24] The presumption laid out by the Supreme Court of Canada in ***Dunsmuir*** is correctness for decisions where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's area of expertise.

[25] The Supreme Court of Canada has repeatedly rejected a liberal interpretation of what constitutes a question that is both of central importance to the legal system as a whole and outside the decision maker's specialized area of expertise (***Canada (Canada Human Rights Commission) v. Canada (Attorney General)***, 2018 SCC 31, at para.42). The authority cited by the Supreme Court of Canada in ***Dunsmuir*** at para.60, for what does constitute such a question was ***Toronto (City) v. CUPE, Local 79***, 2003 SCC 63. That case dealt with complex common law rules and conflicting jurisprudence on the doctrine of *res judicata* and abuse of process. These *"issues are at the heart of the administration of justice"* (see ***Dunsmuir***, at para.60).

[26] Correctness was also the standard of review employed by the Supreme Court of Canada in ***Alberta (Information and Privacy Commissioner) v. University of Calgary***, 2016 SCC 53, because the question in that case was a question of central importance to the legal system as a whole and outside the tribunal's specialized area of expertise. The question was whether or not the Alberta ***Freedom of Information and Protection of Privacy Act*** allowed the Alberta Commissioner to set aside solicitor/client privilege. The Supreme Court of Canada found that solicitor/client privilege is *"fundamental to the proper functioning of our legal system"* and *"has acquired constitutional dimensions as both a principle of fundamental justice and part of a client's fundamental right to privacy"* (para.20).

[27] While there are few cases in which the Supreme Court of Canada has found the question to be both of central importance to the legal system as a whole and outside the expertise of the tribunal, the cases in which they have declined to do so

are numerous (see ***Canada (Canada Human Rights Commission) v. Canada (Attorney General),*** 2018 SCC 31, at para.42, and cases cited therein).

[28] In ***Canada (Canada Human Rights Commission) v. Canada (Attorney General)***, 2011 SCC 53, the issue was whether a tribunal could award costs in a human rights proceeding. The Supreme Court of Canada found that the question was not one of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise and that the standard of reasonableness was the proper standard.

[29] In ***MacLean v. British Columbia (Securities Commission)***, 2013 SCC 67, the issue was the application of a limitation period. The Court found, at para.28:

> First, although I agree that limitation periods as a conceptual matter, are *generally* of central importance to the fair administration of justice, it does not follow that the Commission's interpretation of *this* limitation period must be reviewed for its correctness.

[30] The Court found that the interpretation of a limitation period in that case is a *"nuts and bolts question of statutory interpretation confined to a particular context."*

[31] The common theme in ***Toronto (City) v. CUPE, supra***, and ***Alberta (Information and Privacy Commissioner) v. Calgary, supra***, is that the questions the Supreme Court of Canada dealt with in those cases were broad and went beyond provincial boundaries. Those questions were described as issues at the heart of the administration of justice and fundamental to the proper functioning of our legal system.

[32] The standard of review employed in ***Canada Human Rights Commission v. Canada, supra,*** and ***MacLean v. British Columbia, supra***, was reasonableness. Those cases dealt with questions of general law that had significance beyond provincial boundaries but they did not rise to the status of being of central importance to the legal system so as to attract a correctness standard. The question in the case at bar may have a degree of importance for the legal system on Prince Edward Island but it is not of central importance to the legal system as a whole nor is it a question of general law. It does not strike at the heart of the administration of justice nor is it fundamental to the proper functioning of the legal system. In fact, it appears to me to be a nuts and bolts question of statutory interpretation.

[33] The applications judge's second reason for choosing the standard of correctness is because *"the **FOIPP Act** and **HSA** contain relevant sections which are in conflict or at least inconsistent with one another and thereby requiring a measure of statutory interpretation."* (***Health PEI v. Privacy Commissioner, supra***, at para.10)

[34] This was not one of the presumptions laid out in ***Dunsmuir***. The cases in which the standard of reasonableness was found to be the proper standard on judicial review involving statutory interpretation are legion. ***Dunsmuir*** itself was a case involving statutory interpretation and the interplay between two acts. The two acts involved in that case were the ***Civil Service Act***, S.N.B. 1984, c. C-5.1 and ***The Public Service Labour Relations Act***, R.S.N.B. 1973, c. P-25. The ***Dunsmuir*** court applied the reasonableness standard.

[35] ***Phillips and Myers v. WCB (Prince Edward Island)***, 2018 PECA 22, involved two tribunals interpreting the same section of the ***Workers Compensation Act*** differently. The standard of review applied was reasonableness. Even the fact that the two tribunals came to different conclusions would not have been sufficient to allow the court to abandon the reasonable standard in favour of the correctness standard (***Wilson v. Atomic Energy of Canada Ltd.***, [2016] 1 S.C.R. 770).

[36] In ***Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)***, 2014 SCC 31, the Supreme Court of Canada reviewed a decision of the Information and Privacy Commissioner for Ontario. In that decision, the Ontario Privacy Commissioner ordered the disclosure of certain records after considering the interplay between the Ontario Freedom of Information legislation and ***Christopher's Law (Sex Offender Registry)***, 2000, S.O. 2000, C-1, a law which established and maintains a confidential sex offender registry in Ontario. That Court wrote at paras. 26 and 27 as follows:

> [26] ... Moreover, the Court has repeatedly said that the reasonableness standard will generally apply to a tribunal interpreting its home statute or statutes closely connected to its function: see, e.g., ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; ***Smith v. Alliance Pipeline Ltd.***, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28. The Ministry concedes this general point, but argues that because the Commissioner also interpreted *Christopher's Law*, which is not her home statute, the standard of correctness should apply.
>
> [27] We do not agree. 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.

[37] In my view the reasons provided by the applications judge for applying a correctness standard cannot stand.

- **Proper standard**

[38] This case is similar to the ***Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), supra***, in that the Commissioner was required to interpret the ***HSA***, in the course of applying her home statute, ***FOIPPA***. The Commissioner had to interpret the ***HSA*** for the narrow purpose of determining whether the record sought was quality improvement information. This task, it appears to me, is closely connected to her core functions under ***FOIPPA*** relating to access to information and privacy and involved interpreting provisions of the ***HSA*** which were closely connected to her functions.

[39] The Supreme Court of Canada in ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61, at para.34, stated as follows:

> ... unless the situation is exceptional, and we have not seen such a situation since ***Dunsmuir***, the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[40] The standard of review to be applied in this case is that of reasonableness.

The application of the reasonableness standard

[41] The resolution of this case involves an exercise of statutory interpretation. The Supreme Court of Canada has provided clear directions on how to approach a question of statutory interpretation. In ***Canada Trustco Mortgage Co. v. Canada***, 2005 SCC 54, at para.10, the court stated as follows:

> It has been long established as a matter of statutory interpretation that "*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*": see ***65302 British Columbia Ltd. v. Canada***, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on

> the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

See also: ***Rizzo and Rizzo Shoes Ltd. (Re)***, [1998] 1 S.C.R. 27, at para.21; ***Celgene Corp. v. Canada (Attorney General)***, 2011 SCC 1; ***BMO v. 100875 P.E.I.***, 2014 PECA 12, at paras.18 and 51.

[42] This approach to statutory interpretation applies to administrative tribunals as well as courts (***Canada (Public Safety and Emergency Preparedness) v. Wang***, 2014 FCA 228, at paras.40-41; ***Phillips and Myers v. WCB (Prince Edward Island) supra***, at para.78, in dissent).

[43] In ***Dunsmuir***, the Supreme Court of Canada stated, at para.47:

> ... In judicial review, reasonableness is considered 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.

[44] In order to arrive at an acceptable outcome defensible in respect of the facts and law, it was incumbent upon the Commissioner to read the words of the ***Act*** in their grammatical, ordinary sense harmoniously with the scheme of the ***Act***, the object of the ***Act***, and the intention of the Legislature. The Commissioner also had to identify the correct question to answer. In my view, she did not do so. The Commissioner framed the issue as being "*whether s.53 of the **FOIPP Act** gives the Commissioner the power to examine the record to assess whether it is quality improvement information*." (***Prince Edward Island (Health) Re, supra***, para.1)

[45] Forming the issue this way led her to examine s.53 ***FOIPPA*** and s.29 ***HSA*** and ultimately to conclude that the word "*person*" in s.30 of the ***HSA*** meant someone other than the Commissioner. The word "*person*" is an unequivocal word that everyone understands.

[46] The proper question, in my view, is not related to compellability but rather the question is: is the information quality improvement information? If it is, the Commissioner has no power to order production. If it is not, the Commissioner has the power to compel production and to provide access to a person who requests it subject to exceptions contained in ***FOIPPA***.

[47] The purposes of ***FOIPPA*** are set out in s.2 of that ***Act*** and include allowing any person a right of access to records in custody and control of a public body subject to certain exceptions and providing an independent review of decisions made by public

bodies under the ***Act***. Access to information and privacy are important elements of a modern society. So is health care.

[48] The ***Health Services Act*** was enacted several years after ***FOIPPA***. Part IV is entitled "*Quality Improvement and Apologies.*" The disciplinary process is governed by the bylaws established under Part II of the ***HSA***. Part II sets up a different process for a different purpose.

[49] Prior to the enactment of Part IV of the ***HSA*** hospitals often found themselves in a bind. If there was something in a hospital that needed improvement, staff, including physicians and nurses, were often reluctant to come forward. If the hospital initiated any sort of investigation into a matter, an adverse party could obtain access to the investigation through litigation or by way of a ***FOIPPA*** request. The witnesses could then see their statements analyzed in public and the reports could be used as legal weapons against the hospital as well as hospital staff and physicians in courts of law and other legal arenas. This situation encouraged a do-nothing, say-nothing approach which quite obviously would be detrimental to the quality of health care in this province. Part IV is designed to combat that situation. Part IV allows a full, open, candid discussion and thorough review of incidents at the hospital without the spectre of the report ending up as evidence in a legal proceeding or on the front page of the paper. This, in the long run, will increase the efficiency and effectiveness of health services on Prince Edward Island (***Carter v. Flemming***, 2015 PECA 9, at para.8). This is an important policy objective.

[50] The language of Part IV is strong and clear; no person has a right of access to quality improvement information. It evinces the choice of the Legislature to favour confidentiality of the quality improvement information over the public's or litigants' right of access. The intention of the Legislature is also clear. The Legislature intended to apply virtually a blanket prohibition on access to information gleaned by the hospital for the purpose of assessing, evaluating or making recommendations respecting the provision of health services with a view to maintaining or improving the quality of health services.

[51] Part IV prohibits access by individuals and litigants to relevant evidence. That is the price the Legislature has chosen to pay for a better health system. Part IV does not, however, prohibit access to documents or evidence that existed before a quality improvement activity takes place or documents or information that are gathered for a different purpose. Information contained in records such as hospital charts, medical records, and facts contained in the record of incidents involved in the provision of health services are specifically excluded in the definition of quality improvement information, and are therefore compellable under ***FOIPPA*** and may be used as evidence, if they are relevant, in legal proceedings.

[52] Section 27 empowers the Minister or the Board to establish a quality improvement committee or designate any committee as a quality improvement committee to carry out quality improvement activities. Quality improvement activities are defined in s.26(e) as meaning *"a planned or systemic activity the purpose of which is to assess, investigate, evaluate or make recommendations respecting the provision of health services by the Minister or Health P.E.I. with a view to maintaining or improving the quality of such health services."*

[53] Quality improvement information is defined in s.26(g) as meaning

> ... information in any form that is communicated for the purpose of, or created in the course of, carrying out a quality improvement activity but does not include
>
> (i) information contained in a record, such as a hospital chart or a medical record, that is maintained for the purpose of providing health services to an individual,
>
> (ii) facts contained in a record of an incident involving the provision of health services to an individual,
>
> (iii) the fact that a quality improvement committee met or conducted a quality improvement activity,
>
> (iv) the terms of reference of a quality improvement committee, or
>
> (v) an accreditation report issued by Accreditation Canada.

[54] Section 28 protects those who provide quality improvement information to a quality improvement committee from retaliation. Section 29 provides that quality improvement information is neither compellable nor admissible in any legal proceeding. Section 30, the brick wall against which the Commissioner's interpretation ultimately crashes, reads as follows:

> Notwithstanding the ***Freedom of Information and Protection of Privacy Act***, no person has a right of access to quality improvement information, regardless of whether it includes personal information about the person.

[55] Quality improvement information maybe quite relevant in a law suit, disciplinary hearing or other legal proceeding. However, once the quality improvement committee has been formed pursuant to s.27 for the purpose set out in s.26(e), then any information that is communicated for the purpose of carrying out the quality improvement activity cannot be accessed by any person even the

Commissioner.

[56] In my view, it doesn't make any difference whether or not this particular case is a legal proceeding as defined in s.26(c). Even if the Commissioner could compel production, she could not access the quality improvement information. Section 26(g) uses clear, unequivocal plain language.

Application to the case on judicial review

[57] I agree with Health PEI that it is not the role of the Privacy Commissioner to look at information which was communicated for the purpose of carrying out a quality improvement activity to ensure that it is quality improvement information. The role of the Commissioner when the public body claims the protection of Part IV of the ***HSA*** is to ascertain whether or not the quality improvement committee is properly established under s.27 and that the quality improvement activity is for the purpose set out in s.26(e). I note that the Legislature has chosen the definite article "*the*" before the word "*purpose*" as opposed to the indefinite article *"a"* in s.26(e).

[58] However, I disagree with Health PEI that the information in issue is quality improvement information. To obtain the protection of Part IV, the purpose of the quality improvement activity must be to assess, investigate, evaluate or make recommendations respecting the provision of health services with a view to maintaining or improving the quality of such services.

[59] Part IV is a powerful shield in the hands of Health PEI that prohibits courts, adjudicators and the public from access to relevant and often important information. This powerful shield must be used responsibly. To gain the protection, the provisions of Part IV must be strictly followed (***Carter v. Flemming, supra***).

[60] It is incumbent upon Health PEI to keep its accountability/discipline processes and procedure under Part II completely separate and distinct from quality improvement activities under Part IV. Failure to do so robs the information of the protection of Part IV of the ***HSA***.

[61] In this case the information was gathered February 13th and 14th for the purpose of an accountability report under Part II of the ***HSA*** . None of the information gathered was quality improvement information. Having commenced a Part II inquiry, Health PEI could not then convert the information gathered under Part II into information to be communicated under Part IV simply by instructing Dr. Chin to wait and then to communicate the information and his opinion after they set up a quality improvement committee. That would allow Health PEI and/or Dr. Chin to determine what is relevant and what is not relevant to the subject physician's defence.

Whether the information or opinion contained in the systemic report is relevant to the subject physician's defence is not a question for Health PEI or Dr. Chin to decide.

[62] While the Commissioner made a finding that a quality improvement activity had taken place, her decision is unreasonable because she did not deal with the essential facts of the case as to how the information arose. On the facts of this case, it is indisputable that all the information gathered by Dr. Chin was gathered, not for the purpose of a quality improvement activity, but for the purpose of an accountability report to be used in a disciplinary process pursuant to Part II of the ***HSA***. This information was gathered one full month before the Quality Improvement Committee was formed and six weeks before the request for the QIA report was made. Dr. Chin had all the information February 14, 2014, when he finished his investigation at the hospital. He had just not yet reduced his report to writing. Part IV of the ***HSA*** provides a blanket protection for quality improvement information, information which would otherwise be relevant in other proceedings. However, that information is only protected as quality improvement information if Health P.E.I. follows the law in Part IV of the ***HSA*** (***Carter Estate v. Flemming, supra***).

[63] In my view, Health PEI cannot repurpose information obtained under Part II of the ***HSA*** to shelter it under Part IV. I do not accept Health PEI's position that there is a blanket prohibition on production of quality improvement information regardless of how quality improvement information arose provided the quality improvement committee was validly established. The quality improvement information must arise for the proper purpose. Dr. Chin's opinion and the information upon which it is based would not have existed but for the Part II investigation. Health PEI cannot, *ex post facto*, declare some of the Part II investigation work product as quality improvement information and thereby obtain the protection of Part IV. The genesis of the investigation and the opinion that flowed from it were for the purpose of a Part II investigation, not a quality improvement activity.

Costs

[64] The usual practice in civil cases is that costs are in the discretion of the court and usually follow the event. Where costs are requested for or against an administrative tribunal, these costs may only be awarded in unusual or exceptional circumstances, and then only with caution (***St. Peter's Estate Ltd. v. Prince Edward Island Land Use Commission***, 1991 CanLII 2745 (PESCTD)). In ***M&M Resources Inc. v. Prince Edward Island (Workers Compensation Board)***, 2018 PECA 9, at para.61, this court stated:

> Regarding the Appeal Tribunal, contrary to normal practice, where a tribunal is concerned costs do not as a general rule follow the event on a

> judicial review or statutory appeal. A tribunal bears a statutory responsibility to act, and should not be burdened with costs for fulfilling this duty. As such, the Appeal Tribunal would not expect to either pay or receive costs on an appeal to the Court of Appeal. On the other hand, where a tribunal misconducts itself by neglecting to properly consider a serious issue of jurisdiction, conducts itself capriciously, or makes a clear breach of procedural fairness or similar egregious conduct, then costs could be awarded against the tribunal; but even then, a court would exercise caution before making such an award. In the result, an award of costs against a tribunal, including the Appeal Tribunal on a statutory appeal, would be a rare and unusual occurrence.

[65] A tribunal should ordinarily not expect to either pay or receive costs on a judicial review save in exceptional circumstances. As a general rule, where the tribunal is acting in good faith and conscientiously throughout they should not have costs imposed against them even if they are in error nor should they expect to have costs awarded in their favour.

Conclusion

[66] I would therefore overturn the decision of the applications judge, including the costs order, and remit the matter back to the Privacy Commissioner to reconsider the matter in accordance with the reasons herein.

_____
Justice John K. Mitchell

I AGREE: _____
Chief Justice David H. Jenkins

I AGREE: _____
Justice Michele M. Murphy