SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: CBC v. Privacy Commissioner & IIDI 2012 PESC 32 Date: 20121102
Docket: S1-GS-23769
Registry: Charlottetown

Between:

Canadian Broadcasting Corporation

Applicant

And:

Prince Edward Island Information and Privacy Commissioner

Respondent

And:

Island Investment Development Inc.

Respondent

Before: The Honourable Justice Wayne D. Cheverie

Appearances:
Alan v. Parish, Q.C., solicitor for the applicant
Douglas R. Drysdale, Q.C., solicitor for respondent Information and Privacy Comm.
Rosemary Scott, Q.C. & Jonathan Coady, solicitors for respondent IIDI

Place and dates of hearing	Charlottetown, Prince Edward Island March 26, 27, 28 & 29, 2012
Place and date of judgment	Charlottetown, Prince Edward Island November 2, 2012

Administrative law - judicial review - standard of review applicable to decision of Acting Information and Privacy Commissioner - whether Commissioner's decision to uphold the public body's refusal to release requested information is reasonable. Application of judicial review granted with respect to names of corporations sought.

STATUTES CONSIDERED: ***Judicial Review Act***, R.S.P.E.I. 1988, Cap. J-3; ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01, ss. 14, 15, 61(1), 65(1), 1(i), 1(k); ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8**;** ***Companies Act***, R.S.P.E.I. 1988 Cap. C-14**;** ***Access to Information Act***, R.S.C. 1985, c. A-1.

CASES CONSIDERED: ***Dunsmuir v. New Brunswick***, 2008 SCC 9; ***Smith v. Alliance Pipeline Ltd.***, 2011 SCC 7, [2011] 1 S.C.R. 160; ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 S.C.R. 654; ***Prassad v. Canada (Minister of Employment & Immigration)***, [1989] 1 SCR 560; ***Ontario Health***, 1993 CanLII 4861 (ON IPC); ***Ruby v. Canada (Solicitor General)***, [2000] 3 FC 589 (C.A.); ***Merck Frosst Canada Ltd. v. Canada (Health)***, [2012] SCC 3; ***Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)***, 1998 CarswellOnt. 3445 (C.A.), 41 O.R. (3d) 464; ***Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)***, 2005 NSCA 52.

CONSIDERED: ***Brown and Evans, Judicial Review of Administrative Action in Canada*** (Toronto: Canvasback Publishing - looseleaf, para. 10:5200.)
James Elliott, Freedom of Information Act, 1982 (CTH) Effect on Business Related Information and Confidential Information in the Possession of the Commonwealth Agencies, (1988) 14 Monash University Law Review 186.

Cheverie J.

Introduction

[1] This is an application for judicial review under the ***Judicial Review Act***, R.S.P.E.I. 1988, Cap. J-3 brought by the Canadian Broadcast Corporation ("CBC"). The decision under review is that of the Acting Information and Privacy Commissioner (the "Commissioner") dated June 4, 2010 and bearing Order No. FI-10-007. The Commissioner was acting under authority granted to her by the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01 (the "***Act***").

[2] In Order No. FI-10-007, the Commissioner upheld a decision taken by the head of Island Investment Development Inc. ("IIDI") to refuse to disclose information regarding the Provincial Nominee Program ("PNP"). IIDI falls under the definition of

"public body" in s. 1(k) of the ***Act***. Specifically, CBC requested the name of the individual/companies that received units under the PNP; and the number of units each received. Three other requests also formed the subject of the Commissioner's order and those additional requests were:

1. A request, by a public interest, non-profit applicant, for a list of corporations, and their publicly available list of directors, the amounts of funds they received, and the nature of the business they were in, as firms that participated in the PNP. This should include firms from the past three years. This information is preferred in database format.

2. All information relevant to a list of names of all the companies that received funding under the PNP; and

3. All corporate/business names that paid an application fee for the Prince Edward Island PNP.

As may be readily seen, the CBC request was more focussed and limited in scope than the other three requests which were all dealt with together by the Commissioner. In passing, I would also note that while the CBC requested the name of the individuals/companies relative to the PNP, it has been established only corporations could be considered for the PNP.

[3] IIDI refused to disclose the requested information and in doing so relied on portions of ss. 14 and 15 of the ***Act***. I shall reproduce the relevant sections later. CBC then asked for a review of IIDI's decision and made application to the Commissioner under s-s. 61(1) of the ***Act***. In her decision, the Commissioner determined s. 15 did not apply and then went on to determine the three essential elements for refusal as set out in s. 14 had been met. Thus, she upheld IIDI's decision to refuse disclosure.

Background and chronology

[4] The application before the court is not about the pros and cons of the PNP. The court is called upon to determine whether the Commissioner erred in any fashion in reaching her conclusions that CBC was not entitled to the names of the corporations that received units under the PNP and the number of units each received. Notwithstanding that, I believe a brief overview of the PNP provides a useful background and what follows is a summary of information on the PNP which appears in the report of the Auditor General to the Legislative Assembly in 2009 (Record, Tab 71).

[5] In his report, the Auditor General noted that in 2001, Prince Edward Island entered into the Federal Provincial Cooperation Agreement on Immigration. The purpose of the agreement was to develop a partnership between the federal and provincial governments on recruitment, selection, admission, settlement, and integration of immigrants to Prince Edward Island.

[6] Under the agreement, the province established the PNP with the following objectives:

1. To admit provincial nominees to Prince Edward Island whose admission is consistent with the province's immigration policies and which will support the industrial and economic goals of Prince Edward Island;

2. To admit to Prince Edward Island those immigrants nominated by the province and their qualifying dependents; and

3. To process provincial nominees nominated by Prince Edward Island for permanent residence as expeditiously as possible, taking into account statutory requirements, operational and resource constraints, and service standards as developed.

[7] Under the agreement, the province had the responsibility for developing criteria, assessing applicants against those criteria, and making a formal nomination to the federal authorities. In the end, the federal government was responsible for determining the admissibility of each nominee with respect to all federal legislative requirements including health, criminality, and security.

[8] The Auditor General noted there are four categories of applicants under the PNP:

1. Immigrant partner - where a principal applicant proposes to make an investment in a P.E.I. company and takes an active role in that company as a director or senior manager;

2. Immigrant entrepreneur - where a principal applicant proposes to establish a viable, new business on P.E.I.;

3. Immigrant connections - where a principal applicant suggested by a P.E.I. based "champion" meets settlement and employability criteria;

4. Skilled worker - where a principal applicant with specialized skills and experience fills a labour market need on P.E.I.

IIDI, a Provincial Crown Corporation, having as its objectives to raise capital in foreign and domestic markets, to provide investment opportunities in projects of significant economic benefit to the province, to promote the province as a destination for offshore investments, and to attract entrepreneurial expertise to the province, was the body to whom applications concerning the PNP were made.

[9] The Auditor General reported that from the inception of the program in 2001 to November, 2009, there were 3,798 applications approved by IIDI under the PNP. Of that number, 3,422 were made through the Immigrant Partner category - the overwhelming majority of approved applications. This category includes the P.E.I. corporations, the names of which and the units received are the subject of CBC's request.

[10] In his report, the Auditor General noted that under the Immigrant Partner category, an immigrant who has a net worth of at least $400,000 makes a $200,000 preferred share investment in an eligible Island business and takes on a role as a director or senior manager of the company. He goes on to describe the funding options and determination of the net proceeds to the Island business. He produced a chart setting out the theoretical flow of funds for fiscal years 2007-08 and 2008-09 based on the number of units and certain assumptions and concluded the net amount to businesses in P.E.I. was $120,000,000. It is therefore easy to see why the Auditor General concluded the immigrant partner category of the PNP has had a significant impact on the Island economy.

[11] The following information is now in the public domain: 1423 businesses received units under the PNP and the number of actual investment units matched totalled 3374. These numbers appear in the Auditor General's report. He went on to explain when a company was deemed eligible by IIDI, the company received an eligibility letter, valid for one year, that outlined the terms of the approval, including the number of investor units it was eligible to receive and any conditions. Company officials were then instructed to bring the eligibility letter to one of seven approved investment intermediaries who would be responsible for matching the business with a nominee. When a nominee and business were matched, the necessary legal documents were signed and sent to IIDI for final approval. PNP staff confirmed with the company's lawyer the funds were disbursed to the company and then issued a nomination certificate for the immigrant.

[12] The chronology of events leading up to the Commissioner's decision is found in an affidavit sworn by Commissioner Maria MacDonald on November 1, 2010 in support of an earlier motion with respect to the record in this proceeding. The affidavit provides the following information:

1. CBC requested access to certain records in the possession of IIDI;

2. IIDI contacted third parties to whom the records related and requested submissions from them;

3. Hundreds of letters and emails were received from the third parties as submissions by IIDI;

4. IIDI made a decision not to disclose the records to CBC;

5. CBC (and three other applicants) submitted requests to the Acting Commissioner to review the decision made by IIDI;

6. The Acting Commissioner asked IIDI to provide copies of records it had relied on to make the decision not to disclose the records;

7. IIDI responded to the Acting Commissioner with a submission and with originals of the submissions IIDI had received from third parties;

8. The Acting Commissioner invited third parties to make further submissions with respect to whether the records should be disclosed;

9. Hundreds of submissions were made by third parties to the Acting Commissioner, and numerous third parties indicated to the Acting Commissioner that they were relying on their previous submissions to IIDI;

10. The Acting Commissioner sent IIDI's submissions and a representative sampling of third party submissions made to IIDI and the Acting Commissioner, to CBC (and three other applicants);

11. CBC (and the three other applicants) made submissions to the Acting Commissioner;

12. The submissions made by the four applicants were sent by the Acting Commissioner to IIDI for reply;

13. IIDI made a final submission to the Acting Commissioner; and

14. The Acting Commissioner issued her decision and order.

Standard of review

[13] Counsel referred the court to a host of cases on the standard of review. Of those, there are three decisions from the Supreme Court of Canada which are of particular assistance. They are: ***Dunsmuir v. New Brunswick***, 2008 SCC 9; ***Smith v. Alliance Pipeline Ltd.***, 2011 SCC 7, [2011] 1 S.C.R. 160; and ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 S.C.R. 654. Among other things, ***Dunsmuir*** established there are now only two standards of review, correctness or reasonableness. In that decision in paras. 53 through 56, the court provided direction as to how to identify which standard to apply and set out a series of factors which when applied to a particular situation would point in the direction of deference and the reasonableness standard. However the court concluded at para. 57 that an exhaustive review is not required in every case in order to determine the proper standard of review to apply.

[14] In the ***Smith*** case, the Supreme Court went on to distill ***Dunsmuir*** a little further and the following appears at paras. 25 and 26:

> 25 Accordingly, reviewing judges can usefully begin their analysis by determining whether the subject matter of the decision before them for review falls within one of the non-exhaustive categories identified by *Dunsmuir*. Under that approach, the first step will suffice to ascertain the standard of review applicable in this case.
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> 26 Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

In the ***Alberta Teachers' Association*** case, the court through Rothstein J. took the opportunity to further underscore the principles articulated in ***Dunsmuir*** and ***Smith***. At paras. 30 and 32 the court stated:

> ...There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per*

> Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires*" *(Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).
>
> ...
>
> 32 And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to *PIPA*...

The Supreme Court expressed the view that unless the situation is exceptional, 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. (See ***Alberta Teachers' Association***, para. 34.)

[15] To further drive the point home, Rothstein J. went on to state:

> When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. (See ***Alberta Teachers' Association***, para. 39.)

Rothstein J. then flips the issue over and at para. 46 writes:

> In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central importance to the legal system but also outside the adjudicator's specialized area of expertise.

[16] Applying the foregoing statements of the law to the case at bar, the applicable standard of review is reasonableness. The Commissioner was interpreting and applying her home statute with which she had particular familiarity. She was not dealing with a constitutional issue or a question of general law that is of central importance to the legal system and outside her specialized area of expertise, nor was she called upon to draw jurisdictional lines between two or more competing

specialized tribunals, all of which would attract a correctness standard.

[17] Therefore, the task of this Court is to determine whether the Commissioner's decision is reasonable. In ***Dunsmuir*** at para. 47, the Supreme Court provided some guidance to a reviewing court where it expressed the following considerations on reasonableness:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The task before this Court is to review the Commissioner's decision in light of these considerations.

Analysis

[18] Two sections of the ***Act*** are at the centre of this judicial review. They are ss. 14 and 15. The relevant portions are as follows:

> 14. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, explicitly or implicitly, in confidence; and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of a third party

> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or

...

> **15.** (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[19] In addition, s-s. 65(1) of the ***Act*** provides:

> 65. (1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

IIDI refused to disclose the information requested by CBC. Therefore IIDI bears the burden of proof.

Section 15

[20] The Commissioner dealt with the application of s. 15 summarily. Subsection 15(1) speaks to disclosure of "personal information" which "would be an unreasonable invasion of a third party's personal privacy." IIDI argued that the combination of the definition of "third party" in the ***Act*** with the definition of "financial information" as addressed in a prior order of the Commissioner together with the definition of "person" in the ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8, leads to the conclusion that the disclosure of the information sought by CBC is personal information of the third parties. The Commissioner considered this argument, but dismissed it. She reasoned IIDI's argument failed because it did not take into consideration the definition of "personal information" in the ***Act***. In clause 1(i) personal information is defined to mean "recorded information about an identifiable individual, including" such things as name, address, phone number, race, etc.

[21] The Commissioner reasoned one did not have to go through the exercise suggested by IIDI, but merely had to look to the definition of "personal information" in the ***Act***. At p. 24 of her decision, the Commissioner disposed of the s. 15 issue as follows:

> It is necessary to determine to whom or what the definition of "personal

> information" in clause 1(i) of the FOIPP Act applies. This clause includes a carefully chosen word, which vitiates the Public Body's argument. Personal information means recorded information about an identifiable individual. An "individual" is, in common usage, a single person or item as distinct from a group. In my opinion, the word "individual" means a single human being rather than a company, which is a group of persons. A company is a person by definition under the *Interpretation Act*, but a company is not an individual. Section 15 of the FOIPP does not apply to the Third Parties in this case because they are all companies. I will not be considering further argument by any of the parties on section 15. Further elaboration on section 15 of the Act as it relates to individuals can be found at P.E.I. Order No. FI-10-001, at page 10.

The Commissioner is dealing with and applying her home statute. She obviously dealt with s. 15 in this context in a prior order. That experience, when taken in combination with her application of the applicable definitions in the ***Act***, led her to a conclusion regarding the applicability of s. 15 which I believe is reasonable and therefore ought not to be interfered with.

Process

[22] CBC took issue with the fact the Commissioner lumped its request for information with that of three other applicants. CBC also took issue with the fact the majority of the submissions received by the Commissioner were not under oath. As will be seen from my review of the Commissioner's decision as it relates to s. 14 of the ***Act***, as long as there is evidence to support her conclusions, and those conclusions fall on a spectrum of reasonable conclusions, then this Court ought not to interfere. For example, para. 14(1)(c) of the ***Act*** requires the provision of detailed and convincing evidence to establish a reasonable expectation of harm. I must review the record to see if such evidence exists, and if not, the Commissioner's conclusion on that point would be unreasonable.

[23] However, the Commissioner decided to consolidate the four requests and deal with them together. That was her prerogative. (See ***Prassad v. Canada (Minister of Employment & Immigration)***, [1989] 1 SCR 560; ***Ontario Health***, 1993 CanLII 4861 (ON IPC). There was similarity in the requests and the number of third parties approximated 1,350. In a perfect world, she would have conducted four inquiries and addressed each of the 1,350 third parties individually. But we don't live in a perfect world. Her decision to consolidate was not unreasonable.

[24] As to the form of the evidence she would receive, the Commissioner was free to accept unsworn statements. This was within her discretion. (See ***Brown and Evans, Judicial Review of Administrative Action in Canada*** (Toronto: Canvasback Publishing - looseleaf, para. 10:5200.). At para. 178 of its factum, IIDI states:

> In addition, absent any specific statutory restrictions, a tribunal is a master of its own procedure. The only limitation on its power is that it must act fairly. CBC has not alleged or shown that the Acting Commissioner did not act in a procedurally fair manner.

I agree.

Section 14

[25] In the analysis of the application of s. 14, one must keep in mind the purposes of the ***Act*** as set out in s. 2. The list found there includes allowing any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this ***Act***. (Underlining mine.) Section 14 appears in the part of the ***Act*** entitled "Exceptions to Disclosures."

[26] IIDI, being the public body, shoulders the burden of proving that CBC has no right of access to the information it is seeking. In the course of discharging the burden upon it to the Commissioner, IIDI shall only refuse to disclose the requested information if the requirements of s-s. 14(1) are satisfied. Specifically, IIDI must prove disclosure of the information requested:

> (a) would reveal (i) trade secrets of a third party, or (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that the information requested is supplied explicitly or implicitly in confidence; and
>
> (c) the disclosure of such information could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of a third party or result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or result in undue financial loss or gain to any person or organization.

These are the relevant provisions of s-s. 14(1). If any of the requirements in s-s. 14(1), be it in para. (a), (b), or (c) is not met, then IIDI has no legal right to refuse disclosure of the information requested.

Paragraph 14.(1)(a) - Whether the requested information would reveal commercial or financial information of a third party.

[27] The information requested by CBC is twofold. It wants to know the names of the corporations that received units under the PNP, and also wants to know the number of units each such corporation received. The question is whether the requested information would reveal commercial or financial information of a third party. The prohibition against information related to trade secrets or scientific or technical information does not apply.

[28] CBC says the Commissioner's decision here is flawed in several ways. It argues the names of the corporations do not constitute commercial or financial information. CBC submits the Commissioner's decision discloses no express or implicit analysis on whether the corporate name amounts to disclosure of commercial or financial information. CBC argues the Commissioner's decision at this juncture deals only on the number of units being requested; finds that the number of units indeed is financial information; and, therefore, concludes on this prong of s. 14, IIDI was justified in refusing disclosure.

[29] IIDI's response to this argument is extensive and detailed in its factum. However, the essence of its argument appears to be that the combination of the release of the corporate name and the application of what is known as the "mosaic effect" results in the corporate name becoming commercial or financial information. The mosaic effect arises when seemingly harmless bits of information, which are of little or no utility on their face, are combined with other items of available information and lead to the disclosure of information that is exempt from disclosure under the legislation. (See ***James Elliott, Freedom of Information Act***, 1982 (CTH) and its Effect on Business Related Information and Confidential Information in the Possession of the Commonwealth Agencies, (1988) 14 Monash University Law Review 186; and ***Ruby v. Canada (Solicitor General)***, [2000] 3 FC 589 (C.A.).

[30] It is the contention of IIDI that the corporate name, the release of which would be apparently harmless, when coupled with other readily available information under the ***Companies Act***, R.S.P.E.I. 1988 Cap. C-14, leads to a great deal more information which would then be caught by para. 14.(1)(a) of the ***Act***. In essence, once an individual has the name of the corporation, that person may go to the corporate registry, which is open to the public, and find out such things as the name and address of the directors and officers of the company; the names and addresses of each shareholder of the corporation together with the number of type of shares held by each shareholder; and so on. Of course, CBC's response is to say the legislators have seen fit to require corporations to provide this type of information and that it should be readily available to the public. Therefore, it is entitled to access such information.

[31] Prior to conducting her assessment of the application of s. 14, the Commissioner acknowledged the case before her was a difficult one. It was not a cut

and dried access request. It had the potential to impact several hundred third parties. She was alive to the sensitivity of the task before her. My review of the extensive record provided to the court that was available to the Commissioner confirms the difficulty of the task she faced. However, by virtue of her office, she still had to apply s. 14 of the ***Act*** to the case as presented by IIDI.

[32] The Commissioner disposed of the para. 14.(1)(a) arguments at pp. 27 and 28 of her decision. She did so in one paragraph which reads as follows:

> Clause 14(1)(a) - Information would reveal financial information of a third party.
>
> In order to satisfy clause 14(1)(a) of the FOIPP Act, the information requested must contain information that would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party. The number of units for which a company qualified could reveal financial information and the level of pre-existing assets of the company, since the financial information required to be given by the third parties to the Public Body for the approval process is the basis of that approval. An obvious inference from the requirement to provide financial information as a part of the approval process is that each company must demonstrate financial viability as a qualification for approval under the PNP. It is not necessary to go into other elements of clause 14(1)(a), since only one of them is necessary. I am satisfied that clause (a) applies because financial information was provided by each of the Third Parties to the Public Body.

The Commissioner addressed the request for disclosure of the number of units approved for each corporation. She found the number of units "could reveal financial information" about the company and reasoned that was so because financial information was required to be given by third parties to IIDI in the course of the approval process under the PNP. She further reasoned that by inference, the provision of financial information and subsequent approval under the PNP demonstrates the financial viability of the corporation. She then concluded the financial information requirement in clause 14.(1)(a)(ii) had been met and so she moved on to the next part of the section.

[33] My review of the documentation outlining the PNP, including its policies, procedures, background information and legislation, which is found at tab 69 of the record, supports the Commissioner's finding that the disclosure of the number of units would indeed transgress the prohibition against disclosure of commercial or financial information. While I appreciate CBC's argument that it was not seeking the financial information upon which the granting of the unit was based, the Commissioner's conclusion on this was reasonable.

[34] Likewise, the Commissioner's failure to specifically address CBC's request for the names of the corporations is not fatal. As may be seen from the prior decisions of the Commissioner referred to by both counsel for CBC and IIDI, the Commissioner had been confronted with the argument with respect to financial or commercial information previously. Although she did not express it until dealing with para. 14.(1)(c) of the ***Act***, it is apparent the Commissioner was aware of the mosaic effect and its impact. While she could have provided more detail and approached the request for the corporate name in clause 14(1)(a)(ii) in a more singular fashion, her decision is still reasonable. Her decision here falls within a range of possible or acceptable outcomes as suggested by the Supreme Court in ***Dunsmuir***. If I had been writing the decision, I might have approached it differently or expressed it more expansively, but that is not the point. If the Commissioner's decision falls within a range of acceptable outcomes in respect of the facts and law before her, then it stands the test of judicial review. I am not prepared to interfere with her conclusions on this particular heading.

Paragraph 14.(1)(b) - Information supplied, explicitly or implicitly, in confidence.

[35] This paragraph prohibits IIDI from supplying the names of the corporations or the number of units they received if that information has been supplied, explicitly or implicitly, in confidence. CBC takes issue with the Commissioner in her approach to this issue when she did not specifically refer to a non-exhaustive list of criteria to determine whether the information was supplied in confidence. This non-exhaustive list includes such things as the existence of an express condition of confidentiality in an agreement between a public body and the third party; evidence that the public body requested the information be supplied in a sealed envelope; the third party's evidence that it believed the information was supplied in confidence; evidence that the third party providing the information was promised by the public body that he or she would not be identified; and evidence that a motion was passed that the information remain private. (See ***Prince Edward Island (Department of Health & Technology) Re***, 2003 Carswell P.E.I. 146 ; see also ***Prince Edward Island (Department of Health) Re***, 2006 Carswell P.E.I. 58 (PEIPC). This list, which emanated from an Alberta case and was approved by the Commissioner in prior cases, left the door open for other reasonable evidence of confidentiality. CBC argues the Commissioner did not reference any of these suggested criteria in her decision.

[36] CBC also submits the Commissioner was wrong in her treatment of the request for the number of units. Specifically, CBC argues the number of units would have actually been supplied by IIDI once the requirements of the PNP were met. Therefore, CBC says the Commissioner got her interpretation of "supplied" in the legislation wrong.

[37] IIDI advances the proposition that information is "supplied" if it was provided by the corporation to it. This information came via an application which necessarily included the name of the corporate applicant. Since the name of the corporation appeared in the application and subsequent approval had a unit or units attached to that application, the inference is the necessary information to meet the PNP requirements came from the corporation.

[38] As to the explicit or implicit supply of this information in confidence, a review of the record shows the corporations had an expectation the commercial and financial information they provided to IIDI would remain confidential. (See Record - Vol. III, Tab 89, p.5, 7, 22-23, 240, 267, 282, 294-295, 309, 315, 317, 321, 324, 327, 357-358, 359, 363, 367, 368, 370, 374, 378, 381, 382, 388, 391, 392, 405, 407, 1586, 2687, 2901, 2903, 2969, 2972, 2979, 2982, 3020, 3029, 3051, 3053, 3120, 3133, 3135, 3143, 3146, 3149, 3152, 3163, 3167, 3177, 3185, 3187, 3190, 3200, 3208, 3215, 3218, 3228, 3237, 3241, 3248, 3252, 3254, 3295, 3312, 3324, 3328, 3374.) Additional evidence of confidentiality is found throughout the record. I note language such as the following: "The nature of the investment, the amount of the investment, names and all information with regard to the investment was always intended to be confidential; hence the inclusion of legal confidentiality agreements in the investment documentation. These confidences should be respected." (Record, p. 295.) Another indicative quote is: "In view of the inclusion of the explicit confidentiality provisions in the PNP documents, the parties to the Placement Agreement and to the Shareholders Agreement have a reasonable expectation of confidentiality". (Record, p. 2521.) These are but examples of submissions made to the Commissioner on this aspect of s. 14.

[39] Dealing with this issue, the Commissioner had this to say at p. 28 of her decision:

> The Applicants argue that they want to know how many units were approved to the Third Parties, submitting that the information in itself would not reveal financial information about the Third Parties. I disagree. Each Third Party was required to submit financial information to show that they were eligible for PNP units. Eligibility consisted of, among other things, proof of financial viability at a particular minimum level. In my opinion, it is reasonable to assume a minimum net worth of a company based on the approval of one or more PNP units. In order to come to that assumption, the calculation is a matter of simple mathematics. For that reason, I cannot agree that revealing the number of units per Third Party would be as innocuous as the Applicants argue.

[40] The Commissioner continues at p. 29:

> The fact that the Public Body referred an approved company to the private

> sector to enter into a private transaction is an anomaly. This anomaly is an important element of the PNP that distinguishes it from the ordinary grant or loan business of the Public Body. The result of the anomalous nature of the transaction is that I must conclude that the financial information submitted to the Public Body by each of the Third Parties was submitted, in many cases explicitly and in all cases at least implicitly, in confidence. I cannot conclude otherwise because any other conclusion would, in my opinion, defy common sense. This means that clause 14(1)(b) of the FOIPP Act is also satisfied.

[41] CBC argues the logic here is difficult to follow. That may be so, but one thing is certain and that is the Commissioner concluded the information was supplied in confidence. The record, portions of which I have already referred to, support that conclusion. It is also reasonable to conclude the number of approved units coming back to the corporation following the PNP process was predicated upon confidential information provided by the corporation in order to satisfy the PNP criteria. Yes, the number of units were actually supplied by IIDI, but would not have been so supplied except for the provision of the information emanating from the corporation.

[42] My review of the record, which includes the evidence before the Commissioner, leads me to the conclusion that her decision on the application of para. 14.(1)(b) was within reasonable parameters. I might have chosen to employ a more detailed explanation of my reasons and more references to the evidence I relied on if I were writing the decision, but that is not the test on judicial review. When one examines the record when taken in conjunction with the expertise of the Commissioner within the confines of her own statute, her decision here falls within the acceptable range. Her decision on the application of para. 14.(1)(b) ought not to be interfered with.

Paragraph 14.(1)(c) - Whether disclosure could reasonably be expected to harm significantly.

[43] In the circumstances of this case, IIDI was required to refuse to disclose to CBC the names of the corporations and the number of units they received under the PNP if such disclosure "could reasonably be expected to":

1. Harm significantly the competitive position of the corporation. (Para. 14.(1)(c)(i);

2. Result in similar information no longer being supplied to the public body (IIDI) when it is in the public interest that similar information continued to be supplied. (Para. 14.1(c)(ii); and

3. Result in undue financial loss or gain to their competitors. (Para. 14.1(c)(iii)).

[44] Two questions flow from the application of this part of s. 14 to the case at bar:

1. What is the threshold contemplated by the words "could reasonably be expected to"?

2. What type of evidence meets this threshold?

Once these questions are answered, then the court can review the decision of the Commissioner through the lens of reasonableness to determine its sustainability.

1. What is the threshold contemplated by the words "could reasonably be expected to"?

[45] Counsel for IIDI referred the court to the recent decision of the Supreme Court of Canada in ***Merck Frosst Canada Ltd. v. Canada (Health)***, [2012] SCC 3. Counsel suggested this was an important case to consider when reviewing the Commissioner's decision under para. 14.(1)(c).

[46] The majority decision in ***Merck*** was written by Cromwell J. and although it dealt in part with the ***Access to Information Act***, R.S.C. 1985, c. A-1 as opposed to freedom of information and protection of privacy legislation, it is relevant to the case at bar. In particular, ***Merck*** dealt with s. 20 of the Federal Act which reads in part:

> 20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> ...
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; ...

While s. 20 of the Federal Act and s. 14 of the Provincial Act have differences, they both use the phrase "could reasonably be expected to" which delineates the threshold in relation to material financial loss or gain or prejudice to the competitive position of a third party in the federal legislation, or in the case of the provincial legislation demarcates the threshold for "harm significantly the competitive position" or "result in similar information no longer being supplied" or "result in undue financial loss or gain" to corporations. Beginning at para. 192 of the decision, Cromwell J. discusses the degree of likelihood that harm will occur. He writes, in part, at para. 196:

> ... while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible.

At para. 197, commenting on a prior decision to which he had been referred, Cromwell J. said in part:

> ...This comment, while not requiring proof that harm will occur on the balance of probabilities, nonetheless underlines the point that something well beyond a mere possibility of harm must be shown.

[47] At para. 201 of ***Merck***, Cromwell J. offered the following insight as to the meaning of "could reasonably be expected to result" by suggesting it is meant to cover some middle ground between a mere possibility and the standard of probability. He notes:

> ...something cannot reasonably be expected to occur if it is a mere possibility; but something may be reasonably expected even if it is not more likely than not to occur.

He then concludes:

> ...I conclude that the English text of the statute suggests a middle ground between that which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur. [Underlining mine.]

[48] From this I conclude the threshold in the Federal Statute is somewhere between a possibility and a probability. Section 14 employs similar language, but modifies the harm that must be suffered by the word "significantly." The use of this modifier suggests the threshold established by the wording in the Federal legislation may have been moved more along the continuum toward a probability in the Provincial legislation, but nonetheless points to proof beyond a mere possibility.

[49] In an effort to assist the Privacy Commissioner and the court on the application of this standard, Cromwell J. points out that exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary, or contrived. He says that such fears of harm are not reasonable because they are not based on reason. He goes on to say the words "could reasonably be expected" refer to an expectation for which real and substantial grounds exist when looked at objectively. Finally, Cromwell J. balances the argument by noting that what is at issue is risk of future harm and that depends on how future uncertain events unfold. Therefore, requiring a

third party to prove that harm is more likely than not to occur would impose, in many cases, an impossible standard of proof. (See ***Merck***, para. 204.) Cromwell J. concludes his discussion of this concept with the following at para. 206:

> To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

This leads to the next question as to what type of evidence is required to meet the threshold.

2. What type of evidence meets this threshold?

[50] The Ontario Court of Appeal spoke of the type or quality of evidence required to meet the s. 14 test as follows::

> 26. With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again, it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. (***Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)***, 1998 CarswellOnt. 3445 (C.A.), 41 O.R. (3d) 464 at para. 26, (cited with approval in ***Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)***, 2005 NSCA 52).

The Commissioner was well aware of the necessity of "detailed and convincing

evidence" as she references the Ontario Court of Appeal case at pp. 30 and 31 of her decision. The Commissioner concluded the evidence before her met the threshold test because she upheld the decision by IIDI to refuse disclosure of the corporate names and number of units received. The question for the court to determine is whether her conclusion was reasonable.

[51] Turning first to the issue of the number of units received, IIDI argues the disclosure of such would reveal detail about the structure, worth, size of business, investment sources, obligations, and activities of the corporation. By inference, IIDI suggests the disclosure of the units would reveal that a corporation received PNP monies from an immigrant investor or investors, and that the corporation had PNP commitments to IIDI and the immigrant investors. IIDI submits the receipt of PNP funds would also disclose that the corporation would be using the PNP proceeds in order to expand its business activity as required by the PNP program. CBC responds by saying it is not looking for any of this information, but only wants to know the number of units each corporation received.

[52] The Commissioner concluded at p. 32 of her decision:

> The number of units granted to each participant company would lead directly to information about the Third Parties' financial viability, minimum net worth, sources of funding, etc.

Although the Commissioner did not set out a detailed description as to how she arrived at these conclusions, the question is whether on a review of the record before her such a conclusion is reasonable. In my view, although lacking in precision, disclosure of the number of units received by a corporation under the PNP could meet the test of significant harm in s. 14. As discussed earlier, although CBC says it is not looking for the information underpinning the application, the record shows the application of prerequisite information to the PNP program tends to disclose financial information of the corporate applicant. In deference to the Commissioner, she had the documentation including that which appears at tab 69 of the record before her and concluded the disclosure of the number of units would violate para. 14.(1)(c) of the ***Act***. In addition, the disclosure of the number of units received does not automatically indicate the amount of funds which actually flowed to the corporation. There were a variety of fees and charges which were deducted from the gross amount. On the range of possible or acceptable outcomes, it was open to the Commissioner to conclude such disclosure was not warranted.

[53] Contrary to the Commissioner's decision with respect to the number of units, I find her decision to uphold IIDI's refusal to disclose the corporate names indefensible upon the facts and law and, therefore, not reasonable. IIDI submits the corporations

did reasonably expect, and could have reasonably expected, to be significantly harmed if the corporate name was disclosed. CBC argues IIDI has failed to discharge the onus upon it to show the corporation would be "significantly" harmed should its name be disclosed. It further argues that whatever evidence was presented to the Commissioner was speculative and general in nature and that the Commissioner confused argument with evidence.

[54] In my view, CBC is correct. The submissions received by the Commissioner claiming harm do not amount to "detailed and convincing" evidence. The multitude of letters she received and relied upon amount to argument and not evidence.

[55] Even if the submissions do constitute evidence in the broad sense, the positions reflected in those submissions speak to the possibility of harm which does not meet the legal threshold as stated in ***Merck***. Indeed, many of the submissions could be categorized as speculation.

[56] In CBC's factum at para. 63, counsel reproduced some excerpts from third party submissions which support his contention the submissions amount to possibilities or speculation. In her decision, the Commissioner also quoted from a number of third party submissions which also speak to the possibility of harm. Some examples referred to by the Commissioner include:

> 1. Our Business feels that if our company's name were to be made public, it would bring undue hardship to our business. With the media and all of the bad publicity, we feel that people would look different at our business. (Commissioner's decision, p. 14.)
>
> 2. Our company operates in a ...community in which we employ a number of people. Our employees are not aware that we participated in this program. The recent publicity of this program has painted a very negative picture of those involved and many people feel that the monies received is a government handout or "free money". If our employees become aware of this, it could cause significant human resource issues. Some employees may feel that they should be "entitled" to some of this free money which could lead to efficiency issues in their work habits or possible fraud situations such as the use of company assets for person gain. Some employees may even [quit] to go work elsewhere as they may not feel fairly compensated or that they do not want to work for someone who was involved with this program.
> (Commissioner's decision, pp. 17 and 18.)

[57] The submissions received from affected third party companies (appropriately redacted to protect identities) were provided to the court. They are contained in six binders totalling 3592 pages. Many of the submissions are identical and most are

similar in nature. At para. 156 of their brief, IIDI suggests the record is replete with evidence from the third parties on the point that they would suffer significant harm if the requested information were disclosed. At that paragraph, IIDI refers to numerous specific page references from the binders of submissions from third parties received by the Commissioner. I have examined those references and reached a contrary conclusion to that suggested by IIDI. From my review, those references are replete with possibilities and speculation. I have selected the following to illustrate the point:

- _____ operates in an industry that has a significant number of competitors on Prince Edward Island. It is possible that some or all of these competitors did not participate in this program. If _____ name is released as being involved with this program, our competitors could use that to their advantage in discussions with our customers to gain their business. This could have a significant impact on our customer base and sales volume. (Page 3112).

- Our company operates in an industry that has a significant number of competitors on Prince Edward Island. It is possible that some or all of these competitors did not participate in this program. Also, some of our largest customers are _____ who were not eligible to participate in this program. If our company's name is released as being involved with this program, our competitors could use that to their advantage in discussions with our customers to gain their business. This could have a significant impact on our customer base and sales volume. (Page 3114.)

- The requested information will harm significantly the competitive position and interfere with _____ dealings with third parties. (Page 3168.)

- Due to the fact we operate a company that depends on a good reputation and customer confidence, we feel the negative publicity that has developed around this program (through no fault of ours) may adversely affect our customer and business relationships. (Page 3190.)

- We are concerned that a release of our company's involvement in the Program may have a detrimental effect on our customer base, our suppliers, and others, with whom we expect to do

> business and, upon whom we depend for the continuing success of our operations. (Page 3375.)

These are examples of the kind of information the Commissioner received and relied upon. They amount to nothing more than possibility, conjecture, or speculation. The Commissioner concluded at p. 32 of her decision:

> I find that the harm described in clause 14(1)(c) of the FOIPP Act has been amply proved by the submissions of the Public Body and the Third Parties.

From my review of the record, that conclusion is unreasonable.

[58] The Commissioner goes on to write at pp. 32 and 33 of her decision:

> I am persuaded by the arguments of the Third Parties that the majority of the Third Parties would suffer significant harm to their business if any information about their involvement in PNP were to be made public.

There is nothing in the record to support a finding the third parties would suffer any harm, let alone significant harm, and therefore this conclusion drawn by the Commissioner is also unreasonable.

[59] Similarly, there is no evidence to support a finding that the disclosure of the corporate names will result in a violation of clause 14.(1)(c)(ii), that is, that similar information will no longer be supplied to the public body when it is in the public interest that such information continue to be supplied. Further, there is no evidence other than possibility or speculation the release of the name of the corporation will result in undue financial loss or gain to any person or organization. It appears from the words chosen by the Legislature that financial loss or gain is permissible if it results from the disclosure of information contemplated by s. 14. It is only if the disclosure results in "undue" financial loss or gain that it is caught by the ***Act***.

Piercing the corporate veil

[60] In her decision at p. 33, the Commissioner wrote:

> It is clear that the ballooning nature of the controversy over PNP has taken its toll on the peace of mind of many of the owners of the Third Party businesses. In my opinion, it is appropriate in this case to acknowledge reality by "piercing the corporate veil" to confirm that the principals of most of these companies are really small business people who incorporated as part of the PNP requirements.

At the conclusion of the judicial review hearing, counsel for CBC sought permission

from the court to file a supplementary brief on the principle of piercing the corporate veil as referenced by the Commissioner in her decision. Permission was granted and a supplemental factum and authorities was filed on April 18, 2012. IIDI also filed a supplemental factum with authorities on May 10, 2012 while counsel for the Commissioner declined the opportunity to provide additional argument on this issue.

[61] In her supplementary factum at para. 5, counsel for IIDI sets out the main general principle of what is meant by the "corporate veil" and two principles flowing therefrom. She writes:

> (i) A corporation is a separate legal entity distinct from its shareholders and the courts will not disregard the corporate entity to fasten liability on its shareholder (the rule in *Salomon v. Salomon and Co.*);
>
> (ii) A shareholder cannot sue for a harm done to the corporation (the rule in *Foss v. Harbottle*);
>
> (iii) A shareholder will not be permitted to claim a corporate asset as his own, because, where a person chooses to incorporate and receives the benefits of incorporation, he may have to bear the corresponding burdens (*Kosmopoulos v. Constitution Insurance Co. of Canada*...

Counsel then goes on to submit the common law in relation to the concept of the "corporate veil" is not relevant or applicable in this case. She argues variously for her position with submissions such as the ***Act*** is a complete code with respect to the type of information which is exempt from disclosure under s. 14 and thus the common law concept of the "corporate veil" ought not to be imported into the section; resort to the notion of "corporate veil" is not expressly authorized by s. 14 of the ***Act*** and is not needed in order to interpret that section; reliance on the common law notion of the "corporate veil" is misplaced because that concept has been developed to address very different issues; the law pertaining to the concept of "corporate veil" is uncertain and its particular application in the context of the ***Act*** would create confusion. While all of those arguments are worthy of consideration, it is IIDI's submission at para. 3(vii) which directly bears on the issue raised by CBC.

> The Privacy Commissioner, in her reasons, said she would "lift the corporate veil" but she was not using the term in its ordinary "common law" sense. She was actually applying the "mosaic effect" (i.e. she was looking behind the corporate name disclosure of the corporations' participation in PNP, to see what would be disclosed by them.) S. 14 and s. 15 of *FOIPP,* by their terms, mandate that consideration be given to the "mosaic effect". This is supported by the case law;

Aside from all the other arguments advanced by IIDI on this issue, in defence of the Commissioner's statement with respect to piercing the corporate veil, IIDI is of the view she was merely applying the mosaic effect and that is permissible.

[62] The sum and substance of CBC's argument that the Commissioner fell into error when she apparently pierced the corporate veil, is set out at para. 18 of the supplementary factum:

> In the case at bar the Information Commissioner did not set out the legal basis upon which she decided to pierce the corporate veil. She referred to no case law or legal principles. She seemed to be simply piercing the corporate veil on the basis of her own view of sympathy or pathos for the principals of the companies. In our view that was "arbitrary" and "indefensible. There was no evidence upon which to base a decision that justice required piercing of the corporate veil as an alter ego for all 1,423 companies that took advantage of the program.

CBC then argues the Commissioner's resort to piercing the corporate veil is an issue of law not relating to her home statute and that the standard of review on this issue should be correctness. Thus, CBC argues the Commissioner erred in law.

[63] Although I have already determined the Commissioner was in error in her application of s. 14 of the ***Act***, which effectively disposes of this judicial review, I offer the following comments on the corporate veil issue. Regardless of whether the application of this principle is applicable to the case at bar, the fact is the Commissioner chose to expressly invoke the principle in her decision. She makes no reference to any legal principles or case law to support her resort to the principle and, therefore, has offered no legal basis for doing so.

[64] IIDI interprets the Commissioner's words as really another expression of the application of the permitted "mosaic effect." In my view, that is a stretch. The Commissioner invoked the principle and couched it in quotation marks to make it clear she was applying the principle so as to protect the principals of the companies from the significant harm she perceived was coming their way. As I have already concluded in my analysis of s. 14 of the ***Act***, there was no evidence to support such a conclusion in any event.

Conclusion

[65] The appropriate standard of review in this case is reasonableness. That deferential standard requires an inquiry into both the process of articulating the reasons for the decision under review as well as to outcomes. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the Commissioner's decision making process. Additionally, the standard of reasonableness is concerned with whether the Commissioner's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (See ***Dunsmuir***, para. 47.)

[66] After reviewing the Commissioner's reasons for decision and the record she had before her, I conclude:

1. The process chosen by the Commissioner was within her scope of authority and reasonable;

2. The Commissioner's determination that s. 15 of the ***Act*** did not apply to the case before her was reasonable, and, indeed, correct;

3. The Commissioner's decision to uphold IIDI's refusal to disclose the number of units received by each corporation under the PNP falls within the range of possible or acceptable outcomes and is defensible on the facts as contained in the record and, therefore, ought not to be interfered with;

4. The decision of the Commissioner to uphold IIDI's refusal to disclose the names of the corporations which received units under the PNP is not reasonable and, therefore, CBC is entitled to the names of those corporations under the ***Act***.

Costs

[67] At the conclusion of his submissions, counsel for the Commissioner urged the court not to award costs for or against his client. Reserving the right to seek specific instructions from their respective clients, counsel for both CBC and IIDI were in agreement with the position advanced by counsel for the Commissioner. However,

counsel for CBC and IIDI both requested the opportunity to speak to the matter of costs once the decision on the merits was rendered. Noting that costs are always in the discretion of the court, and, when ordered, usually follow the outcome, costs may be spoken to by counsel for the parties if they are otherwise unable to reach resolution among themselves.

_____

J.

November 2, 2012