SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Health PEI v. Privacy Commissioner*, 2018 PESC 11 Date: 201805
Docket: S1-GS-27700
Registry: Charlottetown

2018 PESC 11 (CanLII)

Between:

Health PEI

Applicant

And:

Prince Edward Island Information and Privacy Commissioner

Respondent

Before: The Honourable Justice Wayne D. Cheverie

Appearances:
Karen A. Campbell, Q.C., solicitor for the applicant
D. Shannon Farrell, solicitors for the respondent

Place and dates of hearing	Charlottetown, Prince Edward Island April 6, 2018
Place and date of judgment	Charlottetown, Prince Edward Island May 3, 2018

Judicial review - the respondent Commissioner ordered the applicant, Public Body, to produce information for inspection pursuant to certain provisions of the *Freedom of Information and Protection of Privacy Act* - the applicant seeks judicial review of that decision claiming that its legislation overrides the provisions relied upon by the respondent.

Standard of review - the applicant suggests it is correctness - the respondent suggests it is reasonableness because the respondent is acting within her home statute and a statute closely associated with her mandate.

The respondent's decision is reviewed on the standard of correctness - the application for judicial review is allowed and the respondent's order is nullified.

STATUTES CONSIDERED: ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01; ***Health Services Act***, R.S.P.E.I. 1988, Cap. H-1.6; ***Judicial Review Act***, R.S.P.E.I. 1988, Cap. J-3, ss. 1(h).

CASES CONSIDERED: ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9**;** ***Canadian Broadcasting Corp. v. Prince Edward Island (Information and Privacy Commissioner)***, 2012 PESC 32; ***A.T.A. v. Alberta (Information and Privacy Commissioner)***, 2011 SCC 61; ***Carter Estate v. Fleming***, 2015 PECA 9.

Cheverie J.:

Introduction

[1]***[*** Health PEI (the "applicant") has applied to the Court for judicial review of a decision of the Prince Edward Island Information and Privacy Commissioner (the "Commissioner"). The decision in question deals with the legislative authority and interplay between certain sections of the ***Freedom of Information and Protection of Privacy Act,*** **R.S.P.E.I. 1988, Cap. F-15.01** (the "***FOIPP Act***") and the ***Health Services Act***, R.S.P.E.I. 1988, Cap. H-1.6 (the "***HSA***"). As may be seen from the facts which are set out below, the Commissioner was asked to deal with an interim issue and therefore her ruling was interim and not final. The interim issue was phrased this way: Does the Commissioner have the authority to order production of records, for his or her independent review, where the Public Body alleges that the records or parts of the records fall within the scope of s. 30 of the ***HSA***? The Commissioner answered that question in the affirmative and issued an order under s-s. 53(3) of the ***FOIPP Act*** that the Public Body (Health PEI)

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produce to the Commissioner a complete copy of the Record at issue for the purpose of determining the main issue before her, that is whether the Public Body properly assessed that the applicant (the person seeking the information) has no right of access to the Record at issue, pursuant to s. 30 of the ***HSA***. (Record of Tribunal, Tab 11, paragraph 29)

[2] The Commissioner is a tribunal within the meaning of that term in s-s. 1(h) of the ***Judicial Review Act***, R.S.P.E.I. 1988, Cap. J-3. The applicant is a public body as defined in s-s.1(k) of the ***FOIPP Act***. It is a Crown Corporation established by s-s. 6(1) of the ***HSA***. It is in possession of the record in question.

[3] The ***FOIPP Act*** allows any person a right of access to the records in the custody or control of a public body subject to specific exceptions set out in the ***FOIPP Act***. The Commissioner purportedly exercised the authority granted to her under the ***FOIPP Act*** and ordered the production of the record in question. Therefore, the present application is properly brought under the ***Judicial Review Act***.

[4] The applicant seeks an order of this Court nullifying the decision of the Commissioner issued on April 21, 2017, being Order No. FI-17-005. The applicant also seeks certain declarations with respect to the interplay between sections of the ***HSA*** and the ***FOIPP Act*** which were brought into question and dealt with by the Commissioner in her decision as well as a declaration that the Commissioner's jurisdiction is limited by certain sections of the ***HSA***. In the alternative, the applicant seeks an order pursuant to paragraph 3(3)(e) of the ***Judicial Review Act*** referring the matter back to the Commissioner for further consideration in accordance with the specific findings of this Court.

The Facts

[5] In paragraph 1 of the respondent Commissioner's factum, the Commissioner does not dispute the facts contained in paragraphs 6 through 17 of the applicant's factum. Those facts are as follows:

> 6. In February 2014, Dr. Joseph Chin was retained by Dr. Rosemary Henderson (the Medical Director of the Queen Elizabeth Hospital at the time) in relation to a complaint investigation regarding a physician. Dr. Chin was initially contracted to conduct a review of issues raised in the complaint against the physician. Dr. Chin attended at the Hospital for two days in February 2014 to conduct chart reviews and interviews with several individuals, including the physician. Dr. Chin's report regarding his review of the physician was provided in March 2014.
>
> 7. At the conclusion of his visit in February 2014, Dr. Chin indicated

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that there were a number of systemic concerns in a hospital department which he wanted to bring to the attention of the hospital administration. In a letter to Dr. Chin dated March 12, 2014, Dr. Henderson indicated to Dr. Chin that a Quality Improvement Activity ("QIA") would be initiated, and that any observations or opinions regarding potential systemic issues would be a part of the QIA process and should not be addressed in his report related to the complaint investigation.

Record of Tribunal, Tab 12

8. As a result of being made aware of Dr. Chin's systemic concerns, on March 14, 2014, a QIA was initiated and a Quality Improvement Committee ("QI Committee") was established in accordance with the provisions of the *HSA*. On March 25, 2014, the Chair of the QI Committee requested from Dr. Chin "a written review of those systems issues that [he] found in relation to [his] review". Dr. Chin's report regarding the broader systemic issues was provided to the QI Committee in April 2014.

Record of Tribunal, Tab 12

9. On April 29, 2016, HPEI received a request from an individual for access to Dr. Chin's systemic report prepared at the request of the QI Committee (the "Record").

Record of Tribunal, Tab 1

10. Because the Record was prepared at the request of the Chair of a QI Committee, HPEI withheld the Record from disclosure on the basis that the Record is "quality improvement information" as defined at subsection 26(g) of the *HSA* ("QI Information"). That section reads:

(g) "quality improvement information" means information

in any form that is communicated for the purpose of, or created in the course of, carrying out a quality improvement activity...[Emphasis added]

Health Services Act, SPEI 2009, c. 7, s. 26(g)

(*HSA*) **[Tab 5F]**

11. Further, Section 30 of the *HSA* provides:

30. 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.

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HSA, *supra*, s. 30 (*HSA*) **[Tab 5F]**

12. Upon HPEI's denial, the individual then requested a review by the Commissioner of HPEI's decision to deny access to the Record. On August 15, 2016, HPEI received a request from the Commissioner for submissions regarding the Commissioner's review. The Commissioner also requested that HPEI provide a complete copy of its file, including the Record at issue which had not been disclosed to the individual.

    Record of Tribunal, Tab 2

13. HPEI responded to the Commissioner's request via letter dated September 9, 2016 and enclosed its complete file, which did not include the Record.

    Record of Tribunal, Tab 4

14. In that same letter, HPEI advised the Commissioner of its position that, as a result of the provisions of the *HSA*, it would not be releasing the Record, even for the limited purpose of the Commissioner's review. HPEI's reasons for refusing to disclose the Record to the Commissioner is more fully discussed at paragraphs 27 and 80.

15. On November 4, 2016, the individual provided additional submissions to the Commissioner regarding HPEI's position on disclosing the Record, and HPEI further responded to those submissions via letter to the Commissioner dated December 9, 2016.

    Record of Tribunal, Tab 5

16. On April 21, 2017, the Commissioner issued her Decision in which she determined that, on the basis of sections 5 and 53 of the *FOIPP Act*, she has the authority to examine the Record and ordered HPEI to produce a copy of the Record to her for the purpose of determining whether HPEI properly assessed that the individual has no right of access to the Record pursuant to section 30 of the *HSA*.

    Applicant's Record **[Tab 2]**; Record of Tribunal, Tab 11

17. As noted above, it is HPEI's position that the Commissioner erred in finding that section 53 of the *FOIPP Act* prevails over section 30 of the *HSA* such that the Applicant is compelled to disclose Quality Improvement Information to the Commissioner. As such, on May 19, 2017, HPEI filed a Notice of Application for Judicial Review of the Commissioner's Decision.

Standard of Review

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[6] Since the Supreme Court of Canada's pronouncements in ***New Brunswick (Board of Management) v. Dunsmuir***, 2008 SCC 9, there are only two standards of review. The decision of the tribunal will be examined through the lense of reasonableness where deference is to be accorded to that tribunal or through the lense of correctness, if that is the appropriate standard.

[7] In the case of ***Canadian Broadcasting Corp. v. Prince Edward Island (Information and Privacy Commissioner)***, 2012 PESC 32, I had the opportunity to determine the appropriate standard of review with respect to a decision made by the Commissioner who was interpreting and applying her home statute. I found that deference was accorded to her in that circumstance and therefore, the standard of review was reasonableness. At paragraphs 13 through 16 of the ***CBC*** decision, I referenced a number of decisions of the Supreme Court of Canada on this subject and I noted in particular the Supreme Court of Canada's expressed 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 ***A.T.A. v. Alberta (Information and Privacy Commissioner)***, 2011 SCC 61 at para. 34).

[8] The Commissioner submits the standard of review applicable to her decision is one of reasonableness because she was involved in interpreting her home statute and the ***HSA***, which she argues is a statute "closely connected" to her function and one with which she would have particular familiarity. There is no question in the course of her decision, the Commissioner is interpreting and applying certain sections of the ***FOIPP Act*** with which she deals daily and is presumed to have familiarity. In the course of discharging her responsibilities, the Commissioner would regularly receive requests from individuals seeking records in the custody or under the control of a public body. By inference it is suggested in her argument that records produced or in the custody of a public body, such as the applicant, takes her into statutes such as the ***HSA*** thereby causing her to have particular familiarity with such statutes. On this basis, the Commissioner argues deference is owed to her and the standard of review is reasonableness.

[9] On the other hand, the applicant suggests the appropriate standard of review is correctness. The applicant does not concede the ***HSA*** is a statute closely connected to the Commissioner's function and one with which she would have particular familiarity. The applicant argues statutory interpretation is in play in this case and the Commissioner has no particular expertise in that area. It is also argued the decision under review has broader application than just this particular case in that it will affect how applications for records held by other public bodies are dealt with in similar circumstances. What is being suggested

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here is that there are other public bodies with provisions similar in nature to s. 30 of the ***HSA*** which would be affected by the Commissioner's decision in this case.

[10] Although I determined the appropriate standard of care accorded to the Commissioner in the ***CBC*** case was one of reasonableness and therefore attracted deference, I find the current case to be different. There is no privative clause here which would point in the direction of deference. There is a discrete and special administrative regime under the ***FOIPP Act*** in which the Commissioner has special expertise while acting within her own statute. This points in the direction of reasonableness. However, I am of the view the appropriate standard of review is correctness for two reasons: 1) the question of law raised by the relevant sections of the ***FOIPP Act*** and the ***HSA*** is of central importance to the legal system in this province when individuals seek records from public bodies where prohibitions against actions exist; and 2) the ***FOIPP Act*** and the ***HSA*** contain relevant sections which are in conflict or at least inconsistent with one another thereby requiring a measure of statutory interpretation. These factors distinguish the current situation from the ***CBC*** case.

[11] At the heart of this judicial review is the application and interrelationship between certain sections of the ***FOIPP Act*** and the ***HSA***. In the case of ***Carter Estate v. Fleming***, 2015 PECA 9, Mitchell J.A. had this to say at paragraph 9:

> The appropriate standard of review with respect to questions of statutory interpretation is correctness (***Bank of Montreal v. 100875 P.E.I. Inc.***, 2014 PECA 12 (P.E.I.C.A.), at para.12). The motions judge decided the issue on the basis of the interpretation of Part IV of the ***Health Services Act***. In my view, for the reasons that follow, the motions judge erred in his interpretation and his decision cannot stand.

[12] While I recognize the ***Carter*** case was not a judicial review, I am bound by that Court's statement with respect to statutory interpretation. Because statutory interpretation is required in the case at bar, it supports my conclusion that the standard of review is correctness, and therefore, the Commissioner must get it right.

The Issue

[13] The central issue in this judicial review may be phrased as follows: Did the Commissioner err in determining that s. 53 of the ***FOIPP Act*** prevails over s. 30 of the ***HSA*** so that she has the authority to require the applicant to produce the record to her for examination?

[14] The key sections of the ***FOIPP Act*** are s. 5 and s. 53. The key sections of the ***HSA*** are s. 26 and s. 30. For ease of reference I set out those legislative provisions here:

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Freedom of Information and Protection of Privacy Act

5. Refusal, existing law

(1) Repealed by *2001, c.37, s.5*.

Relationship to other Acts

(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act; or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

Commencement

(3) Subsection (1) is repealed, and subsection (2) comes into force, two years after the day on which section 6 comes into force. *2001,c.37,s.5; 2002, c.27, s.4.*

53. **Powers of Commissioner in conducting inquiries**

(1) In conducting an investigation under clause 50(1)(a) or an inquiry under section 64 or in giving advice and recommendations under section 51, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* R.S.P.E.I. 1988, Cap. P-31 and the powers given by subsection (2).

Examination of records

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

Production of record

(3) Despite any other enactment or any privilege of the law of evidence, a public body shall produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

Examination of original

(4) If a public body is required to produce a record under subsection (1) or (2) and it is not practicable to make a copy of the record, the head of that public body may require the Commissioner to examine the original at its site.

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Return

(5) After completing a review or investigating a complaint, the Commissioner shall return any record or any copy of any record produced. *2001,c.37,s.53; 2005,c.6,s.15*.

Health Services Act

26. Definitions

For the purposes of this Part,

...

(e) "**quality improvement activity**" means a planned or systematic activity, the purpose of which is to assess, investigate, evaluate or make recommendations respecting the provision of health services by the Minister or Health PEI, with a view to maintaining or improving the quality of such health services;

(f) "**quality improvement committee**" means a committee established or designated under subsection 27(1);

(g) "**quality improvement information**" means 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. *2009,c.7,s.26; 2014,c.31,s.82(2)*.

30. **No right of access**

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.

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2009, c.7, s.30.

Analysis

[15] The Commissioner concluded the ***FOIPP Act*** explicitly authorizes her to compel records from a public body whether or not the record is subject to the provisions of the ***FOIPP Act*** . She did not accept the submission of the Public Body that s. 30 of the ***HSA*** prohibits the Public Body from providing the record to the Commissioner for her examination. The Commissioner concluded s. 30 refers to the right of access of an applicant generally described under s. 2 of the ***FOIPP Act*** and s. 6 of the ***FOIPP Act***, not the Commissioner's power to examine the record under s-s.53(2) of the ***FOIPP Act***. Therefore, she concluded there is no conflict between s. 30 of the ***HSA*** and s. 53(2) of the ***FOIPP Act***. (Record of Tribunal, Tab 11, paragraph 20)

[16] The Commissioner received a request from an individual seeking access to Dr. Chin's systemic report (the "Record") which was prepared at the request of the Quality Improvement Committee ("QI Committee"). She exercised the power granted to her under s-s. 53(2) of the ***FOIPP Act*** and ordered the applicant to produce the Record to her for examination. It is her position that the "person" referred to in s. 30 of the ***HSA*** refers to the individual who requested access to the Record through her. Although s. 5 of the ***FOIPP Act*** appears to provide that s. 30 of the ***HSA*** would prevail over s. 53 of the ***FOIPP Act***, the Commissioner's position is that it does not apply to her. She is of the view the apparent inconsistency or conflict between s. 30 of the ***HSA*** and s. 53 of the ***FOIPP Act*** is illusory. She merely wants to review the Record to ensure that it does contain Quality Improvement Information ("QI Information"). In essence she says she is trying to comply with s. 30. The Commissioner submits there are no provisions in the ***HSA*** which purport to limit her powers of examination under s. 53 of the ***FOIPP Act***.

[17] The applicant focuses the Court's attention on the definitions contained in s. 26 of the ***HSA*** as it applies to the facts of this case, and then argues the answer to the dilemma is really contained in s. 5 of the ***FOIPP Act***. The facts disclose that a QI Committee was established under the ***HSA***; that it engaged in a Quality Improvement Activity ("QIA"); and that it received the report from Dr. Chin which contained QI Information. The applicant submits the legislature by defining QI Information in s-s 26(g) to mean information in any form that is communicated for the purpose of, or created in the course of, carrying out a quality improvement activity is an end to the matter when read in conjunction with s. 30 of the ***HSA*** and s. 5 of the ***FOIPP Act***. While the Commissioner says she merely wants to have the Record produced so that she might determine if it does contain QI Information, the applicant argues the legislature has already taken

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care of that in the broad definition it enacted as s-s.26(g).

[18] The applicant argues s-s. 5(2) of the ***FOIPP Act*** confirms that if a provision of the ***FOIPP Act*** is inconsistent or in conflict with a provision of another enactment, the provision of the ***FOIPP Act*** prevails unless another act expressly provides that the other act prevails despite the ***FOIPP Act***. That being so, the applicant says that the legislature by enacting s. 30 of the ***HSA*** has clearly indicated that notwithstanding the ***FOIPP Act***, no person has a right of access to QI Information.

[19] The Commissioner's position that the word "person" in s. 30 does not apply to her, is tenuous. There is nothing in either piece of legislation that excludes the Commissioner as a "person" under the ***HSA***. I find it difficult to accept that the Commissioner merely wants to examine the Record to determine whether it meets the definition of QI Information when the legislature by definition has already answered that question. Furthermore, by requesting the Record for examination, the Commissioner is, in fact, accessing the Record and this is expressly prohibited by s. 30 of the ***HSA***.

[20] Reference to the purposes of the ***FOIPP Act*** and Part IV of the ***HSA*** is helpful in determining the objectives of the legislature in enacting s. 30 of the ***HSA*** as it applies to the relevant provisions of the ***FOIPP Act***. Section 2 of the ***FOIPP Act*** sets out the various purposes of that ***Act***, the first of which is to allow 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. Subsection 4(1) states that the ***Act*** applies to all records in the custody or under the control of a public body, with the exception of the records listed in paragraphs (a) to (m). In s. 6 of the ***FOIPP Act***, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant (s-s 6(1)). There are exceptions to the disclosure referred to in s-s. 6(1), but none of those apply to the case at bar. It appears to me that in enacting the ***FOIPP Act***, the legislature created the Commissioner and gave her the difficult task of not only assisting individuals in obtaining records held by public bodies, but the Commissioner must also balance personal privacy considerations. This is no easy task.

[21] In order to allow the Commissioner to carry out her statutory mandate, the legislature included s. 53, where for the purpose of her investigation or inquiry she may require any record to be produced to her for examination. Among other things, this provision gives power to the Commissioner to order production of any record in the possession of a public body so that a public body cannot arbitrarily withhold that information from a person seeking it pursuant to the ***FOIPP Act***.

[22] In enacting Part IV of the ***HSA*** entitled "Quality Improvement and

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Apologies", the legislature was concerned about the ongoing improvement of health services for the public and how that might be achieved without fear of reprisal. The applicant argues QI Information as defined in the ***HSA*** must be kept confidential so that persons providing information to a QI Committee may do so knowing they have the protection of the legislation. In the ***Carter*** case at paragraphs 7 and 8, Mitchell J.A. writing for the Court of Appeal had this to say:

> [7] Therefore when a quality improvement committee undertakes a quality improvement activity and thereby obtains quality improvement information, no one can compel the disclosure of the information and, additionally, the information is not admissible in any legal proceeding even if it had been produced or disclosed.
>
> [8] The court and the parties, appreciate that the policy objectives of the quality improvement provisions of the Health Services Act serve an important and laudable purpose. The motions judge articulated, succinctly, that when unfortunate incidents occur in a hospital, it can be difficult for doctors and nurses to review what happened to see if treatment could be improved in the future. The legislation promotes a full, open, candid, discussion and thorough review without the spectre of the report ending up as evidence in a law suit. This, in the long run, will increase the efficiency and effectiveness of the health services on Prince Edward Island without compromising the rights of plaintiffs to a civil action.

As Mitchell J.A. notes, the legislation promotes "a full, open, candid, discussion and thorough review without the spectre of the report ending up as evidence in a law suit" - or perhaps in the hands of the Commissioner. Although s-s.53(5) requires the Commissioner to return the record to the public body after completing her review or investigating a complaint, there is nothing to prohibit her from sharing any information she obtained with the person who applied to her under the ***FOIPP Act***. This is not to say she would necessarily do that, but I do not see any prohibition against it.

[23] Therefore, the legislature enacted s. 30 of the ***HSA*** which prohibits the Commissioner from accessing QI Information. The legislature defined QI Information in broad terms in s-s. 26(g) such that the Record sought in this case clearly meets the definition. If there is any conflict or inconsistency between s-s. 53(2) of the ***FOIPP Act*** and s. 30 of the ***HSA***, it is resolved by operation of s. 5 of the ***FOIPP Act***. The legislature has protected the integrity of the quality improvement provisions in the ***HSA*** by enacting s. 30 which is an express provision as contemplated by s-s.5(2) of the ***FOIPP Act***.

Conclusion

[24] For these reasons, I must conclude the Commissioner erred in determining that s. 53 of the ***FOIPP Act*** prevails over s. 30 of the ***HSA*** and therefore she

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had no authority to require the applicant to produce the Record to her for examination. Therefore, the Commissioner's order of April 21, 2017 being Order No. FI-17-005 is nullified pursuant to paragraph 3(3)(a) of the ***Judicial Review Act***.

Costs

[25] The applicant seeks its costs of the application if successful. The Commissioner requests an order requiring each party to bear its own costs. While costs are always in the discretion of the Court, I believe this is an appropriate case for the exercise of that discretion. Therefore, the applicant shall have its costs of this application on a partial indemnity basis. If the parties cannot agree on costs, they may contact the court for directions.

_____
J.

May 3, 2018

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