IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Minister of Public Safety) v. British Columbia (Information and Privacy Commissioner),* 2024 BCSC 345

Date: 20240229
Docket: S234349
Registry: Vancouver

In the matter of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241

Between:

Minister of Public Safety and Solicitor General

Petitioner

And

Information and Privacy Commissioner for British Columbia and British Columbia Civil Liberties Association

Respondents

In Chambers

Before: The Honourable Mr. Justice Gomery

On judicial review from: An order of a delegate of the Information and Privacy Commissioner, dated June 1, 2023 (*The Ministry of Public Safety and Solicitor General*, 2023 BCIPC 50, Order F23-42).

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver, B.C. January 22-23, 2024
Written submissions received	February 12, 2024
Place and Date of Judgment:	Vancouver, B.C. February 29, 2024

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Overview

[1] In 2013, the Province enacted the *Community Safety Act,* S.B.C. 2013, c. 16 [*CSA*] to enable the investigation of civilian-driven complaints about neighbouring properties. The *CSA* was not proclaimed in force. In 2017, the Province further considered the legislation and the costs of bringing it into effect. Amending legislation was enacted in 2019; S.B.C. 2019, c. 34. Still, the amended *CSA* has not been proclaimed in force.

[2] The petitioner is the Ministry responsible for the *CSA.* The British Columbia Civil Liberties Association ("BCCLA") sought records from the Ministry concerning the estimated and anticipated costs of implementing the *CSA*. The request is governed by the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 [*FIPPA*]. The Ministry produced 80 pages of records in response to the request, although 47 pages were redacted and withheld pursuant to various provisions of *FIPPA.*

[3] The BCCLA sought review of the withheld material by the Information and Privacy Commissioner, as provided in the statute. The request was referred to a delegate of the Commissioner for adjudication. The adjudicator issued a written decision on June 1, 2023. Her decision is indexed at 2023 BCIPC 50. She upheld some of the redactions and rejected others.

[4] The Ministry seeks judicial review of two categories of redaction rejected by the adjudicator:

a) Redactions of two documents on the basis of solicitor-client privilege pursuant to s. 14 of *FIPPA*; and

b) Redactions of a draft budget paper on the ground that it constituted a cabinet confidence contemplated by s. 12 of *FIPPA*.

[5] The cabinet confidences issue engages consideration of the Supreme Court of Canada's decision in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner),* 2024 SCC 4 [*Mandate Letters*], released on February 2,

2024, after this application was heard. I requested and received written submissions addressing the impact of *Mandate Letters* and have taken them into account in deciding this case.

Privilege issue

Standard of review

[6] Section 14 of *FIPPA* provides:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[7] Solicitor-client privilege is established by the common law. It is law of central importance to the legal system as a whole; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2020 BCCA 238 at para. 38. In view of the centrality and importance of this law, the review of an adjudicator's decision determining the scope of privilege under s. 14 of *FIPPA* is determined under a standard of correctness; *The District of Sechelt v. Information and Privacy Commissioner of British Columbia,* 2021 BCSC 2143 at paras. 44-49.

The decision under review

[8] The adjudicator was not provided unredacted copies of the materials claimed to be privileged, though unredacted copies might have been provided without the privilege being lost; *FIPPA,* s. 44(2.1). Instead, the Ministry provided an affidavit made by a lawyer employed by the Province to substantiate the claim of privilege. The lawyer is identified as "NC" in the decision. There was also an affidavit made by a senior civil servant in the Ministry, who is identified as "AB".

[9] The adjudicator considered that NC's affidavit demonstrated that privilege was established in respect of various redactions, but not in respect of the two redactions in issue on this application.

[10] The material redacted for privilege that is the subject of this application is found at pp. 18 and 46 of the document package produced by the Ministry.

[11] Page 18 is part of a deck of slides prepared to brief senior Ministry executives. On consideration of AB's affidavit and the content of the slide deck as a whole, the adjudicator concluded that the slide deck was created in 2013 when the *CSA* was initially enacted (at para. 43).

[12] Page 46 is a document associated with emails exchanged in 2017 and 2018. The adjudicator describes it as "the Word document". It appears that only a part of a sentence from the Word document was redacted. On consideration of the context, the adjudicator found that the Word document set out research gathered by the Ministry in 2012 before the *CSA* was enacted (at para. 44).

[13] The Ministry does not contest the adjudicator's findings that the redacted passages now in issue were created in 2013 and 2012 respectively.

[14] In his affidavit, NC affirmed that he had worked as a lawyer providing legal advice and services to the Ministry since September 2017. The adjudicator reasoned that he could not have personal knowledge of materials prepared in 2013 and 2012, and they could not reflect legal advice that he had provided to the Ministry.

[15] The adjudicator cited *Solosky v. The Queen,* [1980] 1 S.C.R. 821, 1979 CanLII 9 at 827, for the uncontroversial proposition that solicitor-client privilege extends to documents that satisfy three requirements. There must be (1) a communication between solicitor and client or the client's agent; (2) that entails the seeking or providing of legal advice; and (3) that is intended by solicitor and client to be confidential. She accepted that the privilege captures the continuum of communications within a privileged relationship, citing *Balabel v. Air India,* [1998] 2 W.L.R. 1036 at 1046.

[16] The adjudicator held that the burden was on the Ministry to substantiate a claim of privilege by providing evidence to establish that its requirements were satisfied. She stated:

> [27] When a public body makes a claim of privilege over records, but does not provide them to the OIPC, the laws and practice respecting privilege claims in civil litigation guide the adjudication of the issue during the inquiry.

> Past decisions of this office and the courts have discussed the evidence required to establish s. 14 in the absence of the records: there must be a clear description of the records that should include the date it was created, the nature of the communication and the author and recipient. In most cases, there is additional evidence that usually includes an affidavit provided, ideally, by an affiant with direct knowledge of the disputed records. It is helpful, even preferable, for the affidavit evidence to be provided by a lawyer, who is an officer of the court and has a professional duty to ensure that privilege is properly claimed.
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> [Emphasis added.]

[17] Concerning pp. 18 and 46, NC's affidavit states:

> 5. Pages 18, …, 46, … of the Records include information that is subject to solicitor-client privilege. I can see on the face of the Records that the information in the Records that is subject to solicitor-client privilege has been withheld from disclosure to the applicant under section 14 of [*FIPPA*].
>
> …
>
> 8. The Records contain:
>
> a. a summary of my legal advice (page 18);
>
> …
>
> d. a second reference by the Ministry to an intention to seek legal advice which corresponds to legal advice that I later provided to the Ministry (page 46 …) …

[18] The adjudicator concluded that NC's evidence was insufficient to substantiate the claim of privilege. She stated:

> [45] … As NC was not in a solicitor-client relationship with the Ministry about the CSA at the relevant time, he would appear not to have the direct knowledge of the disputed records that is preferable for establishing s. 14. In sum, it is difficult to see how disclosure of a document prepared in 2012 or 2013 could somehow reveal confidential legal advice about the CSA from an individual who did not serve in the capacity of solicitor to the Ministry until 2017. As the courts have confirmed, there is a strong preference for evidence to come from those with direct knowledge of the communications, who can provide the proper contextual information about the communication, as well as the intentions of the parties to the communication. That type of evidence is lacking in respect of the slides and Word document excerpt in this case.
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> [46] I also acknowledge that the courts have been clear that some deference is owed to lawyers claiming privilege, given their professional obligation to properly claim it. However, in this situation, I am not persuaded that NC's evidence, and the Ministry's evidence relying on it, are sufficient to meet the Ministry's burden to establish on a balance of probabilities that the withheld portions of the slide and Word document satisfy all three parts of the test for privilege. While I accept that s. 14 will apply to internal records of a public body that do not involve a lawyer, if disclosure would reveal (internal

> discussions about) legal advice, I have not been provided with sufficient evidence to establish that disclosure of the slide and Word document would reveal actual confidential communications about legal advice provided to the Ministry by its solicitor. Nor has the Ministry provided an alternative satisfactory explanation or justification for the legal advice privilege basis of these severances. Based on the insufficient evidence that s. 14 applies to the withheld content of the slide at page 18 and the Word document page 46, I find that s. 14 does not apply.
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> [Emphasis added.]

The Ministry's argument

[19] In essence, the Ministry makes two arguments. First, it submits that the adjudicator failed to give any deference to NC's evidence and relied on irrelevant considerations. It relies upon "the presumption that a lawyer will exercise due diligence when asserting privilege over a document", regardless of when it was created. Privilege would apply to advice provided by lawyers who advised the Ministry prior to 2017 when NC became involved.

[20] Second, the Ministry submits that, upon identifying NC's affidavit as inadequate, the adjudicator was obliged to offer the Ministry a further opportunity to offer evidence to substantiate the claim of privilege.

[21] On both branches of the argument, the Ministry relies heavily on *British Columbia (Minister of Finance) v. British Columbia (Information and Privacy Commissioner),* 2021 BCSC 266 [*Minister of Finance*]. This is a case in which Steeves J. accepted that an adjudicator had correctly decided that the government had not provided sufficient evidence to support various privilege claims, but ordered that the government should be afforded an opportunity to present further information to the adjudicator to substantiate the claims.

Analysis

Did the adjudicator err in holding that NC's affidavit failed to substantiate the claim of privilege?

[22] The glaring problem with NC's affidavit is his unequivocal assertion, at para. 8(a), that p. 18 contains a summary of his legal advice. It is obvious that it does not, because the document was prepared years prior to his involvement with

the file. This error undermines para. 5 of the affidavit, which includes p. 18 in a list of records that disclose, on the face of the unredacted documents, privileged information, because it is unclear that the affiant has actually looked at p. 18, or what he saw if he did. The error is inconsistent with any presumption that the affiant exercised due diligence in asserting privilege over the document.

[23] So far as p. 18 is concerned, the Ministry's primary argument boils down to the untenable proposition that the adjudicator (or the court on review) must accept a claim of privilege grounded in a false affidavit, because the affidavit was made by a lawyer. *Minister of Finance* offers no support for this proposition.

[24] In *Minister of Finance,* Steeves J. does suggest at para. 86 that "some deference is owed to the lawyer claiming the privilege". This suggestion comes in the course of the following reasoning. Evidence is required to substantiate a claim of privilege, and "an affidavit from counsel is the preferred approach"; para. 85. The party claiming privilege may rely upon a rebuttable presumption that communications between a lawyer and client and the information they share are confidential in nature; paras. 88-90. However, Steeves J. goes on to hold that the affidavit should specifically address the documents subject to the privilege claim; para. 91. The presumption will not be engaged where the affidavit is inadequate; para. 92. It is for the adjudicator, not counsel, to decide whether the affidavit is adequate; paras. 92-93. The amount of explanation required to substantiate a claim of privilege depends upon documents in question; para. 93.

[25] In short, *Minister of Finance* underscores the point that a claim of privilege must be substantiated by evidence from the party claiming the privilege, and it is incumbent on the adjudicator to evaluate whether the evidence is adequate to the task. I agree with the adjudicator that the evidence is inadequate to substantiate a claim that the redacted material on p. 18 was privileged. There was only NC's affidavit, and its description of the redacted material is manifestly incorrect.

[26] On the other hand, the claim of privilege asserted over the passage in the Word Document at p. 46 is sensible, because at para. 8(d) the affidavit describes the redacted material as disclosing "an intention to seek legal advice which corresponds

to legal advice that I later provided to the Ministry". This description is consistent with the timing of NC's involvement, and the basis of the claim is not that the document contains NC's advice, but that it discloses an intention to seek legal advice from some other lawyer.

[27] In my view, the adjudicator erred in this regard. She stated that it had not been shown that disclosure of the withheld portion of the Word document "would reveal actual confidential communications about legal advice provided to the Ministry by its solicitor" (at para. 46 of the decision, quoted and emphasized above). This reflects an unduly narrow view of the scope of solicitor-client privilege. The Ministry always had legal advisors available through the office of the Attorney General. A record from the Ministry's files setting out an intention to obtain legal advice would be privileged whether or not the advice was obtained at the time.

Should the Ministry be afforded a second chance to substantiate the claim of privilege?

[28] The Ministry's argument that it should be afforded a second chance to substantiate the claim of privilege is not advanced in its petition for judicial review. It emerged in the course of submissions during oral argument. The Ministry's argument was not put forward as an alternative position before the adjudicator. She was not asked to consider whether, in the exercise of her discretion, she should invite further evidence and submissions from the Ministry.

[29] The general rule is that an applicant for judicial review may not raise new issues that could have been but were not put before the decision-maker whose decision is under review; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at paras. 22-23. The reviewing court may entertain new issues, in the exercise of its discretion, but should exercise caution in doing so; *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal,* 2022 BCCA 189 at paras. 45-50 [*Strata Plan VR 1120*]. In *Strata Plan VR 1120,* Justice Horsman gave judgment for the court and stated that exceptional circumstances are required to warrant such an order (at para. 50). She explained at para. 49 that:

> … a judge must be cautious in adopting such a process as it may undermine expedient and cost-efficient decision making, which are objectives of many administrative schemes. Parties should not receive a second hearing simply because they failed to raise at the first hearing all pertinent issues: *Alberta Teachers* at para. 55; *Vandale v. Workers' Compensation Appeal Tribunal,* 2013 BCCA 391 at para. 54.

[30] I am of the view that I should exercise my discretion to consider the Ministry's new argument for the following reasons. It concerns the law of solicitor-client privilege, which, as already noted, is law of central importance to the legal system as a whole. One of the considerations favouring the limitation on raising new issues derives from the obligation of deference to the administrative decision-maker – see *Strata Plan VR 1120* at para. 48 – but that consideration is muted where the standard of review is correctness, as it is here. As already noted, the Ministry's argument places considerable weight on Steeves J.'s judgment in *Minister of Finance,* a case already cited in at least 36 decisions of *FIPPA* adjudicators in the three years since that judgment was rendered. An analysis of what was and was not decided in that case may assist in the development of the jurisprudence

[31] Turning to *Minister of Finance*, the critical passage for present purposes is the following:

> [119] The result is that I conclude that the adjudicator was correct when she decided that the petitioner did not provide sufficient evidence to establish that the attachment to the legitimately excluded email should also be excluded.
>
> [120] As discussed in the authorities there can be significant repercussions if documents that are properly subject to solicitor-client privilege are disclosed. And it has to be recognized that the case law is not always helpful. For this reason the petitioner will have another opportunity to make a submission (including affidavit evidence) to the IPC with respect to the attachment at issue in this category of documents and whether the petitioner can refuse to disclose it under s. 14 of the FIPPA (*Keefer Laundry*, at para. 89). The IPC will then make another decision.
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> [Emphasis added.]

[32] I take *Minister of Finance* as standing for the legal proposition that, in a case involving an assertion of solicitor-client privilege where the claim of privilege is plausible but is not made out on the evidence, it is open to the adjudicator (or to the court standing in the shoes of the adjudicator on an application for judicial review) to open the door to further evidence and submissions from the party claiming the

privilege rather than denying the claim on the basis of the burden of proof. The decision is discretionary. Justice Steeves exercised his discretion in favour of reopening the case because he considered that there had been a lack of clarity in the law bearing on how the privilege should be asserted and assessed. As he put it, the case law was "not always helpful".

[33] In my view, like the discretion to consider a new issue for the first time on judicial review, the discretion to reopen should only be exercised in exceptional circumstances. The Province and other public bodies subject to *FIPPA* are invariably well advised and professionally represented. The process by which requests for access to information are adjudicated is already prolonged. The legal principles governing solicitor-client privilege are well established. With the guidance provided by cases such as *Minister of Finance,* public bodies have the means and ample opportunity to assert claims of privilege to which they are entitled, and they should be expected to put forward all of the relevant evidence correctly and at the first available opportunity.

[34] The progress of the case at bar offers a good illustration of the duration and intensity of the process. It began with a request for access to information made by the BCCLA more than four years ago, in October 2019. The Ministry identified the 80 pages of records responsive to the request, and the redactions it claimed in respect of allegedly privileged material, in February 2020. The applicant invoked the review process under the statute in March 2020. There was a mediation, as contemplated by *FIPPA* s. 55. The redactions were in issue, and presumably the Ministry reviewed the privilege claim at that time.

[35] The process before the adjudicator did not begin until late 2022. It began with the Ministry's submission dated August 3, 2022, consisting of a package containing a 27-page written argument, prepared by counsel, the affidavits of AB, NC, and a Treasury Board staffer identified as "GE", and copies of the documents in issue. The BCCLA responded with a 10-page written submission dated September 23, 2022, and the Ministry submitted a further 7-page reply submission dated October 11, 2022. By an exchange of correspondence with counsel in January 2023, the

adjudicator sought and obtained from the BCCLA clarification of the scope of the request. The decision is dated June 1, 2023.

[36] *FIPPA* is intended to make public bodies more accountable to the public by giving the public a right of access to records; s. 2(1)(a). The objective is one "crucial to the proper functioning of our democracy"; *Mandate Letters* at para. 1. But *FIPPA* cannot accomplish its purpose if the process of obtaining access to records is too dilatory. At some point, access delayed is access denied.

[37] I do not think that the circumstances of this case are so exceptional as to require that the Ministry be given another opportunity to substantiate its claim that the contents of the slide at p. 18 reflect legal advice and are privileged. The Ministry has not indicated what additional evidence it would propose to bring forward. It has not sought to explain or excuse the error in NC's affidavit. Unlike *Ministry of Finance,* this is not a case in which there has been any lack of clarity as to what the Ministry had to do to assert a claim of privilege.

[38] I conclude that the Ministry should not be afforded a second opportunity, by order of this Court, to substantiate a claim that the redacted material on p. 18 is privileged.

[39] I offer two post-scripts.

[40] The first arises from a particular feature of the decision under review. In deciding that the redacted material at p. 18 was not protected from disclosure by solicitor-client privilege, the adjudicator left open the possibility that it might be protected under other exceptions established by ss. 13(1) or 16(1)(a)(ii). Pursuant to s. 44(1)(b), the adjudicator ordered the Ministry to produce the unredacted material to her for the purpose of adjudicating the availability of those exceptions. That adjudication has yet to take place.

[41] I have decided that the Ministry is not entitled to an order from this Court, on the record on this application, that would afford it a further opportunity to substantiate its claim of privilege over p. 18. I have not decided whether it would be

open to the adjudicator on fresh evidence, including the unredacted document itself, to reconsider whether the material is privileged.

[42] The second post-script concerns *Ministry of Finance.* I have taken it as authority for the legal proposition set out at paragraph [32] above. I consider that I am bound to accept that proposition by principles of comity; *Hansard Spruce Mills (Re),* [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.); *R. v. Sullivan,* 2022 SCC 19 at para. 6. Apart from *Ministry of Finance,* it would seem to me doubtful that it is open to a court on judicial review to set aside the decision of an administrative decision-maker in the absence of legal or factual error, as Steeves J. held. However, that is a matter for another court.

Cabinet confidences issue

[43] Section 12 of *FIPPA* protects Cabinet confidences. In British Columbia, the Cabinet is formally known as the Executive Council. The protection extends to committees of Cabinet. The Treasury Board is a Cabinet committee. By its terms, s. 12(1) provides:

> The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[44] The general rule in s. 12(1) is subject to various exceptions in sub-s. (2), none of which apply in this case.

[45] Section 12(1) exists to protect "the confidentiality the executive requires to govern effectively"; like the public's right to know, this is a principle crucial to the proper functioning of our democracy; *Mandate Letters case,* para. 1. It grants the executive latitude to govern in an effective, collectively responsible manner and is essential to good government; *Mandate Letters,* para. 3.

Standard of review

[46] Prior to *Mandate Letters,* the parties were agreed and it seemed clear that the standard of review of an adjudicator's decision concerning the Cabinet confidences

exception was a standard of reasonableness; that is, that the court should only intervene on a showing that the decision was unreasonable. Reasonableness is the presumptive standard; *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 23. It was the standard adopted in this Court prior to *Vavilov*; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2011 BCSC 112 at paras. 62-78. After *Vavilov,* it was adopted by a majority of the Ontario Court of Appeal in the *Mandate Letters case,* 2022 ONCA 74. In that case, a dissenting judge in the Court of Appeal raised at para. 108, without deciding, the possibility that the standard should be one of correctness.

[47] In the Supreme Court of Canada in *Mandate Letters,* Karakatsanis J. gave judgment for six of seven judges. She held at para. 16 that the question of the standard of review could be left for another day, because the decision under review fell to be set aside even on the deferential standard of reasonableness. The seventh judge was Côté J. While concurring in the result, she held at para. 67 that the standard of review was correctness because she viewed the scope of Cabinet privilege to be a general question of law of central importance to the legal system as a whole.

[48] The Ministry now takes the position that the reasoning in *Mandate Letters* "requires that a correctness standard be applied" in this case. The respondents submit that *Mandate Letters* does not affect the standard of review established by prior British Columbia jurisprudence.

[49] As a matter of *stare decisis,* Côté J.'s reasons may perhaps be persuasive, but they are not binding on me. The majority leaves the question of the standard of review open for decision in a later case.

[50] On the other hand, I have not been referred to binding British Columbia authority for the adoption of the reasonableness standard in respect of the question at hand. The British Columbia cases pre-date *Vavilov*. The question, therefore, is what *Vavilov* requires in this context.

[51] *Vavilov* holds that the presumption of reasonableness review may be rebutted for "certain types of legal questions", namely: "constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies"; para. 53. Constitutional questions require correctness review because "[t]he constitutional authority to act must have determinate, defined and consistent limits"; para. 56. General questions of law of central importance to the legal system as a whole require correctness review because of both their importance and their broad applicability; they have:

> … implications beyond the decision at hand, hence the need for "uniform and consistent answers".
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> (at para. 59, citing *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 60)

[52] *Vavilov* cautions that neither public concern, nor the importance of an issue in the abstract, qualify a question as one of central importance to the legal system as a whole; para. 61. Examples of qualifying issues offered at para. 60 are: the applicability of doctrines of *res judicata* and issue estoppel in administrative proceedings; the scope of the state's duty of religious neutrality; limits on solicitor-client privilege; and the scope of parliamentary privilege.

[53] The court cites *Chagnon v. Syndicat de la function publique et parapublique du Québec,* 2018 SCC 39 at para. 17 for the final example. There*,* the Supreme Court of Canada characterized the existence and scope of parliamentary privilege as a question of central importance to the legal system; at paras. 17 (Karakatsanis J.), 59 (Rowe J.) and 86 (Côté and Brown JJ.).

[54] The extent of the protection offered to Cabinet confidences has a constitutional aspect, because it is underlaid by constitutional convention; *Mandate Letters* at paras. 27-31. However, it does not engage the constitutional authority to act. It is not a doctrine of such general applicability as the doctrines of *res judicata,* issue estoppel, and solicitor-client privilege, which may be engaged in virtually any administrative context.

[55] Dealing with the standard of review in the Court of Appeal in *Mandate Letters,* the majority adopts the reasoning of the Divisional Court at 2020 ONSC 5085, paras. 13-17. The Divisional Court reasons as follows:

> [16] This case involves a straightforward issue of statutory interpretation of one specific provincial statute and the scope and application of the s. 12(1) protection against disclosure to specific documents. The rule of law exception is not engaged simply because "the question, when framed in a general or abstract sense, touches on an important issue," *Vavilov* para. 61. There is no issue of the "rule of law" or of constitutional law engaged in this case which removes the analysis from the presumed standard of reasonableness.
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> [Emphasis added.]

[56] In the Supreme Court of Canada, Côté J. maintains that "the scope of Cabinet privilege falls within the already existing *Vavilov* category of general questions of law of central importance to the legal system as a whole" (at para.67). She reviews the examples of such questions offered in *Vavilov* and states:

> [69] There is no principled reason why Cabinet privilege should be treated any differently — or is any less important to the legal system as a whole — than solicitor-client privilege or parliamentary privilege. Writing for the majority of the Court in *Chagnon v. Syndicat de la fonction publique et parapublique du Québec,* 2018 SCC 39, [2018] 2 S.C.R. 687, my colleague noted that parliamentary privilege helps preserve the separation of powers and plays an important role in our Westminster model of parliamentary democracy (para. 1). This is echoed in her consideration of the importance of Cabinet privilege in this case, which implicates constitutional traditions and conventions "crucial to the proper functioning of our democracy" (para. 1; see also paras. 3, 7, 21, 27-28 and 60). Indeed, "[j]ust as legislative privilege protects the ability of elected representatives to act on the will of the people", she states, citing *Chagnon*, "Cabinet confidentiality grants the executive the necessary latitude to govern in an effective, collectively responsible manner" (para. 3).
>
> [70] The scope of Cabinet privilege is not a question particular to Ontario's specific regulatory regime (see *Vavilov*, at para. 61; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 60). As my colleague notes, similar exemptions are found in freedom of information legislation across the country (para. 14). … Further, courts must determine the scope of Cabinet privilege, including under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, when dealing with questions of admissibility of evidence. Indeed, my colleague's interpretation of the purpose of Cabinet privilege is largely based on common law jurisprudence or jurisprudence concerning freedom of information legislation from other jurisdictions (see, e.g., paras. 3 and 31). This confirms the wide-ranging implications of decisions on the nature and scope of Cabinet privilege.
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> [71] For these reasons, I would find that the scope of Cabinet privilege is a question of central importance to the legal system as a whole that requires a final and determinate answer. …

> [Emphasis added.]

[57] The essential difference in reasoning between the Divisional Court, who adopt a reasonableness standard, and Côté J., who opts for correctness, is not a disagreement as to the importance of the legal doctrine addressing Cabinet confidences. It involves their differing assessments of the importance of the protection afforded to Cabinet confidences to the legal system as a whole.

[58] In my judgment, Côté J.'s reasoning is more persuasive. The Cabinet confidences doctrine is important in divers categories of cases involving, for example: requests for access to information; the judicial review of administrative action involving Cabinet-level decisions; and lawsuits against the government involving Cabinet-level decisions. By limiting the information available to individuals and the court, the doctrine affects the ability of individuals to challenge or seek compensation for state action and the relationship between individuals and the state generally. It is as important to the legal system as a whole as the issue of parliamentary privilege addressed in *Chagnon*.

[59] Accordingly, I conclude that the standard of review in this case is correctness. I should have regard to the adjudicator's findings and reasoning and come to the conclusion that I believe is correct, without deference.

The decision under review

[60] For ease of reference, I repeat s. 12(1) of *FIPPA*:

> The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> [Emphasis added.]

[61] The adjudicator cites *Aquasource Ltd. v. The Freedom of Information and Protection of Privacy Commissioner for the Province of British Columbia* (1998), 111 B.C.A.C. 95, 1998 CanLII 6444, for the proposition that the "substance of deliberations" refers to the body of information that the Treasury Board (as a Cabinet

committee) considered or would consider, in the case of submissions not yet presented, in making a decision. She interprets s. 12(1) as asking whether the information sought to be disclosed formed the basis for Treasury Board deliberations (at paras. 57, 65).

[62] The adjudicator describes the material redacted under. s. 12(1) as comprising most of a draft budget paper and two Word documents, as well as parts of emails (at para. 64). It is described by the Treasury Board staffer, GE, in an affidavit as "the draft *Budget 2018* Key Priority Paper #4". GE affirms:

> 7. I confirm that the signed copy of the *Budget 2018* Key Priority Paper #4 was signed by the Solicitor General and is dated October 28, 2017. I confirm that the signed copy of the *Budget 2018* Key Priority Paper #4 was taken to the Chair of the Treasury Board on December 18, 2017 for the Chair's consideration.

[63] The adjudicator also refers to AB's affidavit stating her belief that "the Word documents and emails were reflective of the information in the draft budget paper that was 'considered by Treasury Board in its decision-making processes'". She observes (at para. 68):

> The basis of this belief is not provided; nor are more specific details about when Treasury Board considered the withheld information. This can be contrasted with the particularity of AB's evidence about the legislative proposal to amend the CSA (developed concurrently with the budget paper).

[64] The adjudicator is unpersuaded that GE's affidavit establishes that the redacted material formed the basis for Treasury Board deliberations. She notes that it does not indicate that the redacted information was ever contained in a submission to Treasury Board (at para. 71). She views the documents as "one step on the path to Treasury Board" and the subsequent version as a document that went to Treasury Board staff and the Chair as "solely to see if the Ministry would be 'invited' to make a formal Treasury Board submission" (at para. 72). At para. 73, the adjudicator states that:

> … the Chair of Treasury Board as an individual is not the same as Treasury Board, the relevant Cabinet committee for the purpose of s. 12(1), and it is important not to conflate the two. In sum, the evidence does not persuade me that the withheld information was submitted or prepared for submission to

> Treasury Board or that its disclosure would directly or indirectly reveal the deliberations of Treasury Board.

[65] Further, in view of the time that had passed and changes in the legal environment that would inevitably affect the cost of bringing the *CSA* into force, the adjudicator is unpersuaded that the redacted information would eventually be presented to Treasury Board for its consideration at some future time (at para. 74).

[66] Accordingly, the adjudicator concludes that the Ministry has not justified the redaction of material pursuant to s. 12(1) of *FIPPA.*

The Ministry's argument

[67] The Ministry submits that all that s. 12 requires for its application is a sufficient link between the records in issue and Treasury Board deliberations. The draft budget paper is properly understood as advice or recommendations or, at the very least, background explanations or analysis that was considered in making a decision. It was prepared as part of a process and its contents "may reveal substantive information about a final submission … such that the deliberative secrecy of Cabinet is undermined". The Ministry argues that:

> … there is an absurdity in the notion that draft documents put before Treasury Board staff as part of a procedure for selecting and streamlining final and complete submissions to the Treasury Board do not reveal the substance of deliberations. The content of preliminary submissions such as the Draft Budget Paper inherently reveals or allows accurate inferences about the substance of what the Treasury Board intends to deliberate upon.

[68] In written submissions addressing *Mandate Letters,* the Ministry submits that the case holds that "materials that would reveal the substance of deliberations are part of a 'continuum' of Cabinet deliberations" beginning with the setting of policy priorities at an early stage. It submits that the adjudicator erred in requiring evidence linking the redacted material to actual deliberations at an actual meeting of Treasury Board and that the draft budget paper and related materials "fall squarely within the continuum of the Treasury Board's deliberations". It adds that:

> Submission of the Draft Budget Paper to Treasury Board staff represents the Ministry's communication of a policy priority to Cabinet.

Analysis

Legal framework

[69] The starting point for the adjudicator was the British Columbia Court of Appeal's decision in *Aquasource.* In my opinion, *Aquasource's* interpretation of the Cabinet confidences exception contained in s. 12(1) of *FIPPA* is consistent with the decision in *Mandate Letters* and remains good law.

[70] In *Aquasource,* Donald J.A., giving judgment for the Court, held that the class of materials that "would reveal the substance of deliberations" is broad and "as a consequence the provision must be read as widely protecting the confidence of Cabinet communications" (at para. 41). It extends to material that "would permit the drawing of accurate inferences with respect to the deliberations" (at para. 48).

[71] *Mandate Letters* involved equivalent statutory language contained in s. 12(1) of Ontario's *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F-31. The documents in issue in *Mandate Letters* were letters delivered by Ontario's Premier to Cabinet Ministers setting out priorities for the government's term in office. Justice Karakatsanis states, at para. 8:

> … the Letters reflect the views of the Premier on the importance of certain policy priorities, and mark the initiation of a fluid process of policy formulation within Cabinet. The Letters are revealing of the substance of Cabinet deliberations, both on their face and when compared against what government actually does.

[72] *Mandate Letters* does not call into question the interpretation of the statute adopted in *Aquasource.* The Court's characterization of the letters was dispositive. According to *Mandate Letters,* consistently with *Aquasource,* information that is revealing of the substance of Cabinet deliberations is protected under s. 12(1) of both the Ontario and British Columbian statutes.

[73] In *Mandate Letters,* the Information and Privacy Commissioner erred both in his interpretation and application of s. 12(1). Justice Karakatsanis emphasizes that the decision-making process in Cabinet extends beyond formal meetings to one-on-one discussions in offices, corridors, and over the phone. Agenda-setting is

crucial, as is the role of the Premier. Evidence linking the letters to "actual Cabinet deliberations as a specific Cabinet meeting" is not required. Justice Karakatsanis states, at para. 54:

> Such a requirement is far too narrow and does not account for the realities of the deliberative process, including the Premier's priority-setting and supervisory functions, which are not necessarily performed at a specific Cabinet meeting and may occur throughout the continuum of Cabinet's deliberative process. Accordingly, it would be unreasonable for the Commissioner to establish a heightened test for exemption from disclosure that would require evidence linking the record to "actual Cabinet deliberations at a specific Cabinet meeting".

[74] On the other hand, the protection afforded to Cabinet confidences is not so large as to extend to "any record that was not placed or intended to be placed before Cabinet if it contains information that Cabinet Office claims may become the subject of a future Cabinet meeting" (at para. 57). This is because the mandate letters are not a collection of topics like items on an agenda. As Karakatsanis J. explains, the reality is this:

> The Letters reveal the Premier's initial views on priorities for the new government — priorities subject to change as the deliberative process unfolds. The communication of the Premier's initial views to other members of Cabinet are part of Cabinet's decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action. This context is crucial.

Did the adjudicator err?

[75] The burden of proof is on the Ministry to establish that material should be withheld under s. 12 of *FIPPA*; s. 57(1). The adjudicator correctly observed that the proof submitted in the Ministry's affidavits only goes so far. The withheld material consists of a draft budget priority paper and supporting materials. This material was prepared by Ministry staff and discussed with Treasury Board staff. A later signed version of the priority paper was presented to the Chair of the Treasury Board in December 2017. The evidence does not establish that any version of the priority paper was ever considered by the Treasury Board itself, or that there is any real likelihood that it will be presented to the Treasury Board in the future.

[76] I agree with the adjudicator that discussions involving Treasury Board staff are not to be confused with deliberations of the Treasury Board itself, and a submission to the Chair of the Treasury Board should not be conflated with a submission to the Treasury Board. To automatically include everything discussed by Treasury Board staff or submitted to the Chair as revealing the substance of Treasury Board deliberations would be to overlook the crucial importance of context, contrary to Karakatsanis J.'s caution at para. 57 of her reasons for judgment.

[77] The withheld material in this case is not at all similar to a mandate letter issued by a premier setting priorities for his term in government. I reject the Ministry's argument that its submission of a budget priority paper to Treasury Board staff can be analogized to a premier's dictation of policy priorities to his or her Cabinet. The relationship between author and recipient is totally different. A premier is a leader who addresses Cabinet from a position of authority. The Ministry is one of many ministries offering budgetary input. Directions from the premier to Cabinet ministers take place among members of the Cabinet. Submissions from a ministry to Treasury Board staff do not take place among members of the Treasury Board.

[78] *Mandate Letters* makes it clear that Cabinet or Treasury Board deliberations are not confined to discussions in a meeting room. However, the notion of a 'continuum' of deliberations cannot be taken so far as to include everything that might have been submitted to the Treasury Board but was not. That would spread the blanket of Cabinet confidences over material far removed from Treasury Board deliberations, and undermine the scheme of the statute.

[79] I reject the Ministry's argument that to exclude "draft documents put before Treasury Board staff as part of a procedure for selecting and streamlining final and complete submissions to the Treasury Board" is absurd, because it "inherently reveals or allows accurate inferences about the substance of what the Treasury Board intends to deliberate upon". The activities of the provincial government are extensive and the remit of the Treasury Board is vast; *Financial Administration Act,* R.S.B.C. 1996, c. 138, s. 4. It is unrealistic to think that the Board considers and

deliberates upon more than a fraction of the material considered by its staff, or its Chair. Accurate inferences are unavailable.

[80] Accordingly, I agree with the adjudicator that the Ministry has failed to establish that the withheld material is protected from disclosure under s. 12(1) of *FIPPA* on the basis that it would reveal the substance of Treasury Board deliberations.

Disposition

[81] For these reasons, the petition is allowed to a limited extent. The order requiring production of the redacted material at p. 46 of the document package is set aside. On the record, there is only one conclusion that could be reached in respect of the redacted material at p. 46, and there is no need for the adjudicator to reconsider this material, because reconsideration would serve no useful purpose; *Vavilov,* at para. 142. In respect of all other aspects of the decision under review, the petition is dismissed.

"Gomery J."