The Consumer Advocate

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May 16, 2018

Board of Commissions of Public Utilities
120 Torbay Road, P.O. Box 2140
St. John's, NL A1A 5B2

Attention: G. Cheryl Blundon, Director of Corporate Services / Board Secretary

Dear Ms. Blundon:

RE: NLH 2017 GRA
Consumer Advocate's Reply to Hydro's Submissions re
Consumer Advocate's Motion for Clarification of the Board Jurisdiction

The following is the Consumer Advocate's Reply to Hydro's submissions, dated April 30, in response to the Consumer Advocate's Motion requesting clarification of the jurisdiction of the Board dated April 5, 2018 (the "Consumer Advocate's Motion").

As an overall comment, the Consumer Advocate submits that Hydro's submission does confirm that the wording of OC2013-343 is clear. OC2013-343 states as follows:

> *"Notwithstanding sections 1 and 2 ... no such costs, expenses or allowance shall be recovered by Newfoundland and Labrador Hydro in rates;*
> ...
> *(b) in any event, in respect of each of Muskrat Falls, the LTA or the LIL, until such time as the project is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from this project."*

However, to address this clarity - which would now prevent Hydro from recovering the LIL / LTA costs, including the operation and maintenance costs, since the Muskrat Falls Project is neither "commissioned" nor "nearing commissioning" - Hydro embarks upon a discussion of the law of statutory interpretation in an attempt to illustrate that, while the words in OC2013-343 say one thing, in fact, the legislature intended something else.

Hydro correctly cites the applicable principle relating to statutory interpretation as the "modern approach", as referenced in Tuck v. Supreme Holdings (2016) NLCA 40 and Bell ExpressVu Limited Partnership v. Rex [2002] 2 SCR 559 (see: Page 10 of Hydro's submission dated April 30). Generally, if an ambiguity is present in a legislative Act, the

modern approach to statutory interpretation requires words of the Act to be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." (See: Tab 1 - R. v. Skakun (2014) BCCA 223, para. 12.)

However, this principle of statutory interpretation, which Hydro relies on, is only applicable if there is in fact an *ambiguity* in the words of the legislative Act.

What constitutes an ambiguity is set out in the Bell ExpressVu case, as referenced in Skakun at paragraph 16:

> *[16] In Bell ExpressVu, the Court explained the meaning of "ambiguity" in this manner:*
>
> > *[29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte [Marcotte v. Deputy Attorney General for Canada, [1976] 1 S.C.R. 108] supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14 is apposite: "it is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".*
> >
> > *[30] ... it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing to opposing views as to their meaning" (Willis [Professor John Willis], "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1), supra, at pp. 4-5)*
> >
> > *[Emphasis in original.]*
>
> (See: Tab 1 – R. v. Skakun, para. 16)

The Consumer Advocate submits that Hydro has not demonstrated that there is any ambiguity whatsoever in the wording of OC-2013-343, or, to use the wording of the Marcotte case as referred to above in Bell ExpressVu, that "the words of the provision must be reasonably capable of more than one meaning".

The Consumer Advocate further submits that the words in OC2013-343 are not capable of more than one meaning. It may be the case that OC2013-343 was drafted in the anticipation that there would be no significant timing delay between the commissioning or near commissioning of the LIL and the LTA and the Muskrat Falls Project itself, but that would not amount to an ambiguity in OC2013-343. This may have been a failure by the legislature to anticipate such a significant timing gap between the completion of the LIL / LTA and the Muskrat Falls Project but that is not ambiguity. The principles of statutory interpretation address ambiguities in legislation, they do not empower the courts to rehabilitate legislation.

The Deferral Account

In effect, as indicated, OC2013-343 prohibits Hydro from recovering any costs until the Muskrat Falls Project is commissioned or nearing commissioning. This fact is acknowledged by Hydro at page 24, paragraph 2, of their submission dated April 30.

Hydro submits that the LTA and LIL costs, including the operational and maintenance costs, are required to be included as costs in Hydro's cost of service calculation for recovery in rates, subject to timing set out in Section 3 of OC2013-343.

It is apparent, then, that it is the timing issue for recovery of these costs that is essential to Hydro's deferral account scheme, as a way to obtain indirectly what OC2013-343 prevents them from obtaining directly.

Hydro refers to the case of Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commission of Public Utilities (2012) 323 Nfld. & P.E.I.R. (127) (NL CA) (the "RSP Appeal"), which confirmed the operation of deferral accounts as permissible under the current regulatory scheme.

However, in the RSP Appeal case, the Newfoundland Court of Appeal identified the purpose of deferral accounts as follows:

> *Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs.*
>
> (See: RSP Appeal, Tab 2, paragraph 63)

The Consumer Advocate submits that there is nothing "uncertain or volatile" about the operational and maintenance costs of the LIL and the LTA in 2018 and 2019, which CA-NLH-50 indicates will be $27.3 million in 2018 and $52.9 million in 2018.

Mr. Haynes, in his testimony of April 16, 2018, in these proceedings referred to the Deferral Account and indicated that it would be the Board that would "actually determine the best utilization of that amount of money to actually … to particularly aid rate smoothing as we transition to Muskrat Falls …". (See: Hearing transcript dated April 16, 2018, page 57, ln. 3-7.)

However, in its submission dated April 30, 2018, Hydro has indicated that the operation and maintenance costs ("O & M costs") of the LTA and the LIL are "*prima facie* required to be included as costs in Hydro's cost of service calculation, for recovery and rates, subject to the timing set out in Section 3 of OC2013-343" (See: Hydro's submission dated April 30, p. 23, ln. 38-41.), and furthermore "the costs to be paid by Hydro for the use of the LTA and LIL includes the operation and maintenance costs of those assets are costs exempted from the Board's review and approval pursuant to OC2013-342 …". (See: Hydro's submission dated April 30, p. 23, ln. 35-38).

Thus, it is clear that Hydro has no intention whatsoever of submitting to the Board's jurisdiction "to determine the best utilization" regarding monies collected from consumers in the Deferral Account that have been earmarked for the LTA and LIL costs. Hydro takes the position that the Board has no ability to deny them their recovery of these costs. Thus, whether these costs offend least cost regulatory principles or not, the Board has no power to disallow them.

The Consumer Advocate submits that Hydro's proposed Deferral Account is an attempt to circumvent the timing recovery problem OC2013-343 has created in relation to recovery of the LIL and the LTA costs and has very little to do with the interests of consumers or "rate smoothing" as it has been represented.

Notably, in their submission on this issue dated May 4, Newfoundland Power appears to acknowledge that Hydro's proposed Deferral Account would have the effect of collecting money (plus harmonized sales tax) from consumers in 2018 and 2019 in relation to the LIL and LTD O & M costs:

> *In Newfoundland Power's submission it is difficult to accept Hydro's logic that the rates proposed under Hydro's Deferral Account Scenario do not include the LIL and the LTA O & M costs. The OIPDA, as proposed, includes assumptions for off-island purchases, as well as for LIL and LTA O & M costs. Whether the recovery of these costs is deferred to a later date, the costs themselves appear to be provided for in amounts proposed to be collected from customers in the Test Years.*
>
> (See: Page 7 of Newfoundland Power's submission dated May 4, 2018)

Summary and Conclusion

OC2013-343 is not ambiguous. It prohibits any recovery by Hydro of any costs related to the LIL and LTA O & M costs "in any event" until the Muskrat Falls Project is commissioned or near commissioning.

There is no evidence before the Board that the Muskrat Falls Project is "commissioned or near commissioning".

Hydro's Deferral Account Proposal will take money from consumers in the Test Years for the purpose of recovering Hydro's 2018-2019 LIL / LTA O & M costs.

Hydro's Deferral Account has the intended effect of circumventing the legislative prohibition present in OC-2013-343 by prematurely collecting money in 2018 and 2019 from consumers for LIL and LTA O & M costs, even though the Muskrat Falls Project is not commissioned or near commissioning, even though Hydro is prohibited from collecting these costs "in any event" as stated in OC2013-343.

The combined effect of OC2013-342 and OC2013-343 denies the Board's jurisdiction to consider Hydro's present request to recover the LIL and LTA O & M costs despite the fact that Hydro has attempted to do so in the guise of its Deferral Account included in its 2017 GRA.

Finally, the Consumer Advocate submits that if the Board remains uncertain as to jurisdiction following the submissions of the parties on this issue, then, having regard both to the significant monetary amount involved and the significant jurisdictional issue, the Board does have the discretion to refer this matter to the Court of Appeal, on the basis of a Stated Case, pursuant to Section 101 of the *Public Utilities Act*.

Yours truly,

Stephen Fitzgerald
Counsel for the Consumer Advocate

Encl.

/bb

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TAB 1

R. v. Skakun (2014) BCCA 223

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Skakun*,
2014 BCCA 223

Date: 20140611
Docket: CA040157

Between:

Regina

Respondent

And

Brian Skakun

Appellant

Before: The Honourable Madam Justice D. Smith
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated July 24, 2012 (*R. v. Skakun*, 2012 BCSC 1103, Prince George Registry No. 30095).

Counsel for the Appellant:	J.M. Duncan
Counsel for the Respondent:	L.A. Ruzicka
Place and Date of Hearing:	Prince George, British Columbia April 24, 2014
Place and Date of Judgment:	Vancouver, British Columbia June 11, 2014

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

Summary:

Mr. Skakun, a municipal councillor in the City of Prince George, was convicted under s. 30.4 of the FOIPPA of making an unauthorized disclosure to the CBC of personal information that included a copy of a confidential workplace harassment report he had received during a closed restricted city council meeting. He was granted leave to appeal from the dismissal of his summary conviction appeal on the legal issue of whether a municipal councillor is an "officer" of a public body under s. 30.4.

Held: Appeal dismissed. The trial judge and summary conviction appeal judge correctly interpreted the term "officer" in s. 30.4 as including elected municipal councillors. Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4, based on its dictionary definition (both legal and non-legal), when read in the context of the broadly-stated purposes of the legislation (to provide access to information and privacy of personal information in the custody or control of public bodies) and the wide scope of its targeted public bodies and organizations, evinces a legislative intention to include elected municipal councillors within the ambit of the provision.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Overview

[1] In an open and democratic society, protection of personal information in the control of public bodies is an essential counterbalance to the right of access to information from public bodies. Legislation that ensures these dual objectives has long been recognized as "quasi-constitutional", and is generally interpreted in a manner that advances its broad underlying policy objectives: *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403 at paras. 64-69, La Forest J., dissenting, but not on this point; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773 at paras. 24-25; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62, [2013] 3 S.C.R. 733 at paras. 19, 22. In this province, those objectives are encompassed in the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*].

[2] The central issue in this appeal is whether an elected municipal councillor is captured by the definition of "officer" in s. 30.4 of *FOIPPA*. Section 30.4 provides:

> An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this act.

[3] The circumstances in which this issue arose may be summarized briefly. On May 24, 2011, Mr. Skakun, a municipal councillor with the City of Prince George, was convicted by a Provincial Court judge for breaching s. 30.4 after admitting that he had delivered to the Canadian Broadcasting Corporation a copy of a confidential workplace harassment report which he had received during a closed restricted city council meeting. The trial judge found that the disclosure of the report occurred on August 18, 2008. His appeal from conviction was dismissed by the summary conviction appeal judge. Mr. Skakun then sought leave to appeal to this Court on two issues. He was granted leave to appeal on the single issue of "whether the summary conviction appeal judge erred in law in confirming the trial judge's

conclusion that a municipal councillor is an 'officer ... of a public body' under s. 30.4 of the *Freedom of Information and Protection of Privacy Act*." See *R. v. Skakun,* 2013 BCCA 94 at para. 19.

[4] Mr. Skakun submits that the plain and ordinary meaning of the term "officer" in s. 30.4 is not evident when read in its immediate context and that the dictionary meaning of "officer" does not shed light on the legislators' intended meaning. Therefore, he submits, the term is ambiguous and resort must be made to interpretive aids. In this case, those include the technical meaning of the term to its specialized municipal audience. He points to other internal provisions of *FOIPPA* that refer separately to the term "officer" and "elected official"; these terms are also used separately from references to municipal councillors in the *Local Government Act,* R.S.B.C. 1996, c. 323 [*LGA*], and the *Community Charter,* S.B.C. 2003, c. 26. He contends that if the Legislature had intended to include municipal councillors in s. 30.4, it would have done so explicitly. He also relies on a number of secondary principles and presumptions of statutory interpretation to support his position that the term "officer" in s. 30.4 does not include an elected municipal councillor. He maintains that such an interpretation would not give elected municipal councillors freedom to disclose unauthorized personal information to the public with impunity, as they continue to be subject to s. 117 of the *Community Charter,* which also prohibits such disclosure:

> 117(1) A council member or former council member must, unless specifically authorized otherwise by council,
>
> (a) keep in confidence any record held in confidence by the municipality, until the record is released to the public as lawfully authorized or required, and
>
> (b) keep in confidence information considered in any part of a council meeting or council committee meeting that was lawfully closed to the public, until the council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

[5] The respondent Crown submits that the quasi-constitutional status of *FOIPPA* mandates a "broad, liberal, and purposive interpretation" of s. 30.4 (citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2011 SCC

53, [2011] 3 S.C.R. 471 at para. 62) in order to advance fundamental Canadian values of access to information and the protection of privacy of personal information in the control of public bodies. The Crown contends that while the term "officer" is not defined in *FOIPPA,* its omission from the list of public bodies exempted from the legislation (judges and members of the legislative assembly) and its dictionary meaning, which includes "[i]n public affairs ... a person holding public office under ... local government" (*Black's Law Dictionary,* 9th ed.) and "a holder of a public ...office; ... an appointed or elected functionary" (*Canadian Oxford Dictionary,* 2nd ed.), informs an interpretation that includes both appointed and elected officials, including municipal councillors. The Crown maintains that an application of the broad and purposive approach, and "[t]he first and cardinal principle of statutory interpretation ... that one must look to the plain words of the provision" (*R. v. D.A.I.,* 2012 SCC 5, [2012] 1 S.C.R. 149 at para. 26), leads inexorably to an interpretation of "officer" in s. 30.4 that includes elected municipal councillors.

[6] For the reasons that I shall explain below, in my opinion the term "officer" in s. 30.4 of *FOIPPA* is not ambiguous. Based on the plain and ordinary meaning of the term, when read in the context of the broadly-stated purposes and wide range of targets in the legislation, I am of the view that "officer" in s. 30.4 includes an elected municipal councillor.

The legislative scheme

[7] The relevant provisions of *FOIPPA* are those that were in place in 2008 when the unauthorized disclosure of confidential information occurred in this case. While there have been some minor changes to the legislation since then, it is common ground that at the time of the offence *FOIPPA* applied to records in the custody or control of officials within a public body, which included by definition a municipality.

[8] Section 2(1) of *FOIPPA* sets out the purposes of the legislation: (i) to make public bodies more accountable to the public by providing the public with access to their records; and (ii) to protect personal privacy by preventing the unauthorized collection, use or disclosure of personal information by public bodies that would

unreasonably invade the privacy of individual members of the public. See *Legal Services Society v. British Columbia (Information and Privacy Commissioner),* 2003 BCCA 278 at para. 1, 14 B.C.L.R. (4th) 67.

[9] The Supreme Court of Canada has endorsed these objectives in different contexts. Under the federal regime encompassed by the *Access to Information Act,* R.S.C. 1985, c. A-1, and the *Privacy Act,* R.S.C. 1985, c. P-21, the Court observed that while an open and democratic society requires access to information in the hands of public bodies, it must also offer protection for some of that information "in order to prevent the impairment of those very principles and promote good governance": *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 S.C.R. 306, at para. 15 [*National Defence*]. In *Lavigne,* the Court observed that the federal *Privacy Act* "is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society" (para. 25). In the context of Alberta's *Personal Information Protection Act,* S.A. 2003, c. P-6.5, the Court underscored the importance of privacy in a "vibrant democracy" and raised the status of legislation that aims to provide individuals with a measure of control over their personal information to the level of "quasi-constitutional": *Alberta (Information and Privacy Commissioner)* at paras. 19, 22.

[10] *FOIPPA* is structurally complex. It has six distinct parts, each of which deals with a different subject matter: Part 1 – Introductory Provisions; Part 2 – Freedom of Information; Part 3 – Protection of Privacy; Part 4 – Office and Powers of Information and Privacy Commissioner; Part 5 – Reviews and Complaints; and Part 6 – General Provisions. Section 30.4 falls within Part 3 of the Act. The legislation also includes three schedules: Schedule 1 – Definitions; Schedule 2 – Public Bodies; and Schedule 3 – Governing Bodies of Professions or Occupations. Schedules 2 and 3 list respectively, a wide range of public bodies and governing bodies of professions or occupations that are subject to the legislation. Schedule 1 defines a "public body" as including "a local public body" but excludes "the office of a person who is a member or officer of the Legislative Assembly" or "the Court of Appeal, Supreme

Court or Provincial Court". A "local public body" is defined as including "a local government body"; a local government body is defined as including a "municipality". The scope of s. 30.4's application is increased by s. 3(3)(e), which makes s. 30.4 applicable to "officers of the Legislature [and] their employees ... as if the officers and their offices were public bodies".

[11] There is no definition for the term "officer". This omission provides the foundation for the appellant's argument that the term is ambiguous. From that conclusion, the appellant argues for a narrow interpretation of s. 30.4 that restricts the term to appointed officials only.

The first and cardinal principle of statutory interpretation

[12] The preferred "modern approach" to statutory interpretation endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 S.C.R. 27 at para. 21, adopts the classic statement from Elmer Driedger's *Construction of Statutes* (2d ed. 1983) at page 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[13] This approach, the Court recognized, is not "founded on the wording of the legislation alone" (para. 21) but requires consideration of "the plain meaning of the specific provisions in question" in the context of "the scheme of the [legislation], its object or the intention of the legislature" (para. 23). The Court also relied on the statutory principle codified in what is now s. 8 of the *Interpretation Act,* R.S.B.C. 1996, c. 238:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[14] In *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, [2002] 2 S.C.R. 559, the Court further observed:

> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.,* [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter".

[15] Other presumptions and principles of statutory interpretation are engaged if a legislative provision is found to be ambiguous. This would include the strict construction of penal provisions for which the appellant advocates: *Bell ExpressVu* at para. 28. However, a provision is not ambiguous merely because individuals may differ on its interpretation. Genuine ambiguity exists only if a provision is reasonably capable of giving rise to two or more plausible meanings, "each equally in accordance with the intentions of the statute" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743 at para. 14) and consistent with the entire legislative scheme.

[16] In *Bell ExpressVu,* the Court explained the meaning of "ambiguity" in this manner:

> [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte,* [*Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108] *supra,* at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General*), [1999] 1 S.C.R. 743, at para, 14 is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
>
> [30] ... it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if

> "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis* [Professor John Willis], "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1), *supra,* at pp. 4-5).
>
> [Emphasis in original.]

[17] Therefore, the "modern approach" to statutory interpretation seeks "to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute" (*National Defence* at para. 27). Stated otherwise, it is to choose an interpretation "that best honours [the Legislature's] intention in enacting the ... regime": *R. v. Fice,* 2005 SCC 32, [2005] 1 S.C.R. 742 at para. 39.

[18] The question then is: What is the ordinary and grammatical meaning of the term "officer" in s. 30.4, when read in its entire context and harmoniously with the *FOIPPA* legislative scheme, that best ensures the attainment of *FOIPPA's* objects and gives effect to the legislative intention of its drafters?

Discussion

[19] In the absence of a statutory definition, the starting point of the interpretative analysis is typically the dictionary definition of the statutory term. See *R. v. A.D.H.,* 2013 SCC 28, [2013] 2 S.C.R. 269 at paras. 43-46; *R. v. Steele*, 2007 SCC 36, [2007] 3 S.C.R. 3 at para. 31. As previously noted, the dictionary meanings of "officer" include both appointed and elected officials of public bodies. The true meaning of the term, however, can only be determined when its dictionary definition is considered in the context of the legislative scheme as a whole.

[20] The appellant relies on the differentiation between the term "officer" in s. 30.4 from other terms for an elected member of a public body in other parts of *FOIPPA,* to argue for an application of the statutory presumption that the same words should carry the same meaning throughout a statute. For this principle, he cites *R. v. Zeolkowski,* [1989] 1 S.C.R. 1378 at 1387, and the corollary principle from *Jabel*

Image Concepts Inc. et al. v. Minister of National Revenue (2000), 257 N.R. 193 (F.C.A.) at para. 12, that "[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning". He reasons that the Legislature must therefore have intended to limit the meaning of "officer" in s. 30.4 to an unelected official. As an example in support of this submission, he refers to s. 73 in Part 6 – General Provisions. Section 73 deals with the protection of a public body from legal actions and provides that no action lies against a public body, the head of a public body, an elected official of a public body, or any person acting on behalf of or under the direction of the head of a public body.

[21] The complexity of the *FOIPPA* legislative scheme is evident in its compartmentalization of a variety of different subject matters. While s. 73 (Part 6 – General Provisions) and s. 12(3)(b) (Part 2 – Access to Information) refer to "elected officials", s. 76(2)(c) (Part 6 – General Provisions) and s. 22(4)(e) (Part 2 – Access to Information) refer to "officers". Section 30.4, the offence provision in Part 3 for the protection of privacy, refers only to "officer" and includes no other reference to an elected member. The appellant would interpret this as legislative intent to exclude elected municipal councillors from the reach of s. 30.4. I am unable to agree.

[22] The significance of the different terminology in the protection of personal information provisions of *FOIPPA* requires an understanding of the interrelationship between Parts 2 and 3. Part 2 authorizes access to <u>all</u> types of information from public bodies where there has been a formal request by a citizen. A formal request for access to information triggers s. 22(1) in Part 2, which mandates certain exceptions. Those exceptions include instances where the disclosure of personal information "would be an unreasonable invasion of a third party's personal privacy." Part 3, in comparison, provides for the protection of privacy of only personal information that is in the control of public bodies. Section 22 is only applicable to information requests under Part 2. Within Part 3, s. 22 is only applicable where a provision in Part 3 specifically refers to s. 22 or Part 2. See *Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.*,

2005 BCCA 604 at paras. 48-49 [*Coast Mountain*]. The duality of *FOIPPA's* objectives and the paramount importance of the privacy provisions of *FOIPPA* were expressly noted by Chief Justice Finch in *Coast Mountain* at para. 17:

> Both Part 2 and Part 3 of the *Act* recognize the specific concerns associated with "personal information" and the fact that when dealing with such information, "privacy is paramount over access": see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 48.

[23] Another notable feature of *FOIPPA* is its use of inclusive definitions. As previously stated (in para. 10 above) a "public body" includes a "local public body", which in turn includes a "local government body", which includes a "municipality". The appellant has not directed the Court to any provisions in *FOIPPA* that suggest an "elected official" may not also be an "officer". In my review of the legislation there are no apparent provisions that would suggest an "elected official" may not include an "officer" or that such an interpretation would create an inconsistency in the application of the statute. To the contrary, absent a conflict or inconsistency that would be created by such a narrow interpretation of s. 30.4, and in view of the "paramount" objective of protecting privacy under the legislation, I am unable to discern why an "elected official" and an "officer" would be mutually exclusive terms.

[24] A narrow interpretation of s. 30.4 that would limit its application to appointed officials only would be inconsistent with the Legislature's enactment of s. 3(3). Section 3(3) further broadens the scope of the application of s. 30.4 to include officers and offices that are not treated as "public bodies" for the purposes of the rest of the *Act*. An interpretation that would exclude elected municipal councillors from the reach of s. 30.4 leads to a gap in the application of the legislation and in my view to a perverse result that is inconsistent with the underlying objectives of the legislation. It also creates the potential for piecemeal enforcement of its objectives when applied to other public bodies that may not have alternative enforcement legislation to bridge the gap.

[25] The appellant relies on *National Defence* to support his submission that the access to information and protection of privacy provisions of *FOIPPA* must be

interpreted seamlessly together (at para. 74), all in the same manner. In *National Defence,* the Supreme Court rejected a function-based approach to the application of the *Access to Information Act* and the *Privacy Act* to federal Ministers. At issue was: (i) the right to access "any record under the control of a government institution" provided for in s. 4(1) of the *Access to Information Act*; and (ii) the exception in s. 3(j) of the *Privacy Act*, which enabled disclosure of personal information regarding "an individual who is or was an officer or employee of a government institution" where the information "relates to the position or functions of the individual" [emphasis added].

[26] The factual underpinnings of the case were unique and unusual. The issue of the interpretation of certain provisions of the federal *Access to Information Act* arose in the context of a request for information from the Prime Minister's Office (the "PMO"), the Minister of National Defence, the Minister of Transport, the RCMP and the Privy Council Office (the "PCO"). The first issue was whether a Minister was a government institution under s. 4(1). The Court concluded that the PMO, Minister of National Defence, and Minister of Transport were not "government institutions". Parliament had chosen to define "government institution", as it applied to departments and ministries, in the form of a list, which did not include the Prime Minister or the Ministers of National Defence or Transport. It also rejected an interpretation of the relevant provisions of the *Access to Information Act* that would have created a dividing line between a Minister's political and non-political functions in order to determine whether the request was for information under the control of a government institution (paras. 37-42).

[27] Also at issue was whether the information requested of the PCO (the Prime Minister's agenda) was "personal information" protected from disclosure by s. 19(1) of the *Access to Information Act*. The Court concluded that while the PCO was a government institution, it would be contrary to Parliament's intention to interpret s. 3(j) of the *Privacy Act* in a manner that rendered the Prime Minister part of a government institution for the purposes of the *Privacy Act* but not the *Access to*

Information Act. Writing for the majority, Charron J. identified the need for both federal acts to be read together "as a seamless code", concluding:

> [74] Finally, as this Court explained in *Dagg v. Canada (Minster of Finance)*, [1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in [*Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66], the *Access to Information Act* and the *Privacy Act* [R.S.C. 1985, c. P-21] are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act,* a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act,* he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minster to be treated as an "officer" of the PCO pursuant to the *Privacy Act,* it would have said so expressly. Applying s. 3(j) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

[28] Charron J. also cautioned against a court relying on the "quasi-constitutional" nature of the legislation to interpret its provisions without resort to the general principles of statutory interpretation, emphasizing that a court should not rewrite the actual words of the legislation "with its own view of how the legislative purpose could be better promoted" (para. 40).

[29] The concern raised in *National Defence* regarding the potential for an inconsistent interpretation of the provisions of the *Access to Information Act* and those in the *Privacy Act* is clearly distinguishable from the circumstances of this case. I agree that the quasi-constitutional nature of the legislation does not obviate the need to apply the principles and presumptions of statutory interpretation in order to determine the true meaning of s. 30.4. However, unlike the *Privacy Act* and *Access to Information Act*, *FOIPPA* is a single piece of legislation that incorporates the dual objectives of access to information and protection of privacy to personal information. It defines the persons and institutions to which the statute applies using broad language, with specific exclusions as necessary (such as the exclusion of MLA's and members of the judiciary from the definition of "public body"). This legislative decision, when considered in conjunction with the importance of the underlying values recognized in *FOIPPA's* stated objectives, attracts a generous

interpretation that permits the achievement of the statute's broad public purposes. Common sense would also dictate such an approach. In my view, an interpretation of *FOIPPA* that renders disclosure of personal information in the control of a municipality permissible on the basis of who makes the disclosure would not be a "seamless" interpretation of the dual objectives laid out in *FOIPPA*.

[30] The importation of the meaning of "officer" from other statutes, in a different context, also does not assist in the interpretation of s. 30.4. In this regard, I echo the sentiments of Charron J. in *National Defence* (at para. 71) that the meaning of "officer" must be ascertained in its proper context and not by resorting to definitions in other statutes, in the absence of any indication that incorporation of those definitions was intended. *FOIPPA* is very different legislation from the *LGA* and *Community Charter*. Both the *LGA* and the *Community Charter* are sector-specific enabling statutes that cloak municipalities (in s. 3 of the *Community Charter*) and regional districts (in s. 1 of the *LGA*), with the legal authority to govern their communities. In contrast, *FOIPPA* is a complete code for the implementation of its dual objectives of access to information and protection of personal information in the control of public bodies. It is not sector specific but targets a wide range of public bodies and organizations. Therefore, to import the meaning of "officer" from narrowly-focussed municipal/district-related legislation into the broad regime of *FOIPPA* would, in my view, unduly restrict its application and result in an inconsistent and piecemeal approach that is contrary to the legislative intent. Again, this would create an absurdity where an elected municipal councillor would not be subject to *FOIPPA* even though the legislation clearly intended municipalities to be subject to its requirements.

[31] The appellant relies on s. 117 of the *Community Charter* to restrict the application of s. 30.4 of *FOIPPA* to appointed officials only, arguing that s. 117 of the *Community Charter,* in combination with s. 5 of the *Offence Act,* R.S.B.C. 1996, c. 338, covers the gap that such an interpretation would create. With respect, this submission merely begs the issue. As was observed in *R. v. Sheets,* [1971] S.C.R. 614 at 621, "[t]he fact that a person may, because of an act or omission, be subject

to prosecution under two statutory provisions, is not *per se* a decisive criterion of interpretation of either one."

Disposition

[32] Properly construed, the ordinary and grammatical meaning of "officer" in s. 30.4 of *FOIPPA*, based on its dictionary definition (both legal and non-legal), when read in the context of the legislation's broad stated purposes and wide-ranging scope of application to public bodies and organizations, inexorably leads to the conclusion that the legislative intention was for "officer" in s. 30.4 to include both elected and appointed officials. In the result, I find no error in the decision of the summary conviction appeal judge to uphold the trial judge's interpretation of s. 30.4 of *FOIPPA* and I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Harris"